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Australian Government
Attorney-General's Department

By email

Dear Sirs,

Submission on Commonwealth Integrity Commission Bill – Exposure Draft (Exposure Draft)

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted, not-for-profit and public sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in their respective sectors. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

Governance Institute commends the Government for beginning the process of establishing a Commonwealth Integrity Commission for the detection and prevention of corruption in the Commonwealth public sector and the higher education and research sectors.
Our submission will not comment in detail on the Exposure Draft but will address the principles our members consider should underpin the creation of any Commonwealth Integrity Commission, with a brief examination of where our members consider the Exposure Draft may depart from these principles.

Governance Institute's members consider that a Commonwealth Integrity Commission is long overdue. It should have sufficient scope, jurisdiction, powers and resources to fulfill its purpose of promoting integrity, and therefore good governance, in the Commonwealth public sector. Its resourcing should be transparent and free of conflicts of interest. Its wide-ranging powers should be used as intended, subject to appropriate oversight.

The link between public integrity and good governance

Public integrity and good governance are closely related, with trust being the vital link between them. Good governance in the public sector means that Government is entrusted by the public to govern in and for the public interest, and not for improper or extraneous purposes. Corruption and other failures of integrity are the opposite of good governance and are symptoms of governance failure. Governance Institute members consider integrity, stewardship,

transparency, accountability, and risk management – including the management of corruption risks – to be the five key components of good governance. Public sector misconduct is inconsistent with these principles and leads to a loss of trust. Corruption impacts society more broadly, including by: disadvantaging those conducting their business with integrity; increasing the cost of regulation; impeding economic growth; and weakening the morale of public service employees. Good governance practices and acting with integrity in the public sector will enhance public trust, while poor governance and a lack of integrity erode it.

While we do not consider that misconduct and illegal activity is endemic within the public sector public trust in Government is essentially important to the community. Governance Institute's 2020 Ethics Index found that Australian federal politicians were among the occupations perceived to be least ethical. Federal, state and local politicians were ranked in the lower occupations for ethical behaviour. The Survey also found a wide gap between the high importance Australians place on ethics in the public sector, and how ethically they believe those in public service do in fact conduct themselves.[1] Detecting and preventing corruption in the use of public power and making those findings public, demonstrates that public trust in the functions of Government is validated and that the system has integrity. If public trust is lacking, then trust and confidence in Government and its officials, appointed or elected, is threatened.

As Governance Institute's definition indicates, good governance encompasses not only the system by which organisations are controlled, but the mechanisms by which organisations and those who comprise them *are held to account*. A properly constituted, appropriately resourced and well-functioning Commonwealth Integrity Commission will act as an accountability mechanism that promotes a culture of integrity. Governance Institute's members consider such a Commission to be the most practical and effective measure to ensure any allegations of misconduct and maladministration by elected and public officials are properly and independently investigated, so that corruption is detected and prevented, with the ultimate aim of maintaining and enhancing public trust in Government.

Governance Institute's members consider that the following principles should underpin the creation of a Commonwealth Integrity Commission.

Guiding principles for a Commonwealth Integrity Commission

1. Best Practice

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.

2. Comprehensive Jurisdiction

[1] Governance Institute's Ethics Index is a nationally representative independent survey of 1000 Australians conducted annually. The 2020 edition found that the public believes ethical behaviour is very important in Government and the Public Service. Respondents gave a net positive score of +79 to the importance of ethical behaviour in Government, and +81 in the Public Service. A large perception gap was also observed. Respondents rated, on average, a 63-point gap in net scores between what they saw as the importance of ethical behaviour in Government (+79) and actual perceived ethics in Government (+16).

A Commonwealth Integrity Commission should have a broad and comprehensive jurisdiction. It should be empowered to investigate corruption in all levels of the public sector. There should be no distinctions, special protections or treatment between an entry-level public sector employee and the department head, an elected official or minister. The entire public sector should be subject to the jurisdiction of the Commission so far as practical, unless there are very strong public interest grounds to vary the jurisdiction.

3. Wide Scope of Referrals and Notifications

All members of the public should be able to refer a matter to a Commonwealth Integrity Commission. A Commission should also be empowered to investigate matters on its own initiative. Referrals and notifications should not be restricted to public officials, public servants, public agencies or other designated bodies. A Commission should be free to consider any referral, including from members of the public, on its merits. To preclude the public from referring matters to a Commission would undermine its important role in promoting public trust.

Governance Institute recommends that all members of the public should be able to refer a matter to a Commonwealth Integrity Commission and have it considered for investigation on its merits and in a timely manner. This is key to promoting public trust in the effectiveness of a Commission. The Commission should also be free to investigate on its own initiative.

