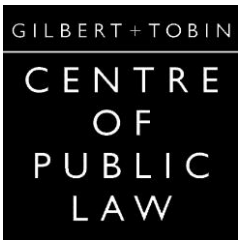

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20 April 2016

Committee Secretary
Select Committee on the establishment of a National Integrity Commission
PO Box 6100
Parliament House
Canberra ACT 2600

By email: nic.sen@aph.gov.au

Dear Secretary

Thank you for the opportunity to make a submission to the Select Committee on the establishment of a National Integrity Commission. We are writing this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law, at the Faculty of Law, University of New South Wales. We are solely responsible for the views and content in this submission.

Part I – Executive Summary

In this submission we conduct a detailed examination of existing integrity frameworks across Australian jurisdictions to assist the Committee in forming a view as to whether the creation of a new federal integrity institution would be an appropriate course of action, and if so, how some of the key features of such an institution might be designed to best meet its objectives. This submission is divided into four parts:

In **Part II**, by reference to survey data and other recent material on corruption in Australia, we explore preliminary issues for the Committee to consider in formulating an appropriate response to the terms of reference of this inquiry. In particular, we identify that there may be two interrelated considerations in this area:

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(a) dealing with *actual* instances of corruption at the federal level of government; and,

(b) increasing public confidence in the integrity of the federal government.

In **Part III**, we undertake a survey of the existing federal integrity institutions, and in particular, the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Ombudsman and the Commonwealth Auditor-General. This survey demonstrates a central question that the Committee must grapple with: whether there is a genuine need for the introduction of a new integrity commission, or whether the objectives of reducing corruption and enhancing public confidence in government administration are better achieved by amendments to these existing institutions.

Finally, in **Part IV**, we undertake a survey of standing anti-corruption and integrity commissions in relation to their key design features: jurisdiction, independence, power and accountability. This survey is based on the existing State anti-corruption commissions, together with the federal model proposed in the 2013 private senator's bill: the National Integrity Bill 2013. This Part provides not only an explanation of how these features might be designed in a federal body, but also an analysis of the different options, considering the advantages and disadvantages of each and, where appropriate, making recommendations as to which model should be preferred.

In summary, our key recommendations to the Committee are:

1. That the Committee consider institutionalised means of enhancing integrity compliance within Parliament itself, such as through the establishment of an independent parliamentary ethics officer.
2. That the Committee consider whether extension of standing hearing powers beyond the law enforcement context is desirable. If it is determined that it is desirable to extend this jurisdiction, the Committee will need to consider whether the most appropriate way of doing so is to extend the ACLEI's jurisdiction, or create a new and separate integrity institution. If the latter course is selected, the Committee will also need to determine what the new integrity institution's relationship to ACLEI would be.
3. That:
    (a) The Committee consider whether other integrity-promoting institutions play roles equal in importance to the Auditor-General, and equally demanding of strong independence. If the Committee determines that they do, we recommend that the Committee consider harmonising the relevant statutes to place budgetary control for institutional appropriations in the hands of Parliament; and
    (b) In the event that the Committee elects to proceed with a new integrity institution, the Committee ensure that it benefits from the same budgetary security.
4. That the Committee commission production of a *Commonwealth Integrity Manual*, accessible to the general public, setting out the roles, processes, powers, and

responsibilities of all integrity institutions capable of receiving individual concerns or complaints. Any new integrity institution should be incorporated into this Manual. An electronic copy of the manual should be provided to all employees of the Commonwealth public service.

5. That, should the Committee determine that a new federal integrity Commission is desirable:

   (a) The Commission's jurisdiction is limited to investigating serious or systemic misconduct. To make such limitations on jurisdiction meaningful, we recommend that the statute governing any new federal Commission include a provision specifying the factors to be taken into account in determining whether conduct is 'serious' or 'systemic' for the purposes of initiating an investigation (as is currently the case under the *Law Enforcement Integrity Commissioner Act 2006*). We also recommend that the governing statute specify a clear and simple path for review of such a decision.

   (b) The Commission is given non-investigative functions, including those relating to research, education and prevention of corruption, with the following two caveats:

   - any non-investigatory functions bestowed upon the Commission must be accompanied by adequate funding; and
   - functions related to the giving of advice on specific ethics and corruption issues are reserved to an institution other than the federal integrity Commission.

   (c) The Commission have wide jurisdiction to investigate the conduct of government and parliamentary officers and agencies as well as government contractors.

   (d) A statute establishing a federal integrity Commission contain a normative statement as to the independence of that Commission, and a statement that it is not subject to the direction or control of the Minister.

   (e) Appointment of a federal integrity Commissioner or Commissioners require the approval of both the Executive and Parliament; that appointment be pursuant to a merit-based review; and that appropriate merit-based criteria for appointment be specified in the governing statute.

   (f) Removal of a federal integrity Commissioner or Commissioners require the approval of the Parliament; that removal only be available for enumerated grounds limited to incapacity, incompetence or misbehaviour.

   (g) A federal integrity Commissioner's term is limited to one term of five years or, if it is considered desirable that the possibility of reappointment be included, this is limited to one further term, with the Commissioner not being able to hold office for a total term of longer than seven years.

   (h) Should it be determined that extraordinary investigative powers including use of controlled operations and assumed identifies are required, they are subject to

judicial oversight and monitoring, and their exercise trigger compulsory parliamentary reporting obligations.

(i) The power to hold public hearings is statutorily circumscribed, and that the statute provides a clear, immediate and efficient avenue to review Commission decisions to conduct such a hearing.

(j) The federal integrity Commission's powers to abrogate privilege are confined to:

- abrogating government legal privilege and public interest immunities where the latter might otherwise impede a paramount investigative mandate; and
- abrogating the privilege against self-incrimination, but subject to strong subsequent-use immunities barring the admission of incriminating information in subsequent proceedings other than prosecution for perjury or contempt.

(k) A statute establishing a federal integrity Commission include the power to impose confidentiality obligations at the discretion of the Commission, taking into account the rights and reasonable interests of persons affected by publication and the public interest at large in publication.

(l) A federal integrity Commissioner:

- must not make findings of legal guilt and all adverse findings or commentary about person or agencies must be predicated on having afforded those persons or agencies procedural fairness.
- is empowered to report to Parliament, and through Parliament to the public, on all investigations it undertakes. The Commissioner may exclude certain information from a public report where, in his or her judgment, disclosure poses risks to an ongoing investigation, places an individual in danger, or prejudices an upcoming judicial proceeding.
- is empowered to 'follow up' its recommendations and reports with government and parliamentary agencies and officers.

(m) That:

- the federal integrity Commission is subject to oversight by a bi-partisan Parliamentary committee;
- timely and accessible review processes are available for individuals and agencies affected by the exercise of the Commission's powers, mitigating recourse to court proceedings; and
- operational reviews of the Commission's statutory framework are conducted by an independent and competent review body.

Part II – Framing certain relevant considerations

Our review of published research in this area suggests that there are two preliminary, but important, considerations for the committee in contemplating a major institutional reform in the area of anti-corruption. One is a practical consideration: the *actual incidence* of corruption and how to meet it. Experts seek to measure levels of actual corruption and whether they are rising or falling, though it is difficult. Clearly public sector corruption exists at some level in Australia and a range of institutional mechanisms have emerged to address it (as detailed in Parts III and IV). The present question for the Committee is whether a new institutional response is needed at the federal level. Our submission responds to that question by presenting and analysing existing approaches to institutional design that seek to deal with actual instances of corruption in a practical and effective way, while drawing attention to other important values which should weigh in the balance.

The second consideration is more intangible: it involves *public perceptions* of corruption and the corresponding impact on overall public trust in our system of government. Our submission acknowledges that this too can be an important objective in framing institutional responses to corruption, though we also recognise that public perceptions can have a complex relationship with the incidence of actual corruption and with measures taken to combat it. Drawing on that published research and data, we now elaborate on those two points.

Actual corruption

According to Transparency International's Corruption Perceptions Index, which is the most widely cited indicator of corruption worldwide, Australia is currently ranked 13th least corrupt out of 114 countries.[1] Transparency International ranks countries using a composite index of survey and other assessment data collected by independent institutions.[2] Australia has maintained a high rank on a global scale throughout the 21 years that this survey has been conducted. However, we note that there has been a steady decline by two places each consecutive year from 7th in 2012.[3]

There have been certain high-profile instances of irregular conduct involving federal public sector employees and politicians from various political parties in recent years, in areas not within the jurisdiction of the current federal anti-corruption watchdog (ACLEI). In a notable example of which the Committee is likely to be aware, since 2007 allegations have been made that secret commission payments were made by the Reserve Bank of Australia's subsidiaries, Note Printing Australia Ltd and Securency International Pty Ltd, in a number of

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1 'Corruption Perceptions Index 2015', Transparency International, available at: http://www.transparency.org/cpi2015.

2 The title of this index suggests that it relies on 'perceptions' not actual evidence of corruption to reach its conclusions. Nonetheless, there are two reasons for its inclusion under the heading of 'actual corruption' in this submission. First, for obvious practical reasons, empirical data quantifying actual corruption is difficult to obtain and therefore the index relies heavily upon proxy measures, derived from reported perceptions and experience. Ultimately, however, it is purported to be a measure of actual corruption despite its reliance on these proxies. Second, the index is widely accepted internationally as a measure of actual corruption.

3 It is too early yet to determine whether this represents a long-term trend or normal variation in the data, and caution is emphasised here given that Australia's ranking has varied somewhat over the years. For example, Australia was ranked 11th in 2001, 9th in 2006 and 11th again in 2007.

overseas jurisdictions.[4] In another high-profile example, in the mid-2000s two independent inquiries found that a federal statutory corporation, AWB Limited, had provided kickbacks to the Iraqi government in order to secure tender contracts for Australian wheat.[5]

Other federal government agencies have also been the sites of instances of corruption or other irregular conduct, albeit on a less systemic level. In 2015, Christopher Hill, an employee of the Australian Bureau of Statistics was convicted and sentenced to three years and three months incarceration after pleading guilty to charges of insider trading, identity theft and abuse of public office.[6]

In a recent High Court case, *McCloy v New South Wales,*[7] a majority of the Court writing in a joint judgment emphasised that there is more than one type of corruption risk relevant to the contemporary Australian system of government and politics. In 'quid pro quo' corruption, for example, a 'candidate for office may be tempted to bargain with a wealthy donor to exercise his or her power in office for the benefit of the donor in return for financial assistance'.[8] On the other hand, there is a more subtle kind of corruption, known as clientelism, where officeholders decide issues in accordance with the wishes of their largest financial donors rather than their constituents. That subtle form of corruption arises from a relationship of dependency that can exist between an officeholder and wealthy patrons, but is difficult to detect.[9] According to French CJ, Kiefel, Bell and Keane JJ, both forms of corruption 'threaten the quality and integrity of governmental decision-making'.[10]

A 2014 Australian study found that personal experiences of bribery, as a subspecies of corruption, in relation to public officials were very low.[11] In surveys conducted in 2007 and 2012, less than 1 per cent of respondents reported that they or someone in their family had 'encountered a public official seeking a bribe 'very' or 'quite' often'.[12] Indeed, 86 per cent of respondents in 2007 and 91 per cent in 2012 reported that neither they nor a member of their family had encountered a public official seeking a bribe in the previous 5 years. Nonetheless, bribery is only one form of corruption. The study distinguished between 'low level' corruption involving public sector employees that might be encountered in daily life, such as bribery, and 'high level' corruption which involves political figures or other well-known people and attracts a great deal of publicity.[13] That distinction overlaps with the one drawn by the High Court in *McCloy* and discussed in the previous paragraph.

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4 'Statement Concerning Securency International Pty Ltd and Note Printing Australia Ltd', Reserve Bank of Australia, 1 July 2011, available at: http://www.rba.gov.au/media-releases/2011/mr-11-14.html; 'Questions remain on RBA's involvement in scandal', *Australian Financial Review* (2 October 2013).

5 'Report on Work undertaken by the Australian Federal Police's Oil for Food Taskforce', Senate Standing Committee on Legal and Constitutional Affairs – Chair's Minority Report, Chapter 2, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Oil/Report/d02.

6 'Jailed insider trader Lukas Kamay who bought 'The Block' apartment loses appeal', *The Age* (13 November 2015).

7 [2015] HCA 34.

8 *McCloy v New South Wales* [2015] HCA 34, [36] (French CJ, Kiefel, Bell and Keane JJ).

9 Ibid.

10 *McCloy v New South Wales* [2015] HCA 34, [38] (French CJ, Kiefel, Bell and Keane JJ).

