



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPENDENT
INTEGRITY COMMISSION 2018

Mr Shane Rattenbury MLA (Chair), Ms Elizabeth Lee MLA (Deputy Chair)
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Submission Cover Sheet

Inquiry into an Independent Integrity Commission 2018

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Finlay, Hamish

From: Committees
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Subject: FW: Submission to the Select Committee on an Independent Integrity Commission 2018 [SEC=UNCLASSIFIED]
Attachments: ACT public hearings article.pdf; Principles for designing a National Integrity Commission.pdf; National Integrity Commission - Design Blueprint Part 3 - Public hearings.pdf

From: Hannah Aulby [REDACTED]
Sent: Thursday, 23 August 2018 4:04 PM
To: Committees <Committees@parliament.act.gov.au>
Subject: Submission to the Select Committee on an Independent Integrity Commission 2018

Dear committee members,

Thank you for the opportunity to make a submission on the draft Independent Integrity Commission legislation.

I make this submission on behalf of the National Integrity Committee of former judges and corruption fighters, including the Hon Stephen Charles AO QC, the Hon Margaret McMurdo AC QC and the Hon Anthony Whealy QC.

The National Integrity Committee has developed a best-practice model for the establishment of a National Integrity Commission, based on direct experience of committee members of the operation of state integrity commissions. The lessons learnt here are critical to the establishment of an ACT Independent Integrity Commission, and I attach the Committee's work on design principles and, in particular, public hearings.

The Committee would like to advise the Select Committee to amend Section 138 2(b) to read: *a public examination will make the investigation to which the inquiry relates more effective*. In its current form the clause will allow for those under investigation to challenge the decision to hold a public hearing in court, damaging the corruption investigation in a number of ways including through the publicising of corruption evidence collected to date (for full list see page 10 of the Design Blueprint Part 3 – Public Hearings attached).

Please don't hesitate to get in touch if you would like more information or would like to speak to the National Integrity Committee members.

Thank you, warm regards,
Hannah

Hannah Aulby
Accountability Project Officer
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Principles for designing a National Integrity Commission

*A briefing paper prepared in November 2017 by the
National Integrity Committee*

BACKGROUND

A National Integrity Commission is urgently needed to investigate and expose corruption and misconduct in federal government and the public sector.

There are significant gaps in the jurisdiction and investigative powers of the existing federal agencies responsible for scrutinising the public sector and government. No federal agency has the power to investigate corrupt conduct as defined by our state based commissions. No federal agency can investigate misconduct of MPs, ministers, political staff or the judiciary.¹ The federal agencies that do have strong investigative powers, such as the federal police, can use them only when investigating criminal charges. No federal agency has the ability to hold regular public hearings, meaning that corruption and misconduct is not properly exposed to the public. Many cases of corruption reach across state borders, but state anti-corruption bodies are forced to abandon investigations once they reach the federal sphere. Consequently there is a need for an overarching body with umbrella type functions for the supervision of corruption and integrity in every area of federal public administration.

There is a growing public distrust of federal government with a recent poll finding 85% of Australians believe there is corruption in federal politics. In addition, there is overwhelming public support for a National Integrity Commission, with a recent poll

¹ Advice should be taken as to whether an investigation of this kind of all or some Commonwealth judicial officers is constitutional.

finding over 80% of respondents support the establishment of a commission, and 78% of respondents supportive of a commission that holds public hearings.²

The design of a National Integrity Commission is critical. That design must incorporate features which ensure that the commission increases public trust in government. It must therefore be such as to allow corruption and misconduct to be properly investigated and exposed without improperly and unfairly prejudicing the innocent. This briefing paper was prepared by the *National Integrity Committee* to establish design principles for a national integrity commission that will ensure it is given the strength and tools to effectively do its job effectively and fairly.

NATIONAL INTEGRITY COMMITTEE

The *National Integrity Committee* was established by the Australia Institute to advise on the design of specific accountability reforms, including the establishment of a National Integrity Commission. The members of the committee are Margaret McMurdo AC, David Ipp AO QC, Stephen Charles AO QC, David Harper AM QC, Paul Stein AM QC and Anthony Whealy QC.

PRINCIPLES AND RATIONALE

- 1. That the Commission is an independent statutory body that is provided with the required resourcing to enable it to promote integrity and accountability and to enable it to prevent, investigate and expose corruption.*

Rationale: establishing the National Integrity Commission as a statutory body ensures the Commission is a permanent body protected from political intervention and unjustified budgetary constraints imposed to lessen its effectiveness. It must be independent from existing federal agencies as these agencies do not have the overarching jurisdiction, investigative powers, or breadth of profile to effectively investigate and expose corruption.

