# Griffith/Narrabundah Community Association Inc.

PO Box 4127, Manuka ACT 2603

www.gnca.org.au email: info@gnca.org.au


Dr Andrea Cullen
Secretary
Select Committee on an Independent Integrity Commission
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601
committees@parliament.act.gov.au



**SUBMISSION ON A PROPOSED ACT INDEPENDENT INTEGRITY COMMISSION**

The Griffith Narrabundah Community Association (GNCA) is grateful for the opportunity to make comment on the proposal to establish an Independent Integrity Commission for the ACT. The GNCA believes that such an institution should have a positive effect on public administration in Canberra.

***Recommendations***

The GNCA recommends that an ACT Independent Integrity Commission (AIIC) should:

1. Be established as a matter of urgency;
2. Have a wide range of powers like those available to the NSW Independent Commission Against Corruption (NSW ICAC) to prosecute its mandate;
3. Be subject to judicial review by the Supreme Court, with the Auditor General and the Ombudsman responsible for review of specific areas; have a Code of Conduct applicable to all staff; and be subject to an ACT Inspectorate supervising the AIIC, the Auditor General and the Ombudsman on the Victorian model;
4. Have a Commissioner or Commissioners appointed by and working for the Assembly;
5. Report and account for its work to the Assembly, through an Assembly Committee established to oversight its activities;
6. Have a budget that is determined by the Assembly separately from the Government's budget;
7. Have powers to:
    a. Initiate investigation on its own motion;
    b. hold public hearings when necessary or convenient;
    c. search properties and seize evidence;
    d. engage in covert tactics;
    e. directly investigate the most serious and intermediate matters;
    f. not be limited from dealing with corrupt behaviour or misconduct because the matter that took place a specified time in the past;
8. Not have the power to:
    a. arm its officers;
    b. act as a judicial body, but should have the power to initiate prosecution of cases with appropriate judicial bodies;
    c. prosecute complainants who are patently vexatious but may refer these to be dealt with by other bodies;

9. Have a Commissioner who may also hold the offices of:
    a. Public Service Standards Commissioner;
    b. Assembly Ethics and Integrity Adviser;
    c. Assembly Commissioner for Standards;
10. Have a wide authority with scope to cover a broad range of public officials, including politicians, and any private sector elements who seek to influence the efficacy or probity of public processes;
11. Not have scope to investigate the AFP initially but that this issue be subsequently reviewed;
12. Have enabling legislation which provides for a broad definition of corruption and misconduct;

13. Be assisted by the further examination of the following measures to discourage corruption and misconduct:
    a. steps to enhance the transparency of government;
    b. effective Codes of Conduct for politicians and other office holders;
    c. measures to better protect whistle-blowers and those who report suspected corrupt behaviour;
    d. changes to prevent defamation laws being used to deter reporting of corruption, or as a vehicle for illicit payment of inducements; and
    e. other changes to reduce the scope for unaccountable decision making by bureaucrats.

**Need for an AIIC**

Numerous scandals revealed by the NSW ICAC since its establishment in 1988 have demonstrated beyond doubt the need for such an integrity agency in that state. Former Senator John Button, Industry Minister under the Hawke Government, used to attribute the prevalence of corruption in Sydney to the vigour of the Rum Corps' genes, but a more likely explanation is that similar corruption exists in all states and Territories, but is not in the public eye because of the absence or ineffectiveness of an anti-corruption body. It seems implausible that the cultural and social factors which make corruption common in Sydney do not operate in Canberra, only three hour's drive distant.

In smaller jurisdictions, such as NT and Tasmania, there has been evidence of extensive corruption. The ACT is of similar size, and if an AIIC were to be properly established would serve as a powerful deterrent to any corrupt activities in the Territory.

Corruption in the Northern Territory under the recent Giles Government reached almost farcical levels. Many have explained this as a consequence of the Northern Territory's small size. As Darwin lawyer and writer Ken Parish writes "*In a very real sense, the Northern Territory means the tiny city-state of Darwin whose population is around 140,000 people. ... Not only are there not enough people to provide a revenue base to support either the full bureaucratic apparatus of a State government or the necessary relatively sophisticated political establishment to make it efficient and accountable, but there aren't even enough people to provide a sufficient number of talented politicians, apparatchiks or bureaucrats themselves.*"

Similarly, corruption appears to have become so entrenched in Tasmanian politics (partly due to the activities of Gunns Ltd') that no one bothers to comment on it. This has also been attributed to small size. As Tasmanian environmental academic Dr Peter Hay has written "*Tasmania's small size meant that it lacked the capacity to ensure proper rules were followed, because ministers and bureaucrats mixed closely with the same handful of business interests*". Some might feel that this sounds unpleasantly similar to Canberra.
Few would argue that corruption is rife in both the Northern Territory (smaller than the ACT, and with no anti- corruption watchdog) and in Tasmania (somewhat larger than the ACT, and with an ineffective anti-corruption watchdog), with the small size of both polities being identified, at least by some, as a contributing cause to the pervasive corruption. Even without the series of strange events and overly close relationships between government members, senior bureaucrats and development companies in Canberra over the past several years, this would lead one to worry that there may be considerable corruption to be uncovered in the ACT. **The GNCA believes that there is an overwhelming case for the establishment of an ACT Independent Integrity Commission.**

