

Chapter 3

State, territory and international integrity commissions

3.1 Each of Australia's six states currently has a dedicated integrity agency. These state-based agencies are as follows:

- New South Wales (NSW) Independent Commission Against Corruption
- Queensland Crime and Corruption Commission (Qld CCC)
- Western Australian (WA) Corruption and Crime Commission
- Tasmanian Integrity Commission
- Victorian Independent Broad-based Anti-Corruption Commission
- South Australian (SA) Independent Commission Against Corruption

3.2 The Northern Territory (NT) does not yet have an integrity commission but is in the process of establishing one. On 26 August 2015, the Legislative Assembly of the NT resolved to establish an independent anti-corruption body and noted the intention of the government to appoint an independent person to provide advice on possible models.¹ Mr Brian Martin AO QC was appointed to complete this task and delivered his report on 27 May 2016.² This report recommends that the NT adopt the model of the SA Independent Commission Against Corruption and that the current Independent Commissioner Against Corruption in South Australia, the Hon. Bruce Lander QC, be appointed on a part-time basis as the first head of the NT's commission.³ The NT government has developed draft legislation in response to the Martin report and is currently conducting a public consultation process on its content.⁴

3.3 Following the October 2016 Australian Capital Territory (ACT) election, the Labor and Greens parties formed a coalition government. The two parties agreed to establish an 'Independent Integrity Commission, broadly structured on those operating in similar sized jurisdictions, following a Parliamentary Committee inquiry into the

1 *Minutes of the Proceedings of the Legislative Assembly* (NT), 26 August 2015, pp. 651–2.

2 Northern Territory Government, 'Anti-Corruption, Integrity and Misconduct Commission Inquiry', <https://acimcinquiry.nt.gov.au/> (accessed 12 July 2017).

3 Department of the Chief Minister, *Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report*, May 2016, p. 9, <https://acimcinquiry.nt.gov.au/?a=292252> (accessed 28 August 2017).

4 Northern Territory Government, 'Independent Commission against Corruption – Draft Legislation', <https://justice.nt.gov.au/attorney-general-and-justice/law/icac-bill> (accessed 12 July 2017).

most effective and efficient model for the ACT'.⁵ On 15 December 2016 the Legislative Assembly for the ACT established a Select Committee on an Independent Integrity Commission, which is due to report by 31 October 2017.⁶

3.4 As noted in the 2016 interim report of the Select Committee on the Establishment of a National Integrity Commission (the 2016 select committee), Australia's state-based integrity agencies share a number of similarities in institutional design, including:

- They each have jurisdiction over the public but not the private sector (although the extent of jurisdiction across the public sector varies);
- All, with the exception of the Qld CCC, have investigative, preventive and educational functions;
- They all possess coercive powers similar to those of Royal Commissions; and
- Each is overseen by a Parliamentary committee.⁷

3.5 Nevertheless, significant differences exist between these six agencies in terms of the details of their institutional design. The following sections of this chapter discuss each agency in turn with respect to five central elements of their design: the number, appointment and tenure of commissioners; functions; definition of corruption or misconduct and jurisdiction; powers; and oversight. This chapter also addresses evidence presented to the committee regarding comparisons with international integrity agencies.

New South Wales—Independent Commission Against Corruption

3.6 The New South Wales Independent Commission Against Corruption (NSW ICAC) was established by the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act (NSW)), and commenced operation in 1989.⁸ The commission's mandate is to:

...promote the integrity and accountability of public administration by investigating, exposing and preventing corruption involving or affecting NSW public authorities and public officials and to educate public

5 Australian Capital Territory (ACT) Government, *Parliamentary Agreement for the 9th Legislative Assembly for the Australian Capital Territory*, http://www.cmd.act.gov.au/__data/assets/pdf_file/0005/1013792/Parliamentary-Agreement-for-the-9th-Legislative-Assembly.pdf (accessed 12 July 2017).

6 Legislative Assembly for the ACT, *Minutes of Proceedings*, 6 June 2017, p. 234.

7 Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 6.

8 New South Wales Independent Commission Against Corruption (NSW ICAC), *Submission 10* [2016], p. 3.

authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community.⁹

3.7 The establishment of the NSW ICAC came in response to a series of corruption scandals in the state. In his second reading speech on the NSW ICAC legislation, the then premier, Mr Greiner, made the following comments:

In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.

...

Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified.¹⁰

3.8 Significant amendments to the ICAC Act (NSW) have been made since 1988, including the following changes:

- Significant amendments made in December 1990 overcame problems identified in the course of litigation against the ICAC. These included changes to clarify the aims of ICAC investigations and the ICAC's powers to make findings in its reports.
- In 1994 the definition of corrupt conduct was modified to extend its application to the conduct of members of Parliament. A new Part was also inserted into the Act to constitute two committees of Parliament to prepare draft codes of conduct and provide advice and education on ethical standards applying to members of both Houses of Parliament.
- A number of amendments were made in 1996 concerning the ICAC's powers. In particular, its powers to provide protection for witnesses were enhanced.
- The Police Integrity Commission, established in 1997, assumed responsibility for investigating allegations of police corruption.
- In response to the High Court's decision in *ICAC v Cunneen* [2015] HCA 14, which threw into doubt earlier ICAC corrupt conduct

9 NSW ICAC, *Submission 10* [2016], p. 3.

10 *Legislative Assembly Hansard*, 26 May 1988, p. 673.

findings, the NSW Government introduced the *Independent Commission Against Corruption Amendment (Validation) Act 2015*.