11 McAllister, 174.

12 McAllister, 177.

13 McAllister, 183.

Public perception of corruption

On a number of indicators, it appears that there is a growing perception within the general population that integrity standards in Australia are declining. For example, approximately 1000 people in Australia were surveyed for Transparency International's Global Corruption Barometer. In response to the question 'Over the past two years how has the level of corruption in Australia changed?', 54 per cent of participants in 2010 and 59 per cent of participants in 2013 responded that they felt that corruption had increased.[14] Corroborating these results, a study conducted in 2007 found that 63 per cent of respondents were of the view that corruption was increasing in Australia.[15] In a similar study conducted in 2012, 43 per cent of respondents felt that corruption had increased in Australia.[16] These studies do not, however, differentiate between perceptions of corruption at a federal, state and local level.

Complex relationship between actual corruption and perceptions of it

There is no necessary correlation between the actual incidence of public sector corruption and public perceptions of it in the view of some authors. Indeed, there is some suggestion of an inverse relationship between the two, at least in the short-term, in the sense that exposure of incidents of actual corruption may erode public confidence. For example, McAllister posits that public perceptions of the prevalence of corruption amongst Australian public officials increased dramatically after a series of high-profile Royal Commissions that began in the early 1970s.[17] Similarly, Bowman and Gilligan found that Australians were more likely to nominate public sector organisations as being associated with corruption than those in the private sector. They speculated that the explanation for this might lie in the 'relatively higher levels of scrutiny by the media of individuals and organisations that function in the public domain'. [18]

These hypotheses suggest a short term, positive correlation between high-profile public attention on exposure of corruption and lower public confidence in the overall integrity of government. It may be, however, that the strength of that effect diminishes over time and that simultaneously it is accompanied by a sense of reassurance that public institutions are acting to detect and address corruption. One paradoxical possibility is that exposure of corruption may simultaneously erode trust in the short term and work to enhance it over the longer term. We suggest that those designing reforms in this area be mindful of both objectives – addressing actual corruption and increasing public confidence in government institutions – and that due to their complex inter-relationship, those objectives may be achieved over different timelines.

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14 'Corruption by Country: Australia', Transparency International Global Corruption Barometer 2011 and 2013, available at: https://www.transparency.org/country/#AUS.

15 Diana Bowman and George Gilligan, 'Public awareness of corruption in Australia' (2007) 14(4) *Journal of Financial Crime* 438.

16 Ian McAllister, 'Corruption and confidence in Australian political institutions' (2014) 49(2) *Australian Journal of Political Science* 174.

17 McAllister, 176.

18 Bowman and Gilligan, 447.

Part III – Analysis of current federal integrity mechanisms

The Committee has been directed to evaluate the adequacy of existing integrity mechanisms in the Australian Government's legislative, institutional, and policy framework. Our aim in this Part is assist the Committee by surveying the capacity of existing Commonwealth institutions, in both a practical and jurisdictional sense, to confront corruption and foster integrity. Our intention in doing so is to bring into clearer focus questions of how a new institution would interact, functionally and jurisdictionally, with its existing counterparts. A central dilemma raised in this Part is whether the Australian public is best served by the introduction of a new integrity commission with broad jurisdiction and powers, or by tailored enhancements to existing institutions and mechanisms.

We have chosen to focus our review on three institutions, selected for their importance, jurisdictional breadth, possession of strong coercive powers, and mandates related broadly to enforcement of public sector integrity within the Commonwealth sphere. These institutions are:

(a) the Australian Commission for Law Enforcement Integrity ('ACLEI');

(b) the Commonwealth Ombudsman; and

(c) the Office of the Commonwealth Auditor-General.

Below is an overview of each institution, with a more detailed explanation of their jurisdiction, investigative powers and processes and statutory guarantees around independence contained in **Appendix 1.**

In the final section of this Part, we consider the three institutions in relation to a broader legislative and regulatory environment, including the roles of other integrity institutions and the critical oversight role played by Parliament itself. We conclude by identifying the existing vulnerabilities and gaps in the current federal integrity landscape, making a number of recommendations for the Committee's consideration in addressing these.

(a) The ACLEI

The ACLEI is the clearest federal counterpart to standing anti-corruption and integrity commissions that exist at the State level. While functionally similar to those State counterparts, the ACLEI is distinguished by a narrower jurisdictional focus on Commonwealth law enforcement agencies. This focus nevertheless concerns a field in which concern for the proper observance of official powers is acute. Within this field the Integrity Commissioner, acting as head of the ACLEI, has a robust capacity to detect and address corruption, instil integrity, and inform the public.

However, in terms of achieving the possible objective of building public confidence in the integrity of federal government, ACLEI suffers from a fundamental, although perhaps relatively easily addressed, flaw: it has an incredibly low public profile. ACLEI's jurisdictional restriction to suspected corruption issues arising within Commonwealth law enforcement agencies, combined with the secrecy with which it necessarily conducts much of

its activities, may result in it being little known to the Australian public. Whatever the reasons for its very low profile, it is unfortunate given the significance of the ACLEI in the Commonwealth anti-corruption landscape. It is possible that much of the expressed public concern for a federal integrity and anti-corruption commission might be addressed through better dissemination of the ACLEI's role, its responsibility to consider public referrals of suspected corruption issues that pertain to law enforcement, and its public reporting duties.

The ACLEI has several laudable design features, including the authority for the Commissioner to initiate investigations on his or her own motion; the ability to publicly report dissatisfaction with agency follow-up to investigations and inquiries; discretionary ability for the Commissioner to educate and inform the public of his or her work; and standing responsibility to submit a public annual report to Parliament. Each of these measures lends valuable transparency to matters within the Commissioner's ambit of investigation and oversight.

Appropriate use of the Commissioner's powers, and the proper balancing of transparency and secrecy in the conduct of investigations and inquiries, depends heavily upon the sound judgment of the Commissioner. While supportive of institutional versatility and discretion, we advocate for strong standards to govern a Commissioner's judgment in these areas, as expressed more fully in Part IV of this submission. We also advocate in that Part for restraint in the conferral and use of certain investigative powers, some of which are presently conferred on the Integrity Commissioner.

(b) The Commonwealth Ombudsman

The Commonwealth 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 also provides an important point of contact for facilitative, confidential reporting of corruption concerns within the Commonwealth public service.

The Ombudsman lends important values of conciliation and problem-solving to the Commonwealth integrity framework. However, its processes are at once a strength and a 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. An emphasis on privacy may also diminish the Ombudsman's power of deterrence. 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 critical findings in a report.

The ACLEI and Ombudsman provide powerful institutional comparators. The ACLEI exercises a larger and more imposing set of powers within a focused jurisdictional mandate.

The Ombudsman exercises flexible and adaptive powers over a broader and more diverse field of Commonwealth activities. The two institutions intersect in the Ombudsman's duty to report serious corruption issues to the Integrity Commissioner, and in the fact that ACLEI activities may be subject to the Ombudsman's review.

(c) The Auditor-General

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 public sector 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 three major federal integrity institutions, combined with the strongest institutionalised protections for independence and the greatest transparency attaching to final reports. Its focus on systemic issues, and capacity to examine issues on a cross-sectoral basis, lends a necessary and distinct element to the Commonwealth integrity framework. Nevertheless, the Auditor-General is not an intuitive institutional starting-point for investigating corruption and integrity concerns. 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 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.

(d) Federal integrity institutions in context and options for reform

The preceding review does not account for the full breadth of Commonwealth mechanisms that foster integrity in government or that help root out instances of corruption. The institutions themselves must be understood as part of a dynamic governance framework, comprising federal laws, regulations, and policies, together with a range of specialised agencies with their own oversight mechanisms adapted to context, ad hoc royal commissions, federal administrative tribunals and the judiciary, and ultimately Parliament itself. While the promotion of integrity is *functionally* associated with specific institutions, integrity itself is a *value* that should pervade government and be continually reinforced by multiple institutions in their interaction.

This observation is important both in identifying vulnerabilities in federal integrity mechanisms and in evaluating their significance. Gaps in these mechanisms may define the contours for the reform of current institutions, or for the design of entirely new institutions.

The fact that the mechanisms are integrated in a dynamic and interactive framework nevertheless calls attention to the central dilemma emphasised in this submission – that is, whether Parliament should proceed with the adoption of a new integrity commission or with focused institutional reforms, and the deeper analytic challenge of defining purposive goals to guide this selection. Consistent with our aim of helping to inform, rather than direct, the Committee's position, we offer recommendations below that are conducive both to the improvement of existing institutions or to the design of a new integrity commission.

Our review of the three major integrity institutions in this part reveals the following institutional vulnerabilities and gaps:

(i) **Limited ability to scrutinise the conduct of Ministers and Parliamentarians.** None of the institutions considered have express mandates to scrutinise the conduct of members of parliament or of government ministers. The Ombudsman is statutorily restricted from doing so, and the Auditor-General's systemic mandate clearly does not embrace such a role. Of the institutions considered, only the ACLEI has *incidental* ability to investigate ministers and members of parliament, and this would only occur were such individuals are implicated in a corruption issue under investigation by the Commissioner.

Traditionally, the exposure of ministers and parliamentarians to coercive authority has been confined to hearings constituted by parliamentary committees or 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. The Committee may consider it appropriate that members of parliament and government ministers only fall under coercive scrutiny in the exceptional circumstances signified by a royal commission or criminal prosecution, or pursuant to the inherent regulatory powers and privileges of Parliament.

We recommend the Committee consider institutionalised means of enhancing integrity compliance within Parliament itself, such as through the establishment of an independent parliamentary ethics officer.

Tasmania's State Parliament, for example, benefits from a Parliamentary Standards Commissioner tasked with providing advice to members of the Parliament on 'conduct, propriety and ethics' in the interpretation of any relevant codes and guidelines, as well as with respect to the parliamentary register of interest.[19] The Commissioner also provides guidance and training on ethics standards to members of Parliament.[20] Our recommendation in this respect relates to our concerns, expressed in Part IV, about bestowing an advisory function, at least as it relates to instances of individual conduct, upon a standing investigatory body.

19 *Integrity Commission Act 2009* (Tas), s 28.
20 Ibid.

(ii) **Limited ability to investigate government agencies through the convening of hearings outside the law enforcement context.** While the Ombudsman has a relatively broad jurisdiction (excepting the conduct of federal 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 narrowly circumscribed to the law enforcement context. As such, the effects of such hearings in facilitating transparency, public education and awareness of corruption issues, and in fostering deterrence, are not available on a broad, standing basis outside ACLEI's ambit. The investigative tools offered by the examination and cross-examination of witnesses, whether conducted in public or in private, are also not available outside of this context.

The Committee must consider whether confinement of standing hearing powers to the law enforcement context is desirable from a policy perspective (recalling that ad hoc inquiries and parliamentary committees may also be deployed to convene special hearings outside this context). Further, if it is determined it is desirable to extend this jurisdiction, the Committee must determine whether the most appropriate way of doing so is to extend the ACLEI's jurisdiction, or create a new and separate integrity institution, and if so, what its relationship to ACLEI would be (in this respect, we draw the Committee's attention to the 2012 NIC Bill, discussion in more detail in Part IV, below).

(iii) **Generally weak safeguards for budgetary appropriations.** Provisions for the security of tenure and remuneration of officeholders heading the various integrity institutions may be easily emasculated where the functional capacities of their institutions are undermined by budgetary deprivation. Of the three institutions reviewed, only the Auditor-General enjoys the security of Parliamentary control over budgetary appropriations.

We recommend:

(a) should the Committee consider that other integrity-promoting institutions play roles equal in importance to the Auditor-General, and equally demanding of strong independence, harmonising the statutes to place budgetary control for institutional appropriations in the hands of Parliament; and

(b) should the Committee elect to proceed with a new integrity commission, that it benefit from the same budgetary security.

(iv) **A lack of overall coherence.** 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. Our research in preparation of this submission bore out that 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. Public confidence in the Commonwealth integrity framework and access to its resources could only be advanced by publicising accessible material aimed at raising awareness of integrity institutions and their roles.

We recommend that the Committee commission production of a* Commonwealth Integrity Manual*, accessible to the general public, setting out the roles, processes, powers, and responsibilities of all integrity institutions capable of receiving individual concerns or complaints. Any new integrity institution should be incorporated into this Manual. An electronic copy of the manual should be provided to all employees of the Commonwealth public service.