At this stage, it is appropriate to note that politicians and public servants are not conscripts. No one compelled them to seek appointment to the jobs they now hold. Consequently, complaints that the establishment of an AIIC might be unfair, in that it exposes them to more scrutiny, and restricts their freedom of action more than other people, are misconceived. They are holders of public office, and a higher standard of behaviour consequently applies to them. Public officials, like Caesar's wife, must be above suspicion.

**Issues**
The Select Committee has been asked to consider the most effective and efficient model of an independent integrity commission for the ACT, and to make recommendations on:

(i) the appropriateness of adapting models operating in other similarly-sized jurisdictions;
(ii) the personnel structure of the commission to ensure the appropriate carriage of workload;
(iii) governance and funding that delivers independence;
(iv) the powers available to a commission;
(v) the educative functions of a commission;
(vi) issues regarding retrospectivity, including human rights, and the timeframes around which former actions can be assessed; and
(vii) the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT.

In addition, the GNCA believes that any discussion of the possible introduction of an AIIC should also consider:

(viii) the scope of the Integrity Commission's mandate;
(ix) the definition of corruption and misconduct; and
(x) other measures that could be enacted that might provide incentives to reduce corruption and misconduct.

**Appropriateness of adapting models operating in other similarly-sized jurisdictions**
The implicit premise of this first question in the Select Committee's Terms of Reference appears to be that there is a direct and linear relationship between the size of a jurisdiction and the prevalence of corruption and misconduct, and that consequently a smaller jurisdiction would only require a smaller integrity agency. To some extent this is correct, and it seems unlikely, for example, that the ACT would require an integrity agency of the size and budget of the NSW ICAC.

However, as is clear from the discussion about the need for an integrity commission in the ACT, many observers feel that small size may be a factor in encouraging corruption and misbehaviour in the smaller jurisdictions. If this is, in fact the case, the optimal size of an integrity agency for the ACT may not be a simple reflection of the different population sizes of the ACT and the larger states such as NSW.

At this stage there is little concrete evidence to draw on beyond the anecdotal observations noted above. Although it seems uncontested that corruption is rife in Tasmania (or at the least was rife a few years ago), the Tasmanian Integrity Commission appears to have been singularly ineffective in bringing any of this to public notice, and the Tasmanian model is therefore presumably an example to be avoided. The other comparable jurisdiction, the Northern Territory, is still setting up its Integrity Commission so cannot provide any guide as to how the ACT should proceed.

Noting these facts, the best way to proceed might be to assess which state based model appears to have been most effective in exposing corruption. Having identified the most effective model, the ACT should seek to copy its legislation and modus operandi as closely as possible, albeit perhaps on a smaller scale reflecting the ACT's small size compared with the mainland states.

In this regard, the GNCA's view is that the NSW ICAC is clearly the most successful state-based Integrity Commission, and we consequently recommend that the ACT base it's AIIC on the example of the NSW ICAC, with similar scope and powers.

**Personnel structure of the Commission to ensure the appropriate carriage of workload**
If it is accepted that the ACT should follow the example the NSW ICAC, there should be some reduction in size because we are a smaller jurisdiction. However, as argued above this should not be in a simple direct relationship with size. As the ACT is about one twentieth the size of NSW, an AIIC with about one tenth the staff of the NSW ICAC (ie about twice as many staff per capita) would probably be an appropriate starting point, and one that could be adjusted over time. As the NSW ICAC normally has a staff of about 130, staffing of 13 to 20 would probably be appropriate for the ACT.

The organisational structure of the AIIC is something we leave to the Committee to decide after examining all state Integrity Commissions. We would stress, however, the need for the appointment of a strong willed and independent individual as the leader of the organisation. This would probably best be someone drawn from outside the ACT, who would be

undisturbed by the prospect that none of Canberra's great and good would invite him or her to dinner again if the job were done properly.

**Quis custodiet ipsos custodes?**
Who guards the guards? No doubt this question was asked in Egyptian and Sumerian several millennia before the Latin formulation above. As an AIIC would have extensive powers, it is clearly very important that the enabling legislation establish a comprehensive accountability framework to ensure that any powers granted to the IAAC were not abused and that it met its legislative responsibilities.

The NSW ICAC is subject to external accountability through a NSW Parliamentary joint committee, and an Inspector of the ICAC. It is also subject to the Auditor General, the Ombudsman, the Attorney General, and NSW Judges who issue warrants, for the way it carries out various of its functions, and must also meet annual reporting requirements. The actions of the ICAC are of course reviewable by the NSW Supreme Court. Internal controls include an ICAC Code of Conduct which sets out the standards of ethical behaviour and decision-making expected of all ICAC employees and contractors.