- The NSW Government also adopted the recommendations of an Independent Panel and introduced the *Independent Commission Against Corruption Amendment Act 2015*, which effected a number of significant changes to the ICAC Act, primarily affecting the Commission's jurisdiction.¹¹

3.9 Further significant amendments to the ICAC Act (NSW) were made by the *Independent Commission Against Corruption Amendment Act 2016* (NSW), which changed the 'structure, management and procedures' of the NSW ICAC, including the addition of two more commissioners.

Commissioner—appointment and tenure

3.10 The ICAC Act (NSW) currently makes provision for the appointment, by the governor, of a chief commissioner and two other commissioners. The chief commissioner must be consulted on proposed appointments of the other commissioners.¹² The chief commissioner is a full-time office, while the two remaining commissioners are part-time offices.¹³ A commissioner may hold office for a term not exceeding five years, but is eligible for reappointment.¹⁴

3.11 Commissioners must have either served as, or be qualified to be appointed as, a judge of the Supreme Court of New South Wales or of another state or territory, a judge of the Federal Court, or a justice of the High Court.¹⁵ The Joint Parliamentary Committee on the Independent Commission Against Corruption (JPC ICAC) is afforded a right of veto over the appointment of commissioners.¹⁶

3.12 The office of a commissioner becomes vacant if the holder:

- (a) dies, or
- (b) completes a term of office and is not re-appointed, or
- (c) holds office for longer than the relevant period mentioned in clause 5, or
- (d) resigns the office by instrument in writing addressed to the Governor, or
- (e) becomes the holder of a judicial office of the State or elsewhere in Australia, or

11 NSW ICAC, *History and development of the ICAC Act*, <https://www.icac.nsw.gov.au/about-the-icac/legislation/history-of-act> (accessed 25 August 2017).

12 *Independent Commission Against Corruption Act 1988* (NSW), s. 5.

13 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, s. 4.

14 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, s. 5.

15 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, s. 1.

16 *Independent Commission Against Corruption Act 1988* (NSW), s. 64A; Schedule 1, s. 2.

- (f) is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or
- (g) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or
- (h) becomes a mentally incapacitated person, or
- (i) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable¹⁷

3.13 A commissioner may only be actively removed from office by the governor on the address of both houses of parliament.¹⁸

3.14 As noted above, the current configuration of commissioners dates from 2016 and was implemented by the *Independent Commission Against Corruption Amendment Act 2016* (NSW). Previously, the NSW ICAC had operated with only one commissioner. The move to a three-commissioner structure was one of a series of recommendations made by the Committee on the Independent Commission Against Corruption in its October 2016 report: *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*. The committee made the following comments in relation to this recommendation:

Currently, the ICAC is established in a single person – the Commissioner – and he or she is solely responsible for making the many significant decisions necessary to fulfil the ICAC's functions. These decisions can have serious consequences for the individuals affected and the Committee has decided that more weight should be placed on the most significant ones.

For this reason, the Committee has recommended the re-structure of the ICAC, to replace the single Commissioner with a panel of three Commissioners, the 'three member Commission'. Under this proposal, the most significant decisions – those to proceed to a compulsory examination or public inquiry – could no longer be made by a single Commissioner. Instead, a decision to proceed to a compulsory examination or public inquiry would need majority approval of the three member Commission.¹⁹

3.15 This alteration to the structure of the commission was the subject of considerable controversy in New South Wales. In particular, the fact that the

17 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, ss. 7(1).

18 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1, ss. 7(2) and ss. 7(3).

19 Committee on the Independent Commission Against Corruption, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, October 2016, p. viii.

amending legislation had the effect of ending the tenure of the then commissioner, the Hon. Megan Latham, was heavily criticised.²⁰

3.16 Beyond the issue of the new three-commissioner structure, Mr Chris Merritt, Legal Affairs Editor for *The Australian*, suggested that the eligibility requirements for the appointment of commissioners threatened the separation of powers by allowing the movement of judicial officers to and from the NSW ICAC:

In New South Wales, the boundary between the executive and judicial branches is already breaking down in one other way as a result of ICAC. Officially, judges cannot be ICAC commissioners, but I draw to your attention the existence of special legislation in New South Wales that allows former ICAC commissioners to return to the bench at the expiry of their term. This means the separation between the judiciary and ICAC is illusory. This can be seen by the career path of former ICAC commissioner, Megan Latham, who was a judge before her appointment. After she resigned as ICAC commissioner, she used this special law to return to the Supreme Court bench without any involvement by the government.²¹

Functions of the commission

3.17 The ICAC Act (NSW) defines the principal functions of the NSW ICAC as follows:

- (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
 - (i) corrupt conduct, or
 - (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
 - (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,
- (b) to investigate any matter referred to the Commission by both Houses of Parliament,
- (c) to communicate to appropriate authorities the results of its investigations,
- (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,

20 Australia Institute (AI), *Submission 14*, Attachment 1, p. 5; Sean Nicholls, Michaela Whitbourn, Kate McClymont, 'ICAC chief's resignation "sets back corruption fighting by years"', *Sydney Morning Herald*, 23 November 2016, <http://www.smh.com.au/nsw/icac-chiefs-resignation-sets-back-corruption-fighting-by-years-20161123-gsvwo3.html> (accessed 27 August 2017).