² The Australia Institute (2017), *National poll – support for federal ICAC*, May 2017, <http://www.tai.org.au/content/support-federal-icac-poll>

A National Integrity Commission must be given sufficient resources to fulfil its purpose.

NSW ICAC has faced funding cuts over consecutive years, resulting in the loss of 17 staff including an entire investigative team. This occurred after ICAC exposed corruption in political donations involving ten members of the Liberal Party. The NSW Public Service Association has said that the funding cuts are an attempt by the NSW Government to diminish scrutiny.³ Former NSW DPP Nicholas Cowdery AM QC has raised concerns about the resources made available to NSW ICAC and a future federal anti-corruption commission:

NSW ICAC has been faced this year with a funding cut. It is an easy way for government to impair the effectiveness of such a body and steps would need to be taken to ensure that adequate resources continued to be allocated to a national integrity commission.⁴

- 2. That the Commission has a broad jurisdiction, including the ability to investigate any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, if the Commissioner deems the conduct to be serious or systemic.*

Rationale: There are significant gaps in the jurisdiction of existing federal accountability agencies. Parliamentarians, Ministers, parliamentary staff, and at least half of the public sector are not currently covered by effective accountability measures. In addition, currently no federal agency can investigate conduct of third parties attempting to improperly and unfairly influence public administration. The Independent Review of the Jurisdiction of NSW ICAC by the Hon Murray Gleeson AC and Bruce McClintock SC found that:

Certain kinds of fraudulent conduct, not necessarily involving any actual or potential wrongdoing by a public official, should be treated as corrupt conduct where they impair or could impair confidence in public administration.⁵

³ Knaus (2017), *Icac weakening due to budget cuts and job losses, union and NSW Labor warn*, The Guardian, 17th July 2017, <https://www.theguardian.com/australia-news/2017/jul/17/icac-weakening-due-to-budget-cuts-and-job-losses-union-and-nsw-labor-warn>

⁴ Cowdery (2017), *Lessons from NSW ICAC*, Conference Paper: Accountability and the Law 2017 Conference, <http://tai.org.au/content/lessons-nsw-icac-watchdog-has-teeth>

⁵ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC*

3. *That the Commission be granted the investigative powers of a Royal Commission to undertake its work, to be executed at the discretion of the Commissioner.*

Rationale: Corruption and misconduct are complex forms of wrongdoing. Corruption and misconduct are often committed by highly skilled professionals in positions of power within a system that is both well-known to them and difficult for others to penetrate. Corruption often occurs in networks of mutually beneficial relationships of powerful and influential people.⁶ The corrupt often know how to hide their trail and stay in front. As outlined by former Premier Nick Greiner in his second reading of the *NSW Independent Commission Against Corruption Bill* in 1988:

“... corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.”⁷

For this reason, a National Integrity Commission must be given the investigative powers of a Royal Commission. State based anti-corruption commissions, including NSW ICAC and Queensland CCC, have strong investigate powers including the ability to hold public hearings, compel evidence and witnesses, and use surveillance devices. To ensure these powers are not used irresponsibly, oversight of the Commission can be implemented through a parliamentary committee and an inspector as used in state based commissions around Australia.⁸

The necessary investigative powers include:⁹

- Coercive powers to compel the production of documents, other evidence and the examination of witnesses
- Ability to enter and search premises and inspect and copy documents
- Ability to use surveillance devices and phone intercepts
- Own motion powers to begin investigations at the discretion of the commissioner
- The absence of legal professional privilege, except in instances involving privileged communication between an Australian lawyer and a person for

⁶ Murray (2017), *Game of Mates: how favours bleed the nation*, self-published

⁷ Greiner (1988), NSW Parliamentary Hansard, 26th May 1988

⁸ See *NSW Independent Commission Against Corruption Act 1988* and *Queensland Crime and Corruption Act 2001*

⁹ Prenzler (2010), *Towards a model public sector integrity agency*, *The Australian Journal of Public Administration*, vol. 69, no. 3, pp. 251–262

the purpose of providing legal advice in relation to the appearance of a person at a hearing before the Commission

- The ability to open hearings to the public
- The power to immunise witnesses on terms
- Protection to witnesses that anything said or disclosed may not be used against them in criminal proceedings

These powers must be available to be used in an investigation at the discretion of the Chief Commissioner, without any trigger or threshold. The Victorian IBAC has strong investigative powers but is only able to use them once a threshold of evidence has been met and the Commission is 'reasonably satisfied that the conduct is serious corrupt conduct'.¹⁰ This threshold, if applied in NSW, would have not allowed NSW ICAC to investigate the Obeid family. Operations Jasper and Acacia, which led to Eddie Obeid being jailed for misconduct in public office, began with an anonymous phone call to NSW ICAC suggesting that they should look into coal licences in the Bylong Valley.