In Victoria the Victorian IBAC is overseen by Parliament and also the Victorian Inspectorate, which supervises the IBAC, the Victorian Auditor-General's Office, the Victorian Ombudsman and officers, and Chief Examiner and Examiners appointed under the Major Crimes (Investigative Powers) Act 2004. The Inspectorate's role is to review and assess the use of coercive powers by those bodies and ensure that those powers are exercised appropriately, proportionately and in accordance with the law.

In Queensland the Parliamentary Crime and Corruption Commissioner undertakes audits and inspections of the Queensland Crime and Corruption Commission (Queensland CCC) compliance on behalf of the Queensland Parliamentary Crime and Corruption Committee. The Queensland CCC also reports to the Attorney-General on its efficiency, effectiveness, economy and timeliness. In addition the CCC must apply to the Supreme Court of Queensland before exercising some of its powers, and the Court also reviews some CCC decisions and decides contempt of court matters in relation to CCC hearings. The Public Interest Monitor monitors CCC compliance with key legislation, including examining the CCC's applications for covert search warrants and surveillance warrants.

The Western Australian Corruption and Crime Commission (WA CCC) is overseen by the WA Parliamentary Joint Standing Committee on the Corruption and Crime Commission. This Committee is assisted by the Parliamentary Inspector of the Corruption and Crime Commission whose function is to audit the operation of the CCM Act and the CCC's operations and to deal with any misconduct by CCC officers.

The South Australian Independent Commissioner Against Corruption (SA ICAC) works through the SA Office of Public Integrity (SA OPI). The Commissioner's office is subject to the oversight of the SA Parliamentary Crime and Public Integrity Policy Committee. The Commissioner must also keep the Attorney-General informed of the general conduct of the functions of the Commissioner and the OPI. The SA ICAC is subject to an annual review

which must consider whether its powers were exercised in an appropriate manner; whether the practices and procedures of the SA ICAC and OPI were effective and efficient; and whether the operations made an appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration in public administration.

It could be argued that the Queensland, Western Australian and South Australian models give undue authority to Commissioners, Inspectors or Reviewers who report to Parliament and that consequently this approach would be unsuitable for the ACT. This is particularly so as the ACT has a unicameral parliament (as does Queensland) and consequently will always lack the broader perspective provided by an upper house sometimes beyond the Government's control.

The NSW arrangements where the NSW ICAC is oversighted by an Inspector of ICAC does not appear to work particularly well. It appears an apparent personal animosity on the part of the Inspector toward the ICAC Commissioner is not regarded as an undesirable quality despite the unedifying results. This suggests that a different approach might be better for the AIIC.

Unless it is specifically excluded the ACT Supreme will have the power to review the actions of any AIIC It would seem desirable to follow the NSW example and provide for review by the Auditor General and the Ombudsman over appropriate elements of the AIIC's activities. A detailed Code of Conduct dealing with ethical behaviour and decision making for all employees and contractors would also seem worthwhile. Finally some joint ACT Inspectorate oversighting the Auditor General, the Ombudsman and the AIIC, together with any other parliamentary agencies rather than elements of the Act Administration, along the lines of the Victorian model, would be worth consideration.

**Governance and funding that delivers independence**

The Issues Paper – Australian Public Sector Integrity Frameworks (Issues Paper) prepared by the Select Committee on an Independent Integrity Commission notes at paragraph 14.3 that "*Oversight of such a (integrity) commission is commonly provided for by a Parliamentary Committee. In some jurisdictions, there is also a commissioner independent of the integrity commission who has a key role in such oversight.*" This is also evident from the brief survey of control arrangements for the mainland state integrity bodies in the preceding section.

If the AIIC is not to be a mere creature of the Government, it must be independent in both policy and funding. Consequently, it's Commissioner or Commissioners should be appointed by and work for the Assembly rather than be members of the ACT administration reporting to a minister. An Assembly Committee should provide oversight, ideally with a cross bencher as chair. It would be undesirable if the AIIC's budget allocation were to be buried in the budget for Justice and Community Services, or within the myriad activities of the Chief Minister's Directorate. Consequently the GNCA recommends that the AIIC budget be required to be a separate item, and be debated separately from all other budget matters.

It would seem appropriate and indeed essential for an AIIC to report and account for its work to the Assembly, through an Assembly Committee established to oversight its activities. The Issues Paper contains at paragraph 13.2 a lengthy quote from the ICA legislation listing the things to be included in the ICAC's annual report. Paragraph 13.5 of the Issues Paper notes that "the Independent Commission Against Corruption Act 1988 is the most detailed and prescriptive with regard to reporting obligations". The GNCA believes that a requirement to make reports along similar lines to those imposed upon the NSW ICAC would seem appropriate.