Part IV – Designing a federal integrity commission: An analysis of possible design features from State regimes

We have undertaken a detailed survey of the statutory framework establishing and governing the various anti-corruption commissions in the Australian states.[21] We have identified a number of key areas for consideration by the Commonwealth in designing a federal integrity commission. These relate broadly to questions about jurisdiction, independence, powers and accountability. In this Part we will explain the various ways that these features have been designed across the Australian jurisdictions, commenting on the strengths and weaknesses of the different statutory positions that have been adopted. In so doing, while we make some strong recommendations as to best design, more often there is no clear 'best model'. Rather, different design models need to be considered and their advantages and disadvantages weighed.[22]

This analysis draws on existing State regimes, supplemented with references to the regime described in the private Senator's National Integrity Commission Bill 2013 (The NIC Bill 2013). The federal National Integrity Commission (NIC) proposed in that Bill would mainly consist of three officers, but most of the comments in this Part relate to one of those officers: the National Integrity Commissioner (NI Commissioner). In addition to creating the NI Commissioner, the Bill provides that the new NIC would 'absorb' an existing entity discussed in Part III, the Law Enforcement Integrity Commissioner (LEI Commissioner).. That LEI Commissioner was established in 2006 and its eponymous legislation is largely

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21 The New South Wales Independent Commission Against Corruption: *Independent Commission Against Corruption Act 1988* (NSW); the Queensland Crime and Corruption Commission: *Crime and Corruption Act 2001* (Qld); the Western Australian Corruption and Crime Commission: *Corruption, Crime and Misconduct Act 2003* (WA); the Tasmanian Integrity Commission: *Integrity Commission Act 2009* (Tas); the Victorian Independent Broad-based Anti-corruption Commission: *Independent Broad-based Anti-corruption Commission Act 2011* (Vic); and the South Australian Independent Commissioner Against Corruption: *Independent Commissioner Against Corruption Act 2012* (SA).

22 See Peter Allen and Elizabeth Proust (chair), *Review of Victoria's Integrity and Anti-Corruption System: Report* (State Services Authority and Public Sector Standards Commissioner, 2010) available at <https://www.vic.ipaa.org.au/sb_cache/professionaldevelopment/id/193/f/PSSC_Integrity_Review.pdf> 21.

untouched by the NIC Bill 2013. Under the proposed Bill, the LEI Commissioner would continue to investigate corruption in relation to national law enforcement agencies and exercise other functions conferred by s 15 of the 2006 legislation, with these 'law enforcement integrity commissioner functions' described in the new legislation as functions of the NIC. The third officer, the Independent Parliamentary Advisor, is newly created by the NIC Bill 2013 and dealt with below at (b), non-investigative functions.

The following areas of design are considered in more detail below:

Jurisdiction:

(a) the **scope of conduct** that will fall within the Commission's investigatory jurisdiction, and particularly how to limit that jurisdiction to the investigation of serious or systemic misconduct in a meaningful way;

(b) the **non-investigative functions** of the Commission, and more specifically whether it will be tasked with educative, research, preventive and advisory functions in addition to its investigative functions, and the relationship between these investigative and non-investigative functions;

(c) the **agencies and individuals** that will fall within the jurisdiction of the Commission, particularly by reference to the jurisdiction of other public investigatory agencies;

Independence:

(d) the **statutory guarantees of independence** that will be provided to the Commissioner, particularly in relation to appointment, remuneration and removal;

Powers:

(e) the **investigative powers** granted to the Commission, and more specifically whether these will extend to those ordinarily associated with Royal Commissions (including the power to compel testimony from witnesses, the production of documents and search and seizure powers), or whether they will extend to even more extraordinary powers, including the power to undertake controlled operations, use assumed identities or use firearms or other weapons in the course of an investigation;

(f) the power of the Commission to undertake examination of witnesses in **private or public hearings**, what discretion there is to determine whether to hold a public hearing, and the **applicability of rules of evidence and privilege** to Commission hearings, and restrictions on the use of information and material obtained by the Commission in subsequent proceedings;

(g) the existence of **confidentiality obligations** in relation to the publication of the conduct of a Commission's investigations;

(h) the **power of the Commission to make findings** in relation to the conduct of agencies or individuals, the power to refer the matter to other agencies, for example, to pursue prosecution, the **reporting obligations** of the Commission and its power to ensure the report is made public, and its powers to follow up the recommendations made in its report;

Accountability:

(i) the **oversight regime** accorded to the Commission, either through an independent statutory office or a parliamentary committee.

(a) JURISDICTION: scope of conduct

Four key questions need to be considered in relation to the scope of conduct:

(i) Whether the Commission's jurisdiction should be exclusively targeted at corruption, or whether it should be combined with the Australian Crime Commission's jurisdiction to investigate organised crime.

Scott Prasser has identified two models for anti-corruption commissions, what he terms the 'generalist/merged' model and the 'specialist/bifurcated' model. 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.'[23] The 'specialist/bifurcated' model, in contrast, separates the agencies responsible for integrity and crime.[24] In effect, a generalist/merged model would combine the functions of a proposed national integrity commission and that of the Australian Crime Commission. A specialized/bifurcated model would keep them separate. This is the approach adopted, for example, in the NIC Bill 2013. The 2013 Bill provides for an umbrella organisation at the federal level in the sense that it would be constituted by a specialist integrity commission, a law enforcement agency watchdog and an independent advisor to parliamentarians. But essentially the Bill pursues a specialist/bifurcated model under Prasser's typology, as it contemplates the continued independent operation of the specialist organised crime body at the federal level, the Australian Crime Commission.

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.[25]

(ii) Whether the Commission will have the power to investigate conduct of a third party (who is not a public official) that might affect a public official's capacity to conduct their duties properly, or whether it is limited to investigating conduct that involves some wrongdoing on the part of the official themselves.

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23 Scott Prasser, 'Australian Integrity Agencies in Critical Perspective' (2012) 33 *Policy Studies* 21, 27.
24 Ibid.
25 Ibid.

This was the question that was in issue in the 2015 High Court decision *ICAC v Cunneen.*[26] That case involved Ms Margaret Cunneen SC's alleged conduct in asking her son's girlfriend to lie to a police officer 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). At the time, this provided, relevantly:

> **8 General nature of corrupt conduct**
>
> (1) Corrupt conduct is:
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
>
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
>
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
>
> (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters …

The majority of the High Court accepted that Ms Cunneen's alleged conduct did not fall within this definition because, first, it involved Ms Cunneen in her personal capacity; and secondly, 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 had limited 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.[27]

The type of conduct that Gageler J identified 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, how taxpayers' money is spent, how public assets are used, and equality of access to government services and contractors. As such, there is a strong argument it should fall within the jurisdiction of a Commission, and not simply be left to investigation by the police.

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26 [2015] HCA 14.

27 See, eg, at [91] and [92].

This was the view ultimately adopted by the New South Wales government, which, following an Independent Panel's review of the ICAC headed by former Chief Justice of the High Court the Honourable Murray Gleeson AC QC,[28] introduced the following provision into s 8:

> (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:
>
> (a) collusive tendering,
>
> (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
>
> (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
>
> (d) defrauding the public revenue,
>
> (e) fraudulently obtaining or retaining employment or appointment as a public official.

Whether a Commission's jurisdiction ought to extend to conduct of this kind will be informed by a number of factors. First, extending the extraordinary investigatory powers of the Commission to the conduct of non-government officials should be done with caution. These powers are usually justified on the basis that government corruption is of a peculiar nature: it is often 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. Second, whether such extension is required should be informed by the objectives behind the Commission's establishment. If those objectives are predominantly to investigate improper conduct within government, there is little justification for this extended jurisdiction. However, if those objectives are wider and extend to investigating conduct that has the capacity to undermine public confidence in government decision-making, there are good arguments to include such conduct. Finally, a further factor in determining the extent of jurisdiction will be the extent to which such conduct is subject to adequate investigation by other, existing agencies.

(iii) Whether the Commission will only investigate conduct that amounts to criminal conduct, or whether it will include conduct that might amount, for example, to a disciplinary offence.

In some jurisdictions, the definition of corruption to which the Commission's jurisdiction is directed is limited only to criminal conduct (see, for example, the definition of 'corrupt' conduct in the *Independent Commissioner Against Corruption Act 2012* (SA)). Lesser forms of improper conduct – defined in the South Australian statute as misconduct and

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28 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>.

maladministration – fall outside the jurisdiction of the ICAC (see s 7(1)(a) and s 24(1)(a)), but within the investigative jurisdiction of other bodies (s 7(1)(b) and s 24(2)(a)).[29]

Other statutory regimes have included an extended definition of corruption, with a corresponding effect on the jurisdiction of the Commission. So, for example, under s 9 of the *Independent Commission Against Corruption Act 1988* (NSW), the definition of corrupt conduct, provided in s 8, concerns conduct that possibly constitutes or involves:

(a) a criminal offence; or

(b) a disciplinary offence; or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

However it should be noted that 'conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct … is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.'

The decision as to whether to extend the Commission's jurisdiction beyond conduct that might amount to a criminal offence should be informed by a number of factors, including the extent to which public misconduct and maladministration is criminalised within a particular jurisdiction or, alternatively, is regulated through 'soft law' and disciplinary processes..

This decision must also be informed by the objective of the Commission. If it is to supplement existing integrity mechanisms and be directed only at conduct that has the potential to *seriously* undermine public confidence in government administration, one way of appropriately limiting the jurisdiction would be to limit the definition of corrupt conduct to that which could amount to criminal conduct. Another way would be to limit the Commission's investigatory jurisdiction to 'serious' or 'systemic' conduct that might have the capacity bring the integrity of government administration into disrepute.

(iv) Whether the Commission's investigatory function will be limited to 'serious' or 'systemic' corruption, and if so, how to determine whether conduct meets this threshold.

The different statutory regimes in place across the Australian State jurisdictions direct their Commissions to focus their investigative function on serious or systemic wrongdoing. There are obvious and compelling reasons for limiting the investigative jurisdiction of a prospective federal Commission in this way. Beyond matters of cost efficiency and reduction in overlap between the jurisdiction of the Commission and other investigatory agencies, it ensures that the extraordinary investigative powers that are conferred on the Commission are used in a carefully targeted way. In this respect limiting the jurisdiction of the Commission will reduce the sphere in which these powers can be used against individuals and intrude upon basic

[29] Although note that the Commissioner can exercise the powers of other investigative agencies in relation to this less serious conduct: s 24(2)(ab), it would appear this is intended to be an exceptional rather than normal circumstance.

rights.

However, provisions that attempt to limit the jurisdiction in this way are often silent on the means of identifying whether conduct is 'serious' or 'systemic' in nature. This denies Commissioners of an important interpretive guide. For example, s 12A of the *Independent Commission Against Corruption Act 1988* NSW) directs the Commission 'as far as practicable' to 'direct its attention to serious corrupt conduct and systemic corrupt conduct.' Further, s 74BA provides that the Commission is not authorised to include a finding or opinion that conduct of a specified person is corrupt conduct 'unless the conduct is serious corrupt conduct.' In determining whether to investigate conduct, s 20 directs the Commission to consider whether the subject-matter is trivial, whether the conduct occurred at too remote a time to justify investigation, or – if the investigation was initiated as a result of a complaint – the complaint was frivolous, vexatious or not in good faith. Beyond this, there is no assistance or statutory guidance given to the Commission as to what would amount to 'serious' or 'systemic' conduct.

In comparison to the State regimes, some guidance as to what amounts to serious or systemic corrupt conduct is contained in the *Law Enforcement Integrity Commission Act 2006* (Cth). Section 5 defines serious corruption to mean:

> corrupt conduct engaged in by a staff member of a law enforcement agency that could result in the staff member being charged with an offence 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 in a law enforcement agency or in law enforcement agencies.

The NIC Bill 2013 makes no reference to seriousness in the definitions of 'corrupt conduct' and 'corruption issue', the terms that trigger the NI Commissioner's powers of investigation. The only situation in which 'the seriousness of the corruption issue or issues' plays a role is in deciding whether a hearing by the NI Commissioner is held in public or in private, once an investigation is underway.

A further consideration is that Commission proceedings may be hampered by cumbersome judicial review applications surrounding the proper interpretation of limiting terms such as 'serious' and 'systemic'. This problem could be circumvented by a statutory provision that allows an individual to refer a Commissioner's interpretation to a more accessible and timely oversight body, such as a statutory agency, parliamentary committee, or administrative review tribunal.

We recommend that a federal Commission's jurisdiction be limited to investigating serious or systemic misconduct, and to make such limitations on jurisdiction meaningful, the statute governing any new federal Commission should include a provision specifying the factors to be taken into account in determining whether conduct is 'serious' or 'systemic' for the purposes of initiating an investigation (as is currently the case under the Law

Enforcement Integrity Commissioner Act 2006). We also recommend that the governing statute specify a clear and simple path for review of such a decision.