4. That the Commission may hold a public inquiry providing it is satisfied that opening the inquiry to the public will make the investigation to which the inquiry relates more effective, and would be in the public interest.

Rationale: A National Integrity Commission will not be fully effective in exposing or investigating corruption unless it has the ability to hold public inquiries. An important factor to take into account when deciding to open the hearing, is whether the public interest in opening the hearing outweighs the potential damage to a person's reputation. Evidence from Australian state based anti-corruption commissions show that the ability to hold public inquiries has been critical to their success. Public inquiries are an important investigative tool, prompting members of the public to come forward with information that they may not have had the confidence or context to do without a public inquiry. They are also critical to exposing corruption and misconduct to the public, demonstrating publicly that corruption in public administration is taken seriously by government and that investigations are carried out fairly by the commission.

In the 2015 report on the review of the jurisdiction of NSW ICAC, Murray Gleeson and Bruce McClintock observed that although public inquiries carry a risk of reputational

¹⁰ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) s.60(2)

damage and unfairness, publicity itself is a protection against administrative excess.¹¹ The report also noted that the Chief Commissioner is the best person to make the decision as to whether to open the inquiry, and that this process has led to predominantly good decisions:

The decision whether to conduct a public inquiry is an operational decision made for the purposes of the particular investigation. It is a decision best made by the Commissioner who is apprised of all the relevant facts and in the best position to weigh the public interest. There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted. The exception is, of course, the decision to hold the public inquiry in [in the matter of Margaret Mary] Cunneen. That is an insufficient basis to recommend a change.¹²

Anti-corruption commissioners across Australia have recognised the power of public hearings. SA ICAC Commissioner Bruce Lander, who is currently the only Commissioner not able to open hearings, has made a recommendation to the SA State Government to allow the commission to hold public hearings to ensure transparency.¹³ Victorian IBAC Commissioner Stephen O'Bryan QC has said that openly examining cases of alleged serious corruption and misconduct in public hearings has encouraged and empowered people to come forward and report suspected wrongdoing.¹⁴ Former NSW ICAC Assistant Commissioner Anthony Whealy QC has said "there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost."¹⁵ Former NSW ICAC

¹¹ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 62

¹² Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 60-61

¹³ MacLennan, 2016, *ICAC Commissioner Bruce Lander pushes for public hearings to ensure transparency*, ABC, 31st October 2016, <http://www.abc.net.au/news/2016-10-31/icac-commissioner-bruce-lander-wants-public-hearings-in-sa/7980960>

¹⁴ IBAC, 2016, *IBAC sheds light on serious corruption in its third year*, Media release, 14th September 2016, <http://www.ibac.vic.gov.au/media-releases/article/ibac-shines-light-on-serious-corruption-in-its-third-year>

¹⁵ Gerathy, 2016, *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, ABC, 12th May 2016, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

Commissioner David Ipp AO QC has said that “Its main function is exposing corruption; this cannot be done without public hearings.”¹⁶

Sir Anthony Mason, former Chief Justice of Australia, when discussing a possible restraint on the public hearings of a Royal Commission said:

However, this restraint, limited though it is, seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive.

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.¹⁷

5. *That the Commission be governed by one Chief Commissioner and two Deputy Commissioners, appointed by the Minister on recommendations from a bipartisan Parliamentary committee. The Chief Commissioner is to be appointed for fixed non-renewable 5 year terms, and must be a judge or a retired judge or be qualified for appointment as a judge.*

Rationale: the appointment of one Chief Commissioner ensures efficient and fast decision making, functional staff management, and a direct line of responsibility whereby the Chief Commissioner is held accountable for the proper functioning of the Commission. Appointing Deputy Commissioners is critical to ensuring that the commission has sufficient capacity to undertake its work. Appointment by the Minister

¹⁶ Gerathy, 2016, *ICAC inspector calls for end to public hearings to stop ‘trashing of reputations’*, ABC, 12th May 2016, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

¹⁷ In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

on recommendations from a bipartisan committee and for a fixed term ensures political independence and freedom from fear of political retaliation.