Performance measures such as prosecutions and case study reports appear appropriate. However, it is not clear how "stakeholder satisfaction" might be measured. Which persons or things are the relevant stakeholders? How is their satisfaction to be measured? Wrongdoers in fear of exposure might well be very interested in the AIIC and its activities, but would this make them stakeholders? The concept of stakeholder satisfaction is too vague to be usefully included as a performance measure.

While it is hard for the GNCA to accurately determine the likely cost of an AIIC, a budget of one tenth of that of the NSW ICAC or the Victorian Independent Broad-based Anti-Corruption Commission (Victorian IBAC) would be about $2.5m per year, or about the same cost as bringing a Sydney based AFL team to play four matches a year in Canberra.

**Powers available to a commission**

The Issues Paper asks a number of questions about the desirable powers and operations of any AIIC, reflecting a number of issues identified by Prenzler and Faulkner. The GNCA's views are as follows:

Power to initiate 'own motion' investigations

As the Issues Paper notes at paragraph 3.2 "This is a standard power for integrity commissions..." Consequently, it would be most unusual were an AIIC to be established without such powers. The GNCA believes that such an 'own motion' power is essential.

The alternative, where the AIIC had to wait until a matter was referred to it by some other agency or authority, would render the body useless. Every potential matter for investigation would be subject to delay (and considering that the AIIC has been debated since 1989 this is not an imagined threat). It seems likely that the only matters the AIIC would be able to pursue without this power would be those referred to it by the government of the time, and would probably only focus on the (no doubt genuine!) shortcomings of the then opposition. The AIIC would rapidly lose any credibility that it might have had.

Power to require attendance and compel answers to questions

The Issues Paper observes at paragraph 4.1 that the absence of these powers "would reduce the efficacy of inquiries and increase the time required to complete them. In the GNCA's view a failure to grant an AIIC these powers would make it effectively useless.

Power to hold public hearings

The Issues Paper suggests that public hearings have three positive aspects in that they would:

1. enhance public confidence in an AIIC and its processes;
2. contribute to the dread of investigation on the part of those engaged in misconduct; and
3. add a "moral effect" by loss of reputation in addition to the fear of formal prosecution as a deterrent to misconduct.

Paragraph 5.19 of the Issues Paper advises that the enabling legislation for the Victorian IBAC provides that examinations are generally to be held in private, but may be held in public if IBAC considers on reasonable grounds that there are exceptional circumstances. Similarly paragraph 5.21 of the Issues Paper indicates that the legislation establishing the South Australian Independent Commissioner Against corruption and the Office of Public Integrity (SA ICAC) provides that examinations relating to corruption must be conducted in private, and may only hold public hearings in very restricted and specified circumstances.

The GNCA notes these provisions, and also how relatively ineffective these bodies have been. A Google search reveals that the Victorian IBAC has detected "rats and mice" corruption in the Victorian Education Department, but has been unable to deal with unacceptable behaviour by Parliamentary Speakers both under the current Labor Government and the previous Liberal Government. The SA ICAC has investigated the 2013 sale of Government land in response to an unsolicited offer, and is now to investigate SA Health about serious maladministration of the Oakden mental health facility. How many times do you recall seeing these integrity bodies in the news? As the Americans say, "Do the maths".

It might be argued that public hearings are in some way "unfair", subjecting those brought before them to some kind of "Kangaroo Court". While emotive, this argument appears to have little connection to the truth. There is no evidence, for instance, that the NSW ICAC in its public hearings has deviated in any way from appropriate legal behaviour or court procedures.

A possible benefit of a public hearing of suspected wrong doings is that news of the hearings might encourage other witnesses to come forward, as has been the case with the trials of some paedophiles.

But most importantly, private hearings would appear to fly in the face of a very long tradition of alleged wrong doers being charged, and permitted to defend themselves, in public. On what basis is taxpayers' money to be spent on investigations only to have those suspected of wrong doing cross examined in private?

No doubt those who argue for private or closed hearings by any Integrity Commission would also prefer that criminal court cases took place in private. There are, however, good public policy reasons why this is not the case. Citizens should have the right to understand, and to be satisfied, that the way in which an investigation has been carried out was transparent and was conducted appropriately, as the SA ICAC's Commissioner, Bruce Lander, has himself argued. Justice must not only be done, it must be seen to be done.

The GNCA believes that a power to hold a public hearing whenever this is felt either necessary or convenient is an essential power for an AIIC.

Power to search properties and seize evidence

These would seem to be essential powers for an AIIC and a failure to provide an AIIC with them would severely constrain its effectiveness. At best in the absence of such powers the AIIC would be forced to rely on the goodwill of the police force, which may not be forthcoming ion all circumstances.

The GNCA believes that the AIIC should have such power and that warrants for such activities should be sought from judges rather than the Commissioner(s) having the power to issue their own warrants.