4. Funding Independence

A Commonwealth Integrity Commission should be guaranteed sustainable funding to preserve its independence. Parliament, not the Executive Government, should be ultimately responsible for determining its funding. Any degree of influence or control over a Commonwealth Integrity Commission's funding, however remote, by the executive branch of Government is a potential threat to its independence. Connecting a Commonwealth Integrity Commission's funding and resourcing to the Executive is inconsistent with independence. While unlikely, there should be no possibility of public officials reducing a Commission's funding as a means of curtailing its jurisdiction or limiting its activities. A Commonwealth Integrity Commission's funding should not depend on the Government of the day, given the inherent conflict of interest in their being the decision-makers in relation to funding a body that has the power to investigate them.

Governance Institute's members consider recent developments in Victoria, Queensland and NSW demonstrate the importance of independent funding for a Commission. From 1 July 2020, Victoria's Independent Broad-based Anti-corruption Commission (IBAC) will be funded by a separate disclosed budget line through the Parliament Appropriation Bill each financial year. In addition, its annual budget will be determined in consultation with the Victorian Parliament's joint Integrity and Oversight Committee. IBAC was previously funded through a ministerial department, creating the possibility of political interference. Similarly, in 2020, the NSW Independent Commission Against Corruption (ICAC) and Queensland's Crime and Corruption Commission (CCC) both made recommendations to their respective parliaments calling for new funding models with greater independence from ministerial, departmental and government involvement. The CCC recommended that it be funded by a direct appropriation from Queensland Parliament. In its Report to NSW Parliament in May 2020 NSW ICAC, noted that "[i]t has long been accepted that the provision of appropriate financial resources for an anti-corruption agency is inextricably linked to its independence".[2]

Governance Institute recommends that the Parliament not the Executive be ultimately responsible for a Commonwealth Integrity Commission's funding to prevent any conflict of

[2] NSW ICAC strongly recommended the removal of the NSW Government from involvement in funding of the Commission. Its special report contained the legal opinion of Bret Walker SC that the involvement of the Executive Government in NSW ICAC's current funding arrangements is "not only undesirable but unlawful".

interest, real or perceived, and for there to be protections against punitive reductions in funding. At a minimum, the funding of a Commonwealth Integrity Commission should be a direct appropriation from the Australian Parliament disclosed in the Federal Budget, rather than as part of departmental funding overseen by the responsible minister. Parliament should also consider making an independent body responsible for making recommendations on the appropriate level of the Commission's funding. Parliament should consider developments in Victoria, Queensland and NSW when determining the appropriate independent funding model.

5. Clearly Defined Powers including Public Hearings

A Commonwealth Integrity Commission must have a broad range of clearly defined powers to enable it to properly investigate matters referred to it. This should include the ability to gather evidence by intercepting communications, gather data from electronic devices, conduct surveillance both physical and electronic, compel people to provide information and produce documents, conduct searches under warrant, make public reports wherever in the public interest, and to conduct coercive public hearings, noting that coercive public hearings are perhaps the most contentious power of an anti-corruption body.

Governance Institute's members acknowledge that there are valid concerns about 'trial by media', the abrogation of individual rights, and the risk of upsetting the presumption of innocence. However, on balance, they consider that coercive public hearings under oath, with proper protections for the rights of the individual, are integral to the proper functioning of a Commonwealth Integrity Commission because they: (i) enable it to effectively find and expose corruption under threat of perjury, (ii) act as a powerful deterrent to future corruption, and (iii) promote transparency and accountability in the way a Commonwealth Integrity Commission conducts itself. It is essential for there to be a balance between detecting and preventing corruption and protecting the rights of the individual. Safeguards for due process should be clearly defined in the legislation.

It is also appropriate for a Commission to consider the impact of holding a public hearing on the prospects of prosecution. The credible threat of criminal prosecution is a powerful deterrent to corruption. If matters exposed by a Commission only very rarely result in criminal investigations and prosecutions, this would be a weakness. The use of public hearings should be balanced with the feasibility and desirability of criminal prosecutions as a deterrent. That is not to say public hearings are necessarily at odds with prosecution; coercive hearings can be used to expose evidence needed to commence prosecutions.

Based on the experience of the state agencies empowered to conduct public hearings, Governance Institute's members consider it is possible to strike an appropriate balance. They recognise there will be from time-to-time strategic or public interest reasons to avoid a public hearing. Examples of situations include where a public hearing would imperil the prospects of a conviction, breach national security, or where the intrinsic nature of the matter would make it almost impossible to ensure the hearing is conducted fairly. A Commonwealth Integrity Commission should be free to choose to hold private hearings where there are strong reasons to do so.