6. That the Commission be empowered to make findings of fact, to be referred to a well-resourced and specialised unit within the DPP for consideration for prosecution.¹⁸

By their very nature, anti-corruption bodies are not judicial and do not exercise judicial power. Similarly to a Royal Commission, the bodies are usually empowered to receive information; to make findings; to report those findings; and to make recommendations to other agencies, including prosecuting authorities, in respect of further action to be taken arising from the information and findings.

There is a risk that corruption cases are not pursued with sufficient staff, knowledge or skills once referrals are made to the Director of Public Prosecutions (DPP). Corruption cases are often complex and unique, and may not be prioritised in a resource scarce department. For this reason, it is recommended that a well-resourced and specialised unit within the DPP is established to pursue these cases.

¹⁸ Note: this Principle is the majority position of the committee, though a minority view is ‘That the Commission be empowered to make findings of corrupt conduct, to be included in investigation reports and referred to a well-resourced and specialised unit within the DPP for consideration for prosecution.’ The Hon David Ipp AO QC notes that the ability to make corrupt conduct findings are critical to the commission’s role in exposing corruption to the public, as without the power to make corrupt conduct findings the outcomes of investigations can become lost in long lists of specific facts that will confuse the public and may or may not be pursued by the DPP. The dishonest implications of the specific facts found may also be confused, and the public is left not knowing if the government representative or public servant in question is corrupt or not.



A.C.T. INTEGRITY COMMISSION

Judge's warning over watchdog

Katie Burgess

Assembly Reporter

The ACT Integrity Commission could be forced to keep its hearings behind closed doors or face lengthy delays if corrupt officials are able to object to public hearings, a former judge has warned.

An exposure draft of legislation to establish the corruption watchdog will be tabled when the ACT's parliament sits this week.

But while the commissioner will have broad powers, including the ability to authorise sting operations, surveillance and fake identities as part of its investigations, their decision to examine witnesses in public can be challenged because of its indirect impact on the ACT's Human Rights Act.

Section 21 of the Act gives everyone the right to a fair trial, and while the integrity commission is not a court or tribunal, publicly airing allegations of corruption could damage the fairness and impartiality of a jury trial should criminal charges be laid, the government says.

As such, those under a cloud can push to have their evidence heard in private, even after the commissioner has decided the hearings should be public.

Even their case for a private hearing must be listened to and decided behind closed doors, unless the commission reasonably believes the request is vexatious

or without merit.

But Stephen Charles QC said that provision has been used by suspects with deep pockets to avoid scrutiny in Victoria.

Mr Charles chaired a panel of four experts that advised ex-Victorian premier Ted Baillieu on the creation of the Independent Broad-based Anti-corruption Commission.

He is also the chair of left-wing think-tank the Australia Institute's National Integrity Committee, which is pushing for a national integrity body.

However, Mr Charles believes Victoria's IBAC is deeply flawed, with a narrow definition of corruption, too few teeth, and limited scope to hold public hearings.

"One of a corruption commission's prime functions is to expose corruption to the public. One of

Continued Page 4



Judge's warning over watchdog

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the reasons you have public hearings is so the community becomes aware of what's going on," Mr Charles said.

"Whenever you've got a suspect or someone with a fair amount of money or influence, they go to court to stop the public hearing. The commission then has to expose to the court and the suspect what their grounds are and how far their investigation has gone."

While the NSW Independent Commission Against Corruption has broad powers to hold public hearings, Victoria's IBAC can only do so if there are exceptional circumstances, if the matter passes a public interest test, and if the hearing won't cause unreasonable damage to a person's reputation, safety or wellbeing.

Mr Charles said there has only been five public IBAC hearings in the past five years, whereas ICAC holds one roughly every month. "As it's happened in Victoria, the only way to avoid unreasonable damage is to have made a full investigation beforehand, with private hearings in-camera so you know exactly who is the person you correctly suspect of corruption," Mr Charles said.

However, Mr Charles said there were many complaints about the NSW commission, a "fair amount" of them reasonable.

The ACT's commissioner will be accountable to a part-time inspector, who will have unfettered access to the com-

mission's staff and documents.

The commissioner will have to write to the inspector seven days out if they want to hold public hearings, and prove there is public interest in airing the allegations more widely.