(v) Whether the Commission should extend to possible future conduct.

The NIC Bill 2013 extends the scope of the NI Commissioner's jurisdiction beyond *actual* conduct by an *identified* official. It does so by basing jurisdiction not directly on corrupt *conduct* but on allegations raising a corruption *issue*.

A corruption issue can involve the conventional jurisdictional threshold question of whether a public official has engaged in corrupt conduct. But it can also extend to the question of whether an official 'will, or may at any time in the future, engage in corrupt conduct'. Section 8 of the Bill continues this expansive approach by stating that an allegation 'may raise a corruption issue even if the identity of the person is unknown, is uncertain or is not disclosed in the allegation or information'.

In combining a predictive assessment of future corruption and the possibility of unknown and unidentified public officials, the Bill provides for an extremely broad definition as to the scope of conduct that can trigger an investigation by the NI Commissioner. The Explanatory Memorandum states that the capacity to investigate cases 'where corrupt conduct is foreseeable in the future' makes the NI Commissioner's role 'proactive in addressing corruption', while enabling jurisdiction where the identity of the official allegedly engaging in corrupt conduct is unknown ensures that 'corruption issues cannot be ignored because the person concerned has not been identified at the outset'.

(b) JURISDICTION: non-investigative functions: educative, research, preventive and advisory functions

Most anti-corruption commissions have non-investigative functions, including educative, research, preventative and advisory functions. Educative functions usually extend to educating both the government and the public regarding corruption. For example s 13(1) of the *Independent Commission Against Corruption Act 1988* (NSW) includes the following wide-ranging non-investigatory functions:

> (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,
>
> (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration promoted,
>
> (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,
>
> (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,
>
> (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,

> (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,
>
> (j) to enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration,
>
> (k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

The NSW ICAC thus undertakes a substantial research,[30] preventative[31] and educational program.[32]

There are good arguments that, given the powers, functions and therefore expertise and experience of a Commission, it is well-placed to undertake research, educational and preventative functions. However, we would make two qualifications to this statement. The first is that any non-investigatory functions bestowed upon a commission must be accompanied by adequate funding, so as to ensure that they are able to be performed effectively, and that they do not inappropriately take resources away from the Commission's primary function of investigating corruption.

The second concerns the efficacy and propriety of granting a Commissioner an advisory function that includes delivery of advice to officials on factually specific (as opposed to general or systemic) corruption concerns. Public agencies and officials may be unlikely to seek advice and guidance from a Commission that also has power to investigate and make findings against them. As such, we would recommend that this aspect of the advisory function be bestowed on an institution other than the Commission.

Models exist for such a division of functions. In Queensland, for example, the function of the Integrity Commissioner is, broadly, to provide written advice to members of the Queensland Parliament amongst others on matters pertaining to ethics and integrity. This includes on matters relating to conflicts of interest.[33] Similarly, in Tasmania, the Parliamentary Standards Commissioner is tasked with providing advice to members of the Tasmanian Parliament on 'conduct, propriety and ethics' in the interpretation of any relevant codes and guidelines, and with respect to the parliamentary register of interest.[34] The Commissioner also provides guidance and training on ethics standards to members of Parliament.[35]

Under the NIC Bill 2013, the NI Commissioner has a function of making own-motion or on-request reports and recommendations to Parliament about legislative or administrative action on corruption issues, as well as providing advice on request to officials and agencies regarding steps to reduce the likelihood of corrupt conduct. Similarly, the LEI Commissioner has some non-investigatory functions under s 15 of its legislation, including data collection, analysis and dissemination. The Bill however effects an internal functional separation of its investigatory roles and its advisory role in relation to specific issues, but only in respect of ministers, parliamentarians and former parliamentarians: within the proposed NIC the

30 See, eg, https://www.icac.nsw.gov.au/about-corruption/research.
31 See, eg, https://www.icac.nsw.gov.au/preventing-corruption.
32 See, eg, https://www.icac.nsw.gov.au/education-and-events.
33 *Intgrity Act 2009* ((Qld), s 12.
34 *Integrity Commission Act 2009* Tas), s 28.
35 Ibid.

Independent Parliamentary Advisor has no investigatory functions and its role is advisory only. Though the NI Commissioner is designated as the head of the Commission in s 10(3), that office-holder would be legally obliged by s 153 to designate staff to positions assisting the Independent Parliamentary Advisor and such staff must not be involved in the performance of the functions carried out by the NI and LEI Commissioners.

We recommend that a Commission be given non-investigative functions, including those relating to research, education and prevention of corruption, with the following two caveats:

(a) any non-investigatory functions bestowed upon a commission must be accompanied by adequate funding; and

(b) functions related to the giving of advice on specific ethics and corruption issues be reserved to an institution other than a federal integrity Commission.

(c) JURISDICTION: agencies and individuals

As we have set out in Part I, already at the federal level a number of federal agencies and officers are subject to the jurisdiction of the ACLEI –the federal law enforcement agencies (AFP, ACC, NCA), the Department of Immigration and Border Protection, and the Australian Border Force. Notably absent from the jurisdiction of the ACLEI are government Ministers and parliamentarians.

In contrast, State anti-corruption Commissions have a broad jurisdiction to investigate the conduct of government, parliamentary and judicial agencies and individual government officers. This jurisdiction usually extends beyond the ordinary jurisdiction of Ombudsman officers, to include, for example, the conduct of Ministers, parliamentarians, and judicial officers. We would note that at the federal level, it is highly unlikely that a statutory integrity Commission would have the constitutional power to investigate the conduct of judges. This is likely to involve an improper threat to the independence of the judiciary, protected by Chapter III of the Constitution.[36] Commissions are often vested with jurisdiction to investigate the conduct of other integrity agencies, providing an important accountability check on such agencies.

Often Commissions will have a separate and expanded jurisdiction to deal with complaints made against police officers, (for example, the Victorian IBAC), or there will be a separate investigatory agency established to deal with such complaints (for example, the New South Wales Police Integrity Commission, established under the *Police Integrity Commission Act 1996* (NSW)).

In some Acts, the jurisdiction of the Commission is extended to government contractors. For example, 'public body' is defined in s 6 of the *Independent Broad-based Anti-corruption Act 2011* (Vic) as including 'a body that is performing a public function on behalf of the State or

[36] See further Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38(1) (*Melbourne University Law Review* 1, 33-36. That paper recommends the creation of an independent disciplinary body, but one that is carefully designed so as not to transgress Chapter III of the Constitution.

a public body or public officer (whether under contract or otherwise)'; and 'public officer' is defined to include 'a person that is performing a public function on behalf of the State or a public officer or public body (whether under contract or otherwise)'. We believe that given the increasing prevalence of the contracting out of public services and functions, the extension of the Commission's jurisdiction in this way is imperative.

We recommend that a Commission have wide jurisdiction to investigate the conduct of government and parliamentary officers and agencies as well as government contractors.

(d) INDEPENDENCE: statutory statements and guarantees

To fulfill its objectives in investigating government and parliamentary conduct, it is a clear imperative for the Commission to be independent, and be seen to be independent both by those who may be the subject of an investigation and the public. While the exercise of the Commission's functions with independence and impartiality will, ultimately, turn on the integrity of the individuals appointed to the Commission, statutory guarantees of independence can remove potential sources of external pressures, as well as operate as important normative statements of that independence.

(i) General statutory statements/protections

A small number of statutes include a normative statement that the Commission must act independently. For example, s 57 of the Queensland *Crime and Corruption Act 2001* (Qld) provides that the Commission must 'at all times' act 'independently, impartially and fairly having regard to the purposes of this Act and the importance of protecting the public interest'. Some statutes contain more explicit obligations of independence from government control. For example, s 10 of the *Integrity Commission Act 2009* (Tas) provides that the Commission 'is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers.' Such explicit statements are, we believe, important in both normative and preventative terms.

We recommend that a statute establishing a federal integrity Commission contain a normative statement as to the independence of that Commission, and a statement that it is not subject to the direction or control of the Minister.

(ii) Appointment

The statutes all address the question of independence through detailed provision for how the Commissioner will be appointed. It is undesirable that the Commissioner would be appointed by the Executive alone, as the Commissioner is tasked with investigating, predominantly, the conduct of Executive officials. For the same reason, it would be undesirable that the Parliament appoint the Commissioner. Most statutes contain a combination of Executive appointment with Parliament retaining some form of veto. So, for example, under s 5 of the *Independent Commission Against Corruption Act 1988* (NSW), s 5 gives the Governor the power to appoint the Commissioner, subject to the veto of the Parliamentary Committee on the Independent Commission Against Corruption under s 5A. Similarly, the proposed Parliamentary Joint Committee on the National Integrity Commission established by the NIC Bill 2013 can, by majority, veto the Prime Minister's recommendation for the appointment of the NI Commissioner before it reaches the Governor-General.[37]

Western Australia contains a more elaborate scheme that provides the judiciary and the community with input into the appointment process. Section 9 of the *Corruption, Crime and Misconduct Act 2003* (WA) gives the power to appoint the Commission to the Governor (on recommendation of the Premier), but, other than the first appointee, the Commissioner must be selected from a list of three persons nominated by a Committee consisting of the Chief

[37] See clauses 125 and 169 of the NIC Bill.

Justice of the Supreme Court, the Chief Judge of the District Court and a community representative nominated by the Governor and must be supported by a majority of the Standing Committee on a bipartisan basis. 'Bipartisan support' is defined to mean the support of the governing and opposition parties.

Further to the desirability of having both legislative and executive input into the appointment process, it is important that the statute specify the criteria for appointment of the Commissioner clearly. This will encourage a merits-based appointment of highly qualified individuals to the position. Most State statutes provide for minimum qualifications criteria, usually in terms that mirror the criteria for appointment to the judiciary. So, for example, clause 1 of Schedule 1 of the NSW Act provides that a person is not eligible to be appointed Commissioner or Assistant Commissioner unless

> (a) qualified to be appointed as a Judge of the Supreme Court of the State or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of Australia, or
>
> (b) a former Judge or Justice of any court referred to in paragraph (a).

Persons are not eligible if they currently hold judicial office or are members of Parliament of New South Wales or another jurisdiction. This contrasts with the federal *Law Enforcement Integrity Commissioner Act 2006* which expressly contemplates the possibility of a judicial appointee.

We agree that such minimum qualifications provide an appropriate baseline to work from. We would recommend, however, that the statute go further and include a list of criteria that ought to guide the discretion of the Minister and the Parliament. Again, guidance could be taken from those criteria used or advocated in judicial appointments. For example, former Commonwealth Attorney-General Robert McClelland publicised the following 'qualities for appointment' for use by advisory panels evaluating possible candidates under consideration:

legal expertise;

- conceptual, analytical and organisational skills;
- decision-making skills;
- the ability (or the capacity quickly to develop the ability) to deliver clear and concise judgments;
- the capacity to work effectively under pressure;
- a commitment to professional development;
- interpersonal and communication skills;
- integrity, impartiality, tact and courtesy; and
- capacity to inspire respect and confidence.

Without necessarily endorsing these criteria as the most appropriate, we believe it would be desirable to increase the transparency and strength of the merits based process for such criteria to be established and publicised for the appointment of a Commissioner.

We recommend that appointment of a federal integrity Commissioner or Commissioners require the approval of both the Executive and Parliament; that appointment be pursuant to a merit-based review; and that appropriate merit-based criteria for appointment be specified in the governing statute.

(iii) Removal

One of the most fundamental guarantees that can be provided to holders of public office is that of tenure: to prevent the government from removing officeholders that it is displeased with. Where those officeholders are tasked with investigating and reviewing the conduct *of government*, this becomes even more important. This is reflected in each of the State regimes, which generally involve both the government and the Parliament in removal, usually, but not always, restricted to stated grounds.

Under the first identifiable model, removal occurs only on address from both Houses of Parliament, but the grounds are not specified. For example, in New South Wales, under clause 6 of Schedule 1 of the Act, the Commissioner loses office if, inter alia, they become bankrupt, mentally incapacitated or are convicted of an offence punishable by a term of more than 12 months imprisonment, or are removed by Governor on address from both Houses of Parliament. Of concern, the grounds for such removal are not specified for the Commissioner. Rather incongruously, they are limited to incapacity, incompetence or misbehaviour for an Assistant Commissioner.

In other jurisdictions the power of removal is more appropriately constrained. Under s 12 of the Western Australian statute, for example, the Commissioner may be suspended by the Governor if satisfied that the Commissioner is incapable of properly performing the duties of the office, is incompetent or negligent in those duties, or is guilty of misconduct. The Commissioner must be restored unless a statement is laid before both Houses of Parliament and each House passes an address praying for removal.