Governance Institute recommends that a Commonwealth Integrity Commission should have the discretion to hold public hearings and that there should be clearly defined safeguards for due process. When deciding whether to hold a public hearing, the Commission should be required to consider matters of public interest, including whether a public hearing would be unfair to an individual or imperil the prospect of a conviction.

6. Strong and Clearly Defined Prevention Function

Governance Institute's members consider prevention to be a critically important function of a Commonwealth Integrity Commission. It is not enough to expose isolated integrity issues as they arise. Systemic issues should also be addressed so that future offending is prevented. This prevention function needs to be clearly not vaguely defined, with strong powers and adequate resourcing. One example to consider is the evaluation function of the South Australian Independent Commission Against Corruption (ICAC). South Australian ICAC is empowered to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration. Our members consider this could be an effective way to expose corruption risks, correct systemic issues, and to deal with matters where there is clearly improper behaviour but insufficient evidence of criminality, or where the prospects of securing a criminal conviction in any subsequent proceedings are low.

Governance Institute recommends that a Commonwealth Integrity Commission be empowered to conduct preventative evaluations and inquiries in the same broad jurisdiction as its investigative function, including the offices of federal politicians.

7. Proper Oversight

Given its broad jurisdiction and extraordinary powers, and its central role in promoting public trust, a Commonwealth Integrity Commission itself must be held to the highest standards of transparency and accountability. It would undermine the legitimacy of a Commonwealth Integrity Commission if it were not accountable to the public. To preserve the Commission's independence, it should be fully accountable to Parliament but not be in any way accountable to the Executive – to prevent political interference and any real or perceived conflict of interest. Our members consider that the activities of a Commonwealth Integrity Commission should be overseen by a joint parliamentary committee, as provided for in the Exposure Draft. Governance Institute's members note as examples the Integrity and Oversight Committee that oversees Victoria's IBAC, the Parliamentary Crime and Corruption Committee that oversees Queensland's CCC, and the Committee on the Independent Commission Against Corruption in NSW.

Specific comments on the Exposure Draft

Our comments on the effectiveness of the scheme proposed in the Exposure Draft are set out below.

Restrictions on who can make referrals and notifications

The persons who may make referrals and notifications to the Commonwealth Integrity Commission is very limited. The Exposure Draft largely restricts notifications and referrals to the Attorney-General, Ministers with portfolio responsibility, members of Parliament (in limited circumstances) and heads of regulated entities. Members of the public may only raise a corruption issue directly with the Commission if it relates to law enforcement. Members of the public can raise matters with a Commonwealth integrity officer holder, such as the Commonwealth Ombudsman or the AFP Commissioner, in the hope of having it referred to the Commission. However, the integrity office holder is permitted but not obligated to refer the matter to the Commission, and must perform a reasonable suspicion test before they can refer it. This prevents the Commission from acting directly on anonymous 'tip offs' that are unrelated to law enforcement. Members of Parliament, such as members of the Opposition, would only be able to refer or notify a matter if it related to themselves or their own office. In addition, the Commission can only investigate corruption issues on its own initiative if they relate to law enforcement – it cannot investigate matters on its own initiative in the case of public sector and Parliamentary corruption. These provisions do not align with Guiding Principle 3 above.

Our members consider that limiting who can make referrals to the Commonwealth Integrity Commission creates a risk that corruption issues may not be referred to the Commission, especially if members of the Government were implicated. Further, Section 70 creates the offence of referring or notifying a public sector corruption issue with intention to cause detriment and with no basis for suspecting the commission of an offence. There is a potential risk that whistleblowers could face prosecution under this section. It is appropriate for there to be protections against false, malicious and vexatious reports and notifications. However, the combined effect of these provisions on public sector whistleblowers must be considered. Criminalising unwarranted referrals, while also severely limiting who may notify and refer, may have the unintended consequence of deterring whistleblowers from speaking out on corruption issues. Whistleblowers will stay silent if they fear their allegations have little hope of being investigated and only subject them to the risk of prosecution. This would limit the effectiveness of the Commission.

Investigations of parliamentarians, parliamentary staff and public servants

The Exposure Draft appears to set higher pre-conditions for the investigation of parliamentarians, public servants and parliamentary staff, than it does for law enforcement agency staff and for the Commonwealth Integrity Commission's own staff. The Commission is prevented from investigating corruption issues relating to parliamentarians, parliamentary staff and non-law enforcement public sector agencies unless it reasonably suspects a 'listed offence' against a Commonwealth law, in force at the time of the conduct, has been or is being committed. In effect, public sector corruption can only be investigated if it reaches a criminal threshold. Further, the Commission is expressly forbidden by Section 82(2) from making findings of corruption against parliamentarians and their staff.