21 Mr Chris Merritt, Legal Affairs Editor, *The Australian*, *Committee Hansard* 12 May 2017, p. 23.

- (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.²²

3.18 The NSW ICAC summarises these functions into three broad groups:

- investigating and exposing corrupt conduct in the NSW public sector
- preventing corruption through advice and assistance
- educating the NSW community and public sector about corruption and its effects.²³

3.19 In exercising these functions, the NSW ICAC is directed to 'regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns', and:

...as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct.²⁴

22 *Independent Commission Against Corruption Act 1988* (NSW), ss. 13(1).

23 NSW ICAC, *Functions of the ICAC*, <https://www.icac.nsw.gov.au/about-the-icac/overview/functions-of-the-icac> (accessed 27 August 2017).

24 *Independent Commission Against Corruption Act 1988* (NSW), s. 12 and s. 12A.

3.20 The NSW ICAC does not investigate complaints concerning the conduct of New South Wales police officers or the New South Wales Crime Commission. This function has resided with the Police Integrity Commission from its creation in 1997.²⁵ The Police Integrity Commission was replaced in 2017 by the Law Enforcement Conduct Commission, which also took on the functions of the former Police Compliance Branch of the New South Wales Ombudsman.²⁶

3.21 The committee heard from several witnesses that the educative function of the NSW ICAC is a crucial element of its work, despite it receiving very little public attention in comparison with its investigative function. Professor John McMillan, Acting New South Wales Ombudsman expressed his support for ICAC's educative functions:

While so much of the public focus is on the few hearings that ICAC does each year into corruption, much of the effective work that it undertakes is in dealing with the mandatory reporting and assessing. It also publishes quite a lot of very useful guidance material. ICAC does a lot of roadshows around local government and government agencies in New South Wales. So, I think, with proper resourcing and proper skills within the agency, you could ensure that there is an adequate focus on all of the responsibilities.²⁷

3.22 This sentiment was also echoed by Professor Anne Twomey, who stated:

I think that one of the most effective roles of ICAC has been ensuring that particularly public service agencies have procedures and practices in place to prevent corruption from happening to begin with. That is probably the most important thing that any kind of integrity commission or corruption commission can do. It is not just the flashy public hearing stuff on the front page of that newspaper; it is all that back-end work about making sure that your accounting processes and your accountability processes within government are adequate. That is an incredibly important aspect of it.²⁸

3.23 Professor Twomey also argued that the combination of functions within NSW ICAC contributed to its effectiveness overall:

The thing about ICAC is that it has two arms. A lot of its very valuable work is not known, just like the [Australian Federal Police (AFP)]'s work, in dealing with those structural aspects and making sure that corruption does not flourish, simply because you have good ways of accounting for things and good transparency within government and all the rest of it. That is critically important work, and to some extent it does not matter what body does it, but it needs to be work that people within the public sector

25 NSW ICAC, *History and development of the ICAC Act*, <https://www.icac.nsw.gov.au/about-the-icac/legislation/history-of-act> (accessed 25 August 2017).

26 Law Enforcement Conduct Commission, *Who are we*, <https://www.lecc.nsw.gov.au/what-we-do/who-we-are-and-what-we-value> (accessed 27 August 2017).

27 Professor John McMillan, Acting New South Wales Ombudsman, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 6.

28 Professor Anne Twomey, *Committee Hansard*, 12 May 2017, p. 11.

will respect and possibly fear. One of the good things about ICAC is that if it sends recommendations to your organisation or comes to look at the way you are doing things in order to deal with it, people are sufficiently terrified of it that they will comply immediately. It is not going to be ignored as some extra bureaucratic order. The two sides of ICAC help it to function, because the fact that it has a strong public reputation and has developed levels of fear makes it more effective on its other side as well. The two work quite well together, in a way.²⁹

Definition of corruption and jurisdiction

3.24 The ICAC Act (NSW) defines corrupt conduct as follows:

- (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:
 - (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
 - (b) bribery,
 - (c) blackmail,
 - (d) obtaining or offering secret commissions,
 - (e) fraud,
 - (f) theft,
 - (g) perverting the course of justice,

29 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 13.

- (h) embezzlement,
 - (i) election bribery,
 - (j) election funding offences,
 - (k) election fraud,
 - (l) treating,
 - (m) tax evasion,
 - (n) revenue evasion,
 - (o) currency violations,
 - (p) illegal drug dealings,
 - (q) illegal gambling,
 - (r) obtaining financial benefit by vice engaged in by others,
 - (s) bankruptcy and company violations,
 - (t) harbouring criminals,
 - (u) forgery,
 - (v) treason or other offences against the Sovereign,
 - (w) homicide or violence,
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (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.³⁰

30 *Independent Commission Against Corruption Act 1988 (NSW)*, s. 8.

3.25 This extensive definition is limited by a subsequent section, which states that conduct that would fall within the above definition only amounts to corrupt conduct if it could constitute or involve:

- (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.³¹

3.26 Subsection 2A quoted above, was inserted by the *Independent Commission Against Corruption Amendment Act 2015* (NSW), in the wake of the High Court's decision in *ICAC v Cunneen*.³² This decision 'excluded certain conduct of private persons from the definition of "corrupt conduct" under that Act that had previously been assumed to be within ICAC's jurisdiction'.³³ The intention of the amendment was to expressly include the conduct that was excluded by the High Court's decision.