In deciding whether it is in the public interest, the commission must weigh up the seriousness of the matter and whether the conduct was

isolated or more systemic in nature. Like the integrity commissioner, the inspector will be appointed by Speaker Joy Burch in consultation with Chief Minister Andrew Barr, Opposition Leader Opposition Leader Alistair Coe and Greens leader Shane Rattenbury.

A cross-party Select Committee will monitor both the inspector and the commissioner, and the Speaker can suspend them for misbehaviour, or mental or physical incapacity.

The NSW ICAC also has an inspector, although they are appointed by the state's Governor-General.

However, former NSW inspector David Levine previously called for ICAC to be stripped of its power to hold public hearings "to prevent the undeserved trashing of reputations".

Mr Charles said the oversight of the inspector should be enough in most circumstances to ensure the commissioner's

wide-ranging powers were being used appropriately.

The former Court of Appeals judge also expressed reservations about the ACT's narrow

definition of corruption.

According to the draft legislation, conduct by a public official is only considered corrupt if it is illegal or would be grounds for serious disciplinary action. "If you think back to WA Inc. under Brian Burke, some big companies made huge donations to government and the consequence was every time they had something they wanted to do, a building they wanted to put up, if they put a submission in, they got it. It's very difficult to tie that to a criminal offence," Mr Charles said.

"Corruption follows from the ability to use money, power and influence, and goes wider than criminal offences, that's why anti-corruption commission has to be wider than indictable offences."



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Former Victorian Court of
Appeal judge Stephen Charles
QC. Photo: Arsineh Houspian

Public hearings key to investigating and exposing corruption

A National Integrity Commission must have the ability to hold public hearings if the Commissioner considers it would make the investigation more effective and be in the public interest

Briefing paper prepared by the National Integrity Committee

Summary

- The majority of state integrity commissions have the ability to hold public hearings
- The importance of public hearings in Royal Commissions and anti-corruption investigations has been verified by the High Court, by anti-corruption commissioners, by independent reviews of NSW ICAC and Vic IBAC, and by the outcomes of anti-corruption investigations themselves
- Public hearings have been critical to investigations finding and exposing corruption, including Operation Ord in Victoria and Operations Jasper and Acacia in NSW.
- Limitations placed on the ability of Victoria's Independent Broad Based Commission to hold public hearings have led to allegations of serious misconduct not being exposed to the public
- The Commissioner of SA ICAC has been vocal in calling for the ability to hold public hearings, as it is the only commission currently not able to do so
- A National Integrity Commission must have the ability to hold public hearing if the Commissioner considers it would make the investigation more effective and be in the public interest

The National Integrity Committee

The National Integrity Committee was established to design and advise policy makers on specific accountability reforms, including a national anti-corruption commission. Members of the committee are: Margaret McMurdo AC, David Ipp AO QC, Stephen Charles AO QC, David Harper AM QC, Paul Stein AM QC and Anthony Whealy QC.

The role of public hearings in corruption investigations

Public hearings fulfil important functions in corruption investigations. They are a crucial mechanism to meeting corruption commissions' objectives of promoting integrity and investigating and exposing corruption.

Public hearings expose corruption and misconduct to the public. Exposing corruption is a core objective of corruption commissions. The only other mechanism for exposing corruption to the public is the investigation reports that summarise evidence and findings, and are made public only when investigations are concluded. These reports are hundreds of pages long and often are made public months or years after investigations commence.¹

Public hearings increase public trust that allegations of corruption are being investigated fairly and in the public interest. Polling from The Australia Institute shows that 78 per cent of Australians want a federal corruption commission to be able to hold public hearings, and 85 per cent think it will increase public trust if it can hold public hearings.²

Public hearings make investigations more effective, by encouraging witnesses to come forward with new evidence. Without public hearings, witnesses with key information may not know that an investigation is occurring, and may not know how the information they have fits into the case. Witnesses coming forward with new evidence during the NSW ICAC investigation into Liberal party fundraising practices were critical to the investigations scope and findings.³

Public hearings educate the public sector and community about corruption and misconduct issues. Cases revealed through public hearings educate the public about the detrimental impacts of corruption, and how it can be prevented. This can

¹ Ipp (2017), *Accountability and the Law – anti-corruption agencies in Australia*, Accountability and the Law conference paper

² Aulby (2018), *Out in the open – federal ICAC with public hearings key to tackling corruption and public trust*, The Australia Institute

³ Watson (2017), *The Darkest Corners – the case for a federal anti-corruption commission*, Accountability and the Law Conference paper

encourage members of the public service and the community to identify cases in their workplaces and come forward with complaints.