Victoria has a similar but less constrained model: under s 25, the Commissioner will lose office if, inter alia, they become insolvent or are convicted of an indictable offence. The Commissioner can be removed under s 26 only if the Governor in Council first suspends the Commissioner for misconduct, neglect of duty, inability to perform the duties of the office or *any other ground on which the Governor in Council is satisfied that the Commissioner is unfit to hold office*. A statement of the grounds for suspension must then be laid before each House of Parliament, and each House of Parliament must resolve that the Commissioner be removed. If no resolution is passed, the Governor in Council must remove the suspension.

Some jurisdictions combine the two models. So, for example, in South Australia, under s 8(9), the Commissioner may only be removed on address of both Houses of Parliament – and this is unconstrained – but can be suspended under s 8(10) on a number of grounds: contravening a condition of appointment, misconduct, failure or incapacity to carry out official duties satisfactorily or failure to provide information to the Attorney-General as required by the Act. After a suspension, a statement must be laid before the Houses of Parliament, which then have an opportunity to request the Commissioner be returned to office (s 8(13)). If not, the Commissioner is removed from office (s 8(12)). In addition, the office

becomes vacant if, inter alia, Commissioner becomes insolvent or is convicted of an indictable offence (s 8(14)).

Of concern, under the NIC Bill 2013, Parliament would have *no* role in the removal of the NI Commissioner. The grounds for dismissal by the executive are exhaustively defined in s 131. The Governor-General *must* remove the officeholder if he or she is bankrupt, absent without leave for a prescribed period, engages in outside employment without permission or fails to disclose actual or potential conflicts of interest. The Governor-General *may* terminate the appointment for misbehaviour or physical or mental incapacity.

We recommend that the removal of a federal integrity Commissioner or Commissioners require the approval of the Parliament; that removal only be available for enumerated grounds limited to incapacity, incompetence or misbehaviour.

(iv) Remuneration

Statutory guarantees of independence historically relate to both tenure and remuneration. Federal Court judges, for instance, are given constitutional guarantees of both. In a small number of State jurisdictions, similar statutory guarantees are provided. For example, in Victoria, s 24(5) provides that the remuneration of either the Commissioner or a Deputy Commissioner 'cannot be reduced during his or her term of office unless he or she consents to the reduction.' The NIC Bill 2013 proposes an arms length determination by the Remuneration Tribunal of the remuneration to be paid to the federal NI Commissioner or, absent a determination, that regulations prescribe the Commissioner's pay. Allowances would be prescribed by regulation. However, there is no guarantee that the remuneration cannot be reduced during the Commissioner's tenure. Such a 'no-reduction' provision, while obviously possible to override by statute, would appear an important guarantee both in practical and normative terms.

We recommend that the remuneration of federal integrity Commissioner or Commissioners be protected by a clause preventing reduction during the Commissioner's tenure.

(v) Terms and reappointment

Commissioners' terms are generally kept relatively short – a maximum of five or seven years. This reflects the desirability of reducing the possibility of 'capture' by government of Commissioners who have held the position for too long, and of bringing new talent, fresh ideas and energy into the Commission. However, it does raise the possibility of relatively short turnover and the loss of Commissioners who have proven to be of exceptional quality, as well as the institutional memory that is lost when a Commissioner moves on. This raises the question of reappointment. The possibility of reappointment as Commissioner raises concerns about independence, insofar as an individual might undertake investigations in a way as to ingratiate themselves to the government or to Parliament so as to be reappointed.

To balance these competing concerns, most statutes allow for the appointment of the Commissioner for an initial term of up to five years, with the possibility of reappointment for one further term, although this may be temporally limited. (Although under the Victorian Act, s 24, a Commissioner may be appointed for a term of five years and is not eligible for

reappointment.) For example, the New South Wales statute provides in Schedule 1, clause 4, the Commissioner may be appointed for a term not exceeding 5 years, and is eligible for reappointment, but cannot hold office for terms totalling more than five years. The NIC Bill 2013 applies the same rule to the NI Commissioner in s 126. Under the Queensland statute, s 231, Commissioners may be appointed for a term of up to five years, with the possibility of reappointment, but cannot serve more than ten years.

We recommend that a federal integrity Commissioner's term be limited to one term of five years or, if it is considered desirable that the possibility of reappointment be included, this be limited to one further term, with the Commissioner not being able to hold office for a total term of longer than seven years.

(e) **POWERS: investigative powers**

One fundamental difference between the investigative powers of standing anti-corruption commissions and royal commissions is the ability of a standing commission to issue own motion investigations. Across the Australian State jurisdictions, all commissions are vested with such power and under the NIC Bill 2013, the NI Commissioner would also be able to conduct own motion investigations and public inquiries, at the federal level.

Standing anti-corruption commissions are 'far-reaching'.[38] They are generally vested with the same powers as those enjoyed by a royal commission: the power to compel the production of documents and the power to compel the testimony of witnesses (which might or might not be the subject of claims of privilege, see below). Most commissions will also have search and seizure powers, although in an effort to balance the incursions such powers will have on private interests and rights, these may be required to be exercised pursuant to a warrant. In Queensland, for example, under s 73 of the *Crime and Corruption Act 2001*, the Chairman of the Commission may authorize a commission officer to enter, search and seize documents or things from official premises without a warrant; but under s 86 the exercise of a similar power over non-official premises requires a warrant issued by a magistrate or Supreme Court Judge.

In addition to these wide and coercive powers associated with royal commissions, some standing commissions are vested with further powers, including the power to use surveillance devices (see, for example, Chapter 3, Part 6 of *Crime and Corruption Act 2001* (Qld)); to undertake covert operations (see for example Chapter 3, Part 6A of the *Crime and Corruption Act 2001* (Qld)); the use of assumed identities (see for example Chapter 3, Part 6B of the *Crime and Corruption Act 2001* (Qld)); the seizure of passports (see for example Chapter 3, Part 8 of the *Crime and Corruption Act 2001* (Qld)); and even the use of weapons and firearms (see Part 5 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic)). These additional powers are conferred on those commissions that have a general investigatory jurisdiction that includes organised crime as well as government corruption (as in Queensland and Western Australia), or a specific and wider investigatory jurisdiction in relation to police conduct (as in Victoria).

The powers conferred on the NI Commissioner by Part 6 of the NIC Bill 2013 apply to both

[38] *Balog v ICAC* 1990) 169 CLR 625, [7].

investigations and public inquiries. It has royal commission-style powers to conduct searches (with a warrant), seize material and demand information and production of documents (as to privilege, see below). There are two notable wider powers. The NI Commissioner can obtain a court order for the delivery up of a person's passport (ss 68 and 69). The Commissioner can also confer the status of 'authorised officer' on a staff member of the NIC or a member of the Australian Federal Police under s 110 of the Bill. A NIC staff member so designated has the powers and obligations of a police officer under the *Crimes Act 1914*, including the power of arrest.

The powers of royal commissions are already broad and flexible. The extension of a standing Commission's powers in these further ways should be done only if it is perceived to be absolutely necessary. There are arguments to be made that serious and systemic corruption in government requires extraordinary investigatory powers to uncover. If such extraordinary powers *are* considered necessary, they ought to be subject to judicial oversight and monitoring, and their exercise should trigger compulsory parliamentary reporting obligations.

We recommend that, should it be determined that extraordinary investigative powers including use of controlled operations and assumed identifies are required by a federal integrity Commission, they are subject to judicial oversight and monitoring, and their exercise should trigger compulsory parliamentary reporting obligations.

(f) POWERS: private and public hearings, and the applicability of privilege

All state commissions have the power to compel the testimony of witnesses in private examinations. With the exception of South Australia, State Commissions also have the power to conduct public hearings in certain circumstances. Public hearings into government corruption have the capacity to increase public awareness of government impropriety and increase confidence in the work of an anti-corruption commission. However, there are serious costs associated with public hearings, particularly in relation to the potential impact they have on the privacy and reputation of individuals involved. There is also the possibility that public hearings will jeopardise ongoing investigations. Further, as the research at the start of this submission revealed, there is often a negative correlation between public confidence in government administration and the public revelation of government impropriety, at least in the short term. This is perhaps exacerbated where public hearings are sensationalised in media coverage, amounting to 'show trials'.

As investigatory bodies, Commissions are, appropriately, not bound by the rules of evidence. Further, traditional privileges against providing information and answering questions often do not apply to Commission hearings – both private and public. Again, there are strong justifications for removing privilege, on the basis the Commission is undertaking an investigatory function. However, the relaxation of the rules of evidence, and the removal of the ability to claim privilege increase the likelihood that individuals' reputations will be severely damaged by public hearings. Most State regimes attempt to balance these concerns by limiting the use that can be made of testimony given to the Commission in subsequent proceedings.

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.

Under s 17 of the Act, the ICAC is not bound by the rules of evidence. Under s 37, witnesses appearing at public hearings cannot claim privilege in answering questions, but their testimony cannot be used in subsequent civil, criminal or disciplinary proceedings.

The Tasmanian statute provides a three-tiered investigation process, with public hearings generally held only in the final tier of that process. Complaints are initially reviewed by an assessor under Part 5 of the *Integrity Commission Act 2009* (Tas), who might recommend that it is investigated by the Integrity Commission. If the Integrity Commission accepts the complaint for investigation, an investigation will be undertaken under Part 6, and a report will be delivered to the CEO and Board as to whether an Integrity Tribunal should be established. Under s 48, investigations are to be conducted in private unless authorised by the CEO. No criteria are listed as to why an investigation might be opened to the public. If an Integrity Tribunal is convened under Part 7, hearings are conducted in public pursuant to the process set out in Schedule 6, unless the Tribunal closes them on the basis that there are reasonable grounds for doing so. No statutory guidance is listed as to when 'reasonable grounds' will exist. The Integrity Commission is not bound by the rules of evidence (s 9). If an individual seeks to resist a request or direction of an assessor, investigator or the Integrity Tribunal, on the basis of acclaim of privilege, s 92 sets out a detailed process for that claim to be initially assessed by the assessor, investigator, CEO or Tribunal. An individual then has the opportunity to have the Supreme Court determine the claim of privilege.

In South Australia, there is no power to conduct public hearings. The objectives of the *Independent Commissioner Against Corruption Act 2012* (SA) include: 'to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).' South Australian Commissioner Bruce Lander has requested the legislation be amended to allow public hearings into less serious conduct – misconduct and maladministration.[39] In contrast, he has accepted that corruption

[39] See, eg, comments of 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, <http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066>

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. We disagree with Commissioner Lander as to when public hearings by a standing anti-corruption commission might be desirable.

Under the NIC Bill 2013, the NI Commissioner can conduct a hearing in such manner as he or she thinks fit. There is a wide discretion in s 51 as to whether the hearing is held in public or in private and the Bill provides a mandatory but not exhaustive list of relevant considerations that is quite similar to the one cited above from s 31 of the *Independent Commission Against Corruption Act 1988* (NSW). Generally the privilege against self-incrimination and the claim of public interest immunity are not available in the face of demands to provide information, produce a document or answer a question in a hearing (ss 49 and 67). But in most circumstances the answers cannot be used against the person in later proceedings. On the other hand, a claim of legal professional privilege can be made, subject to determination by the NI Commissioner (ss 46-48, 64-66). It is not uncommon for statutes to abrogate certain forms of privilege in order to facilitate the investigative function of a commission. Nonetheless, blanket abrogation of it is troubling. Legal professional privilege serves a critical integrity-promoting function in its own right by enabling individuals to ascertain their legal rights and obligations within the security of a professional confidence relationship. We see no reason why it should be abrogated by an integrity institution. Where privilege is abrogated for the investigatory function, strong safeguards against the use of material obtained in subsequent proceedings must be included.

The power to hold public hearings by an investigatory body with powers to compel the production of documents and the testimony of witnesses, in circumstances where the ordinary judicial safeguards do not apply is an extraordinary one. Not only does it have the potential to destroy the reputation of individuals under investigation, or simply those providing testimony, but it may also compromise ongoing investigations of serious criminal activity and prejudice the future trials of offences investigated by the Commission. There are strong arguments that if a Commission is tasked with investigating only *serious and systemic* corruption (as we have recommended above), in circumstances where it has the power to report findings to the Parliament or to the public directly, this power is not justified in the ordinary case. Rather, the power to conduct public hearings carries with it the likelihood that the public will conflate the proceedings and findings of the Commission with findings of guilt by a court, in circumstances where the individual involved has had no protections of judicial process. However, there are arguments to be made that a Commission should have the discretion to hold a public hearing in circumstances where there are allegations of serious *and* systemic corruption, and where there is a crisis of public confidence caused by the existence of the allegations of such conduct that warrants such a public inquiry.