3.27 Professor Gabrielle Appleby and Dr Grant Hoole outlined the argument in *ICAC v Cunneen* as follows:

The majority of the Court accepted that Ms Cunneen's alleged conduct did not fall within the statutory definition of 'corrupt conduct' because, first, it allegedly involved Ms Cunneen in her personal capacity (not in her capacity as a Crown prosecutor); and second, while it might have affected or hindered the police officer from conducting the investigation, it did not involve dishonest or improper conduct *on the part of the police officer*.

Justice Gageler, in dissent in the case, noted that the majority's interpretation of s 8 to exclude such conduct consequently obstructed the Commission's power to investigate conduct that might amount to defrauding a public official, state-wide endemic collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under New South Wales statutes. The type of conduct that Gageler J identified clearly has the capacity to undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials. This conduct also has the capacity to affect the integrity of government

31 *Independent Commission Against Corruption Act 1988* (NSW), s. 9(1); the Acting Inspector of the Independent Commission Against Corruption, Mr John Nicholson SC, provided a detailed account of the complex interaction of the sections making up this definition of 'corrupt conduct' and how this affects findings that corrupt conduct has occurred: see, Mr John Nicholson SC, Acting Inspector, Office of the Inspector of the Independent Commission Against Corruption (Office of the Inspector), *Committee Hansard*, 12 May 2017, pp. 37–9.

32 [2015] HCA 14.

33 Independent Commission Against Corruption Amendment Bill 2015 (NSW), Explanatory note, p. 1.

processes, threatening equality of access to government services and contracts, and undermining accountability for how taxpayers' money is spent and public assets are utilised.³⁴

3.28 Professor Appleby and Dr Hoole also expressed concern that the lack of a definition for the concepts of 'serious' or 'systemic' corrupt conduct leads to the risk of the NSW ICAC stepping outside its jurisdiction:

Failure to define these terms defers significant interpretive latitude to the officials responsible for implementing these commissions. It escalates the risk that the incremental evolution of jurisdiction, as concepts like 'serious' and 'systemic' are interpreted in new contexts, could lead to missteps that compromise the underlying purpose of a commission. This could include, for example, the commission reaching into spheres better reserved for other institutions, provoking conflict or incoherence and weakening confidence in the system as a whole.³⁵

3.29 The Australia Institute spoke in favour of the definition of corrupt conduct in the ICAC Act (NSW), commenting in its submission that this definition demonstrates that 'a broad definition of corrupt conduct in the jurisdiction of a federal ICAC is critical to ensuring success in investigating and exposing systemic corruption'.³⁶ It was also stated that:

Official misconduct is a critical term in the NSW ICAC Act that allows the NSW ICAC to pursue many cases at a parliamentary and ministerial level that may otherwise not be investigated. Many cases of public interest have been investigated under this term, which covers cases of breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition.³⁷

3.30 TIA also supported the NSW definition of corrupt conduct:

The NSW ICAC model defines corrupt conduct in a comprehensive manner. Although it has been criticised for its complexity, including by the High Court in the Cunneen case, it has recently been scrutinised, affirmed and extended as a result of the Gleeson/McClintock Review. The Queensland approach is largely based on the NSW legislation, but was narrowed in 2014, and is now the subject of a sensible proposed broadening under a 2017 Bill. In the same way, the Victorian approach has been amended to overcome some of the limitations of too narrow a wording, and limitations considered by the High Court in the Cunneen case.³⁸

34 Gilbert + Tobin Centre of Public Law (Gilbert + Tobin), *Submission 18*, Attachment 1, p. 20.

35 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 17.

36 AI, *Submission 14*, p. 8.

37 AI, *Submission 14*, p. 8.

38 Transparency International Australia (TIA), *Submission 5*, p. 6.

Powers

3.31 The NSW ICAC provided the following summary of its investigatory powers, along with references to the legislative basis in the ICAC Act (NSW):

- obtain information from a public authority or public official (s. 21)
- obtain documents (s. 22)
- enter public premises to inspect and take copies of documents (s. 23)
- conduct compulsory examinations (s. 30)
- conduct a public inquiry (s. 31)
- summons a witness to attend and give evidence and/or produce documents or other things at a compulsory examination or public inquiry (s. 35)
- arrest a witness who fails to attend in answer to a summons (or is unlikely to comply with the summons) (s. 36)
- issue or apply for the issue of a search warrant (s. 40)
- prepare reports on its investigations (s. 74).³⁹

3.32 The NSW ICAC is also able to undertake covert activities, including the following:

- apply for telecommunications interception warrants under the *Telecommunications (Interception and Access) Act 1979*
- obtain approval under *Law Enforcement (Controlled Operations) Act 1997* for the conduct of operations that would otherwise be unlawful
- obtain authorisation to use false identities under the *Law Enforcement and National Security (Assumed Identities) Act 2010*
- apply for warrants to use listening devices, tracking devices, optical surveillance devices and/or data surveillance devices under the *Surveillance Devices Act 2007*.⁴⁰

3.33 The ability of the NSW ICAC to hold public inquiries as well as its ability to make findings of corrupt conduct attracted considerable comment, both supportive and critical. With respect to the first issue, following the passage of the *Independent Commission Against Corruption Amendment Act 2016* (NSW), it is now a requirement that both the chief commissioner and at least one other commissioner authorise a decision to conduct a public inquiry.⁴¹ For a public inquiry to go ahead, it remains a

39 NSW ICAC, *Submission 10* [2016], p. 15.

40 NSW ICAC, *Submission 10* [2016], p. 15.

41 *Independent Commission Against Corruption Act 1988* (NSW), ss. 6(2).

requirement that the commission be satisfied it is in the public interest. In making this determination, the commission may consider:

- (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.⁴²

3.34 The Australia Institute referred to its *Queensland watchdog asleep at the gate* report, which found that the 'regular conduct of public hearings' in NSW 'greatly contributed to its success in investigating and exposing corruption, in contrast to Qld CCC which has not held a public hearing since 2009'.⁴³

3.35 The Australia Institute also quoted from former officers of the NSW ICAC:

Former assistant NSW ICAC Commissioner Anthony Whealy QC has said "there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost."