Public hearings deter others from engaging in corruption and misconduct in the future. Individuals that may consider engaging in corruption may be deterred by the knowledge that a corruption commission is actively working to investigate allegations. Public hearings raise the profile of investigations, and demonstrate that allegations of corruption are taken seriously and investigated thoroughly.

Public hearings improve the integrity of the public sector. The public is able to hear and assess the allegations and evidence directly, and the investigation can make findings in an accountable and transparent manner. Public hearings can also lead to the behaviour under investigation ceasing, directly improving the integrity of the public sector.

Public hearings make investigations fairer. The investigation is conducted with full transparency, meaning that the commission is accountable to the public and must treat witnesses and those under investigation fairly. The commission will be accountable for following the rule of procedural fairness, as opposed to a private ‘star chamber’. The Queensland CCC provision acknowledges this, allowing hearings to be public if closing the hearing would be unfair to a person.

Public hearings in state integrity commissions

Table 1: Use of public and private hearings, and investigation reports from 2012-2017

Body	Private examinations	Public inquiries	Investigation reports made public
NSW ICAC	721 examinations	30	32
Qld CCC	36 days	2	1
Vic IBAC	Data not available	5	11
WA CCC	52 examinations over 136 days	5	33

Source: Annual Reports NSW ICAC, Qld CCC, Vic IBAC and WA CCC 2012-17

Public hearings have been critical to the success of many corruption investigations at a state level. Two examples are provided below, one from NSW ICAC and one from Victoria’s IBAC.

During 2012 and 2013, NSW ICAC held public inquiries concerning the issuing of mining leases and licences involving former NSW Government ministers. The investigations

resulted in the prosecution of Eddie Obeid and Ian Macdonald for misconduct. Public hearings were critical to uncovering the information needed to finalise the investigations. During the Operation Jasper and Operation Acacia public hearings, the NSW ICAC called 138 witnesses and in fact had to build a bigger room to hold the hearing. According to former NSW ICAC commissioner David Ipp, “the stark fact is that Operations Jasper and Acacia could not have been undertaken without it.”⁴

In 2017 the Queensland CCC held a public inquiry into allegations of non-compliance with local government electoral laws and political donations disclosures. The investigation report states that a public hearing was critical to fulfilling its functions of promoting integrity, building public confidence and reporting on its investigations:

In coming to this decision, the CCC considered the necessary impact of issues to be canvassed at the hearing relating to exposing the inadequacies of the current system and promoting the need to reform the legislation to provide more transparency and accountability. These issues fall within the CCC’s corruption function to raise standards of integrity and conduct in units of public administration and ensure that corruption is dealt with in an appropriate way, and for the CCC to report its recommendations. In dealing with these issues the CCC has an overriding responsibility to promote public confidence. These functions and responsibilities could not be achieved by private hearings. The CCC considered that closing the hearing would be contrary to the public interest.⁵

Victoria’s IBAC has conducted five public inquiries to expose corrupt conduct in the public sector. One of those, Operation Ord, involved allegations of serious corrupt conduct in the Education Department. The inquiry revealed that millions of dollars were transferred to “banker schools”, supposedly for the purpose of facilitating the payment of invoices on behalf of a region or clusters of schools. But the investigation showed that senior departmental officers instead used these schools as a slush fund to pay for alcohol, lavish hospitality and expensive retreats, and goods and services completely unrelated to departmental activities. The principal player in this conduct was the officer responsible for overseeing the administration of the multi-billion dollars budget allocated to schools. Among the consequences of the public hearings was a significant spike in the number of fresh allegations made to IBAC about corrupt or improper conduct in the education sector. And the Department itself immediately

⁴ NSW ICAC (2013), *Annual Report 2012-2013*

⁵ Queensland CCC (2017) *Operation Belcarra*, p 3, <http://www.ccc.qld.gov.au/corruption/operation-belcarra-public-hearing>

developed a reform program designed to address the vulnerabilities identified in its systems by IBAC's investigation.⁶

Public hearings threshold tests

Each state integrity commission has a slightly different legislative test to satisfy before a public hearing is held. Provisions from the NSW, Queensland, Victoria, Western Australia and South Australia integrity commissions are provided below.