Power to engage in covert tactics

The Issues Paper defines (paragraphs 7.1, 7.3) "covert tactics" to include listening devices (and presumably phone tapping), optical surveillance, the use of undercover agents, and targeted integrity tests (apparently, a polite way of referring to sting operations or the use of agents provocateur). It might help readers more readily understand what was under discussion if these matters were described as "covert activities" rather than "covert tactics".

As the Issues Paper discusses at paragraph 7.4, the absence of a power to use such techniques would make the AIIC dependent on other bodies that did have such investigatory powers, such as the police, which would weaken the AIIC and undermine its independence.

If the AIIC is to have the power to engage in "sting" actions it would probably be desirable to provided explicit provisions to limit the liability of officers whose work requires them to undertake activities which would otherwise be illegal.

These covert tactics powers would also seem to be appropriate powers for an AIIC and the GNCA supports any AIIC having these powers.

At this stage, we are unconvinced that a body established to combat corruption and misconduct would need a power to arm its officers. Matters which required armed officers to carry out their duties have arguably moved beyond corruption to major crime. We believe that an AIIC should focus on detecting corruption and leave crime to the AFP, although it might be desirable to monitor the situation with the possibility of reconsidering this separation of roles at some future date.

Power to directly investigate the most serious and intermediate matters

The issue here is that, without such powers, the AIIC might, after initial investigations had established a reasonable presumption of corruption or misbehaviour, have to pass a matter on the some other body with wider authority to conduct investigations. Failure to award such a power to the Commission could consequently dramatically reduce its effectiveness. A lack of this power would lead to many of the same problems as foreseen if an AIIC lacked the power to conduct 'own motion' investigations.

The GNCA believes that these powers are essential to the effective operation of any AIIC.

Power to make disciplinary decisions and manage a mediation program

There are two objections to such a proposal. First is the question is whether it is appropriate for the same body to be prosecutor, judge and jury. Whether decisions made by such a body were right or wrong they would draw criticism for this reason, impairing the body's effectiveness.

Secondly, as the ACT draws its legislative powers from the Commonwealth, and Chapter 3 of the Australian Constitution restricts the exercise of judicial functions to judicial bodies, it may well be that the ACT Assembly does not have the authority to legislate for such a power for an AIIC. To award it such a power would mean that the AIIC's actions would lack certainty until whether it legitimately had this power, and how it could use it, had been tested in the High Court. So why bother?

Rather than having a power to make disciplinary decision any AIIC should have the power to refer cases of corruption that it had uncovered to appropriate judicial bodies (such as the Supreme Court or the ACAT). To reduce the possibility that the Director of Public Prosecutions or similar officer was reluctant to act, whether because the Government of the day might prefer not to follow up on these cases or for some other reason, the AIIC should be given the power to initiate actions on its own initiative.

We accept that this restriction on undertaking judicial activities means that during its public hearings any AIIC could only expose the relevant corruption or misconduct and refer the matter to an appropriate institution or official such as the Director of Public Prosecutions, or initiate a prosecution through the courts itself. It would not be able to determine that Mr/Ms X had acted corruptly, only that there was a reasonable case that Mr/Ms X's actions were corrupt and that the evidence was sufficient for him/her to stand trial.

The GNCA believes that an AIIC should not have any judicial powers, but should have the power to initiate prosecution of cases with appropriate judicial bodies.

Power to conduct research and risk reviews

It is not quite clear what Prenzler and Faulkner had in mind when they identified this function. In so far as the NSW ICAC does not apparently have this as one of its express functions, and yet appears to operate considerably more effectively than most other state integrity commissions, it appears to be unnecessary. Perhaps the Select Committee could insure that any AIIC has those NSW ICAC powers that the Issues Paper identifies as presupposing that it has in its paragraphs 10.4 to 10.7.

Power to Engage in Public Sector Ethics Training

This issue is discussed below under "Educative functions of a commission".

Power to Prosecute Complainants who are Patently Vexatious

This seems an unnecessary power. Certainly, any AIIC should have the power to decide which cases it chooses to follow up, so that it has scope to ignore vexatious, frivolous, mischievous or malicious complaints. In addition, it should also have the power to refer such

complainants to an appropriate third party such the Supreme Court. But the AIIC should not have any power to prosecute such cases itself.

It needs to remembered that what is a patently vexatious complaint to one observer might be an example of heroic persistence in the face of official indifference in the eyes of another.

The GNCA believes that an AIIC needs to have the discretion to ignore an allegation, but should have to report the receipt of the allegation and the reason why it was not further investigated. It should also have the discretionary power to refer the maker of such a complaint to an appropriate third party.

Requirement to Account for its Work
This was discussed above under "Governance and funding that delivers independence"

**Educative functions of a commission**
It is not entirely clear what the authors of the Issues Paper had in mind under this heading. The argument appears to be that if integrity commissions 'engage in public sector ethics training' this will 'exert downward pressure on compliance failures" (Issues Paper paragraph 11.1). In NSW, Queensland and Western Australia this seems to be taken as an endorsement of programs to advise public authorities and officials about strategies, advice and training on how to reduce or prevent corruption. One presumes that this involves at least in part reviewing activities and systems to reduce incentives and opportunities for corruption and to enhance and strengthen systems and protocols designed to detect corruption. This seems both unexceptional and laudable. However it should be noted that there are probably many private sector consultations who could also give excellent advice on how to protect sensitive data, or minimise losses due to theft or fraud by staff.