...

Former NSW ICAC Commissioner David Ipp QC has said that "Its main function is exposing corruption; this cannot be done without public hearings."⁴⁴

3.36 Mr Geoffrey Watson QC, who has assisted with ICAC investigations, argued '[y]ou should not stop fighting corruption because there might be one or two rogue members of the press who distort what was going on inside'.⁴⁵ Indeed, Mr Watson noted that 'there was a very broad discretion handed to the commissioner in a judgement as to whether or not it was in the public interest to conduct the inquiry in public'.⁴⁶

3.37 However, the Hon. Dr Peter Phelps MLC did not favour the NSW ICAC's use of public hearings, arguing it 'is nothing more than a legalised defamation of character'.⁴⁷ Dr Phelps identified other shortcomings associated with ICAC's hearing powers:

42 *Independent Commission Against Corruption Act 1988* (NSW), ss. 31(1) and ss. 31(2).

43 AI, *Submission 14*, p. 9.

44 AI, *Submission 14*, p. 9 (citations omitted).

45 Mr Geoffrey Watson QC, *Committee Hansard*, 16 June 2017, p. 29.

46 Mr Watson, *Committee Hansard*, 16 June 2017, p. 30.

47 Hon. Dr Peter Phelps MLC, *Committee Hansard*, 16 June 2017, p. 13.

...you have no cross-examination, you have noble cause corruption and you have the get-out-of-jail-free card of section 38 of the act. All of these major structural problems would still exist even if you did not have a bunch of horrible people who are headhunters and go after people unjustifiably.⁴⁸

3.38 In contrast, the New South Wales Council for Civil Liberties—who submitted that 'the use of public hearings by ICAC has overwhelmingly benefited the public good'⁴⁹—noted in its submission that:

It is significant that notwithstanding considerable controversy, both independent and expert reviews [of the NSW ICAC] in 2005 and 2015 and the Parliamentary Committee Review in 2016 reaffirmed the importance of retaining public hearings for the effectiveness and standing of ICAC.⁵⁰

3.39 Further, Ms Kate McClymont, an investigative journalist for Fairfax Media, stated:

...with the ICAC inquiries, the hearings are held in private first. It does not get to a public hearing unless there has been a private hearing and the information has been gathered. That acts as a deterrent for inquiries that might have looked fruitful at the beginning, but then, when there has been a hearing in private, it has not proceeded. When it does proceed and you are in the witness box, you are given the option to say that any of your evidence cannot be used against you in any court of law except if you are caught lying to ICAC. You already have the protection in there that your evidence cannot be used against you for lying.⁵¹

3.40 The rationale for the protections covering the subsequent use of incriminating evidence referred to by Ms McClymont above, are explained by the NSW ICAC as follows:

The Commission is not bound by the rules or practice of evidence. A person attending a compulsory examination or public inquiry is not entitled to refuse to answer questions or produce documents relevant to the investigation on the grounds that the answer or production might incriminate the witness...If a witness objects to giving the answer or producing the document, they must still give the answer or produce the document but the answer or document will not then be admissible against them in any civil, criminal or disciplinary proceedings...The purpose of

48 Dr Phelps, *Committee Hansard*, 16 June 2017, p. 15. Section 38 of the *Independent Commission Against Corruption Act 1988* (NSW) provides that: 'The Commissioner or person presiding at the compulsory examination or public inquiry may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing'.

49 New South Wales Council for Civil Liberties (NSWCCL), *Submission 26*, p. 12.

50 NSWCCL, *Submission 26*, p. 14.

51 Ms Kate McClymont, Investigative Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 25.

these provisions is to enable the Commission to get to the truth of what happened. The trade-off is that admission of wrongdoing and other evidence will not be admissible against the witness in subsequent criminal proceedings.⁵²

3.41 At the conclusion of an investigation, the NSW ICAC is able to make factual findings, just as other state integrity agencies are able to do. However, it is also able to make a finding that a person has engaged in corrupt conduct. This power was modified following the 2015 High Court decision *ICAC v Cunneen* to 'limit ICAC's power to make findings of "corrupt conduct" against an individual to cases where the corrupt conduct is serious'.⁵³ Dr Hoole and Professor Appleby stated that this amendment means that 'the ICAC's investigative powers embraced suspicions of corruption generally, but could only escalate to the formal reporting of adverse findings when the corruption was found to be "serious"'.⁵⁴ Professor McMillan expressed to the committee that he 'did not see any problem' with these changes.⁵⁵

3.42 Mr John Nicholson SC, the Acting Inspector of the Independent Commission Against Corruption, expressed strong concern about the effect of such findings on the people affected and about the threat such findings pose to the presumption of innocence:

There is no doubt the public perception of a finding of a person engaged in corrupt conduct amounts to a label, a label as potent as any criminal label short of murderer. Staff at the office of the inspector have seen many cases come to us where a person has been labelled as engaging in corrupt conduct, which, in the mind of the public, in circumstances where the DPP has been unwilling to convert that finding into a criminal charge, is nonetheless labelled by others as a 'corrupt person'. The problem with the present approach as reflected in legislation is that it undermines or, to put that colloquially, trashes the presumption of innocence, which is supposed to apply to all people who remain unconvicted of an offence.

