

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

### **Integrity of Purpose: Designing a Federal Anti-Corruption Commission**

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#### **I Introduction**

The time is ripe for a renewed conversation about the purpose and design of standing anti-corruption commissions across Australia. Standing anti-corruption commissions have been prominent fixtures in Australian public and political life at the State level for more than three decades. Their creation in the 1980s and 1990s, followed the sweep of ‘new administrative law’ federal reforms of the 1970s and 1980s designed to strengthen and increase the accessibility of public accountability mechanisms. Since that date, each State has created a standing anti-corruption commission, and there has been ongoing debate about how these institutions should best be designed. The Commonwealth government has resisted calls for it to follow suit with the creation of a federal commission, but in the wake of bribery and expenses scandals, pressure to do so is growing.

Any civic institution having the lifespan, profile and influence of these commissions is bound to attract ongoing critical attention. For the most part, this is a good thing: revisiting foundational questions of institutional design is essential to ensuring that anti-corruption commissions remain relevantly focused on the public interest and faithful to their animating values and limits. Such debates offer a rich and informative base from which to approach questions of institutional design for a possible future federal body. Such questions include:

- What precisely is the mischief (or mischiefs) against which these commissions are directed?
- How should the commissions be integrated with the existing mandates, powers, and activities of institutional counterparts, including, for instance, the police force, ombudsman, and auditor-general offices?
- Should ideas like ‘corruption’ and ‘integrity’ be cast broadly, allowing the commissions latitude to investigate and address wrongdoing of diverse varieties, or narrowly, confining the powers of the commissions to highly specific mandates?
- What powers do the commissions require to achieve their objectives?
- Are the specified institutional objectives of the commissions best advanced by undertaking their functions in public or in private?

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## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

- To what extent should the pursuit of those objectives be balanced against possibly harsh effects on individuals?
- How can institutional design reconcile the pursuit of the commissions' objectives with higher-order public law principles like natural justice?

Questions of institutional design are best answered if informed by an overarching theory of the role and interaction of public institutions, and of integrity institutions specifically. In this paper, we propose that legal process theory – a school of thought introduced by American scholars in the mid-20<sup>th</sup> century – can provide a constructive foundational base from which principled and consistent answers to design questions can be drawn.

Legal process theory helps to inform the institutional design of commissions in such a manner that they are sufficiently empowered and targeted to their purpose, while also ensuring appropriate restraint of their powers and fidelity to fundamental public law values. The theory is centrally concerned with how institutions operate together to comprise a functioning legal system. It offers rigorous principles through which to examine whether the institutions in a legal system honour each other's respective authority, maintain fidelity to their respective purposes, and fulfil values fundamental to the system itself. Applying these principles to the design of a federal anti-corruption commission involves thinking proactively about how the commission will operate within a dynamic and evolving institutional landscape.

The paper has two parts. In Part II, we introduce legal process theory and link its tenets to recent scholarship on the 'integrity branch' in Australian law. We develop a theory of *integrity of purpose*: a vision of how accountability institutions can be designed so as to fulfil their roles through simultaneous pursuit of substantive mandates and respect for institutional and systematic boundaries. In Part III, we apply the theory of integrity of purpose to the design of a prospective federal anti-corruption commission in Australia. Our suggested resolutions to a number of design questions are informed by legal process theory as well as the recent experiences of existing anti-corruption commissions at the state level. We thus offer a principled perspective richly informed by theory but grounded in practical reality.

## II From Legal Process Theory to 'Integrity of Purpose'

### (A) *An introduction to legal process theory*

One of the reasons that legal process theory<sup>1</sup> provides a useful starting point from which to consider questions of institutional design of anti-corruption commissions – and integrity mechanisms more generally – is because at its core is an optimism about the role and capacity of official institutions. The importance of empowering institutions to ensure they can achieve their intended objectives is prioritised, although the more

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<sup>1</sup> As developed in the seminal text, Henry M Hart Jr. and Albert M Sacks, 1958, *The Legal Process: Basic Problems in the Making and Application of Law*, prepared for publication from the 1958 Tentative Edition by William N Eskridge, Jr, and Phillip P Frickey, New York: The Foundation Press, 1994.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

traditional liberal-led emphasis on restraint and accountability of exercises of public power is also present. Legal process theorists were concerned with affirming the positive, facilitative role of government as the means by which power is exercised for the public good and social prosperity, but also with anchoring questions of legal interpretation in principles that would guard against unfettered discretion.

Legal process theory assumes that institutionalised procedures are necessary to achieve substantive social goals, and thus focuses on the authority and interaction of these procedures.<sup>2</sup> It is through procedure – the procedures of elections, parliamentary lawmaking, judicial or administrative decision making, to name a few – that substantive social understandings are given effect.<sup>3</sup> Moreover, it is through fidelity to properly established and targeted procedures that institutional decisions gain their legitimacy. This includes their authority to expect reasonable compliance from the persons they affect. It also includes their ability to command respect from other institutions for their settled authority. The legal process theorists expressed these twin requirements as the principle of ‘institutional settlement.’<sup>4</sup>

The principle can be illustrated with a familiar example. An implicit source for the authority of a judicial decision is the procedural quality of the dispute which precedes it. Adjudicative procedure affords disputing parties the opportunity to frame their respective interpretations of the law on their own terms. At least in theory, it structures the disputing parties as equals, empowers them with control over the presentation of a dispute, and obliges a passive and neutral arbiter to issue a decision that rationally accounts for their claims. The structural fairness of this procedure is intended to secure the rational assent of the parties its outcome, regardless of whether they agree with that outcome in substance.<sup>5</sup> Having observed an adjudicative procedure in deciding a legal dispute, a court’s pronouncement of the law should be accepted as binding unless and until it is overridden by the outcome of another, properly constituted process – for example, legislative intervention on the disputed point of law, which itself relies upon the procedural authority of elections, manner and form requirements for legislative enactment, and so on.

Importantly, while a court’s decision binds the parties in the individual resolution of their dispute, it also commands the respect of broader society (including the other institutions of state) to the extent that it involves pronouncing on a question of law. This is the second dimension of the principle of institutional settlement: institutional roles are allocated based on ideas of competence, and reflected in their observance of distinct and

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<sup>2</sup> See Hart and Sacks, *ibid*, 1-3. See also the introductory discussions of legal process theory offered by Eskridge and Frickey, *ibid*, xci-xcvi, and by David M Kennedy, “Henry M Hart, Jr, and Albert M Sacks” in David M Kennedy and William W Fisher III, 2006, *The Canon of American Legal Thought*, Princeton: Princeton University Press, 244-50.

<sup>3</sup> Hart and Sacks, *ibid*, 3-4.

<sup>4</sup> *Ibid*, 4-5.

<sup>5</sup> This example is taken from Lon L Fuller’s account in “The Forms and Limits of Adjudication” (1978) 92 *Harv L Rev* 353. For an account of Fuller’s relationship to the legal process school, see David M Kennedy, “Lon L Fuller”, in Kennedy and Fisher III, *ibid*, 209-217; Eskridge and Frickey, *above n 1*, c-cii; and William N Eskridge, Jr, “Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling between Facts and Norms” (2013) 57 *Saint Louis U LJ* 865, 865-66.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

tailored procedures. Hence the court's decision of law commands authority until altered through another legitimate process, such as a legislative intervention or a future decision by an equivalent court. The principle of institutional settlement involves recognising the authoritative roles of different institutions, as constituted by their respect procedure, at a systemic and societal level.

The principle of institutional settlement is reinforced by a second tenet of legal process theory: the principle of 'reasoned elaboration'.<sup>6</sup> Reasoned elaboration is an interpretive principle that guides the application of legislative frameworks in context. It has two key requirements. First, it requires that those frameworks be applied consistently over time.<sup>7</sup> Second, it requires that they be applied in a manner consistent with their purpose, or when that purpose is vague or indeterminate, consistent with higher order values of the legal system.<sup>8</sup>

On its face, the principle of reasoned elaboration is not strikingly different from a conventional doctrine of purposive interpretation – and indeed, the approach to legal interpretation developed by the legal process theorists directly influenced modern doctrines of statutory interpretation in the United States, Australia, and elsewhere.<sup>9</sup> When courts adhere to the precedents established by earlier decisions and search for the underlying purpose of a statutory provision, they are honouring the principle of reasoned elaboration. But legal process theory doesn't limit the principle to the interpretive activities of courts: it binds all agencies in the administrative state as they interpret and apply their mandates in context. Thus, for example, when an administrative agency determines that a particular matter falls within its jurisdiction, and warrants its exercise of agency-specific powers, it too is obliged to adhere to reasoned elaboration in reaching this determination.

