Abstract of the paper delivered by the Hon Murray Kellam AO to the Michael Coper Roundtable of the AAL held in Canberra on 5 May 2021

Over the last 30 years, Integrity and Anti-Corruption agencies have been created in all Australian States and the ACT and the Northern Territory. The Western Australian, New South Wales and Queensland agencies were created three decades ago, with the South Australian, Victorian, Tasmanian, ACT and Northern Territory entities being created in the last decade.

The State and Territory agencies all have differing functions, powers and legislation governing their operation. Some have coercive powers requiring witnesses to answer questions notwithstanding their common-law privileges of silence. Others do not. Most such agencies have the power to conduct public hearings, but the South Australian agency does not. Whilst it is true that there has from time to time been public controversy concerning the operation of some State agencies (Such as the *Cunneen* case in New South Wales), they have generally proved to be effective in achieving their objects.

Based upon the now extensive experience of the operation of such agencies, and their successes and failures, there is broad agreement amongst those who have an understanding of how such entities work, and should work, as to the necessary principles to be followed in the design of a successful and effective Commission. Those principles include the necessity for the Commission to be independent of Government with sufficient resources to undertake its charter; it should have a broad jurisdiction to investigate conduct which could adversely affect the honest or impartial exercise of public administration; it should have the powers of a Royal Commission including those of fact-finding and reporting as appropriate; it should have power to conduct a public inquiry if in the public interest to do so and it should be subject to proper independent oversight.

It is in this context that the draft Commonwealth Integrity Commission Bill released by the Government in November 2019 is to be considered. Such consideration of the draft legislation reveals that the proposed Commonwealth Integrity Commission does not meet the above principles in several ways. Transparency International Australia has stated that the model "does not meet the necessary criteria to render it credible and effective". The Law Council of Australia has said that the draft Bill has "significant shortcomings – both in the scope of the corruption it can investigate and in the unnecessary complexity of the mechanisms it requires the proposed CIC to engage in to pursue its functions". The criticisms relate mainly to the CIC structure, the public reporting of CIC findings and funding independence.

The criticism of the structure relates to the bifurcation of the proposed CIC into two divisions, the Law Enforcement Integrity division and the Public Sector Integrity division. There is a differing definition of a "corruption issue" depending upon whether a person is a member of the law enforcement division or the public sector division. There are several other legislative differences in processes to be followed depending upon which division a member belongs to. In this regard, the Accountability Roundtable has stated that the "absence of persuasive argument for dividing the powers of the CIC into a strong and a weak portion confirms public apprehension that the provision of weaker powers to the public sector division shields

parliamentarians, their staff and the public service from investigation and from public exposure of corrupt activities".

A further source of criticism of the draft Bill relates to the distinction between the two divisions regarding the threshold for the commencement of an investigation. The law enforcement division may receive complaints from any person, including whistle-blowers or members of the public. However there are no such provisions concerning a public sector corruption issue. A member of the public cannot refer a corruption issue to the Commission. The National Integrity Committee has argued that there is no justification for this distinction.

The draft CIC Bill does not permit public hearings concerning investigations of public sector agencies, parliamentarians, or their staff. However, the law enforcement division does have power under the draft Bill to conduct public hearings. The National Integrity Committee has submitted that the negation of a public hearing in the public sector division is a "massive failing in the government model". It points to the year-long Hayne Banking Royal Commission and the McClelland Royal Commission into child sexual abuse as each demonstrating clearly the value of public hearings.

The draft Bill contains significant restrictions upon the reporting of investigations conducted by the proposed CIC. Once again, there is a difference in approach between reporting upon and investigating the law enforcement division against the public sector division. Transparency International Australia has argued that reporting what the CIC finds is "integral to the integrity of the commission itself".
The distinction in the draft Bill between public sector corruption and law enforcement corruption manifests itself throughout the various reporting requirements that single out parliamentarians and their offices for protection. For example, section 239 (7) prohibits the publication of "any opinion or finding that is critical (either expressly or impliedly) of, or a recommendation about a parliamentarian, or their office, or any staff members of their office". The Centre for Public Integrity has expressed a view that the "extraordinary protection accorded to parliamentarians under the CIC Bill will, however, only further undermine public trust".

There is near unanimity amongst those with a background and understanding of the operation of integrity bodies in Australia that the Bill as drafted is flawed seriously. Transparency International Australia has submitted: "in short, scrutiny of the bulk of the public sector, including parliamentarians and their staff, is restricted at every turn under this model - the threshold of reasonable suspicion, criminal matters only, a narrow referral mechanism, no scope for the public to raise concerns, no public hearings, no findings of fact or reporting of criticism".

In its submission to the Attorney-General regarding the draft Bill, the Governance Institute of Australia stated as follows: *The model, powers and jurisdiction of a Commonwealth Integrity Commission should seek to establish a best practice standard, using other Australian jurisdictions as the comparator. This is an opportunity for the Commonwealth to adopt what has worked well and avoid some of the issues experienced in the various states and territories anti-corruption agencies. The findings and reviews of state and territory Parliaments, the recommendations of the anti-corruption agencies themselves, as well as independent analysis such as*

Transparency International's National Integrity System assessments, should be carefully considered as part of this "best of breed" analysis.

Regrettably, in the drafting of the CIC Bill now under consideration, the present Government has not taken up that opportunity. As Nicholas Cowdery QC, the DPP for NSW between 1994 and 2011, stated in the wake of the *Cunneen* case '*a federal anti-corruption Commission needs to have assured independence, adequate resources, proper accountability, coercive powers, public hearings and ultimately the confidence of the public'*.

The model currently proposed has none of these features and, unfortunately, is unlikely to ensure the public's confidence.