Criminal Lawyers Association of the Northern Territory (CLANT)

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NT Anti-Corruption Integrity & Misconduct Commission Inquiry
Submission by Criminal Lawyers Association of the Northern Territory

1. INTRODUCTION

Since its foundation in 1986, the Criminal Lawyers Association of the Northern Territory (CLANT) has robustly contributed to public policy debate in relation to the administration of criminal justice. CLANT's Objects and Purposes relevantly include:

- to promote and advance the administration of the criminal justice system and development and improvement of criminal law throughout the Northern Territory
- to actively contribute in public debates in issues relating to the criminal justice system
- to represent the views of members to bodies and persons engaged in the administration of criminal justice and a review in development of criminal law, procedure and civil liberties

CLANT was actively involved in public discussion in relation to the events leading to the resignation of Peter Maley from the magistracy in 2014, and the events which surrounded and succeeded the resignation of John McRoberts as Police Commissioner in 2015. In relation to both of those matters, CLANT initially called for independent inquiries under the *Inquiries Act*.[1] In the light of subsequent developments, CLANT did not continue to press for those specific inquiries, but we apprehend that the instant Inquiry was commissioned in the context of and in response to these and various other recent matters involving allegations of misconduct by or in relation to persons in public office. Accordingly, CLANT welcomes this Inquiry, and is grateful for the invitation to make submissions to it.

It is beyond the scope of this submission to provide a detailed or comprehensive review of anti-corruption legislation and agencies in other jurisdictions. With respect to ICACs around Australia, it is easier to identify their problems and limitations than their accomplishments and achievements. This submission is therefore necessarily piecemeal and broad-brush.

2. THE NEED FOR A NORTHERN TERRITORY ANTI-CORRUPTION COMMISSION[2]

Both the Maley affair and the McRoberts affair highlighted the need for a stronger institutional framework in the Northern Territory to protect and maintain the integrity of our public institutions. The Northern Territory does not have some of the protections available in larger jurisdictions, such

[1] R Goldflam, "Peter Maley SM" (16 August 2014), accessed at http://www.clant.org.au/index.php/news/118-peter-maley-sm ; ABC On-Line, "Adam Giles should order fully independent probe into John McRoberts, lawyers say" (21 January 2015), accessed at http://www.abc.net.au/news/2015-01-21/john-mcroberts-investigation-government-solicitor-lawyers/6030488

[2] For convenience, this submission will henceforth refer to the proposed NT body as 'the Anti-Corruption Commission', although this is but one of many possible available names.

as a legislative Upper House or a Judicial Commission. The Office of the Ombudsman and the Public Interest Disclosure Commissioner have only limited resources and powers in comparison to their interstate counterparts.

CLANT welcomes the very recent amendments passed with bi-partisan support by the Legislative Assembly on 15 March 2016 to strengthen the provisions of the *Inquiries Act.* However, the fact remains that an inquiry established pursuant to the *Inquiries Act* is a creature of either the Executive (section 4: "The Minister may… appoint a Board of Inquiry…") or the Legislature ("section 4A: "Where the Legislative Assembly passes a resolution…"). Usually (but not always), the government of the day controls the passage of resolutions by the Assembly. Accordingly, a fundamental limitation of the *Inquiries Act* is that it is only engaged when politicians either in government or able to secure the support of a majority on the floor of parliament, resolve to commission an inquiry.

In recent times the Northern Territory has seen a litany of complaints of misconduct involving senior official figures, including elected politicians. Some of these matters have led to the commissioning of inquiries under the *Inquiries Act*. Other matters, despite appearing to be of comparable seriousness and concern, have not. In CLANT's view, the apparent politicisation of the process by which decisions are made in relation to the conduct of inquiries under the *Inquiries Act* has seriously undermined public confidence in the measures currently available to scrutinise and investigate allegations of misconduct in public office.

The response to the allegations in relation to "Foundation 51" exemplify this politicisation problem.[3] On 20 August 2014, the Legislative Assembly resolved that this matter be made the subject of an *Inquiries Act* inquiry.[4] Shortly thereafter, the NT Government decided not to act on that resolution. The matter was referred to the NT police and NT Electoral Commission for investigation. Despite a determination by police that there was a prima facie case and reasonable prospect of conviction, the Director of Public prosecutions determined that it was not in the public interest to prosecute. In the face of intense media scrutiny of this decision, the DPP took the unusual step of explaining his decision by way of a statement to the NT News.[5] It is undesirable that the Director be placed in a position of having to publicly defend a decision made in the exercise of the prosecutorial discretion. The establishment of an Anti-Corruption Commission would mitigate both the risk that the response to allegations of misconduct involving politicians is placed in the hands of politicians, and the risk of the DPP being dragged into the glare and dust of the political arena.