So it is worth asking: how does this impact upon the presumption of innocence differ from other rights legally set aside by legislation to enhance and facilitate investigation? Those other rights which are put aside have been legally set aside only for the duration of the investigation. If those court proceedings occur, those rights are reactivated and restored. But the presumption of innocence, if trashed, is trashed for ages.⁵⁶

3.43 The NSW ICAC explained that it views the ability to make such findings as important for its deterrence and education functions as well as its investigatory activities:

52 NSW ICAC, *Submission 10* [2016], pp. 16–7.

53 Independent Commission Against Corruption Amendment Bill 2015 (NSW), Explanatory note, p. 1.

54 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 17.

55 Professor McMillan, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 7.

56 Mr Nicholson, Office of the Inspector, *Committee Hansard*, 12 May 2017, p. 39.

Given that the Commission must conduct its investigations with a view to determining whether corrupt conduct has occurred, is occurring or is about to occur, it is appropriate that, at the conclusion of an investigation, the Commission state whether or not such conduct has actually occurred. A finding of corrupt conduct provides a succinct statement of the improper conduct engaged in by the affected person. There will be cases where it is clear that a person has acted corruptly, even though there may be insufficient admissible evidence to warrant a criminal prosecution or the taking of other action. If a person is charged with a criminal offence and acquitted, any finding of corrupt conduct stands. In such cases a finding of corrupt conduct may be the only adverse consequence the person incurs.

The ability to make findings of corrupt conduct is also relevant to the Commission's deterrence and education roles.⁵⁷

Oversight

3.44 The ICAC Act (NSW) requires the appointment a joint committee of members of parliament, to be known as the Committee on the Independent Commission Against Corruption, as well as the appointment of an Inspector of the Independent Commission Against Corruption.⁵⁸

3.45 The parliamentary committee comprises 11 members, with three from the Legislative Council and eight from the Legislative Assembly. The committee is to elect a chair and deputy chair from its members. There are no legislative restrictions on which party should hold the positions of chair and deputy chair. However, the current chair and deputy chair are members of the Liberal and National parties respectively.⁵⁹ The functions of the committee are:

- (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to

57 NSW ICAC, *Submission 10* [2016], p. 18.

58 *Independent Commission Against Corruption Act 1988* (NSW), parts 5A and 7.

59 *Independent Commission Against Corruption Act 1988* (NSW), s. 63 and s. 65; the current chair is The Hon. Mr Damien Tudehope MP, and the current deputy chair is The Hon. Mr Geoffrey Provest MP.

the functions, structures and procedures of the Commission and the Inspector,

- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.⁶⁰

3.46 In addition to these functions, the committee holds a right of veto over the appointment of commissioners.⁶¹ The committee is not, however, authorised to take the following actions:

- (a) to investigate a matter relating to particular conduct, or
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.⁶²

3.47 The Inspector of the Independent Commission Against Corruption is appointed by the governor, but appointments are subject to veto by the joint committee. The inspector may be reappointed, but cannot hold office for longer than five years in total.⁶³ The inspector's office becomes vacant in similar circumstances to those that apply to NSW ICAC commissioners, and an inspector may only be removed from office by the governor on the address of both houses of parliament.⁶⁴

3.48 The role of the inspector is to hold the ICAC accountable for the manner in which it carries out its functions. It carries out this role by:

- undertaking audits of the ICAC's operations to ensure compliance with the law;
- dealing with complaints about the conduct of the ICAC and current and former officers; and
- assessing the effectiveness and appropriateness of the ICAC's procedures.⁶⁵

3.49 The inspector is granted the following powers by the ICAC Act (NSW):

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and

60 *Independent Commission Against Corruption Act 1988* (NSW), s. 64.

61 *Independent Commission Against Corruption Act 1988* (NSW), s. 64A.

62 *Independent Commission Against Corruption Act 1988* (NSW), s. 64.

63 *Independent Commission Against Corruption Act 1988* (NSW), s. 57A; Schedule 1A, s. 4 and s. 10.

64 *Independent Commission Against Corruption Act 1988* (NSW), Schedule 1A, s. 7.

65 NSW ICAC, *The Inspector of the Independent Commission Against Corruption—Role*, <http://www.oicac.nsw.gov.au/> (accessed 28 August 2017).

- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and
- (e) may investigate and assess complaints about the Commission or officers of the Commission, and
- (f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and
- (g) may recommend disciplinary action or criminal prosecution against officers of the Commission.⁶⁶

3.50 In addition, the inspector is empowered to make and hold inquiries and for these purposes 'has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*'.⁶⁷ The inspector is able to exercise these powers on his or her own initiative, at the request of the minister, in response to a complaint, or in response to a reference from the joint committee or any public authority or official.⁶⁸

3.51 The Acting Inspector, Mr John Nicholson SC, made the following comments about the role of his office and its sometimes tense relationship with the NSW ICAC:

Significantly and in my submission regrettably, the Office of the Inspector to the ICAC was not included in the initial 1988 bill. The office of inspector was legislated some 17 years later in 2005. Let me make clear: all previous holders, at least as best as I can ascertain, of the statutory position of the Inspector to the ICAC have sought by their actions to enhance the functioning of the ICAC—that is, we are not the enemy of the ICAC; we simply seek to enhance its functioning, although in more recent times the level of critical observation by the inspector has been sharper than in previous years.