By contrast, where staff members of law enforcement agencies and the Commonwealth Integrity Commission are concerned, the conduct need not be a listed offence. For law enforcement, 'corruption of any other kind' can be investigated, with no criminal threshold, and findings of corruption can be made public in the Commission's final report. The reasons for these distinctions are unclear and would seem to indicate a view that public servants involved in law enforcement are more prone to corruption issues, or that MPs, political staff and the majority of the public service are less prone to corruption. Our members consider as noted in Guiding Principle 2 above, the Commonwealth Integrity Commission should apply to the entire public sector equally so far as is practical and unless there are exceedingly strong public interest grounds not to do so. The pre-conditions for investigation of parliamentarians, parliamentary staff and public servants should be the same as for law enforcement agency and Commonwealth Integrity Commission staff. Likewise, the Commission should be able to make findings of corruption against parliamentarians and their staff.

It is noted that Section 18 defines the Commonwealth offences that qualify as 'listed offences'. Our members consider these offences to be sufficiently broad as to not, as a practical matter, restrict the Commission's jurisdiction. In particular, the listed offence of abuse of public office under Division 142.2 of the *Criminal Code Act 1995 (Cth)* captures a wide range of activities.

Section 270 certified information

On our reading of the Exposure Draft the Attorney-General has exceptionally broad powers to prevent documents and other information from being given to or accessed by the Commission. Under Section 270, the Attorney-General may issue a certificate declaring disclosure of certain information to be contrary to the public interest. Certificates may be issued on very broad grounds, including if the information would harm Australia's defence, prejudice relations between the Commonwealth and states and territories, harm national security, prejudice a fair trial or the impartial adjudication of a matter, disclose the deliberations or decisions of Cabinet or one of its committees, or prejudice an investigation or inquiry into a contravention of a civil

penalty provision under Commonwealth, state or territory law (with no minimum threshold set for the civil penalty provision).

The Exposure Draft appears to limit the Commission's access to and use of certified information at various points in time, including during investigations, hearings, information sharing with other agencies, and in reports. A note under Section 106(1) implies that the Attorney-General may prevent witnesses at private hearings from giving evidence relating to certified information. Sections 110(3) and 110(5) appear to exempt from prosecution anyone who refuses to answer questions or comply with summonses for documents if they relate to certified information. The Attorney-General may also prevent Parliament from accessing certified information. Under Section 261(5), a person must not give, and must not be required to give, certified information to the Parliamentary Joint Committee that will oversee the Commission if it would contravene the terms of a Section 270 certificate.

Governance Institute members question whether such broad ministerial discretion powers are the most appropriate way to deal with difficult issues of national security and other important public interest matters. It would be concerning if the Attorney-General were to have these powers without appropriate safeguards. Safeguards might include an application by the Minister to a judge of the High Court sitting in Chambers, or some other oversight mechanism that protects secrecy while ensuring ministerial discretion is not unfettered. Absent appropriate safeguards, these powers are potentially inconsistent with principles of accountability, transparency and parliamentary sovereignty and may be open to misuse.

Public hearings are limited

The Exposure Draft restricts public hearings to law enforcement corruption issues only. Section 99(5) specifically provides that any hearings relating to public sector corruption issues must be held in private. Section 99(9) also excludes public sector agencies, higher education providers and research bodies from public hearings. Again, Governance Institute members do not consider there should be a distinction between public servants involved in law enforcement and the wider public sector. The Exposure Draft also creates an offence in Section 103(5) for being present at a private hearing while evidence is being given, in certain circumstances. As noted in Guiding Principle 5 above, our members consider there are strong public interest grounds for public hearings, except in exceptional circumstances, such as where to do so would be grossly unfair to the individual, imperil the prospect of a conviction, or would manifestly not be in the public interest.

Prevention function

Governance Institute's members are pleased to see the inclusion of an express prevention function. However, they consider there should be more detail in the legislation of what the prevention function involves, including the powers, responsibilities and resources to fulfill this function. Section 88 empowers the Minister to direct the Commission to conduct broad inquiries into systemic corruption issues in particular public sector agencies. In light of Guiding Principle 6 above, Governance Institute members consider this function could be more clearly defined. At a minimum, the Commission should be able to conduct evaluations on its own initiative and in response to any referral or notification, including from public sector whistleblowers, without a ministerial direction.