In Victoria the IBAC appear to share at least some of this function in that it is supposed to assist the public sector to increase capacity to prevent corrupt conduct by providing advice, training and education services. But it is also expected to educate the community and public officers about the detrimental effects of corruption. The South Australian ICAC is expected to conduct educational programs to prevent or minimise corruption. In Tasmania there appears to be an emphasis on the development by the Integrity Commission on developing standards and codes of conduct for public officers.

Arguably attempts to educate the public and/or public officers about what constitutes corruption, or of the detrimental outcomes of corruption, are misplaced. There are those that argue that educating the public, politicians and other public officers about what is right and what is wrong is very important. Those that argue this may cite President Trump as someone who probably believes that he has done no wrong, despite the evidence that very many clearly disagree. And draw from such examples the conclusion that more exposure to ethical behaviour is very important, as such a character might learn from it. The counter to this argument is again President Trump. Does it seem reasonable to expect him to change his ways, no matter how much ethical education is made available?

The underlying premise of the argument for greater ethical education of public officers seems to be that ethical behaviour is some kind of hidden dark art, known only to the initiated. Some feel that this is not the case, and would argue that the unfortunate reality is that most perpetrators of corrupt activity know perfectly well that their actions are inappropriate, but undertake them in any case. It is not ignorance which drives corruption, but the rational calculation that the chance of detection is small, and the rewards for misbehaviour are large. All too often this view is encouraged by the behaviour of others in leading positions, who shamelessly pursue their own advantage to the detriment of society. The rational way to change such rational behaviour is to rebalance things by increasing the sanctions on misbehaviour and reduce the incentives or rewards (or at least make it more difficult to enjoy them). And to require that those at the peak of public administration, politicians and very senior public servants, set an example of correct ethical behaviour. Those who hold this view believe that lecturing politicians and public servants about their responsibilities to the public would in the overwhelming number of cases be an exercise in futility. Corrupt politicians and public servants are much more likely to mend their ways if they have the example of other offenders being identified and punished.

While codes of conduct on ethical behaviour can be complex, the basic principles are very simple. Receipt of some benefit, in cash or in kind, from any party other than one's employer is generally unethical behaviour on the part of a public official. In the vast majority of cases such benefits come with strings attached, even though these might not seem particularly obvious at the time of receipt. As the old adage goes "There is no such thing as a free lunch".

Before a large investment is made into ethical education, it might be desirable to have codes of conduct in place which identify unethical behaviour and provide sanctions to discourage it. How can we object to a senior public servant resigning and going to work for a company which deals with the Government in his/her area of expertise if there is no code to say that this is wrong. This is touched on further at the end of this submission

The GNCA believes that the AIC should be empowered to advise public authorities and officials about strategies, techniques and training on how to reduce or prevent corruption. Other aspects of ethical education should be permitted but this should not be a primary role of the AIIC and should always play a secondary role to the actual detection and exposure of corruption. A more important but related role might be to encourage the promulgation of clear, explicit and unambiguous written codes of conduct so that public officers know what is expected of them Making ethical educational a primary function of an AIIC in the absence of such codes runs the risk that this could become a substitute for real anticorruption activities. Arguably this appears to be the case with the Tasmanian Integrity Commission.

**Issues regarding retrospectivity, including human rights and the timeframes around which former actions can be assessed**

Apparently some argue that for an AIIC to have power to instigate corruption and misconduct that took place before it was established is somehow retrospective. This appears to misunderstand retrospectivity. The rights of alleged wrong doers would only be violated if they were to be charged and proceeded against for doing actions which were legal at the time

that they were done. Clearly there would be little point in the AIIC investigating actions which had been legal when done, no matter what their current status.

A more pertinent question is whether there is any length of time beyond which the AIIC should not seek to investigate wrongdoings. Arguably the AIIC should not be able to undertake investigations into cases no longer actionable because of the statute of limitations or the expiry of some relevant limitation on when action could be initiated. Such rules reflect the judgement of courts and legislators as to when it is reasonable to restrict the rights of plaintiffs, or the period beyond which it is reasonable to expect defendants to be able to produce evidence in their defence.

Some have advanced the argument that the fact that a court could not hear case because of some legal rule imposing a time limit for commencement of action should not mean that the wrong doing should not be exposed. And that time limited powers could frustrate investigation into a current case whose antecedents stretch back beyond a statute of limitations. However, as noted above, these time limitations on when actions can be commenced are not arbitrary, but reflect views about what is reasonable. Can one really expect the recollections of plaintiffs, defendants, and witnesses to be accurate decades after an event has taken place? Recollections may be faulty, and much other physical or documentary evidence may by now be missing. If it is felt that a trial could not be fair under these circumstances then how could an AIIC hearing be fair? To proceed under these circumstances would just discredit the AIIC.