Institutional settlement and reasoned elaboration are thus principles by which the various government institutions interpret and exercise their roles recognising each other's corresponding authority, and recognising a duty of fidelity to agency-specific purpose and to the fundamental values of the legal system. One of their greatest analytic strengths is that they treat those institutions as dynamic – that is, as evolving over time. They recognise that when a legislature sets out the framework for a new institution through legislation, this is not the end of the story: the legislation itself must be interpreted and applied, and the officials doing so will give substantive content to the institution's characteristics. For a legal system to function coherently, the key is that those officials adopt interpretations which respect the authority of institutional counterparts, build logically from the past interpretations of officials who preceded them, align with the animating purposes of their institutions, and honour fundamental values of the legal system itself. This is what the principles of institutional settlement and reasoned elaboration are meant to achieve.

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<sup>6</sup> See the discussion in Hart and Sacks, above n 1, beginning 145ff.

<sup>7</sup> Ibid, 147. In Hart and Sacks' language, each new application of a framework must be consistent 'with other established applications of it.'

<sup>8</sup> Ibid, 147-48. See also Eskridge and Frickey, above n 1, xci-xcii.

<sup>9</sup> See Eskridge, above n 5.

CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

(B) *Legal process theory, integrity systems, and 'integrity of purpose'*

Legal process theory has special relevance to the study and design of integrity systems in the Australian context. In 2000, the American constitutional theorist Bruce Ackerman coined the term 'integrity branch' in arguing that modern constitutions should include an institutionally distinct and constitutionally entrenched apparatus of government empowered to scrutinise the other branches for the express purpose of suppressing corruption. While Australia has not pursued Ackerman's thesis to the extent of formally entrenching an 'integrity' branch, the term itself has been widely adopted by Australian jurists and scholars.<sup>10</sup> Former New South Wales Chief Justice James Spigelman is perhaps its most vocal proponent.<sup>11</sup> In Spigelman's view, referring to an integrity branch properly signals the centrality of integrity as a value suffusing all facets of government activity. He writes:

[I]n any stable polity there is a widely accepted concept of how governance should work in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of government functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.<sup>12</sup>

Integrity, Spigelman suggests, 'goes beyond matters of legality', but 'is not so wide as to encompass any misuse of power.'<sup>13</sup> It requires that each public institution observe 'fidelity to the public purposes for the pursuit of which the institution was created,' and obey 'the public values, including procedural values, which the institution is expected to obey.'<sup>14</sup>

AJ Brown offers a closely related point. The integrity functions of government – those associated with formal integrity institutions (such as commissions against corruption) and with distributed integrity measures (such as codes of conduct) – constitute a distinct type of *power*. It is not a power to make, execute, or adjudge laws, but rather 'the power to ensure integrity in the manner that laws are made, executed and adjudicated upon.'<sup>15</sup>

The 2005 report of the National Integrity Systems Analysis advanced the metaphor of a bird's nest to explain how governance systems work to foster integrity. The metaphor implies that integrity is achieved through multiple interlocking measures that, while individually insufficient, reinforce one another to protect something fragile and vital at

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<sup>10</sup> See, for example, the papers delivered at the Australian Institute of Administrative Law's 2012 Annual Conference, *Integrity in Administrative Decision Making*, online: <http://www.aial.org.au/news-events/national-admin-law-con>.

<sup>11</sup> See, for example, the Hon JJ Spigelman, "The Integrity Branch of Government" (2004) 78 *Aus LJ* 724; *ibid*, "The Significance of the Integrity System" (2008) 4 *Orig Law Rev* 39; and *ibid*, *Institutional Integrity and Public Law: An Address to the Judges of Hong Kong*, Hong Kong, 30 October 2014.

<sup>12</sup> Spigelman (2004), *ibid*, 725.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> AJ Brown, "The integrity branch: a 'system', an 'industry', or a sensible emerging fourth arm of government?" in Matthew Groves (ed), 2014, *Modern Administrative Law in Australia: Concepts and Context* (Cambridge: Cambridge University Press) 301, 314.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

their core.<sup>16</sup> A key feature of this vision is that it is institutionally pluralistic. Indeed, the authors of the NISA report deliberately declined to advocate for the adoption of *specific* anti-corruption and integrity promoting institutions. Wishing for their study to be useful in a range of jurisdictional settings, they instead highlighted the need for a given matrix of institutions to function together harmoniously and coherently within their respective contexts.

The legal process principles of institutional settlement and reasoned elaboration function together to create a doctrine of coherence. They also complement the design objectives of integrity mechanisms on a deeper level, however, pointing the way to how those mechanisms can not only foster integrity in an instrumental sense, but honour their own integrity of purpose. It is noteworthy that both Brown and Spigelman associate integrity with procedural considerations: Brown by suggesting that integrity depends on official power being exercised according to an appropriate ‘manner’, and Spigelman including ‘procedural values’ among those public values that institutions must obey in order to foster integrity. Both conceive of integrity in terms that evoke the simultaneous facilitation and restraint of power – as something that must be actively pursued through official processes, but which also resides in those processes adhering to intended limits.<sup>17</sup> The principles of institutional settlement and reasoned elaboration are each attuned to evaluating official power in the terms presaged by Spigelman and Brown – that is, by enquiring whether a given exercise of power aligns with its proper purpose, honours appropriate (and limiting) procedure, and coheres with a rational account of relevant public values.

Borrowing Spigelman’s language, we suggest that the principles of institutional settlement and reasoned elaboration require that individual integrity institutions within the system are designed to best achieve *integrity of purpose*.

Integrity of purpose is shorthand for the long-term compliance of an institution with the principles of institutional settlement and reasoned elaboration. It is intended to recognise that institutions evolve over time as their constituting legislation is interpreted and applied, and that institutional fidelity to purpose relies on the integrity of communication between legislators and future officials. As an aide for the design of prospective institutions, integrity of purpose requires that legislators and policymakers anticipate the dynamic and evolving role that a new institution will play in context. Accounting for the institution’s place within a system, it requires that the institution exhibit respect for the settled authority of institutional counterparts and that it align with individual animating principles and the higher order principles of the legal system.

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<sup>16</sup> National Integrity Systems Assessment (NISA), 2005, *Chaos or Coherence: Strengths, Opportunities and Challenges for Australia’s Integrity Systems* (Victoria & Brisbane: Transparency International Australia and the Key Centre for Ethics, Law, Justice and Governance) 15, citing R Mulgan, 2003, *Holding Power to Account: Accountability in Modern Democracies* (New York: Palgrave MacMillan) 232.

<sup>17</sup> See especially Spigelman’s (2014) discussion of how public simultaneously generates and constrains power, above n 11, 8-9.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Institutional architects are thus challenged to cast their minds into the future, anticipate interpretive challenges that might confront the institution, and ensure the clearest possible forward-looking communication of institutional aims and limits.

### III 'Integrity of purpose' and key design elements

In this Part, we consider what the theory of integrity of purpose means for key elements in the design of a prospective federal anti-corruption commission. In particular, we consider the following key design questions:

(A) Should a basic normative statement be set out in legislation to direct the purpose of the commission, and if so what should its content be?

(B) How should the commission's jurisdiction be framed and limited to ensure integrity to its purpose over time?

(C) How can the commission's hearing powers – including the power to hold hearings in public and to report adverse findings – be designed and exercised in a manner consistent with the provisions articulating its jurisdiction and its purpose, as well as with more systemic values including protection of individual rights and the tenets of natural justice.

There are of course other important matters of institutional design that are not addressed in these questions, for instance concerning the appointment, removal and remuneration of commissioners, which will affect their independence and capacity to fulfill their legislative direction with fidelity to overarching institutional purpose. While we do not address these questions directly in this paper, our application of integrity of purpose to inform the design objectives above will illustrate the potential for this approach to resolve dilemmas of institutional design more comprehensively.

An important caveat is necessary before proceeding. In an earlier submission to the 2016 Senate Select Committee on the Establishment of a National Integrity Commission,<sup>18</sup> we remained agnostic as to whether a new federal anti-corruption commission was truly necessary. In the next section, we conduct a survey of existing federal integrity institutions in order to identify gaps and vulnerabilities that a new federal commission could address. Our aim is to demonstrate how a new integrity commission could be purposively informed, should the Commonwealth government elect to proceed with its creation. While this approach necessarily highlights many positive effects that could be achieved by such a commission, we acknowledge that a new commission is not the only means by which vulnerabilities in the existing institutional landscape could be addressed. Integrity of purpose could also be employed to better reconcile the interrelation of existing integrity institutions and to deepen public understanding of their roles and purposes.

*(A) Suppressing corruption and fostering confidence: the goal and content of a normative purpose statement in legislation*

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<sup>18</sup> Gabrielle Appleby, Sean Brennan, Shipra Chordia, and Grant Hoole, *Submission to the Senate Select Committee on the Establishment of a National Integrity Commission*, 20 April 2016, online: [http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/nic\\_composition.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/nic_composition.pdf).