Consequently, there has been a view about in more recent times that there is a tension between the ICAC and the office of the inspector. Both offices of course link specific functions to the person of the commissioner or the inspector, as the case may be. By and large, however, the relationships between the commissioner and the inspector are fulfilled in a highly professional spirit. However, the legislative parameters of the office of

66 *Independent Commission Against Corruption Act 1988* (NSW), s. 57C.

67 *Independent Commission Against Corruption Act 1988* (NSW), s. 57D.

68 *Independent Commission Against Corruption Act 1988* (NSW), ss. 57B(2).

inspector, geared as they are to dealing with complaints made in respect of alleged ICAC's abuse of power, maladministration, delay, unreasonable invasions of privacy, impropriety and the like are bound to have the unintended consequence of some tension between an inspector scrutinising the work of the ICAC in response to complaints, particularly where the inspector finds merit in them, and in ICAC using its extraordinary powers focused in enthusiastic pursuit upon the unscrupulous few public officers engaged in undermining public confidence in public administration.⁶⁹

Queensland—Crime and Corruption Commission

3.52 Since the completion of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct—the Fitzgerald Inquiry—in 1989, Queensland has possessed a body focused on investigating public sector corruption. The Criminal Justice Commission (CJC) was established in 1989, on the recommendation of the Fitzgerald Inquiry, and combined the functions of investigating police and public sector misconduct and cooperating with police to investigate organised and major crime.⁷⁰

3.53 The CJC's crime function was removed and vested with the Queensland Crime Commission in 1997. In 2001, however, these two functions were recombined within a new body, the Crime and Misconduct Commission, by the passage of the *Crime and Misconduct Act 2001* (Qld). The Crime and Misconduct Commission was again reformed in 2014 via the *Crime and Misconduct and Other Legislation Amendment Act 2014* (Qld) and became the current Crime and Corruption Commission (Qld CCC).⁷¹

3.54 The Queensland framework also includes the Queensland Integrity Commissioner, established pursuant to the *Integrity Act 2009* (Qld) in 2009, but who operated 'administratively and through previous legislation since about 2000'.⁷² The commissioner 'has two distinct roles, providing advice to designated persons and maintaining the Queensland Register of Lobbyists'.⁷³ This advice extends to 'any ethics or integrity issue, including a conflict of interest issue', but not to legal advice.⁷⁴

3.55 The commissioner, Mr Richard Bingham, informed the committee that where a designated person acts in accordance with the advice he has given, the act provides

69 Mr Nicholson, Office of the Inspector, *Committee Hansard*, 12 May 2017, p. 37.

70 Queensland Crime and Corruption Commission (Qld CCC), *History*, <http://www.ccc.qld.gov.au/about-the-ccc/history> (accessed 17 August 2017).

71 Qld CCC, *History*, <http://www.ccc.qld.gov.au/about-the-ccc/history> (accessed 17 August 2017).

72 Mr Richard Bingham, Queensland Integrity Commissioner, Office of the Queensland Integrity Commissioner, *Committee Hansard*, 15 May 2017, p. 19.

73 Queensland Integrity Commissioner, *What we do*, <https://www.integrity.qld.gov.au/about-us/what-we-do.aspx> (accessed 30 August 2017). A 'designated person' is defined at s. 12 of the *Integrity Act 2009* (Qld) and includes a member of the Legislative Assembly; a statutory office holder; and a chief executive of a department of government or a public service office.

74 Queensland Integrity Commissioner, *What we do*, <https://www.integrity.qld.gov.au/about-us/what-we-do.aspx> (accessed 30 August 2017).

for 'a limited protection from civil liability and administrative consequence'.⁷⁵ Mr Bingham stated that he was 'not aware of any circumstances in which that has actually occurred', but was 'aware of circumstances in which people use the advice to assist in the public dimensions of a debate about actions that they are involved in'.⁷⁶

Commissioner—appointment and tenure

3.56 The *Crime and Corruption Act 2001* (Qld) (CC Act (Qld)), establishes a five-member commission to head the Qld CCC, including a full-time commissioner, who is the chairperson, and four part-time commissioners, one of whom is also the deputy chairperson. The CC Act (Qld) also establishes the position of chief executive officer.⁷⁷ The chairperson and deputy chairperson of the commission are required to have served as, or be eligible for appointment as, a judge of the Supreme Court of Queensland or any other state, the High Court of Australia or the Federal Court of Australia.⁷⁸ Eligibility for appointment to the remaining commissioner and chief executive officer positions is limited only by a requirement that a person has appropriate 'qualifications, experience or standing'.⁷⁹

3.57 Commissioners and the chief executive officer may only be recommended for appointment by the minister if:

- (a) the Minister has consulted with—
 - (i) the parliamentary committee; and
 - (ii) except for an appointment as chairperson—the chairperson; and
- (b) the nomination is made with the bipartisan support of the parliamentary committee.⁸⁰

3.58 Commissioners and the chief executive officer are appointed for terms not exceeding five years. The chief commissioner and chief executive officer may be reappointed but cannot serve for longer than 10 years in total.⁸¹

3.59 The provisions governing the termination of a commissioner or chief executive differ from those of other state integrity commissions in that the parliament

75 Mr Bingham, Office of the Queensland Integrity Commissioner, *Committee Hansard*, 15 May 2017, p. 20.

76 Mr Bingham, Office of the Queensland Integrity Commissioner, *Committee Hansard*, 15 May 2017, pp. 20–21.

77 *Crime and Corruption Act 2001* (Qld), s. 223 and s. 223A.