It should also be recalled that the statute of limitations does not apply to all matters. There is no limit on the laying of charges for murder, or rape, for example. Thus these rules are unlikely to prevent investigation of major crimes.

Given that it seems likely there will be more matters to be investigated by the Commission than resources to do all the work necessary, some focus on misconduct which might lead to convictions would seem to be the preferred course. This would make the issue of whether or not to investigate beyond a defined period into the past somewhat moot.

While it is understandable that politicians may have reservation about establishing a body that may uncover actionable evidence of wrongdoings that had previously gone undiscovered, this does not really provide a reason why special limitations should be imposed on any AIIC to restrict its scope to investigate matters which the police would still be a liberty to investigate.

The GNCA would not support some limit prohibiting the AIICC from dealing with corrupt behaviour or misconduct for the reason that the matter that took place a specified time in the past.

**Relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT**

While the AIIC would not overlap in any way with the responsibilities of the ACT Auditor General or the ACT Ombudsman, it would not be unreasonable if the Commissioner of the AIIC were to also hold the offices of:

- Public Service Standards Commissioner, or at least had responsibility for those functions involving promoting integrity in the ACT Public Service and in investigating misconduct;
- Assembly Ethics and Integrity Adviser, providing advice to members on request on ethical issues including the use of entitlements and potential conflicts of interest; and
- Assembly Commissioner for Standards, to investigate matters referred by the Speaker in relation to a complaint against a Member or from the Deputy Speaker in relation to complaints against the Speaker.

This would lead to some simplification of sources of integrity advice and possible fiscal savings.

**Scope of the Integrity Commission's mandate**

Recognising Canberra's local circumstances there would be little point in having an AIIC that did not have wide coverage. This should start by explicitly including politicians (ie any MLA), and their political advisers, and include all "public officials". We note that the Issues Paper quotes at paragraph 1.10 a proposed definition of "public official" originally developed in 1989 which would include "all persons receiving a salary, wages or other payment from the ACT Government Service, its statutory authorities, agencies and boards," and also cover public office holders in a position of possible influence even if they do not receive payment for their services.

As well of these members of the public sector the AIIC should also have the power to investigate those in the private sector, for example lobbyists, developers and any businessman who did business with the Government or who had sought to do business with the Government and who had sought to subvert the efficacy or probity of public processes.

The GNCA recommends that the AIIC have a wide authority covering a broad definition of public officials, including politicians, and any private sector elements who seek to influence the efficacy or probity of public processes.

The GNCA believes that it would be desirable for the AIIC to have the scope to investigate the AFP, at least to the extent that their activities involve the provision of policing services to the ACT. However, we also recognise that the ACT does not have its own police force but purchases policing functions from the Commonwealth via the Australian Federal Police (AFP). The AFP has its own internal investigation unit. Even if the Commonwealth were agreeable to an arrangement whereby a Territory based organisation such as an Integrity Commission could investigate a federal body (such as the AFP, or even the Division which deals with ACT policing), setting appropriate arrangements in place to allow this would

require (probably lengthy) negotiations between the Commonwealth and Territory Governments.

This process might unreasonably delay or defer the establishment of the AIIC. Consequently the GNCA believes that at this stage it would be preferable to establish the AIIC as soon as possible and to omit the ACT policing side of the AFP from the scope of any AIIC's area of responsibility at the beginning. After establishing the AIIC the Territory Government can subsequently engage with the Commonwealth Government on the appropriate mechanisms to allow the ACT policing side of the AFP to also be subject to the AIIC in due course. The GNCA recommends that the ACT adopt this approach

While the exclusion of oversight over the local police might not be typical of other state based integrity commissions, it would be like arrangements in NSW where the NSW ICAC does not cover the NSW police. This model appears to work well enough..

**Definition of corruption and misconduct**

If an AIIC is to work effectively it is important that this establishing legislation contains a broad enough definition of corruption and misconduct to allow the AIIC to adequately deal with any corruption of misconduct that its investigations may unearth.

Consequently, Corruption and Misconduct should be defined to include any illegal action, including bribery, fraud, theft, homicide, violence, embezzlement etc. Corruption and Misconduct should also include actions which are unjustified or harmful, abuse of power, improper failure to act, as well as oppression, extortion, imposition and acting with partiality is a corrupt activity. The definition of corruption also needs to be broad enough to encompass actions by private sector persons seeking to affect the efficacy of a public process. The definition should also include any attempt to influence the outcome of any process which legislation had removed from direct political control, such as the selection of officials for public office, a decision to press or not press charges against an alleged offender, or an attempt to pre-empt a departmental recommendation where the legislation provides that the Minister shall seek the advice of his Department, etc.