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Integral to designing a public institution that is intended to exercise its jurisdiction with fidelity to purpose is a clear statement of legislative intention. We do not suggest that this is an uncommon or even particularly controversial claim in the design of institutions or the drafting of legislation. Indeed, with the judicial endorsement of contextual and purposive construction as the dominant approach to statutory interpretation in Australia, we have seen the proliferation of increasingly detailed objects provisions.

A legal process perspective brings into focus the distinct importance of a legislative purpose statement. Recognising that the legislative framework for an institution needs to be interpreted and applied by officials, and that institutions evolve in context according to those interpretations, a legal process approach directs legislators to contemplate the degree of interpretive latitude they intend to defer to institutional officials in the future. A statutory framework that gives only a basic – or ‘thin’ – statement of institutional purpose leaves considerable latitude for those officials to develop the meaning of the statement in context, evolving the practical conduct of the institution accordingly. Conversely, a more refined and detailed – or ‘thick’ – purpose statement reflects an attempt by the legislator to narrow and direct the potential future conduct of the institution. At the point of design, it provides a stronger anchor by which questions of process, jurisdiction, and power can be based. For the future officials tasked with administering these institutions, it provides a foundational basis on which to interpret and operationalize their processes, jurisdiction, and powers over time. If they do so with fidelity to the goals that have been articulated by legislative drafters, and using procedures appropriate to those goals, they will build public, social, and political legitimacy for their institutions, even as they respond to issues that are not addressed definitively in the legislation itself.

It is helpful to briefly consider the type of institution for which a thin statement of institutional purpose would be appropriate. Imagine, for example, that an administrative body is constituted to confer civic awards on individuals for service to their communities. Here a very limited legislative statement of purpose could be useful in allowing an adjudicative panel maximum discretion to employ their community knowledge and expertise. Further, a more expansive discretion in such a function does not pose a danger to the integrity of higher order systemic principles, such as individual liberties. An anti-corruption commission is clearly an institution of a different sort: its capacity to exercise strong investigative powers with potentially harsh adverse effects on people and organisations cautions a more detailed articulation of the purposes for which those powers and effects are justified. The concern is not solely about protecting the rights of those who may be affected by the institution, but about the integrity of the institution itself. A strong normative statement in legislation will safeguard against the institution evolving in a way that undermines public, social, and political legitimacy by provoking conflict with other institutions, incoherency, or troubling misuses of power. In other words, it helps guard against the institution compromising its own integrity of purpose.

These observations direct us to think about the institutional landscape into which a new federal anti-corruption commission will be deployed, and to ask: what legislative



## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

interpretive aids are appropriate to ensure that the commission will evolve a way that strengthens rather than weakens this landscape, contributing a new valuable purpose that is presently missing from it?

Answering this question involves two steps. First, it requires an inventory of the current institutional landscape, with particular attention to institutions that already serve recognised roles in relation to corruption. The goal of this inventory is to identify vulnerabilities or gaps: in what areas could the landscape be strengthened through the incorporation of new public goals and new procedures? Second, it involves translating the results of that survey into a foundational concept of what a new anti-corruption should do and how it should do it. This foundation will supply the essential content for a normative statement of institutional purpose, which in turn will inform more specific legislative provisions regarding jurisdiction and procedure.

A comprehensive survey of the relevant institutions exceeds the scope of this paper. We can nevertheless begin the process by considering four institutions of obvious relevance: the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Ombudsman, the Auditor-General, and the new Independent Parliamentary Expenses Authority. Even this limited survey proves useful to identifying areas of systemic vulnerability that could form the basis for a new anti-corruption commission.

### *(i) Surveying the landscape*

The ACLEI is the clearest federal counterpart to standing anti-corruption and integrity commissions that exist at the State level, and thus an appropriate place to begin our survey. While functionally similar to those State counterparts, the ACLEI is distinguished by a narrow jurisdictional focus on Commonwealth law enforcement agencies, including the Australian Crime Commission, the Australian Federal Police, and the Department of Immigration and Border Protection. This focus nevertheless concerns a field in which the consequences of corruption are particularly acute: the power of these agencies to immediately impact civil liberties, combined with the likelihood that their officials will encounter criminal activity, means that they especially warrant strict enforcement of institutional integrity. Within this field the federal Integrity Commissioner, as head of the ACLEI, has a robust capacity to detect corruption, enforce integrity, and inform the public, as reflected in several features of institutional design.

First is the authority of the Commissioner to initiate investigations on his or her own motion, thus enabling independent scrutiny of law enforcement agencies as and when necessary, without the need for referral by the government or others. Second is the ability to publicly report dissatisfaction with agency responses to investigations and inquiries, thus ensuring that recalcitrant officials are exposed, at minimum, to public awareness and pressure to comply with the ACLEI's findings and recommendations. Third is the standing responsibility to submit a public annual report to Parliament, lending valuable transparency to matters within the Commissioner's ambit of investigation and providing oversight that helps to ensure the ACLEI's own integrity of purpose.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Other than its narrow jurisdiction, the ACLEI suffers from at least one significant flaw: it has an incredibly low public profile. This may be partly on account of the ACLEI's jurisdictional restriction to issues arising within Commonwealth law enforcement agencies, combined with the secrecy with which it necessarily conducts much of its activities. Whatever the reasons for its low profile, it is unfortunate given the significance of the ACLEI in the Commonwealth anti-corruption landscape. If anti-corruption institutions are intended not only to root-out instances of corruption, but to broadly foster confidence in government – a distinction we consider in further detail below – then public awareness and understanding of the institutions is essential.

We next consider the Commonwealth Ombudsman. The Ombudsman is tasked with reviewing complaints arising from the exercise of official powers by federal agencies and officials. It also serves a standing oversight role in respect of specific powers exercised by certain Commonwealth agencies. Conceived as an integrity institution, the Ombudsman helps to ensure that official powers are exercised in a non-abusive manner conforming to relevant legislation, policies, and standards. It provides an important point of contact for facilitative, confidential reporting of corruption concerns within the Commonwealth public service. The Ombudsman thus lends important values of conciliation, privacy, and problem-solving to the Commonwealth integrity framework.

These characteristics are at once a source of institutional strength and weakness. The privacy that surrounds most of the Ombudsman's work no doubt facilitates candour and provides a secure environment in which problems may be resolved constructively between a complainant and the relevant Commonwealth agency. Perhaps unfairly, this may also limit public awareness of the extent to which the Ombudsman succeeds in fostering integrity within the public service, given that public reporting may result in conflict between the Ombudsman and a department. An emphasis on privacy and 'soft power' may diminish the Ombudsman's capacity to deter the worst instances of corruption. Finally, some features of the Ombudsman's procedural flexibility diminish at least the appearance of independence. This is the case in respect of the Ombudsman's duty to consult a Minister before including findings that are critical of government in a public report.

The Auditor-General is an independent officer of Parliament appointed pursuant to the *Auditor-General Act 1997*. In addition to the financial auditing of Commonwealth departments and agencies, the Auditor-General conducts performance audits evaluating the operations of both specific Commonwealth bodies and entire sectors of Commonwealth activity. While routine financial auditing is a crucial feature of any government accountability framework, the Auditor-General's performance audit powers provide the most robust and flexible capacity to serve as an integrity-promoting institution. The Auditor-General has the broadest jurisdiction of the federal institutions considered thus far, combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports. Its focus on systemic problems, and capacity to examine issues on a cross-sectoral and inter-institutional basis, lends an indispensable element to the Commonwealth integrity framework.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

The Auditor-General is not an intuitive institutional starting-point for investigating corruption and integrity concerns, however. Its role doesn't include the investigation of complaints, and neither public servants nor individual citizens have standing to raise concerns with the Auditor-General. Moreover, the Auditor-General's contact with integrity and corruption issues is largely incidental to a broader mandate relating to the scrutiny of public sector performance and financial management. Despite having a broad jurisdiction, the Auditor-General doesn't have the institutional flexibility to address integrity and corruption issues in as nuanced or multifaceted way as the ACLEI or the Commonwealth Ombudsman. The Auditor-General may detect and report maladministration, but does not have a clear institutional mandate to forensically study its cause or to correct misconduct. Finally, as a practical matter, instances of corruption that do not involve the management of public funds may simply escape the Auditor-General's scrutiny.