An alternative view within our group is that, used prudently and relatively sparingly, public hearings are a valuable tool in exposing for public attention the existence of serious wrongdoing within politics or public administration, and for deterring future conduct of that

kind. The conventional criminal justice system carries out the lion's share of this role in society, through trials conducted in public with particular legal safeguards in place for the accused. According to this alternative view, however, we cannot rely exclusively on the conventional court process to address reasonable public expectations about the investigation and exposure of corrupt conduct, and the risks of the public confusing one process for the other are not as high as others suggest. Even within this view, the power to hold public hearings should be statutorily circumscribed to matters where the Commissioner determines it is in the public interest to do so, such as is required by s 31 of the *Independent Commission Against Corruption Act 1988* (NSW).

We recommend that the power to hold public hearings be statutorily circumscribed and that the statute provide a clear, immediate and efficient avenue to review Commission decisions to conduct such a hearing.

We recommend that a federal integrity Commission's powers to abrogate privilege be confined to:

(a) abrogating government legal privilege and public interest immunities where the latter might otherwise impede a paramount investigative mandate; and

(b) abrogating the privilege against self-incrimination, but subject to strong subsequent-use immunities barring the admission of incriminating information in subsequent proceedings other than prosecution for perjury or contempt.

(g) POWERS: Confidentiality obligations

As a threshold point, confidentiality obligations within a statutory scheme should be distinguished from secrecy obligations that attach to those working in an official capacity in the administration of a Commission, or are otherwise engaged with the work of the Commission in an official capacity. Such secrecy provisions (for example, s 111 of the New South Wales statute) ensure that government officials maintain the secrecy of information obtained in their official capacity and do not use it for any purpose other than that for which it is intended. In contrast, confidentiality obligations attach to those not administering the statute (or exercising other official functions), but who might be privy to information about the Commission's investigation, for instance, individuals who have made complaints to the Commission, against whom a complaint has been made, or those who have been summoned to provide documents or give evidence before the Commission.

As is clear from our above discussion regarding the desirability of public hearings, there are many reasons justifying the position that information about a Commission's investigation not be published. Restrictions on the publication of such information might be justified by the potential reputational damage that can be inflicted on individuals if such information is made publicly available, and the potential for such disclosure to amount to incursions into privacy. Finally, there are other concerns about the revelation of information relating to a Commission's investigation, including the potential for reprisals against complainants or even witnesses, prejudice to future court proceedings, and compromising ongoing police (or other agency) investigations. Against this concern is the public interest in the public revelation of corruption issues – particularly when serious and systemic – and the intrinsic

value of a Commission acting with as much transparency as possible.

We believe there is a strong argument that confidentiality provisions should exist, but should be imposed at the discretion of the Commission, taking into account the rights and reasonable interests of persons affected and the public interest at large. We would also note that the justification of any confidentiality obligation ought to be considered against the constitutional protection of communication on government and political matters. Such confidentiality obligations would amount to a burden on such communication, and as such must be carefully tailored to those objectives that justify its imposition to be likely to withstand constitutional challenge.

Two models for such a discretion exist: a discretion that operates in the *creation* of the obligation and a discretion in *lifting* the obligation. An example of the first model can be found in s 112 of the NSW statute, under which the NSW ICAC has the power to make suppression orders on the publication of material if it is satisfied that this is necessary and desirable in the public interest. There is, however, no list of criteria to guide the exercise of this discretion.

The second model can be seen in a particularly restrictive form in South Australia. The confidentiality regime in that State applies whether or not the Commission has issued an order. Section 56 prevents the publication of certain information by other persons unless authorised by the Commissioner – including information that would identify the person who is the subject of a complaint, report, assessment, investigation or referral under the Act, or a person who has made a complaint or given evidence under the Act. Again, there is no list of criteria to guide the exercise of the Commissioner's discretion. The Commissioner is also vested with the power under s 25 to make public statements in relation to matters under investigation if he or she believes it is in the public interest to do so, having regard to factors that include the benefits to the investigation, the risk of prejudicing the reputation of individuals, whether the statement is necessary in order to allay public concern and the risk of adversely affecting a potential prosecution. We would argue that a similar list of factors should be included to guide the discretion of the Commissioner in relation to the operation of confidentiality obligations.

The South Australian Commissioner, Bruce Lander, has argued that the secrecy provisions in that State are 'overengineered', making difficult for appropriate conversations to be had around whether a matter has been referred to the OPI and what has happened in relation to complaints.[40] This is particularly acute in South Australia, which has additional restrictions on the extent to which individual investigations can be identified in the Commissioner's reports.

This raises a final important consideration in determining the appropriate design of confidentiality provisions, and that is the ability of the Commission to issue public reports. The power to issue public reports, we argue below, is an important part of maintaining transparency and public confidence in the operations of a Commission. In contrast to public

[40] See comments reported in David Washington, 'ICAC secrecy too tight: Anti-corruption boss', *In Daily*, 21 November 2013, <http://indaily.com.au/news/2013/11/21/icac-secrecy-too-tight-anti-corruption-boss/>.

hearings and the revelation of information relating to Commission's investigations by individuals, public reporting is less likely to result in sensationalised, one-sided portrayals in secondary coverage, particularly in a way that might appear that the Commission has engaged in a judicial process or that individuals have been found 'guilty' of corrupt conduct.

We recommend that a statute establishing a federal integrity Commission include the power to impose confidentiality obligations at the discretion of the Commission, taking into account the rights and reasonable interests of persons affected by publication and the public interest at large in publication.

(h) POWERS: power of the Commission to make findings and reporting obligations

The primary function of standing commissions is to *investigate* corruption. An important question is what the Commission's powers are upon the conclusion of an investigation. Generally, state anti-corruption Commissions are empowered to refer matters to other agencies for investigation or prosecution, to make recommendations as to further actions that is required, and to report their findings.

The Victorian statute provides a good example of the various powers of a Commission upon the completion of an investigation. Section 164 provides that, upon concluding an investigation, the IBAC may:

> (a) make a referral under Division 5 of Part 3 [for investigation by another person or body];
>
> (b) make a recommendation in accordance with section 159 [to the relevant principal officer, responsible Minister or Premier, including the power to require a report on whether the recommendation has been actioned];
>
> (c) transmit a special report under section 162 [to the Parliament, that is then made public, although a requirement is included for procedural fairness to be accorded]
>
> (d) advise a complainant or other person in accordance with section 163 [of any action or recommendation taken by the IBAC];
>
> (e) do any combination or all or none of the matters referred to in paragraphs (a) to (d);
>
> (f) determine to make no finding or take no action following the investigation.

As Commissions are not courts with the accompanying requirements to operate in accordance with the judicial process, it is appropriate that they do not make findings of guilt. In the 1990 High Court decision of *Balog v ICAC*, the High Court explained that the NSW ICAC's broad function was to facilitate the actions of other agencies – particularly prosecutorial agencies – by conducting investigations. The Court emphasised the need for ICAC to limit itself in drawing conclusions that would express findings of guilt.[41] At the federal level, it would be constitutionally impermissible for a non-judicial body to find that a person is guilty of a criminal offence.[42] In many State statutes this is made explicit. For example, in Western

41 (1990) 169 CLR 625 [16].

42 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

Australia, s 217A 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.

Further, as investigators of corrupt conduct Commissions should not be involved in the prosecution of individuals. Generally speaking, the state regimes maintain the traditional division between investigative and prosecutorial functions, thus recognising the public interest in having a separate, independent agency reviewing the evidence and making determinations about whether the public interest justifies a prosecution.

The statutes generally provide for referral by the Commission of matters for prosecution to the relevant prosecutorial body. Unusually, under s 50 of the *Crime and Corruption Act 2001* (Qld), in Queensland the QCC can bring prosecutions for corrupt conduct in disciplinary proceedings in the QCAT (see also s 219I). 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. It is our view that the more desirable position is to retain the traditional division between investigative and prosecutorial functions, and that a Commission should not be involved in prosecutions beyond referring the matter for consideration for prosecution by another agency.

Under the NIC Bill 2013, the NI Commissioner has powers and obligations to refer matters to other agencies, deliver reports and recommendations, and advise complainants and persons who are the subject of investigation. Section 113 requires the Commissioner to refer evidence relevant to use in criminal, civil penalty or confiscation proceedings to the police and/or prosecution authorities. There is also a process for referring evidence suggestive of a wrongful conviction under s 115. There are obligations to submit reports to the Prime Minister following both investigations (ss 33-34) and public inquiries (ss 40-41). Likewise the NI Commissioner may and sometimes must advise complainants and persons investigated about the course and outcome of investigations and public inquiries (ss 35-36).

There are three further issues in relation to reporting:

(i) Procedural fairness:

It is highly desirable that procedural fairness be accorded to any individual or agency subjected to an adverse finding or comment in a Commission's report. Some state statutes explicitly include such requirements (see, eg, s 86 of the *Corruption, Crime and Misconduct Act 2003* (WA)). The NIC Bill 2013 likewise requires procedural fairness where a report will contain a critical opinion or finding against a government agency or a person, in defined circumstances (ss 31 and 158). The opportunity to appear and make submissions also applies where the NI Commissioner decides to make a public disclosure that includes material adverse to an agency or person (s 163). We submit that procedural fairness should apply regardless of whether the Commission's report is tabled in Parliament or otherwise made public.

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of regulatory sanctions: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 219, [33].

(ii) Publication of reports:

The various State statutes generally require Commissions to provide reports of their investigations, together with annual reports, to Parliament. These reports must then be tabled in Parliament. Often the obligation to report to Parliament is discretionary where a private hearing has taken place, but required where a public hearing has taken place. For example, the New South Wales statute sets out the following reporting obligations in s 74:

> (1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
>
> (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
>
> (3) The Commission shall prepare reports in relation to matters as to which the Commission has conducted a public inquiry, unless the Houses of Parliament have given different directions under subsection (2).
>
> (4) The Commission shall furnish reports prepared under this section to the Presiding Officer of each House of Parliament.
>
> (7) A report required under this section shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.
>
> (8) The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest, except as regards a matter referred to the Commission by both Houses of Parliament.

The NSW ICAC may also make 'special reports' to Parliament under s 75 on any administrative or general policy matter relating to its functions, and must make annual reports under s 76. Under s 78, reports are to be tabled by the Presiding Officers within 15 days of receipt from the ICAC, although the Commission may request that the report be made available to the public forthwith. There are similar provisions in the NIC Bill 2013 obliging the Prime Minister to table annual and special reports as well as reports arising from investigations and inquiries that were public and not private (ss 156-158). There are detailed provisions authorising the NI Commissioner and sometimes the Prime Minister to remove information from these reports deemed inappropriate to include. The Bill specifies defined grounds for withholding information in this way and provides guidance on the public interest calculations involved (eg s 159). A supplementary report containing the information, and the reasons for excluding it, must be submitted but will not be tabled in Parliament.

South Australia is unique in the Australian states in not allowing the ICAC to make reports to Parliament on specific investigations. Rather, under s 36 of the *Independent Commissioner Against Corruption Act 2012* (SA), upon completing an investigation the Commissioner is empowered to refer a matter to the relevant law enforcement agency for further investigation and potential prosecution and/or refer a matter to a public authority for further investigation and potential disciplinary action against a public officer. Under ss 40, 41 and 42, 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 note that 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. South Australian Commissioner Bruce 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. In his 2014-2015 annual report, he explained this seriously curtailed his power to place important matters on the public record. For example, it would prevent him from reporting:

> systemic issues of corruption if to do so might identify or be about a matter subject to assessment, investigation or referral. In effect, my reports cannot deal with matters arising directly from the discharge of my core functions.[43]

We agree with Lander that it is imperative that Commissions be able to make reports to Parliament that are then tabled and available to the public on its investigations.

We have recommended, above, that the power of a Commission to hold public hearings should be curtailed within the statute. We have also noted that there are good arguments for granting the Commission the power to require individuals to keep information about the Commission's investigations confidential. However, as we outlined above, both of these recommendations are based on a qualifying submission that a Commission should have the power to report to both Houses of Parliament on all investigations it undertakes. Although, in certain instances where information contained in the report might compromise an ongoing investigation, or place an individual in danger, or prejudice an upcoming judicial proceeding, the Commission should be able to direct that the report, or certain parts of it, not be publicly released. And, of course, as we have explained above, a Commission must not make findings of guilt in such a report, and must accord procedural fairness to any individual/agency the subject of an adverse finding/comment.