New South Wales

31 Public inquiries

- (1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
- (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following:
 - (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
 - (b) the seriousness of the allegation or complaint being investigated,
 - (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
 - (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.⁷

Queensland

177 Whether hearings are to be open or closed

- (1) Generally, a hearing is not open to the public.
- (2) However—
 - (c) for a hearing other than a hearing mentioned in paragraph (a) or (b), the commission may open the hearing to the public if it—
 - (i) considers closing the hearing to the public would be unfair to a person or contrary to the public interest; and
 - (ii) approves that the hearing be a public hearing.⁸

Victoria

117 Examinations generally to be held in private

- (1) Subject to subsection (2), an examination is not open to the public unless the IBAC considers on reasonable grounds—
 - (a) there are exceptional circumstances; and
 - (b) it is in the public interest to hold a public examination; and
 - (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.⁹

⁶ Charles (2016) *Submission to the NSW Parliamentary ICAC Committee on the Report of the ICAC Inspector*

⁷ *Independent Commission Against Corruption Act 1988* (NSW)

⁸ *Crime and Corruption Act 2001* (Queensland)

⁹ *Independent Broad-based Anti-corruption Commission Act 2011* (Victoria)

Western Australia

140 Public examinations, when allowed

(2) The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.¹⁰

South Australia

Schedule 2.3 Conduct of examinations

(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.¹¹

Importance of public hearings

The reasons why it is necessary for a body such as ICAC to be entitled to hold public inquiries have been considered on many occasions, and are well-understood. In the Royal Commission into the Builders Labourers Federation (BLF) in the 1980s, the issue was raised in the High Court. Chief Justice Anthony Mason stated that an order that a commission proceed in private:

... seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive.

The denial of public proceedings immediately brings in its train other detriments. Potential witnesses ..., lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

... Here the ultimate worth of the Royal Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.¹²

¹⁰ *Crime, Corruption and Misconduct Act 2003* (Western Australia)

¹¹ *Independent Commissioner Against Corruption Act 2012* (South Australia)

¹² In *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

The importance of open and transparent anti-corruption investigations is supported by former Federal Court judge and commissioner of the Fitzgerald Inquiry, the Hon Tony Fitzgerald AC QC:

The proposal to close anti-corruption hearings and repress information on public issues to save those involved from embarrassment demonstrates a fundamental ignorance of democracy. Effective democracy depends on informed voters. In a truly open society, citizens are entitled to full knowledge of government affairs. Information about official conduct does not become any less important because it diminishes official reputations.¹³

The leading textbook on the Law of Royal Commissions also contains the observation that –

Royal Commissioners are frequently reluctant to use private hearings, as they diminish the capacity of commissions to acquire information from the public, undermine public confidence in commissions, and reduce the ‘cleansing effect’ of hearings.¹⁴

The direct experience of anti-corruption commissioners across Australia has supported the benefit of public hearings. SA ICAC Commissioner Bruce Lander, who is currently the only Commissioner not able to open hearings, has made a recommendation to the SA State Government to allow the commission to hold public hearings to ensure transparency.¹⁵ Victorian IBAC Commissioner Stephen O’Byrne QC has said that public hearings are key to exposing corruption:

Public examinations are vital to IBAC in fulfilling its primary function of exposing public sector corruption and police misconduct. I consider them an invaluable tool for informing the public sector and the community about the detrimental impacts of corruption and police misconduct, and highlighting ways in which it can be prevented. Public examinations also help deter further wrongdoing, not only for potentially corrupt individuals, but also for public sector agencies which are prompted to examine their own processes and activities.¹⁶

¹³ McKenzie (2017) *Peter Dutton’s Home Affairs ministry will investigate itself for corruption*, <https://www.smh.com.au/politics/federal/peter-duttons-home-affairs-ministry-will-investigate-itself-for-corruption-20170721-gxfwov.html>

¹⁴ Donaghue (2001), *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, p 154.

¹⁵ MacLennan (2016), *ICAC Commissioner Bruce Lander pushes for public hearings to ensure transparency*, <http://www.abc.net.au/news/2016-10-31/icac-commissioner-bruce-lander-wants-public-hearings-in-sa/7980960>

¹⁶ Independent Broad-based Anti-corruption Commission (2015), *Annual Report*

Former NSW ICAC Assistant Commissioner Anthony Whealy QC has said:

There are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.¹⁷

Former NSW ICAC Commissioner David Ipp AO QC has said that:

Its main function is exposing corruption; this cannot be done without public hearings.¹⁸

This majority view is opposed by former NSW ICAC Inspector David Levine, and former NSW crown prosecutor Margaret Cunneen.