Finally, in 2017, the Commonwealth Parliament passed the Independent Parliamentary Expenses Authority Bill. The Bill establishes the Authority with an extremely limited mandate: it has advisory, monitoring, reporting, and auditing functions relating to the various expenses of members of parliament.<sup>19</sup> The Authority has 'power to do all things necessary or convenient to be done for or in connection with the performance of its functions',<sup>20</sup> and more explicit information-gathering powers, specifically to require the production of information or documents,<sup>21</sup> although the privilege against self-incrimination and legal professional privilege limit this power.<sup>22</sup>

### *(ii) Identifying vulnerabilities and gaps*

As we acknowledged above, the preceding review does not account for the full breadth of Commonwealth integrity and anti-corruption mechanisms. The institutions surveyed are part of a diverse governance framework, including federal laws, regulations, and policies, standing agencies with their own oversight mechanisms, ad hoc institutions such as commissions of inquiry, administrative tribunals, the courts, and ultimately Parliament itself. The survey nevertheless helps in defining some institutional vulnerabilities and gaps that a new anti-corruption commission could serve to address.

One clear gap in current institutional capacity is the ability to scrutinise the conduct of ministers and parliamentarians. Only the Parliamentary Expenses Authority has the express mandate to monitor the conduct of members of parliament or of government ministers, and that mandate is limited to the exceedingly narrow issue of members' expenses. The Ombudsman is statutorily restricted from scrutinising parliamentarians, and the Auditor-General's systemic mandate clearly does not embrace such a role. The ACLEI has *incidental* ability to investigate ministers and members of parliament, and this would only occur were such individuals implicated in a corruption issue under investigation by the Commissioner.

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<sup>19</sup> *Independent Parliamentary Expenses Authority Bill 2017* (Cth) ss 3 and 10.

<sup>20</sup> *Ibid* s 13.

<sup>21</sup> *Ibid* s 53.

<sup>22</sup> *Ibid* ss 55 and 58.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Traditionally, the exposure of ministers and parliamentarians to coercive authority has been confined to hearings constituted by parliamentary committees or commissions of inquiry (including Royal Commissions), or to proceedings in the criminal justice system. The principle of responsible government, and Parliament's inherent power to pose questions and demand documents from government ministers, also serve as crucial mechanisms of accountability. Nevertheless, with the exception of the criminal justice system – which is limited to addressing misconduct that is criminal in nature – all of these accountability mechanisms rely upon the initiative of elected officials themselves. While Parliament's ability to regulate itself is no doubt an important source of confidence in government, taken alone it may be vulnerable to partisanship or to the calculated self-interest of majority governments – especially where the subject in issue is corruption, which has the potential to taint the public's perception of an entire administration.

Second, there is a limited ability to investigate government agencies through the convening of hearings – whether in public or in private – outside the law enforcement context. While the Ombudsman has a relatively broad jurisdiction (excepting the conduct of Ministers), the Ombudsman does not convene formal hearings, let alone public hearings in a manner reminiscent of a royal commission. The ACLEI's jurisdiction to do so is confined to the law enforcement context. As such, the ability to employ the robust investigative tools of examination and cross-examination are not available on a standing basis to integrity agencies other than the ACLEI. To the extent that public hearings can help to facilitate transparency, public education and awareness of corruption issues, and to foster deterrence, these effects too are limited beyond the ACLEI.

Finally, there is a seeming lack of coherence in the federal integrity landscape as a whole. A pitfall in diffusing integrity and anti-corruption functions across multiple institutions is that it may deny individuals, including citizens and public service employees, a prominent and accessible point of contact for reporting concerns. It may also fail to broker public confidence in and awareness of integrity activities that do not benefit from the profile and publicity of a single, well-known institution. The interrelationship of the institutions under review, including the legal and functional scope of their jurisdiction, is confusing, requiring attention to multiple cross-referenced statutes and interpretive provisions. It is not obvious that a citizen or public servant wishing to report a serious corruption concern would know where best to start.

### *(iii) Developing a legislative purpose statement*

Accounting for these vulnerabilities and gaps, we may begin to sketch a possible legislative statement of purpose for a new federal anti-corruption commission. The commission could be conceived as a means of exercising broad oversight, including oversight of elected officials, for the purpose of suppressing corruption and fostering public confidence in the integrity of the Commonwealth government. It could also be to expand the availability of strong investigative and hearing powers to settings where those are desirable but currently lacking. Moreover, it could be to introduce a high profile and accessible venue for citizens and public servants to report corruption concerns, bringing greater coherency and simplicity to the integrity landscape.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Yet, each of these ideas engages important counterpoints reflecting the existing strengths of the landscape, which serve to narrow a foundational account of institutional purpose. Recognising that the self-regulating character of Parliament is an important source of public confidence in government (indeed, in democracy itself), it may be appropriate that the oversight powers exercised by a new, external agency be limited to specific areas where the standing regulatory capacities of Parliament are thought to be vulnerable. Recognising the Ombudsman's valuable ability to conciliate, problem solve, and encourage candour within the public service, it may be appropriate that the powers of a new commission be sufficiently focused so as to avoid interference with these functions. Finally, recognising that the ACLEI has a specialist ability to investigate not only corruption, but organised criminal activity in an area of public life where its risk as especially pronounced, a new commission's role could be focused in areas that buttress rather than conflict with the ACLEI.

Bringing these considerations together, a foundational account of institutional purpose begins to take greater shape. The new commission could be conceived to exercise broad oversight of government, including parliamentarians, but only with respect to very specific subject-matter. The latter limitation reflects an attempt to preserve the self-regulating power of Parliament, carving out only a narrow purposive exception to that standing authority. It also preserves the capacity of the Ombudsman to continue its work without interference from an additional agency liberally wielding coercive investigative powers. A narrowly drawn substantive focus for the new commission could also reinforce the goal of preserving the existing authority of the ACLEI.

Clearly, the latter two objectives would require further and more detailed legislative specification within a new federal commission's constituting statute, defining the precise fields in which it is to defer to the standing authority of the Ombudsman and ACLEI. Given that the ACLEI already performs several of the functions that our survey suggests could be conferred on a new federal commission, we also acknowledge the possibility that the ACLEI could be absorbed by a new commission exercising broader oversight responsibility. In this paper however, our account of a new federal commission is developed on the basis that its jurisdiction could be reconciled with the ACLEI through specific jurisdictional provisions informed by a foundational account of institutional purpose.

The legal process concerns underlying this exercise are evident. The identification of institutional vulnerabilities and gaps informs a foundational account of what the new institution is meant to achieve. Conversely, recognition of existing system strengths informs limits required for the new commission to function coherently with its institutional counterparts, supplementing rather than subverting their strengths. The development of a normative purpose statement is thus done with a view to the new commission interacting harmoniously in an existing, purposive framework of institutions.

To this end, one further consideration is important in developing a foundational account of institutional purpose. We have so far employed the concepts of "suppressing corruption" and "fostering confidence in government" as though they have a straightforward instrumental relationship: if corruption is identified and suppressed, the

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

result will be to strengthen public confidence. In fact the relationship between the two concepts may be more nuanced. Suppressing corruption is a matter of fact, while fostering confidence is a matter of subjective social perception. Certainly public confidence in government is likely to be enhanced by the belief that functioning mechanisms exist to eliminate corruption. Yet, the public work of a new commission, including bringing previously undetected instances of corruption into the light, may also impact public confidence in government negatively – at least in the short-term – through the very act of highlighting misconduct. In this sense, heightened public identification and redress of corruption may paradoxically weaken immediate confidence in government integrity.

A sensible resolution to this paradox could be to suggest that any short-term costs to public confidence are worth the long-term gains of suppressing corruption. This resolution depends, however, on the exposed misconduct accurately reflecting subjects of pronounced public concern. A commission that investigates and reports on misconduct too liberally, combining vague interpretive guidelines with robust and highly public investigate powers, could create a sensational and misleading impression that government corruption is widespread. This is a further reason to narrow the substantive focus of an anti-corruption commission and to articulate that focus with precision. The potential short-term injury to public confidence in government will be justified when misconduct is sufficiently grave that the public has a strong interest in its exposure, while the (hopefully) limited instances in which this arises will build confidence over time. That injury may not be justified, however, and could indeed be exacerbated were a commission to wield public powers of investigation in respect of less grave concerns that are already mitigated by existing integrity measures.

Our limited institutional survey, combined with the twin concerns of fostering confidence and actually suppressing corruption, thus lead us to recommend a legislative purpose statement allowing the following lines. The statement must capture the goal of establishing a commission with broad responsibility for oversight, public prominence and accessibility, but limited to a specific and well-understood substantive focus. Recalling that the legislative purpose statement is a starting point for expressing foundational ideas that will be elaborated by more specific provisions concerning jurisdiction and procedure, we suggest that the following statement could be appropriate for a statute establishing a new federal commission:

The object of this Act is to suppress corruption and foster public confidence in the integrity of the Commonwealth government by empowering an independent commission with authority to investigate Commonwealth government activities, including through consideration of public complaints, with the goal of identifying and reporting instances of serious or systemic corruption.