(iii) Power to follow up reports/recommendations

One criticism that is often levelled at Royal Commissions is that their establishment as *ad hoc* bodies means they are unable to follow up on their reports and recommendations. It is, we believe, critical for a standing commission to have the power to follow up its recommendations and reports. An example of such 'follow up' powers can be found in s 159 of the Victorian statute. Under this provision, the Victorian 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.

We recommend that a Commissioner:

(a) must not make findings of legal guilt and all adverse findings or commentary about

[43] South Australian ICAC and OPI Annual Report 2014-2015, available at <http://icac.sa.gov.au/sites/default/files/2014-2015_ICAC_OPI_Annual_Report.pdf#overlay-context=content/annual-reports> 47.

person or agencies must be predicated on having afforded those persons or agencies procedural fairness.

(b) be empowered to report to Parliament, and through Parliament to the public, on all investigations it undertakes. The Commissioner may exclude certain information from a public report where, in his or her judgment, disclosure poses risks to an ongoing investigation, places an individual in danger, or prejudices an upcoming judicial proceeding.

(c) be empowered to 'follow up' its recommendations and reports with government and parliamentary agencies and officers.

(i) ACCOUNTABILITY: oversight regime and periodic review of the statutory framework

The extraordinary powers possessed by standing anti-corruption bodies, and the fact that their powers will, in many cases at least, be exercised in private, underscores the importance of having robust accountability and oversight mechanisms. Most state jurisdictions contain provision for the Commissions to report to and be overseen by a parliamentary committee. It will be important that such a Committee is not government dominated, and this should be mandated in the statute.

The NIC Bill 2013 essentially adopts the existing provisions for the Parliamentary Joint Committee for the ACLEI, applies them to the new NI Commissioner as well as the LEI Commissioner, and rebadges the committee to reflect the name of the new federal commission that it would oversee. There is thus no statutory guarantee against domination of the committee by government members. There is, however, an attempt to strike a careful balance between agency oversight and agency independence through a system of checks and balances. The committee is not authorised to investigate a corruption issue or reconsider the NI Commissioner's decisions or recommendations in relation to a particular corruption issue. But in general the NI Commissioner must comply with a committee request to disclose information about a corruption issue or public inquiry and the general performance of its functions. The NI Commissioner can refuse, however, if the information is sensitive and the prejudicial consequences of disclosure outweigh the public interest in providing the committee with the information. If the committee objects to a refusal, it can ask the Prime Minister to adjudicate on the sensitivity of the information and on the balancing between public interest and prejudicial consequences.

In addition to a parliamentary committee, in some jurisdictions, a statutory agency is also established to oversee the Commission. For example, under s 57B of the New South Wales statute, the Inspector of the Independent Commission Against Corruption is appointed to audit and deal with complaints against the ICAC and review its procedures. Under s 64, the Joint Committee on the ICAC has functions to review the ICAC and the Inspector, and to report to both Houses on the two bodies, to examine their annual and other reports and to examine trends and changes in relation to corrupt conduct.

In addition, some jurisdictions expressly provide for judicial review of certain decisions made by the Commission. For example, in Queensland, s 332 provides for judicial review of a

Commission's corruption investigation if the Commission is found to have been conducting the investigation unfairly or the complaint of information does not warrant investigation. We believe the availability of judicial review for such decisions is desirable and congruent with our emphasis on strictly confining the jurisdiction and powers of a Commission. In addition, we would reemphasise that the judiciary should also play an oversight role in the exercise of some of the Commission's powers, such as search and seizure and any more extraordinary powers such as covert operations and surveillance.

Finally, we would draw the Committee's attention to a number of our earlier recommendations, that where the Commission is empowered to make jurisdictional decisions that are likely to impact severely on an individual – such as to commence an investigation on the basis that the Commission is satisfied an allegation concerns possible serious or systemic corrupt conduct, or to hold a public hearing – a timely and cost-efficient form of review be provided. This might be through a standing oversight body, if one is to be established, or a standing tribunal, such as the AAT.

There is no reference in the NIC Bill 2013 to oversight by another statutory agency nor to review of jurisdictional decisions by the NI Commissioner. The Bill does require an 'independent review' of the Act to be carried out after three years, in accordance with clause 178, and for the report to be tabled in Parliament. Similar provisions for periodic reviews are contained in State regimes. However the NIC Bill does not spell out qualifications for the reviewer (leaving this to the Prime Minister's discretionary judgment) and the requirement lapses if a parliamentary committee instead undertakes a review of the operation of the Act before three years expire. This is in contrast to s 106 of the *Integrity Commission Act 2009* (Tas), which *mandates* the commission of an independent review of the Act. Further, under the Tasmanian Act, the review is to be undertaken by a person appointed by the Governor, but the Minister must consult the Joint Committee, or if Parliament has been prorogued, the President of the Legislative Council and the Parliamentary leader of each political party represented in the House of Assembly.

While we agree that a periodic review of the legislation is desirable, we recommend the strengthening of legal requirements for a three-year review and for measures to achieve its independence. This includes a mandatory requirement for such a review, and attention to the qualifications and criteria for appointment discussed earlier in the submission, in specifying an appropriately skilled and independent review body.

We recommend that:

(a) a federal integrity Commission be subject to oversight by a bi-partisan parliamentary committee;

(b) extraordinary investigation powers, should they be conferred, be subject to judicial review and should trigger compulsory parliamentary reporting obligations.

(c) timely and accessible review processes be available for individuals and agencies affected by the exercise of a Commission's powers, mitigating recourse to court proceedings; and

(d) that operational reviews of the Commission's statutory framework be conducted by an independent and competent review body.

Yours sincerely

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Appendix 1 – Detailed examination of current federal integrity mechanisms

This detailed examination of the statutory regimes governing three current federal integrity mechanisms – the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Ombudsman, and the Commonwealth Auditor-General – is intended to supplement the overview of these institutions provided in Part III of the main submission.

This survey considers in more depth:

(i) the **jurisdiction** of each institution, including the practical manner in which corruption and integrity issues are engaged by their mandates;

(ii) each institution's **investigative powers and procedure**;

(iii) the **reporting functions** of each institution, and in particular the extent to which those functions facilitate public awareness of investigative activities and outcomes; and

(iv) the features of **independence** attaching to each institution, including the appointment and tenure of key officeholders and the nature of their reporting relationships to Cabinet, Parliament, and the public at large.

(a) The Australian Commission for Law Enforcement Integrity (ACLEI)

(i) Jurisdiction

The ACLEI is the administrative apparatus of the Integrity Commissioner, whose jurisdiction and functions are defined by the *Law Enforcement Integrity Commissioner Act 2006* (Cth). The Act's aims are to facilitate the detection, investigation, prosecution, and prevention of corruption within Commonwealth law enforcement agencies.[44] To that end, s.15 mandates the Commissioner to:

- 'detect corrupt conduct in law enforcement agencies';[45]
- 'investigate and report on corruption issues';[46]
- manage, oversee, and review internal corruption investigations undertaken by law enforcement agencies themselves;[47]
- initiate public inquiries on request of the Minister for Justice;[48] and
- 'make reports and recommendations to the Minister … [concerning] the desirability of legislative or administrative action on issues in relation to corruption generally in, or the integrity of staff members of, law enforcement agencies.'[49]

The Commissioner performs these functions in respect of the following Commonwealth agencies:

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44 *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 2.
45 Ibid s 15(aa).
46 Ibid s 15(a).
47 Ibid s 15(c).
48 Ibid s 15(d).
49 Ibid s 15(f).

- the Australian Border Force;
- the Australian Crime Commission;
- the Australian Federal Police and the ACT Police;
- the Australian Transaction Reports and Analysis Centre;
- the CrimTrac agency;
- portions of the Department of Agriculture and Water Resources;
- the Department of Immigration and Border Protection; and
- the former National Crime Authority.[50]

The list of agencies falling under the Commissioner's scrutiny may be expanded by regulation, provided they are agencies constituted to fulfil a law enforcement function.[51]

The Act defines 'corrupt conduct' as:

(a) 'conduct that involves, or that is engaged in for the purposes of, the staff member [of a law enforcement agency] abusing his or her office as a staff member of the agency; or

(b) 'conduct that perverts, or that is engaged in for the purposes of perverting, the course of justice'; or

(c) 'conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purposes of, corruption of any other kind'.[52]

The Act provides for multiple avenues by which the Commissioner's investigative powers may be activated. The Heads of agencies falling with the Commissioner's authority must report 'corruption issues' – meaning the actual or possible occurrence of corrupt conduct by members of their staff[53] – to the Commissioner.[54] These notifications can lead to a range of outcomes,[55] including remittance of the issue to the agency for investigation; the oversight[56] or management[57] of an agency investigation by the Commissioner; and direct investigation by the Commissioner himself or herself. In providing separate definitions for 'serious corrupt conduct', 'systemic corruption', and 'significant corruption issue',[58] the Act generally prescribes higher degrees of involvement by the Commissioner in investigating corruption issues associated with serious criminal offences or patterns of corrupt conduct.[59]

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50 See the definition of 'law enforcement agency' for the purposes of the statute at ibid, s 5.
51 *Ibid*, and see also the definition of "law enforcement function" within the same provision.
52 Ibid s 6.
53 Ibid s 7.
54 Ibid s 19.
55 Ibid s 26.
56 Ibid s 61.
57 Ibid s 60.
58 See definition of 'serious corruption' in ibid s 5.
59 See especially ibid s 16.

The Act also provides for the Commissioner to initiate an investigation on his or her own motion,[60] following a referral from the Minister for Justice,[61] or upon receipt of an individual report.[62] Provisions concerning the individual reporting of suspected corruption are facilitative, specifying only that the Commissioner may require that a referral be put in writing.[63]

(ii) Investigative powers and procedure

The Commissioner's powers may be exercised in respect of both **investigations** and **inquiries**, and the Act confers identical powers and procedures on both functions. It nevertheless distinguishes the functions by specifying that the Minister for Justice may request the Commissioner to conduct a public inquiry, and that the Commissioner must publicise the existence of such an inquiry by inviting public submissions on the issues to be considered.[64] The Act is silent as to whether initiation of a public inquiry remains within the Commissioner's discretion following a ministerial request, or whether it is mandatory.

The Commissioner's powers are extensive and robust. They are buttressed by offences penalising non-compliance, and exercised subject to the Commissioner's broad discretion. They are also generally not limited to individuals working within the agencies under the Commissioner's jurisdictional scrutiny; that is, they may be exercised against persons incidentally implicated in the Commissioner's review of agencies within his or her jurisdiction.

The powers include:

- the power to compel the production of information and things;[65]
- the power to conduct hearings, in public or in private;[66]
- the power to issue summons,[67] take evidence on oath or affirmation,[68] and to conduct examinations and cross-examinations,[69] in public or in private;
- the power to enter places occupied by law enforcement agencies and seize items without a warrant;[70]
- the power to apply to a judge or magistrate, as applicable, for search and offence warrants;[71]

60 Ibid s 38.
61 Ibid s 18.
62 Ibid s 23.
63 Ibid s 23(3).
64 Ibid ss 71-72.
65 Ibid Part 9, Division 1.
66 Ibid Part 9, Division 2.
67 Ibid s 83.
68 Ibid s 87.
69 Ibid s 88.
70 Ibid Part 9, Division 3.
71 Ibid Part 9, Division 4.

- authority to exercise powers of arrest equivalent to those of a constable under Divisions 4 and 5 of Part IAA of the *Crimes Act 1914*,[72] including through the direction of authorised officers;[73]
- the power to authorise controlled operations (the covert infiltration of criminal activities) under Part IAB of the *Crimes Act 1914*;[74]
- the power to authorise integrity testing (the covert evaluation of agency employees with integrity testing scenarios) under Part IABA of the *Crimes Act 1914*;[75]
- the power to authorise assumed identities under the Part IAC of the *Crimes Act 1914*;[76] and
- the power to engage in electronic and telephone surveillance activities.

The Commissioner's coercive powers are limited by only narrow exceptions. A lawyer may decline to provide information or to produce a document or thing where doing so would violate legal professional privilege;[77] however, claims of legal professional privilege do not excuse non-disclosure where the privilege relates to legal advice given to a Minister or government agency,[78] or where it attaches to communications between a Commonwealth government officer and 'any other person or body.'[79] The latter provision has potentially sweeping implications: a plain reading suggests that it denies any Commonwealth official the ability to assert legal professional privilege against the Commissioner, whether the privileged communication relates to the affairs of government or to the individual's own personal affairs.