Margaret Cunneen was investigated by NSW ICAC for allegations that she attempted to pervert the course of justice by telling her daughter-in-law to feign chest pains to avoid a blood alcohol level test at the site of a motor vehicle accident. The decision of NSW ICAC to investigate this matter was challenged by Cunneen, resulting in a majority High Court decision that NSW ICAC had overstepped its jurisdiction in this matter.¹⁹

This matter resulted in a review of NSW ICAC's powers and conduct by ICAC Inspector David Levine. Levine's report, released in 2016, recommended that NSW ICAC's investigations should be held entirely in private:

It will prevent the undeserved trashing of reputations and will still permit a proper focus and a fairly managed forensic process, without the distraction of temptation for flamboyance or theatre.²⁰

The NSW Parliamentary committee on ICAC conducted a review into Levine's report. It did not accept Levine's recommendation that hearings be held entirely in private, and also did not accept recommendations from submissions to increase the threshold for holding public hearings noting that this would increase litigation against ICAC's decision to hold public hearings. The committee did, however, recommend that rules of procedural fairness be followed during public hearings.²¹

¹⁷ Gerathy (2016), *ICAC inspector calls for end to public hearings to stop 'trashing of reputations'*, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-public-hearings/7409126>

¹⁸ Ibid.

¹⁹ *Cunneen v Independent Commission Against Corruption* [2015] HCA 14

²⁰ Ibid.

²¹ Committee on the Independent Commission Against Corruption (2016), *Review of the Independent Commission Against Corruption – consideration of the Inspectors' reports*,

The Government accepted the ICAC Parliamentary committee's recommendation, but also went one step further and legislated that in order to hold a public hearing the Chief Commissioner must get agreement from at least one of the part-time Commissioners.²²

NSW ICAC's ability to hold public inquiries had been considered and supported in at least two reviews of ICAC's operations, first by Bruce McClintock SC in his 2004-5 review and secondly in the more recent 2015 review conducted by the Hon. Murray Gleeson AC and Mr McClintock. This review by the Independent Panel was established in response to the Cunneen case, and found that:

public inquiries, properly controlled, serve an important role in the disclosure of corrupt conduct. They also have an important role in disclosing the ICAC's investigative processes. The Panel is not attracted to the idea that the powers of the ICAC should all be exercised in private.²³

The report also noted that the Chief Commissioner is the best person to make the decision as to whether to open the inquiry, and that this process has led to predominantly good decisions:

The decision whether to conduct a public inquiry is an operational decision made for the purposes of the particular investigation. It is a decision best made by the Commissioner who is apprised of all the relevant facts and in the best position to weigh the public interest. There has, in fact, been little criticism brought to the Panel's attention (with one exception) of the ICAC's decisions to hold public inquiries, as distinct from the manner in which such inquiries are conducted. The exception is, of course, the decision to hold the public inquiry in [in the matter of Margaret Mary] Cunneen. That is an insufficient basis to recommend a change.²⁴

Recommendation

That a National Integrity Commission be able to hold public hearings if the Commissioner considers it would make the investigation more effective and be in the public interest.

<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=1958#tab-reports>

²² *Independent Commission Against Corruption Amendment Act 2016* (NSW)

²³ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC*

²⁴ Gleeson and McClintock (2015), *Report – Independent Panel Review of the Jurisdiction of NSW ICAC* pp 60-61

This model is a combination of the NSW ICAC, Queensland CCC and Western Australian CCC tests. The Victorian IBAC test has not been recommended due to:

- “exceptional circumstances” being difficult to define and prove
- “reasonable grounds” allowing the decision to be challenged in court, damaging the investigation in a number of ways:
 - Investigations are delayed unnecessarily, with the potential for ongoing appeals
 - Public money is wasted on expensive trails, often against opponents with endless financial and legal resources
 - In the trial, to justify its public hearing order, the Commission would have to disclose all the evidence it has, including information collected earlier in private hearings. This would be revealed prematurely and may give those under investigation the advantage when the public hearing finally takes place
 - IBACs decision to hold public hearings has only been challenged once and IBAC won the case, suggesting that IBAC acted correctly
 - There must be trust in the Commissioner to make the right decisions, otherwise the Commission will not be effective
 - In NSW there is an administrative law appeal available which gives ample protection if the Commission steps outside its legislative boundary. No such appeal has ever succeeded in the past, suggesting NSW ICAC has acted correctly in ordering a public hearing. The same protection would be available for a National Integrity Commission.