This language reflects the clear goals of establishing a commission with broad oversight over a narrow subject, modeling functional independence and accessibility to public complainants. It establishes a firm foundation for structuring the conduct of a commission in line with the priorities identified above, to be supplemented by more specific jurisdictional and procedural provisions that flesh-out the commission's intended

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

relationship with institutional counterparts – for example, by defining areas in which it must defer to the investigative authority of the ACLEI.

The language used to define the commission’s substantive focus – “serious and systemic corruption” – foreshadows a critical jurisdictional limitation. Similarly, the terms “identifying and reporting” foreshadow aspects of how the new commission is to go about fulfilling its purpose, implying significant procedural restraints. In the next Part, we consider these subjects in light of integrity of purpose, moving from a foundational account of institutional purpose to the practical implications of that account for more specific questions of jurisdiction and procedure.

The narrow targeting of this statement of purpose to addressing public sector corruption identifies the proposed commission as a ‘specialised/bifurcated’ model of anti-corruption commission. This classification draws from Scott Prasser’s work, in which he identified two models for anti-corruption commissions: the ‘generalist/merged’ model and the ‘specialist/bifurcated’ model.<sup>23</sup> The generalist model performs ‘whole-of-government, anti-corruption/misconduct functions including overseeing the public service, police, elected officials and local government and combating organised crime by taking active roles in intelligence gathering and investigations.’<sup>24</sup> The ‘specialist/bifurcated’ model, in contrast, separates the agencies responsible for integrity and crime.<sup>25</sup> In effect, a generalist/merged model would combine the functions of a proposed national integrity commission and that of the Australian Crime Commission. A specialised/bifurcated model would keep them separate.

Prasser identifies key arguments for and against the different models. Arguments for the generalist/merged model include: (1) that organised crime has strong links to both police and political corruption, and it thus makes sense for this problem to be tackled by a merged agency; (2) the merging creates cost efficiencies; and (3) merger gives a Commission a broader base and therefore greater status and independence from government. Arguments against the model include: (1) that it distracts a Commission from a core anti-corruption function; (2) that merger might undermine the Commission’s independence in scrutinising police and other investigative agencies; and (3) that civil liberties concerns surrounding the use of investigative powers may be more pronounced in a larger-scale, merged Commission.<sup>26</sup>

Ultimately, it is our view that a federal standing anti-corruption commission should be designed in accordance with the specialised/bifurcated model for two key reasons. The first is the potential for a generalist/merged model to confuse the core purpose of the institution. This has consequences for a legal process account and creates further ambiguity for officials tasked with interpreting and operationalising the legislative framework. The second is related: the importance of maintaining the utmost

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<sup>23</sup> Scott Prasser, “Australian Integrity Agencies in Critical Perspective” (2012) 33 *Policy Studies* 21, 27.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

independence of such a commission from institutions including the police to ensure integrity to purpose can be achieved.

### *(B) Framing and limiting jurisdiction to ensure integrity to purpose over time*

In the preceding section we identified the purposive foundations for a potential federal anti-corruption commission: the commission could be conceived with broad oversight responsibilities, but limited to a specific substantive mandate, for the twin goals of suppressing corruption and fostering public confidence in government. We now begin to consider how this purposive foundation should inform more specific design issues related to the jurisdiction of the new commission. We consider two such issues in this Part:

- (i) The appropriate **scope of conduct** that should fall within the Commission's investigatory jurisdiction;
- (ii) the **agencies and individuals** that should fall within the jurisdiction of the Commission.

### *(i) Scope of conduct*

Following our account of institutional purpose, we suggest that a new commission's jurisdiction ought to be limited to investigating matters where it has a *reasonable suspicion* that they involve *serious or systemic misconduct*.

Limiting the commission in such a way is intended to ensure integrity of purpose on three levels. First, it explicitly ties any extraordinary investigative powers conferred on the commission to the specific needs identified through our institutional survey, ensuring that those powers are exercised only in service of a well-defined mandate which accounts for the corresponding roles of other institutions. Second, recalling that our institutional survey was limited and that integrity of purpose requires consistency with higher order values of the legal system, these jurisdictional limits curtail the possible impacts of investigative powers on individuals and preserve the fundamental principle that individuals should not be exposed to official scrutiny absent a pressing public objective. Third, our incorporation of a 'reasonable suspicion' threshold for the use of investigative powers reflects the broad oversight and confidence-raising goals of the commission. Unlike, for example, a criminal prosecution which requires a high evidentiary onus before it can proceed, the commission should have flexibility to determine whether reported complaints or concerns – which may have only limited initial evidence to support them – point the way to actual instances of corruption. Importantly, while a flexible threshold of 'reasonable suspicion' supports this goal, the actual deployment of investigative powers remains limited by the requirement that the suspicion itself focus on subjects of serious or systemic corruption.

Different statutory regimes in place across the Australian State jurisdictions already direct their commissions to focus their investigative functions on 'serious or systemic wrongdoing.' However, many of these regimes fail to define such wrongdoing, or to create an enforcement framework around the limit so as to give it any real practical consequence. This was a factor in the controversy that surrounded the NSW



## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

Independent Commission Against Corruption’s investigation of Ms Margaret Cunneen SC, resulting in the 2015 High Court decision *ICAC v Cunneen*.<sup>27</sup> That case involved Cunneen’s alleged conduct in counselling her son’s girlfriend to fake chest pain in order to avoid a breathalyser test. The Court was asked whether this amounted to ‘corrupt conduct’ as defined in s 8 of the *Independent Commission Against Corruption Act 1988* (NSW), a matter that we consider again below. For present purposes, the Cunneen controversy is relevant for a different reason.

Section 12A of the NSW Act requires the ICAC ‘as far as practicable to direct its attention to serious corrupt conduct and systemic corrupt conduct’. Following the High Court’s decision, an Independent Panel headed by former Chief Justice of the High Court the Honourable Murray Gleeson AC QC and Bruce McClintock SC recommended that the NSW Act be amended to specify that the ICAC can only make *findings* of ‘corrupt conduct’ if it is ‘serious corrupt conduct.’<sup>28</sup> This change, which was incorporated with the adoption of s 74BA, meant that the ICAC’s investigative powers embraced suspicions of corruption generally, but could only escalate to the formal reporting of adverse findings when the corruption was found to be ‘serious.’ It was intended to balance the ICAC’s need for investigative latitude with fairness to the persons affected.

The lingering difficulty with this approach is that ‘serious’ corrupt conduct is nowhere defined in the legislation, nor for that matter is ‘systemic’ corrupt conduct. The same defect is present in every statute governing Australia’s State-level anti-corruption commissions. Failure to define these terms defers significant interpretive latitude to the officials responsible for implementing these commissions. It escalates the risk that the incremental evolution of jurisdiction, as concepts like ‘serious’ and ‘systemic’ are interpreted in new contexts, could lead to missteps that compromise the underlying purpose of a commission. This could include, for example, the commission reaching into spheres better reserved for other institutions, provoking conflict or incoherence and weakening confidence in the system as a whole.

An instructive counter-example to Australia’s State-level commissions is supplied by the *Law Enforcement Integrity Commission Act 2006* (Cth), the legislation governing the ACLEI. That statute supplements its definition of ‘corrupt conduct’ – the abuse of official power or perversion of the course of justice<sup>29</sup> – with further definitions of ‘serious corruption’ and ‘systemic corruption.’ Section 5 defines serious corruption to mean conduct that could result in a charge punishable, on conviction, by a term of imprisonment for 12 months or more. Systemic corruption is then defined to mean instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a pattern of corrupt conduct.

Within the ACLEI statute, these terms inform different investigative powers and

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<sup>27</sup> [2015] HCA 14.

<sup>28</sup> Murray Gleeson and Bruce McClintock SC, *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption: Report* (30 July 2015)

<[http://www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0003/173235/Independent\\_Panel\\_\\_Review\\_of\\_the\\_Jurisdiction\\_of\\_the\\_Independent\\_Commission\\_Against\\_Corruption\\_\\_Report.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/173235/Independent_Panel__Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption__Report.pdf)>.

<sup>29</sup> See s 6 of the Act.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

responsibilities in relation to different types of corruption issue. For present purposes, we refer to them to make the more limited point that serious and systemic corruption are capable of clear legislative definition. For reasons that will be apparent in our later discussion of a prospective federal commission's hearing powers, we would not support a definition of 'serious corruption' that relies on factual analogies to the criminal law – indeed, we feel this risks confusing the roles of commissions and courts and runs contrary to integrity of purpose. But it is nevertheless possible to differentiate between ideas of 'corruption' that seem mismatched with a commission's strong investigative powers and others that align closely with the commission's motivating purpose.