Accordingly, CLANT submits that to regain and retain public confidence in public administration, a Northern Territory statutory authority should be established using lessons learnt from the experience of the anti-corruption agencies now established in most other Australian jurisdictions.

That said, CLANT is concerned that although the NT Anti-Corruption Commission should be strong, independent, transparent and adequately resourced to perform its functions, it should not become an unwieldy, oppressive or ruinously expensive institution, or a lawyers' picnic area. We just do not know the extent to which the NT suffers from serious and systemic corrupt conduct that has been exposed in several other Australian jurisdictions in recent years. However, that experience has shown that corruption is often sophisticated, covert, difficult to detect, and more widespread than had been anticipated.

[3] CLANT makes no comment on the substance of the allegations themselves

[4] Accessed at: http://notes.nt.gov.au/lant/hansard/hansard12.nsf/webSearchView/3455C8D02C10219369257D6C001598E7?opendocument

[5] Accessed at: http://www.ntnews.com.au/news/northern-territory/clp-fund-trial-not-in-public-interest/news-story/016204d488b4503abb2e2d01246ed8ad

3. COST

An effective NT Anti-Corruption Commission will necessarily be expensive. However, an inexpensive Commission will inevitably be ineffective.

Most interstate ICACs have an annual budget in the order of $30,000,000 or even more. By contrast, the Tasmanian Integrity Commission manages on a budget of $3,000,000. However, the powers, functions, activities and achievements of this self-described 'boutique integrity agency'[6] are correspondingly restricted. CLANT opposes the establishment of a boutique integrity agency along Tasmanian lines. It may look attractive, but it will not stop corruption. On the other hand, CLANT does not support the permanent establishment of a full-blown ICAC comparable to those in the more populous States. The cost would be prohibitive and unjustifiable. CLANT proposes instead that a hybrid inhouse/outsource model be developed for the NT, in which acceptance of complaints and preliminary investigations would be undertaken locally, with matters meriting further investigation and inquiry to be referred to an established interstate ICAC.

4. A ONE STOP SHOP

Recent experience in South Australia has highlighted problems of duplication, overlap and confusion between the ICAC and the Ombudsman in that State.[7] Similar problems have been reported in several jurisdictions regarding the investigation of complaints of misconduct and corruption by police. In a small jurisdiction such as the Northern Territory, there is a particularly strong case to establish a single portal through which the public can make complaints to and access the services of the Ombudsman, the Public Interest Disclosure Commissioner, the Information Commissioner, the Health and Community Services Complaints Commissioner – and the Anti-Corruption Commissioner. That portal should also be used for the making of complaints against police.

5. STRONGER PROECTION FOR WHISTLEBLOWERS

Consideration should be given to incorporating the existing powers and functions of the Public Interest Disclosure Commission into those of the Anti-Corruption Commission. In doing so, the limited whistleblower protections currently afforded by the *Public Interest Disclosure Act* should be significantly expanded, enhanced and strengthened.

Furthermore, CLANT submits that, as is the case in some other jurisdictions, public servants in executive positions be subject to provisions which make it mandatory for them to report reasonably suspected corrupt conduct within or in relation to their own agency.

6. PROCEDURES AND POWERS

There has been widespread and sustained criticism of the South Australian, Western Australian and Queensland agencies for their lack of transparency. The SA ICAC, for example, is designed on the Australian Crime Commission model of secret hearings. In WA, the agency's reputation has been tarnished by findings of systemic misconduct within its specialist covert operations unit.

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[6] Tasmania Integrity Commission *Annual Report 2013-2104,* p 14

[7] Parliament of South Australia *Annual Review of the Crime and Public Integrity Policy Committee into Public Integrity and the Independent Commissioner Against Corruption: 1st Report* (2015)

On the other hand, the public hearings model favoured by the NSW ICAC has been blamed for causing serious reputational damage to individuals who have been the subject of ICAC investigations leading to adverse findings that have been discounted or even dismissed in subsequent legal proceedings.[8]

CLANT submits that a balance should be struck between the protection of the privacy and reputation of individuals (particularly those accused of serious impropriety), and the integrity and effectiveness of sensitive investigations regarding serious allegations. Anti-Corruption Commission hearings should be conducted in public unless there are cogent reasons not to do so. Where the discretion to conduct a hearing in camera is exercised, reasons should be given.

