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Dear Commissioner

### **Inquiry – NT Anti-Corruption Integrity & Misconduct Commission**

The Law Society Northern Territory (Society) is grateful for the opportunity to comment on the Inquiry. Unfortunately due to the broad nature of the Inquiry the Society response is limited to general considerations. We would be pleased to provide more detailed input to the Inquiry as it progresses.

As a general principle the Society endorses the establishment of an Anti-Corruption Integrity & Misconduct Commission ("ACIMC"). The Society acknowledges the concern that there is a need to improve transparency and public confidence in NT Government agencies, Ministers, Members of the Legislative Assembly, police and corrections officers. An ACIMC should have broad powers to investigate misconduct and corruption and provide recommendations and guidance regarding conduct ethics and matters of propriety. An ACIMC would provide an appropriate forum and framework for investigating the integrity of public officials and encourage public confidence in the effective workings of government.

#### [Executive summary](#)

Any integrity body should promote respect for the Rule of Law. The body must have adequate powers to tackle corrupt conduct and the definition of corrupt conduct should be broad and not just based on a breach of the criminal law. The definition should cover serious conflicts of interest and undue influence matters.

#### [International obligations](#)

As you may be aware Australia ratified the United Nations Convention Against Corruption (UNCAC) on 7 December 2005, and has also ratified the United Nations Convention against Transnational Organised Crime for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. At a federal level a number of anti-corruption measures have been put in place

and anti-corruption bodies have been established in New South Wales, Western Australia, Tasmania, South Australia, Queensland and Victoria. As such the Northern Territory now finds itself out of step with almost all other Australian jurisdictions.

Whilst the Northern Territory is not bound by these commitments they provide an essential backdrop and the establishment of an ACIMC will make an important statement of the Northern Territories rejection of bribery and corruption. It will reflect positively on the Territory as a safe trading partner as it continues to press for increased business with our near neighbours to the north.

### Scope

The Society recommends that government agency be broadly defined. Public confidence in NT Government agencies, Ministers, Members of the Legislative Assembly, police and corrections officers has been seriously undermined in recent years.

### Financial Independence

In considering the establishment of an independent ACIMC consideration needs to be given to ensuring that it has adequate resources such that those that may come under its scrutiny cannot curtail the performance of its functions through a lack of resources. This would be an important consideration if such a body were incorporated within an existing agency. At present it is the practice that even the most independent commissioners and the ombudsman are staffed by government employees and supported by government corporate systems. Long term funding would need to be secured by legislation and careful consideration to how provide sufficient structural freedom so as not to undermine the independence.

### Coercive powers

The Society is concerned that any governing legislation is likely to contain considerable coercive powers and appropriately so. Importantly the Society is concerned that these powers must balance the need for robust public scrutiny and the protection of the rights of participating individuals particularly witnesses. These powers will not be exercised by judicial officers and are outside of any judicial process. Attention needs to be paid to ensure such powers are only available for a legitimate purpose with adequate protections to mitigate adverse impacts on individual rights. Such as to ensure coercive powers are only exercised when required and proportionate to the matter under investigation. Suggestions include the staging of the coercive powers to align with the gravity of the matter under investigation. Particularly the legislation should enshrine the need for an application to a judge for warrants of entry, search and seizure or apprehension of witnesses. I refer to the Australian Law Reform Commission *Making Inquiries* report.<sup>1</sup>

### Public inquiries

The Society also supports careful consideration as to whether inquiries would be open to the public or held in camera. The Society notes that the ICAC (NSW) public inquiry process has been called into question. The Society submits that the publication of information before ICAC has added a greater level of public scrutiny, arguably increasing awareness of what may be questionable conduct has the potential to impact future conduct – achieving effect for the expense of the investigation.

### Appointment

The Society is concerned that the process of appointment and term of appointment of an individual commissioner should be open and transparent. The present protocol with respect to appointment of judicial officers presents a positive example however would not be adequate in this instance. Importantly the appointment should not be at the discretion of a Minister or Cabinet and any selection panel should not be constituted by majority Government employees. The Society would recommend an appointment process enshrined in legislation consisting of public advertisements and a selection panel the majority of whom are independent of Government like independent judicial officers. Similarly term of appointment should be enshrined.

#### Threshold for investigation

It is important that the threshold for matters that would be the subject of the Inquiries investigative and coercive powers be adequately balanced. The Society suggests a preliminary investigation phase where the more extreme coercive powers are not available that may ultimately progress to an investigation where the full gamut of coercive powers could be called upon. The Victorian IBAC which is limited to 'serious' corrupt conduct has been considered problematic as has the overlap with matters that would attract criminal prosecution. Territorians will have greater confidence where the conduct that may be investigated is broadest. This would include capacity to commence own motion investigations and investigations of systemic corruption that do not require a notification trigger.

#### Compulsory notification

The Society would recommend consideration of a compulsory reporting requirement that applies to government employees. Importantly this should provide adequate guidance about the reporting requirements and protections from any civil or criminal liability. It is likely that this could result in numerous notifications and procedural challenges about how to prioritise investigation and follow-up. A positive obligation and protection will comfort many who would otherwise know of concerning conduct.

#### Application to members of the Legislative Assembly and Ministers

The Society submits that an ACIMC should have power to investigate the conduct of members of the legislative assembly and Ministers. Unfortunately issues such as conflict of interest appear complex and elected members are not immune from allegations of this nature. Having a mechanism to thoroughly investigate such allegations in a transparent and fulsome way will provide a significant safeguard to those members and an opportunity to clear the air. The Society is of the view that there is a need for investigation of police conduct to be undertaken by an agency external to police. At times the close association between the office of the Ombudsman and the police does not provide the necessary perception of independence that should be required when investigating the conduct of senior officers.

#### Privilege against self-incrimination

The privilege against self-incrimination is recognised as a fundamental human right. For example, article 14(3) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge, everyone shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt. The Society would support ensuring that this is protected.

## Natural Justice and Procedural fairness

Overall the Society is of the view that any such Inquiry should be governed by the principals of procedural fairness and natural justice. The Society is concerned that parties involved in investigations or that may be the subject of findings of an Inquiry should have the opportunity to know the charges against them, the evidence upon which those charges are based and have the opportunity to respond to those charges. This would preserve the procedural fairness for all parties. The regime should provide that the Inquiry has taken all reasonable steps to give notice of any proposed findings, particularly adverse findings, or the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the Inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and should properly consider any response given.

## Overlap with other oversight bodies

The Society has considered the existing oversight bodies such as the Ombudsman and the Office of Public Interest Disclosure. Similarly the police would equally have the capacity to investigate conduct that is of a criminal nature. Unfortunately these agencies do not have the resources, sufficient independence or broad powers that are required to meet the objects and purpose of an ACIMC.

The Society looks forward to receiving a copy of your report and would the opportunity to provide further comment in due course.

Yours faithfully



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<sup>1</sup> Australian Law Reform Commission, Report 111, *Making Inquiries: A New Statutory Framework*, October 2009. Available from <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC111.pdf>.