For example, we do not believe that it would align well with the purpose of a new federal commission for it to wield investigative powers over civil servants suspected of misusing office resources, such as computer access, stationary and printing supplies, for their personal needs. Although this behavior could be accurately described as 'corrupt', in the sense that it involves the abuse of a position for personal gain, it is hardly likely to impact public confidence in government (unless it becomes systemic, in which case it would satisfy the second branch of our proposed statutory definition). The situation would be different if the same civil servants were falsifying expense accounts to consume large sums of public money, or demanding kickbacks from tenderers for government contracts. This conduct would certainly weaken public confidence in the integrity of government, and its detection and suppression would align closely with the foundational purpose of a new federal commission.

As such, in limiting the investigative jurisdiction of a new commission to serious or systemic corruption, we suggest that 'serious corruption' be statutorily defined as corrupt conduct that is likely to threaten public confidence in the integrity of government. 'Systemic corruption' should be defined as it is in the ACLEI statute – that is, as a pattern of corrupt conduct. The significance of including a separate definition for systemic corruption is that such an occurrence will presumptively endanger public confidence, even if the individual acts taken alone would not be considered 'serious'. Corrupt conduct itself should be defined consistently with a common sense understanding of the term: that is, as dishonest or fraudulent conduct for personal gain. Certainly, each of these definitions leaves interpretive latitude for future commissioners. Perhaps most significantly, it relies on their judgement, integrity, and expertise to determine when an issue rises to the level of threatening public confidence in the integrity of government. The point in developing this richer statutory language is not to remove the commissioners' judgement, but to inform it with clearer interpretive aids concerning the underlying purpose of the institution.

The new commission would thus be able to exercise investigative powers where it had a reasonable basis to suspect the occurrence corruption falling into either of these two categories. Unlike the Independent Panel report on the ICAC, we do not support an initial threshold for investigative powers that is lower than the types of finding the commission may eventually reach. If the commission is to model integrity of purpose and evolve harmoniously within a systemic framework, its legislative statement of purpose, investigative and reporting powers should each align. A situation in which the

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

commission may initiate an investigation based on mere suspicion of corruption, not reasonable suspicion of the specific *type* of corruption at which the institution has been purposively targeted, invites transgression and incoherence in the use of official power. We do not believe it would unduly limit the capacity of a new commission to foster public confidence were it limited to commencing investigations based on reasonable suspicion of serious or systemic corruption. To the contrary, this strict jurisdictional focus would help foster confidence by ensuring that the commission exercises appropriate power within appropriate bounds.

The approach advocated here is consistent with recent amendments made to Victoria's *Independent Broad-based Anti-Corruption Commission Act 2011*, which removed a former requirement that the IBAC be 'reasonably satisfied' of the occurrence of serious corrupt conduct before it could commence an investigation employing coercive powers.<sup>30</sup> 'Reasonably satisfied' connoted a standard approximating 'belief', as opposed to mere suspicion. A special report following the IBAC's first year of operation identified problems with this threshold: it meant that some corrupt conduct allegations that may have been credible were not investigated for failure to meet the threshold, and for want of an appropriate alternate authority to which they could be referred.<sup>31</sup> The Act was thus amended to authorise commencement of an investigation on the grounds of reasonable suspicion.<sup>32</sup> Importantly, the IBAC's coercive investigative powers were also supplemented with new powers of preliminary investigation – which did not include the use of coercive authority – so that complaints and concerns could be minimally investigated in order to inform the decision of whether to launch a coercive investigation.<sup>33</sup> While such powers of preliminary investigation fall outside the scope of our paper, we would simply note that the use of non-coercive powers of inquiry to give *prima facie* consideration to subjects properly within a commission's jurisdiction makes imminent sense. One important difference between our approach and that adopted under the Victoria statute, however, is that the latter equates 'serious corrupt conduct' with criminal misconduct, and thus explicitly directs IBAC officials to consider subjects of criminality in deciding whether to commence an investigation or in reaching adverse findings. For the reasons identified above, we prefer an approach that reinforces a firm distinction between the work of anti-corruption commissions and the criminal law, thus relying on a definition of corruption which does not incorporate criminal law analytic criteria.

### (ii) *Agencies and individuals subject to jurisdiction*

We have already suggested that a new anti-corruption commission should exercise broad oversight of Commonwealth government activities, but with a narrow substantive focus, and subject to jurisdictional carve-outs required to respect the existing authority of

<sup>30</sup> See discussion in Parliament of Victoria, Parliamentary Library (2014), *Research Brief: Integrity Legislation Amendment Bill 2014*, Melbourne: Parliamentary Library Information Service, 7-8, 14-15.

<sup>31</sup> Ibid, 7-8. See also Independent Broad-based Anti-Corruption Commission (2014), *Special Report Following IBAC's First Year of Being Fuller Operational*, Melbourne: IBAC, 25.

<sup>32</sup> See above n 30, 14-15.

<sup>33</sup> Ibid.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

institutions such as the Commonwealth Ombudsman and the ACLEI. A further issue that must be considered, however, is whether this broad oversight should include individuals, businesses, and organisations that are not formally part of government. Should the commission have the power to investigate the conduct of a third party who is not a public official, but whose conduct is likely to lead a public official to fulfill his or her functions improperly? The answer to this question must flow from our foundational account of institutional purpose. This requires asking whether the investigation of certain third party conduct is consistent with the goals of suppressing serious and systemic corruption and of fostering public confidence in government.

This inquiry mirrors the core question that was before the High Court in *Cunneen*, which turned on the statutory construction of ‘corrupt conduct’ in the New South Wales legislation.<sup>34</sup> The majority of the Court accepted that Ms Cunneen’s alleged conduct did not fall within the statutory definition of ‘corrupt conduct’ because, first, it allegedly involved Ms Cunneen in her personal capacity (not in her capacity as a Crown prosecutor); and second, while it might have affected or hindered the police officer from conducting the investigation, it did not involve dishonest or improper conduct *on the part of the police officer*.

Justice Gageler, in dissent in the case, noted that the majority’s interpretation of s 8 to exclude such conduct consequently obstructed the Commission’s power to investigate conduct that might amount to defrauding a public official, state-wide endemic collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under New South Wales statutes.<sup>35</sup> The type of conduct that Gageler J identified clearly has the capacity to undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials. This conduct also has the capacity to affect the integrity of government processes, threatening equality of access to government services and contracts, and undermining accountability for how taxpayers’ money is spent and public assets are utilised.

Mindful that one of the foundational purposes of a new federal commission would be to foster confidence in government integrity, we believe there is a strong argument that such conduct should fall within the jurisdiction of the commission. That argument is corroborated by our institutional survey, which suggests a limited capacity for existing integrity institutions to impose scrutiny on third parties in response to the types of concern identified above. This was the view ultimately adopted by the New South Wales government, which, following the Gleeson-McClintock review, introduced a new provision that would have caught the type of conduct referred to by Gageler J (although not that allegedly engaged in by Ms Cunneen).

Nevertheless, whether to extend the extraordinary investigatory powers of the commission to the conduct of non-government officials is not a straightforward question. Remember that in defining the jurisdiction of a commission, fidelity must be

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<sup>34</sup> [2015] HCA 14.

<sup>35</sup> Ibid at, eg, [91] and [92].

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

had both to its foundational purpose, and to core principles that underpin the wider public law framework, including individual liberty. The extraordinary investigative powers that are conferred on anti-corruption commissions are usually justified on the basis that government corruption is of a peculiar nature: it may be systemic, shrouded in secrecy, and difficult for traditional investigative agencies to uncover. It also involves the abuse of public power. The conduct of private individuals does not engage the same distinct concerns. It could be argued that the police have sufficient power to investigate this type of conduct, and are a more appropriate agency for doing so. Given that the individuals concerned are private citizens, not public officials held to high standards of accountability and trust by virtue of their positions, perhaps their scrutiny should be confined to institutions that observe the strictest evidentiary and procedural safeguards – as is the case of police investigations or criminal prosecutions.

Answers to these objections can be found on two levels. First, the limited substantive focus of the commission mitigates civil liberty concerns, if only partially, by confining the investigative powers of the commission to a narrow field associated with a legitimate and heightened public interest. This distinguishes the investigative focus of the commission from other traditional subjects of criminal law: it is the heightened public interest in securing the integrity of government, including in its dealings with private persons, that justifies the superimposition of an additional investigative power where police already have standing authority.

Second, the impact of a new commission's powers on individuals can be limited by careful tailoring of its procedures and ultimate outcomes to purpose. The strong evidentiary and procedural safeguards of the criminal law reflect the exceptional prejudice that can flow from a criminal proceeding – both in terms of outcome (a criminal conviction and suspension of personal liberty), and in terms of intrinsic effects, including the stress and stigma of public accusation. Should a new commission exercise investigative powers without equivalent safeguards, it follows that its outcomes and procedures should similarly reflect a significantly lesser prejudice than criminal proceedings. We now turn to consider these issues, focusing on the outcomes and procedures that should attend the commission's use of investigative hearings.