To encourage the reporting of suspected corrupt activity and protect those who do so from threats of defamation or libel, the legislation to establish the AIIC should also make it an offence not to report a reasonable suspicion of corrupt behaviour and preclude any report of suspected corrupt behaviour from being ground for litigation. Consideration should also be given to widening other protections for whistle-blowers and possibly rewarding them with a share of any corruptly diverted funds which are recovered as is done in some cases in the USA. Other measures which might provide incentives to discourage corruption and misconduct are discussed below.

The GNCA recommends that the enabling legislation establishing the AIIC provide a broad definition of corruption and misconduct.

**Oher measures that could be enacted that might provide incentives to reduce corruption and misconduct**

The Issues Paper points out in paragraph 2.30, that irrespective of what institutional arrangements have been put in place to discourage corruption and misconduct, "*some key integrity capacities may reside elsewhere – such as in social structures, cultural values, education systems.*" While this is undoubtedly true, it seems that any serious effort to limit corruption and misconduct would also consider changes to legislation, codes of conduct and institutional arrangements to provide disincentives for corrupt behaviour, make it harder to hide such behaviour and its consequences, and make it easier to detect, discover or report such undesirable conduct.

A matter which needs further consideration in relation to corruption is defamation and libel law. In Australia public interest is not a complete defence, and so litigious politicians can discourage knowledge and discussion of their possibly unusual behaviour by the use of defamation law. Not only that, but the existence of such laws provides a perfect cover for the receipt of bribes, where actions can be settled out of court with confidentiality clauses prohibiting publication of the details of the allegations or the quantum of the settlement.

The GNCA recommends that the following measures to discourage corruption and misconduct be further examined.

Measures to improve transparency

- Better and more effective FOI laws, possibly including a change from the current situation so that a document would be available for release into the public domain except where the Government had applied to an external arbiter at the time of the creation of the document to prevent its release;
- Automatic and timely publication of politicians' meeting diaries;
- Enforcement of the requirement that Lobbyists be registered and revealing for who\m they lobbied;
- Effective and timely updating of politicians' and other sensitive public office holders' Asset Registers;
- Effective and timely reporting of political donations;

Measures to guide politicians and holders of major public offices in relation to acceptable behaviour

- Codes of Conduct, one Ministers, and another for other MLAs, providing guidance on the avoidance of conflicts between their private interests on the one hand and their public responsibilities on the other;
- Enforceable provisions forbidding the receipt of benefits, gifts or emoluments in cash or in kind beyond specified limits, with members required to report overseas travel, gifts given and received, meetings with external organisations and hospitality accepted in a public and a private capacity, with return available on the internet;
- Restrictions on the size of donations and the total amount that any donor could give in a specified period.

- Clear, explicit rules on what parliamentary benefits a politician may receive, interpreted by retired public servants, not fellow politicians;
- A requirement for elected officials to place all their assets in a blind trust for the duration of their term in public office;
- Enforceable provisions about post separation employment by politicians and holders of major public offices after leaving positions of influence –should this "gardening leave" last one year or two years? We understand that in the US under the Obama administration such provisions were legally enforceable as part of an officer's contract of employment.

Measures to better protect whistle-blowers and those who report suspected corrupt behaviour

- Appropriate, effective whistle-blower protection laws;
- Legislative arrangements along US lines that reward whistles-blowers with rewards linked to a fixed proportion (usually 15% to 25%) of the funds recovered following investigation of any complaint or allegation made by a whistle-blower;

Legislative changes to prevent defamation laws being used to deter reporting of corruption, or as a vehicle for illicit payment of inducements

- Reform defamation/libel laws so that it is not actionable for any public official to make factually true statements about their areas of responsibility (so to report eg that a large number of diners had salmonella after eating at café XYZ would not be actionable);
- Reform of defamation/libel laws so that comment about politicians and public office holders are always in the public interest ie to seek election is to waive access to these provisions;
- Prohibition of out of court settlements once an action is initiated, and of confidential settlements, to defamation and libel cases involving politicians and public office holders;

Other changes

- Review ACT legislation and administrative procedures to minimise the need or scope for unstructured decisions
  - and ensure that where discretion is allowed and is exercised, each decision point is identified and recorded, together with the reasons leading to the decision, and the officer(s) who made the decision;
- Reform planning and building rules so that outcomes are much more predictable
  - And enforce the decision once made without second guessing from Access Canberra;
- Legislate to provide that individuals may apply to ACAT for directions to a Directorate or Minister to carry out faithfully and fully all responsibilities and requirements relating to a matter granted to them under relevant acts.
- Review and reform the ACAT legislation to ensure that it provides cheap, timely and accessible resolution of disputes about the exercise of public administration.

The GNCA believes that the establishment of an AIIC would present a singular opportunity to change and improve the civic life in Canberra. We should seize the moment and get on with it.

We would be happy to appear before the Committee, if it is thought we could add any value to its deliberations.

Yours faithfully

John Edquist

President
1 June 2017