By their nature, investigations (as distinct from inquiry hearings) are less public, and should generally be carried out behind closed doors. For the Anti-Corruption Commission to be able to perform its investigative functions effectively, provision should be made to endow it with resources including search warrant powers, the use of telephone intercepts and listening devices, powers of entry, search and seizure, and the capacity to enlist the services of interstate investigators.

The Anti-Corruption Commission should also be equipped to engage counsel assisting to direct investigations and test the evidence of witnesses at hearings.

The Anti-Corruption Commission should be charged with the detection, exposure and prevention of corrupt conduct in public administration; but not (as is the case in WA and Queensland) with the functions and powers of a Crime Commission. Fortunately, organised crime in the Northern Territory does not exist on a scale which requires the establishment of a specialist separate agency with extraordinarily coercive powers to confront it.

7. SETTING THE BAR

The Victorian Independent Broad-based Anti-corruption Commission (IBAC) may only investigate where it is reasonably satisfied (rather than holding a reasonable suspicion) that there is serious corrupt conduct that would, if the facts were proven beyond reasonable doubt at a criminal trial, constitute an indictable offence (or one of three common law offences). The IBAC itself has criticised this limitation on the exercise of its functions[9], and the Law Institute of Victoria has similarly recommended that the IBAC investigation bar be lowered.[10] CLANT submits that the Anti-Corruption Commission be empowered to commence an investigation, whether preliminary or full, where it has a reasonable suspicion of corrupt conduct.

Similarly, the ambit of corrupt conduct should not be too narrowly circumscribed. The scope of 'corrupt conduct' in relation to the NSW ICAC was recently clarified by the High Court of Australia in *Independent Commission Against Corruption v Cunneen.*[11] Following this, an Independent Panel

[8] For example, see Michaela Whitbourn, "Criminal charges dismissed against former SES Commissioner Murray Kear following ICAC probe", *The Sydney Morning Herald* (16 March 2016), accessed at http://www.smh.com.au/nsw/criminal-charges-dismissed-against-former-ses-commissioner-murray-kear-following-icac-probe-20160316-gnkhu8.html#ixzz43CjYCezh

[9] Independent Broad-based Anti-corruption Commission, *Special report following IBAC's first year of being fully operational* (April 2014), Part 5

[10] Law Institute of Victoria, *Strengthening Victoria's Integrity Regime* (2015)

[11] [2015] HCA 14 (15 April 2015)

('the Gleeson Panel') reviewed the ICAC Act in light of the High Court's decisions, making a number of recommendations, including expansion and clarification of the definition of 'corrupt conduct'.[12] CLANT submits that the Gleeson Panel's proposals should be adapted and adopted for the Anti-Corruption Commission. They represent a practical compromise between the broad view rejected by the High Court in *Cunneen*, and the need to ensure that the agency is not unduly restricted in the discharge of its functions.

8. WHO SHOULD BE SUBJECT TO INVESTIGATION?

Among the well publicised shortcomings of the IBAC in Victoria is a lack of clarity around its powers to investigate Members of Parliament. The *Public Interest Disclosure Act (NT)* only permits investigation of MLAs who have been referred to the Commissioner by the Speaker. CLANT submits that the Anti-Corruption Commission should be empowered to investigate on its own motion complaints it receives of corrupt conduct against Members of the Legislative Assembly, including Ministers. In addition, it should have the power to deal with complaints directed at Ministerial advisors and electorate officers.

In a jurisdiction without a Judicial Commission, the Anti-Corruption Commission should also be empowered to deal with complaints of corrupt conduct by judicial officers.

The Anti-Corruption Commission should also deal with complaints of police corrupt conduct, with provision made to ensure that investigators in such matters are independent of NT police.

9. ACCOUNTABILITY

As is the case in other jurisdictions, an all-party Parliamentary Committee should be established to oversee the Anti-Corruption Commission and deal with complaints against it. Consideration should also be given to appointing an Inspector to provide oversight of the Anti-Corruption Commission.

10. CONCLUSION

CLANT welcomes the opportunity to contribute towards this important Inquiry, and looks forward to the implementation of effective, affordable and practical measures adapted to the circumstances of the Northern Territory, for the purposes of detecting, exposing, preventing and deterring corrupt conduct, and enhancing public confidence in public administration.

Russell Goldflam
PRESIDENT

18 March 2016

[12] The Hon. Murray Gleeson AC (Chair) & Mr Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption Report* 31 July 2015