### *(C) Integrity of hearing powers*

We earlier identified the ability to constitute hearings as a desirable quality for a new federal anti-corruption commission. In this Part, we consider how integrity of purpose should inform two features of the power to hold investigative hearings: the outcomes that may result from those hearings, and the manner in which hearings themselves should be conducted.

#### *(i) Maintaining integrity of purpose by prohibiting findings of guilt or the initiation of prosecutions*

It is well established that standing investigative commissions are not courts and do not have the accompanying requirements and safeguards of the judicial process. At the federal level, they are constitutionally restricted from reaching formal determinations of

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers established by Chapter III of the Constitution.<sup>36</sup> An equivalent restriction is also made explicit in the statutes governing many State-level anti-corruption commissions. For example, in Western Australia, s 217A of the *Anti-Corruption Commission Act 1988* states that the Commission must ‘not publish or report a finding or opinion that a particular person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence’, and that a finding of opinion that misconduct has occurred is not to be taken as a finding of guilt.

More importantly for our purposes, however, is the fact that making findings of criminal guilt or being perceived by the public to make such findings would compromise a commission’s integrity of purpose. The design of a new federal commission must account for the authority of the criminal justice system to resolve questions of criminal guilt or innocence. Transferring that authority to a separate government organ without judicial safeguards would rightly raise public suspicion of abuse of power, weakening public confidence rather than strengthening it. Instead, a new federal commission should foster outcomes appropriate to its distinct institutional purpose. In our view, integrity of purpose is best served by a federal commission being limited to the public reporting of factual findings, and by its exercise of limited powers of referral to other agencies. We focus here on the referral power, with a discussion of the commission’s factual reporting powers to follow.

In the 1990 decision of *Balog v ICAC*,<sup>37</sup> the High Court defined the NSW ICAC’s function as one of facilitating the actions of other agencies – particularly prosecutorial agencies – by conducting investigations. The Court emphasised the need for the ICAC to limit itself in drawing conclusions that would express findings of guilt. In practice, this demands that anti-corruption commissions walk a fine line. Public confidence would be endangered should they usurp the role of investigating and adjudicating criminal guilt. At the same time, the public might also lose confidence should anti-corruption commissions identify factual misconduct with obvious elements of criminality, but with no further consequences following for the individuals and organisations adversely implicated.

Three possible resolutions lie to this quandary. The first is that anti-corruption commissions could be vested with the power to lay criminal charges. This resolution rests on a fraught distinction between laying a charge, which necessarily implies a strong opinion as to criminal guilt, and a formal ‘finding’ of criminal guilt. Some State anti-corruption commissions are currently empowered to commence prosecutions for statutory, disciplinary, and other offences. Under s 50 of the *Crime and Corruption Act 2001* (Qld), the QCC can bring prosecutions for corrupt conduct in disciplinary

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<sup>36</sup> The adjudication of criminal guilt under Commonwealth law is a task exclusively for a court established under Chapter III of the Constitution: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. The High Court has recognised that it is compatible with this principle for non-judicial bodies to determine whether a person has engaged in conduct amounting to a criminal offence, when that occurs as a step in an administrative process that leads, for example, to the imposition of regulatory sanctions: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 219, [33].

<sup>37</sup> (1990) 169 CLR 625 [16].

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

proceedings before the QCAT. In Victoria, under s 190 of the Act the IBAC or a sworn IBAC Officer authorised by the Commissioner has the power to bring proceedings for an offence in relation to any matter arising out of an IBAC investigation. In both cases, while commission officials can initiate prosecutorial proceedings, it is ultimately left to a judge or administrative tribunal to decide questions of guilt or regulatory culpability.

In our view, these models are troubling. The traditional division between investigative and prosecutorial functions has deep roots in Australia's tradition of rule of law: it reflects the principle that decisions to prosecute should be informed by the public interest, and taken by independent officials whose distance from an investigation insulates them from preconception and bias. Vesting anti-corruption commissions with the power to lay charges undermines this principle and muddies the distinction between investigation and prosecution. This is inconsistent with integrity of purpose.

The second possibility is that anti-corruption commissions could refer suspected instances of criminality to other institutional authorities, such as the police. This would spare the commissions from directly opining on criminality, limiting them to simply transferring suspicious or concerning information. At one level, this seems conducive to systemic coherence and to fostering respect for the authority of other institutions: were a federal anti-corruption commission to receive a complaint that is strongly suggestive of criminal conduct, but that does not concern serious or systemic corruption, referral could ensure that the complaint is properly investigated without the commission overstepping its bounds.

The matter is more complicated if the subject of referral is more than a *prima facie* complaint, however. Should the commission exercise extraordinary investigative powers unavailable to the police, then refer the results of that investigation to police or to prosecutors, it may be enabling the latter agencies to do indirectly what they could not do directly. While evidentiary safeguards lie against the use of derivative evidence in criminal prosecutions – that is, evidence obtained by virtue of separate coercive proceedings – these measures are not perfect in ensuring that police or prosecutors do not ‘reverse-engineer’ a case from a coerced record.

A final possibility is that anti-corruption commissions could be strictly limited to factual reporting alone. This approach effectively treats the commissions as internally-coherent and closed processes: their aim is to investigate specific subject-matter, with the power to publicly report on that subject-matter following observance of appropriate procedures and satisfaction of appropriate evidentiary standards. Other agencies may avail themselves of the commissions' reports for the purpose of commencing further investigations, but the commissions themselves have nothing to do with these further actions (or, more importantly, with the exercise of any judgment as to whether such actions are warranted). This approach has the benefit of minimising any risk of institutional overstep or undue interference with civil rights. Its cost may be that it requires such a vigilant separation of institutional duties that it obviates valuable inter-institutional cooperation and information-sharing toward common public goals.

We believe that integrity of purpose is best reflected in the middle position, allowing a commission to refer suspected criminality to other authorities without reaching actual

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

findings of criminal wrongdoing or initiating criminal prosecutions. The possible shortcoming of this approach – that referred evidence might be misused by subsequent authorities taking advantage of its coerced origins – must be offset by confidence that those authorities will abide by their own integrity of purpose, adhering to appropriate procedures and principles that safeguard individual liberty in these consequential settings. This confidence is consistent with the view of an integrity system comprising multiple interlocking mechanisms that build horizontal accountability across the system as a whole, with the law restricting use of derivative evidence in criminal prosecutions being one such mechanism. Moreover, empowering anti-corruption commissions with the ability to refer suspected criminality to other authorities reflects the values of inter-institutional awareness, respect for jurisdiction, competence, and authority that underlie integrity of purpose. We accordingly recommend that a new federal anti-corruption commission be empowered to refer suspected instances of criminality to appropriate authorities, subject to existing legal restrictions against reliance on derivative evidence by those authorities.

### *(ii) Integrity of purpose, public hearings, and public reporting*

We finally turn attention to the capacity of a federal anti-corruption commission to hold formal evidentiary hearings and to report findings. Our focus is on locating an appropriate balance between privacy and publicity in the exercise of these powers.

It is widely recognised that the use of public hearings by an anti-corruption commission may have strong deterrence effects. Further, such hearings may increase public awareness of government impropriety and increase confidence in the work the anti-corruption commission itself. Among other things, they allow a commission that is acting fairly and according to well-conceived procedures to be *seen* doing so, brokering public understanding of its role and confidence in its efficacy.

It must also be acknowledged, however, that there can be serious individual and social costs to public hearings. Even when a commission and its officials model procedural and individual integrity, media portrayals may fail to capture the nuances of investigative procedure or honour the need to suspend judgment of witnesses. Public hearings run the inherit risk of being portrayed as trials and perceived as such, with the individuals involved – including those against whom findings of impropriety are never reached – bearing personal indignity and stigma. Even where findings of impropriety are made, the public may conflate such findings with judicial findings of guilt, failing to understand the different procedures and powers of the commission. Misperception and misunderstanding about commission hearings can injure public confidence in government by fostering an exaggerated sense of impropriety. Moreover, public hearings may jeopardise the ongoing investigations of other authorities, even tainting the capacity to develop pools of unbiased jurors for future criminal trials concerning subjects that have received widespread coverage.

The resolution to these dilemmas must flow from a foundational account of institutional purpose and the goal of fostering harmony between a new federal commission and the existing integrity landscape. In the previous section, we discussed important distinctions between the roles of investigators and prosecutors, and the higher order principles those



## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

distinctions serve. We also highlighted an equally vital and closely related distinction between investigative commissions and courts – namely that only the latter are empowered to reach formal legal determinations, such as findings of criminal guilt. This distinction is not simply a matter of formality, but reflects foundational ideas about the purposes of the two different institutions. The purpose of courts is to decide legal questions in a manner that is final and consequential for those affected, and court procedures are accordingly tailored to reflect the highest standards of justice and impartiality required for that purpose. These include the fact that judicial hearings occur in public, where they can be exposed to the highest scrutiny, and the fact that participants are entitled to robust procedural rights and evidentiary privileges.