The Act also abrogates the privilege against self-incrimination,[80] and limits the admissibility of evidence gathered in contravention of the privilege only in subsequent criminal or penal proceedings commenced against the privilege-holder.[81] Importantly, such self-incriminating information may be admitted in disciplinary proceedings consequent to an investigation or inquiry.[82] Claims of official secrecy in the public interest will generally not inhibit the Commissioner's information-gathering powers, except where they arise from taxation or law enforcement secrecy provisions.[83] The Act does, however, provide for the Minister to act via

72 Ibid s 139.
73 Ibid s 178.
74 *Crimes Act 1914* (Cth), Part IAB, Division 2.
75 Ibid, Part IABA, Division 2.
76 Ibid, Part IAC, Division 2.
77 *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 79. This protection is mirrored in s 95, which permits lawyers to decline to answer questions during hearings before the Commissioner where doing so would compromise legal professional privilege.
78 S 80(5)(c)(i). See also s 96 in relation to oral evidence sought in hearings.
79 S 80(5)(c)(ii). See also s 96 in relation to oral evidence sought in hearings.
80 Ibid s 80.
81 S 80(4)(a)-(c) and s 96. An exception to this barrier is provided by s 80(3), specifying that business records may be disclosed in subsequent criminal or penal proceedings despite their having been revealed to the Commissioner in contravention of the privilege against self-incrimination.
82 S 80(4A)(e).
83 S 80(5).

certificate to limit either disclosure to the Commissioner or the inclusion of certain information in a Commissioner's report, as discussed in further detail below.[84]

(iii) Reporting Functions

The Commissioner is responsible for submitting reports of completed investigations and inquiries to the Minister for Justice. Where any investigation or inquiry includes a public hearing, the resulting report must be tabled by the Minister before both houses of Parliament, and thus becomes public. Where the Commissioner is dissatisfied with actions taken or not taken by an agency following an investigation or inquiry, he or she may report this to the Minister, the Speaker of the House of Representatives, and the President of the Senate for tabling in Parliament. The Commissioner may also submit discretionary reports on any matter to Parliament. The Commissioner may restrict sensitive information in a report from public release, but must provide a complementary supplemental report to the Minister conveying the restricted information. The Minister may act by certificate to restrict the release of all or part of a report on public interest grounds.[85]

(iv) Independence

The Commissioner is appointed by the Governor General for a 5-year term, renewable for up to 7 years. The appointee may be a judge of the Federal Court or of a State or Territory Supreme Court, or may be a lawyer of at least 5 years' experience. If the appointee is not a judge, remuneration is set by the Remuneration Tribunal. If the appointee is a judge, the existing terms of his or her judicial appointment continue to apply. A non-judicial appointee may be removed by the Governor General for incapacity or on specified grounds that would compromise performance of the role, such as bankruptcy. A Parliamentary Joint Committee on the ACLEI monitors the ACLEI through its annual and special reporting, and through the power to request information from the Commissioner and from the Minister.

(b) The Commonwealth Ombudsman

(i) Jurisdiction

The *Ombudsman Act 1976* mandates the Commonwealth Ombudsman to "investigate action, being action that relates to a matter of administration, taken … by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman."[86] It also stipulates that the Ombudsman may investigate such actions on his or her own motion.[87] Read in conjunction with other portions of the *Act*, the practical effect of these provisions is to empower the Ombudsman to scrutinize whether officials have acted in accordance with relevant rules of law, policies, and standards, and whether those rules policies or standards are themselves "unreasonable, unjust, oppressive or improperly discriminatory."[88] The Ombudsman's authority in this respect extends to virtually the entire Commonwealth public service, with exceptions defined by the *Act*. These include, notably, action taken by a

84 S 149ff.
85 S 149.
86 *Ombudsman Act 1976* (Cth), s 5(1)(a).
87 Ibid s 5(1)(b).
88 Ibid s 15(1).

Minister,[89] action that falls within the scope of Parliamentary privilege[90] judicial actions,[91] and actions in relation to employment.[92] The exclusion of Ministerial activity does not prevent the Ombudsman from reviewing actions taken pursuant to a Minister's delegated authority.[93]

The Ombudsman also serves as an authorised recipient for disclosures under the *Public Interest Disclosure Act 2013.* Disclosures may be allocated to the Ombudsman by authorised officials within government agencies,[94] or the Ombudsman may receive such disclosures directly[95] (for example, where reporting individuals fear that recourse to internal disclosure processes could result in reprisal). The Ombudsman exercises the same investigative powers in respect of such disclosures as if they were complaints.[96] The only caveat to this aspect of the Ombudsman's jurisdiction is that he or she may not receive public interest disclosures concerning intelligence agencies or the Inspector-General of Intelligence and Security.[97]

The abuse of public office for personal gain clearly falls within the scope of wrongful actions that may be investigated by the Ombudsman.

(ii) Investigative powers and procedure

The Ombudsman will seek an informal and conciliatory resolution to a complaint where appropriate. He or she may decline to consider a matter where the complainant has not yet exhausted internal mechanisms of recourse within the relevant Commonwealth agency, or where the Ombudsman considers a different forum to be more appropriate. [98] The Ombudsman is required to refer a "serious corruption issue"[99] to the Integrity Commissioner, and may refer lesser corruption issues in his or her discretion.

When the Ombudsman elects to proceed with an investigation, he or she has significant procedural flexibility and an array of coercive powers. Investigations occur in private.[100] The Ombudsman need not afford an opportunity for an individual or department to be heard, barring a decision to include adverse findings against the individual or department in a final report.[101] The Ombudsman may require the production of any information or documentation that he or she considers relevant.[102] He or she may also require that individuals attend and answer questions,[103] including under oath or affirmation.[104] The Ombudsman or an authorised

89 Ibid s 5(2)(a).
90 Ibid s 5(2)(b).
91 Ibid s 5(2)(b),(ba).
92 Ibid s 5(2)(d).
93 Ibid s 5(3).
94 *Public Interest Disclosure Act 2013*, s 43.
95 Ibid 34.
96 *Ombudsman Act 1976*, s 5A(2).
97 Ibid s 5A(1).
98 Ibid s 6.
99 As defined in the *Law Enforcement Integrity Commissioner Act 2006*, a "serious corruption issue" concerns corrupt conduct which could eventuate prosecution for a criminal offence warranting up to 12 months' imprisonment.
100 *Ombudsman Act 1976*, s 8(2).
101 Ibid s 8(4),(5).
102 Ibid s 9.
103 Ibid.
104 Ibid s 13.

delegate may enter and inspect government premises in the course of an investigation, and may inspect documents on site.[105] It is an offence not to comply with the Ombudsman.[106]

The Attorney General may, by certificate, prohibit the disclosure of certain information or materials to the Ombudsman on grounds of public interest or national security.[107]

(iii) Reporting function

Where the Ombudsman concludes that an action was inappropriate or wrongful in reference to detailed criteria specified in the Act,[108] he or she must report this finding in first instance to the agency or department from which the complaint arose. The Act provides for an escalating process of reporting whereby, after the lapse of a reasonable time, if the Ombudsman is dissatisfied with action taken by the department, he or she may report the matter to the Prime Minister.[109] Should the report concern departments of the Parliamentary or court bureaucracy, the report is instead directed to the President of the Senate, Speaker of the House of Representatives, or the applicable Chief Justice. Once such a report has been made, the Ombudsman may tender it to be tabled in Parliament.[110] Furthermore, the Ombudsman has standing authority to deliver reports from time-to-time on issues arising in the execution of his or her duties, with such reports to be tabled in Parliament.[111] This supplements annual reporting requirements under the *Public Governance, Performance and Accountability Act 2013*.

Should the Ombudsman intend to include critical findings in a report, he or she must first 'consult the Minister before he or she forms an opinion'.[112] The Ombudsman is also obliged to report evidence of breach of duty or misconduct to senior officials within the relevant departments who may take action in respect of the suspected individuals.[113]

(iv) Independence

The Ombudsman is appointed by the Governor General for a fixed term of up to 7 years, with the possibility of renewal. His or her remuneration is determined by the Remuneration Tribunal. The Governor General may suspend the Ombudsman for incapacity or misbehaviour, but such suspension terminates if it is not ratified and converted to removal by a joint address of Parliament. Only a joint address of Parliament may remove the Ombudsman for incapacity or misbehaviour. The Ombudsman may otherwise be removed by the Governor General under defined circumstances compromising the integrity of the Ombudsman's role.[114]

(c) The Commonwealth Auditor-General

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105 Ibid s 14.
106 Ibid s 36. However, the *Act* also contemplates a defense of reasonable excuse, with the onus resting on the impugned individual to prove such a defense: ibid.
107 Ibid s 9.
108 Ibid s 15(1).
109 Ibid s 16.
110 Ibid s 17.
111 Ibid s 19(1)-(3).
112 Ibid s 8(9).
113 Ibid s 8(10).
114 Ibid s 28.

(i) Jurisdiction

The Auditor-General's jurisdiction is near comprehensive in conferring authority to conduct performance audits of Commonwealth government departments, bodies, agencies, corporate persons, and partners, together with general performance audits of the whole Commonwealth public sector (or part thereof).[115] Such audits are systemic in focus – that is, they direct scrutiny to an organisational or sectoral level rather than to the level of individual conduct.

(ii) Investigative powers and procedure

The Auditor-General's investigative powers cannot override Commonwealth laws relating to the powers, privileges, and immunities of Parliament and parliamentarians. Otherwise they operate to the exclusion of all other privileges, public interest claims, or legal impediments absent express statutory language to the contrary.[116] The Auditor-General may issue a written directive requiring a person to provide information, produce documents, or attend and give evidence, including under oath.[117] The privilege against self-incrimination does not excuse non-compliance with these powers, however the *Act* provides subsequent-use protections against the admission of incriminating evidence or statements in criminal proceedings.[118] The Auditor-General or an authorised delegate may also enter and inspect premises.[119] These investigative powers are exercised in private.

The Commonwealth government may act by regulation to limit or modify the exercise of the Auditor-General's powers in respect of national security and intelligence agencies.[120]

(iii) Reporting function

The Auditor-General must table final reports of performance audits in both Houses of Parliament, and deliver copies to the relevant ministers and officials representing the entities reviewed. For performance audits of specific offices or bodies, the Auditor-General must first provide a proposed report to those bodies for comment before tabling a final report in Parliament. The Auditor-General may also, in his or her discretion, share a proposed report with a Minister or other interested person. The Auditor-General must consider comments before completing a final report, and append the written comments received to the tabled final report.[121] Finally, the Auditor-General has standing authority to table a report before Parliament on any matter at any time, provided he or she also provides a copy of such reports to the Prime Minister, Finance Minister, and any other minister having a special interest in the report.[122]

The information gathering powers of the Auditor-General are exercised subject to strict secrecy provisions[123] under which unauthorised disclosure is an offence. The Auditor-

115 See ss 17-18, setting out the power to conduct performance audits and general performance audits, and related interpretive provisions.
116 Ibid s 30.
117 Ibid s 32.
118 Ibid s 35.
119 Ibid s 33.
120 Ibid s 56.
121 Ibid s 19.
122 Ibid s 26.
123 See ibid s 36.

General is prohibited from including information in a final report where he or she considers disclosure to compromise the public interest.[124] The Attorney General may also act by certificate to restrict the Auditor-General from disclosing information on public interest grounds, including national security, cabinet confidentiality, international and intergovernmental relations, and prejudice to commercial interests.[125] Where the Attorney General limits disclosure by certificate, the information cannot be provided to Parliament but the Auditor-General must include a statement in the remaining public report indicating that certain information has been withheld. Should the Auditor-General elect to limit disclosure on his or her own motion, a supplemental report containing the sensitive information may be provided to the Prime Minister, Finance Minister, and any other minister having a special interest in the subject-matter.

(iv) Independence

The Act empowers the Auditor-General with complete discretion in the performance of his or her functions, including the initiation, focus and conduct of specific audits.[126] Budgetary appropriations to the Auditor-General may only be adjusted by Parliament.[127] Appointment of the Auditor-General is by the Governor General, for a 10-year fixed term, but requires nomination and approval before the Joint Committee of Public Accounts and Audit.[128] The Auditor-General's remuneration is set by the Remuneration Tribunal. The Auditor-General may be removed for misbehaviour or incapacity following joint resolution of Parliament. The Governor General also has a mandatory authority to remove the Auditor-General should specific circumstances arise that compromise his or her role, such as personal bankruptcy.

124 Ibid s 37.
125 Ibid s 37(2).
126 Ibid s 8.
127 Ibid s 50.
128 Ibid Sch 1, s 2.