Oversight

Governance Institute members are pleased to note that the Exposure Draft provides for the Commission to be overseen by a new Parliamentary Joint Committee on the Commonwealth Integrity Commission, and creates the office of the Inspector-General of the Commonwealth Integrity Commission. However, they have concerns that the Inspector-General of the

Commonwealth Integrity Commission may only conduct special investigations of the Commission if authorised by the Minister. In light of Guiding Principle 7 above, it unnecessarily involves the Executive Government in the oversight of the Commission, which should be fully independent of the Executive Government and answerable only to Parliament.

Independence of funding

The Exposure Draft does not address how the Commission will be funded and resourced, other than requiring the Integrity Commissioner to have regard to available resources when deciding whether or not to pursue a corruption issue. The Australian Government has announced significant resources for the Commission. However, one concern is that funding for the Commission would appear to be reliant on ad hoc funding in federal budgets. This creates a potential risk of conflict of interest. In light of Guiding Principle 4 above, our members consider funding for the Commonwealth Integrity Commission should be guaranteed and protected, and should be overseen by Parliament.

Other matters

Whistleblowing

Whistleblowing is a key aspect of fighting corruption and Governance Institute has been a long-time supporter of the reform of Australian whistleblower protection laws. We consider the 2019 amendments to consolidate and broaden the protections and remedies for corporate and financial sector whistleblowers in the Corporations Act, were an important first step in improving the Australian regime**.** We have also consistently advocated for the establishment of a separate Ombudsman or Office of Whistleblowing as an effective advocate for whistleblowers.[3] This was also one of the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services Report *Whistleblower Protections*.[4] Governance Institute's members consider that there is an opportunity to enhance the role of the Commonwealth Integrity Commission by also giving it a role in relation to whistleblowers which would enhance the Commission's ability to fight corruption and fill an important gap in the current Australian whistleblower protection regime.

Extension of jurisdiction to professional membership organisations offering TEQSA-regulated awards

As currently drafted, section 10 of the Exposure Draft appears to extend the jurisdiction of the public sector division of the Commission to all Tertiary Education Quality and Standards Agency (TEQSA) regulated higher education providers. This is regardless of size, proximity to the public sector, evidence of integrity risks, and levels of Commonwealth funding. An unintended consequence is that professional membership organisations that offer TEQSA-regulated awards are potentially subject to the Commission's jurisdiction. Examples of these organisations include industry associations in law, accounting, taxation, auditing and other professions and Governance Institute of Australia, which offers graduate certificates and graduate diplomas in governance and risk management. We understand from recent engagement with the Department that this is intended to address the perceived vulnerability of the higher education and research sector to foreign interference. Governance Institute does not have international students, is not registered with the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) and does not receive Commonwealth Supported Places (CSP) for our awards and does not carry out active research. Imposing reporting obligations on these

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[3] See for example, Governance Institute's submission Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors,10 February 2017 at page 21.
[4] See *Whistleblower Protections*, Parliamentary Joint Committee on Corporations and Financial Services, September 2017 at page xiii.

organisations potentially increases the regulatory burden and falls outside the intended purpose and scope of the Commission.

Governance Institute recommends that the definition in section 10 covering all higher education providers is defined by reference to a schedule of higher education providers and research bodies at risk of foreign interference and excludes professional membership organisations.

Conclusion

Governance Institute members consider that the new Commonwealth Integrity Commission presents an opportunity to establish and implement a best practice model for all jurisdictions, one that will enhance public trust and confidence in our public institutions. Our recommendations are aimed at creating a strong model so that for those who may engage in corruption or inappropriate conduct there is enhanced certainty of being detected and appropriate corrective action.

As with all public policy reform, implementation is key. The desired reform is the detection and prevention of corruption to enhance public trust. Governance Institute members have focussed their comments on an ideal model for a Commonwealth Integrity Commission. There is always a risk when establishing a new program or agency, even one with a best practice model, that it will not achieve the intended outcomes. In the early years of the Commission, much will depend on the right personnel, the right leadership, and the right strategic decisions. Governance Institute members working in the public sector have seen firsthand the challenges of implementation and urge the Government to consider them no less carefully than questions of the model design.

While this submission has focussed on starting with a ‘gold standard’, this does not mean the Commission cannot be improved over time. The legislation should be maintained in response to lessons learned, both from the Commission’s own experience and that of other state and territory anti-corruption agencies. Any model should not be ‘set and forget’ and there should be a continuing effort to ensure the Commission remains best practice.

If you wish to discuss any of the issues raised in this letter, please contact Catherine Maxwell.

Yours faithfully,

Megan Motto
Chief Executive