Investigative commissions are not constituted for the purpose of reaching formal legal determinations. As we have conceived of a potential federal commission, its purpose would be to suppress serious and systemic corruption and to foster confidence in the Commonwealth government, goals linked to powers of fact-finding and referral as distinguished from the power to reach legal findings. This distinction also informs the principle that court-like evidentiary privileges, including the privilege against self-incrimination, don't apply in commission hearings: the purpose of the hearings is to ascertain the truth in terms that engage no immediate legal prejudice, and both the pursuit of truth and the lesser individual consequences involved justify more relaxed protections. A necessary implication of this approach is that the individual witnesses in a commission hearing may be subject to even more probing examination than would occur in a court. The key question is whether, in light of this fact, the same principles informing the open court principle pertain to the investigative hearings of an anti-corruption commission.

Most state statutes provide a wide discretion as to whether to hold a public hearing. In New South Wales, s 31 of the *Independent Commission Against Corruption Act 1988* (NSW) provides that the ICAC may conduct a public inquiry 'if it is satisfied that it is in the public interest to do so'. Without limiting the factors to be taken into account in determining whether it is in the public interest, the Commission is directed to consider the following:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- (b) the seriousness of the allegation or complaint being investigated,
- (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The inclusion of this provision in the NSW statute reflects a decision by the legislative drafters to defer to the expertise of commissioners to balance privacy and publicity concerns in context, on a case-by-case basis. This is one possible approach to the dilemma at the stage of institutional design.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

An alternative approach is offered by South Australia, where there is no power to conduct public hearings. In November 2015, South Australian Commissioner Bruce Lander requested that his governing legislation be amended to allow public hearings into less serious conduct – misconduct and maladministration.<sup>38</sup> He has renewed that request in response to a serious maladministration investigation that he is currently undertaking.<sup>39</sup> In contrast, he has accepted that corruption investigations (which involve criminal conduct) should remain private, and that the public should be informed of investigations into serious criminal conduct only when the matter has reached the courts, where the hearing will be (generally) held in public but constrained by the rules of evidence and the availability of privilege claims for witnesses.

Applying integrity of purpose, we believe there are strong arguments in favour of evidentiary hearings taking place in private rather than in public. First, it is not clear that the goals of suppressing serious or systemic corruption, or of fostering public confidence in government integrity, rely on commission hearings taking place in public. Assuming that actual findings of corrupt conduct will be publicly reported and explained following those hearings – a matter we consider below – the public will have the benefit of considered findings of fact about government activities. These will be less susceptible to inaccurate or speculative media portrayal. The public will also have reassurance that a commission wielding extraordinary powers to compel involuntary testimony does so with respect for the privacy and dignity of those affected, only disclosing their identities where necessary to deliver the public a full and accurate account of actual findings of corruption. This approach would foster systemic harmony and coherence by eliminating the potential that commission hearings could compromise the integrity of judicial proceedings, reinforcing the purposive distinctions between commissions and courts through the observance of distinct procedures.

While thus supporting the use of private hearings in the ordinary course, we would preserve the discretion of a federal commission to convene public hearings in one instance. There may be cases where public concern surrounding an allegation of corruption is so high that rises to a crisis of confidence in government. Here, the goals of suppressing serious and systemic corruption and of restoring confidence in government may demand immediate and pronounced action, giving the public immediate assurance that a robust investigation is underway. Moreover, the commission's own transparency in the conduct of the investigation may be essential to assuring the public that the commission is not, itself, susceptible to the troubling issues that are the source of concern. In our view, judgment as to when such circumstances have arisen can only be exercised in context, relying on the expertise and good faith of a commissioner (or commissioners) and staff. We nevertheless suggest the following statutory guidance for

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<sup>38</sup> See, for example, the comments of Commissioner Lander to the Public Integrity Commission reported in Leah MacLennan, "South Australia's ICAC Commissioner says fractured relationship with Police Ombudsman "improving", *ABC News*, 10 November 2015, online: <http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066>.

<sup>39</sup> See online: <http://www.adelaidenow.com.au/news/south-australia/icac-investigating-government-agencies-over-allegations-of-serious-and-significant-misuse-of-public-resources/news-story/799e2c44ada8f00a9dc44d9d95e2157a>.

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

such discretion: that public hearings only be convened when a commissioner determines that the subject of an investigation concerns both serious and systemic corruption, and that the subject has provoked a crisis of public confidence in government.

Our position in favour of presumptively closed commission hearings relies on these hearings being complemented by three additional design features for a prospective federal commission. First, the commission must be able to publicly report the findings that result from any hearing, including findings of serious and systemic corruption and their relevant factual foundations. This ability is not only consistent with the commission's foundational purpose, it is essential to it. Across Australia, South Australia is unique in not allowing the ICAC to make reports to Parliament on specific investigations. Under ss 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012* (SA), the Commissioner may report to Parliament on its more general review and recommendation powers, for example, its evaluation of practices, policies and procedures of government agencies, and recommendations it has made that government agencies change or review practices, policies or procedures. But under s 42(b), a report must not identify or be about a particular matter that was the subject of an assessment, investigation or referral under the Act. Commissioner Lander has criticised this constraint on his powers to report and bring to the attention of Parliament and the public his findings and recommendations in relation to specific investigations.<sup>1</sup> We would agree with the Commissioner's criticisms. It is difficult to conceive of how a commission can broker confidence in government if the government itself exercises control over whether the commission's findings can be released. The incoherence of this approach – allowing the government to be the gatekeeper of damaging findings about its own conduct, reached by an independent commission – is patent. We would nevertheless allow for exceptions to public disclosure where, in the commissioner's opinion, disclosure would compromise an ongoing investigation, or place an individual in danger, or prejudice an upcoming judicial proceeding. In each instance, limits on disclosure would be consistent with the considerations motivating the use of private hearings.

The second important design feature is that commission hearings must honour procedural fairness. Public confidence in the integrity of private hearings, and the accuracy of conclusions they reach, would be compromised if individual witnesses were not afforded an opportunity of notice and reply to potential adverse findings that may be made against them. It would also be compromised if commissioners weren't held to stringent standards of impartiality. Both of these requirements reflect basic principles of natural justice, and their statutory codification would reinforce consistency between the specific design elements of a new federal commission and the fundamental values of Australia's legal system.

Finally, we recommend that a new federal commission have a statutory power of 'follow-up' – that is, the ability to report publicly on the government's compliance (or lack thereof) with past reports and recommendations. An example of such follow-up powers can be found in s 159 of the Victorian statute.<sup>40</sup> Under this provision, the Victorian

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<sup>40</sup> *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).

## CONFERENCE PAPER PREPARED FOR NATIONAL INTEGRITY 2017

IBAC may make recommendations to the relevant principal officer, the responsible Minister or the Premier. Sub-section (6) then states:

- (6) The IBAC may require a person (other than the Chief Commissioner of Police) who has received a recommendation under subsection (1) to give a report to the IBAC, within a reasonable specified time, stating—
  - (a) whether or not he or she has taken, or intends to take, action recommended by the IBAC; and
  - (b) if the person has not taken the recommended action, or does not intend to take the recommended action, the reason for not taking or intending to take the action.

This power would reinforce the institutional distinctness of a new federal commission in comparison to the discrete decision-making powers of courts, for example, or the temporally limited influence of royal commissions. Even where follow-up on reports and recommendations fails to spur action by government, it may at least force the government to articulate reasons for inaction, fostering positive systemic values of transparency and democratic dialogue.

### IV Conclusion

There is growing support for a federal anti-corruption commission. Before rushing to introduce such a body, it is important to consider fundamental questions of design in a coherent and principled fashion. We have developed the idea of an ‘integrity of purpose’ approach, informed by legal process theory, to achieve this. A federal anti-corruption commission designed with integrity of purpose would incorporate respect for the authority and competency of existing institutions; respect for fundamental systemic values; and respect for its own foundational purpose, applying procedures which embody that purpose and evolving in a manner that strengthens public faith in the integrity system as a whole.

We have applied this theory to a number of key design questions, including the articulation of an institutional purpose statement, informed by the existing institutional landscape, and the tailoring of the jurisdiction and powers of the body to that purpose statement. The theory would also provide solutions to other design questions including, for instance, those surrounding the appropriate number of commissioners, the selection, tenure and removal of commissioners, and the reviewability of commissioners’ decisions.

Finally, while this paper has been focused on the prospect of a federal anti-corruption commission, the utility of our proposed ‘integrity of purpose’ is far broader: it can be applied to the reform and redesign of existing anti-corruption commissions; the design and redesign of other integrity institutions; and even the design and redesign of other government institutions.