78 *Integrity Commission Act 2009* (Qld), s. 224.

79 *Integrity Commission Act 2009*, s. 225.

80 *Crime and Corruption Act 2001* (Qld), s. 228.

81 *Crime and Corruption Act 2001* (Qld), s. 231.

is not required to approve of the decision.⁸² The governor in council may terminate a commissioner or chief executive in cases of incapacity and absence without reasonable excuse, and in cases where these officers engage in paid outside employment without the minister's approval. The governor may also terminate an appointment in cases where a recommendation to that effect is made by the Parliamentary Crime and Corruption Committee, with bipartisan support, and this recommendation is subsequently endorsed by a resolution of the Legislative Assembly.⁸³

Functions of the commission

3.60 The CC Act (Qld) divides the Qld CCC's functions into four areas: prevention; crime; corruption; and research, intelligence and other functions.⁸⁴ The Qld CCC's prevention function was removed in 2014 but restored in 2016.⁸⁵ As the legislation is currently framed, the Qld CCC can fulfil this function in the following ways:

- (a) analysing the intelligence it gathers in support of its investigations into major crime and corruption; and
- (b) analysing the results of its investigations and the information it gathers in performing its functions; and
- (c) analysing systems used within units of public administration to prevent corruption; and
- (d) using information it gathers from any source in support of its prevention function; and
- (e) providing information to, consulting with, and making recommendations to, units of public administration; and
- (f) providing information relevant to its prevention function to the general community; and
- (g) ensuring that in performing all of its functions it has regard to its prevention function; and
- (h) generally increasing the capacity of units of public administration to prevent corruption by providing advice and training to the units and, if asked, to other entities; and
- (i) reporting on ways to prevent major crime and corruption.⁸⁶

82 See provisions governing removal of a commissioner of the Western Australian Crime and Corruption Commission (WA CCC), the South Australian Independent Commissioner Against Corruption (SA ICAC), the Tasmanian Integrity Commission, the Independent Broad-based Anti-corruption Commission (IBAC) and the NSW ICAC.

83 *Crime and Corruption Act 2001* (Qld), s. 236.

84 *Crime and Corruption Act 2001* (Qld), Chapter 2, parts 1 to 4.

85 The Hon. Ms Yvette D'Ath, Attorney-General, *Legislative Assembly Hansard*, 1 December 2015, p. 2970.

86 *Crime and Corruption Act 2001* (Qld), s. 24.

3.61 The Qld CCC's crime function is restricted to matters referred to it by the Crime Reference Committee, which is also established under the CC Act (Qld). This committee consists of designated officers of the Qld CCC as well as the commissioner of police, the principal commissioner under the *Family and Child Commission Act 2014*, the CEO of the Australian Criminal Intelligence Commission (ACIC), and two community representatives appointed by the governor in council.⁸⁷ During its investigations of major crime, the Qld CCC may gather evidence to support prosecutions, recovery of proceeds of major crimes and the recovery of other property or unexplained wealth. It may also share and receive information with other law enforcement agencies.⁸⁸

3.62 With respect to its corruption function, the CC Act (Qld) includes a statement of the parliament's intention as to how the Qld CCC should operate with respect to other areas of public administration. This statement includes such matters as cooperation, capacity building, devolution and the public interest.⁸⁹ The Qld CCC is to perform its corruption function by:

- (a) expeditiously assessing complaints about, or information or matters (also *complaints*) involving, corruption made or notified to it;
- (b) referring complaints about corruption within a unit of public administration to a relevant public official to be dealt with by the public official;
- (c) performing its monitoring role for police misconduct as provided for under section 47(1);
- (d) performing its monitoring role for corrupt conduct as provided for under section 48(1);
- (e) dealing with complaints about corrupt conduct, by itself or in cooperation with a unit of public administration;
- (f) investigating and otherwise dealing with, on its own initiative, the incidence, or particular cases, of corruption throughout the State;
- (g) assuming responsibility for, and completing, an investigation, by itself or in cooperation with a unit of public administration, if the commission considers that action to be appropriate having regard to the principles set out in section 34;
- (h) when conducting or monitoring investigations, gathering evidence for or ensuring evidence is gathered for—
 - (i) the prosecution of persons for offences; or
 - (ii) disciplinary proceedings against persons;

87 *Crime and Corruption Act 2001* (Qld), s. 278.

88 *Crime and Corruption Act 2001* (Qld), s. 26.

89 *Crime and Corruption Act 2001* (Qld), s. 34.

- (i) assessing the appropriateness of systems and procedures adopted by a unit of public administration for dealing with complaints about corruption;
- (j) providing advice and recommendations to a unit of public administration about dealing with complaints about corruption in an appropriate way.

3.63 The remaining functions assigned to the Qld CCC include undertaking research to support its functions, including research into police operations and powers; undertaking intelligence activities where this is authorised by the Crime Reference Committee; witness protection activities; and civil confiscation functions.⁹⁰

3.64 The desirability of combining serious and organised crime functions with corruption functions, as is currently the case with the Qld CCC, was a subject of contention in evidence before the committee. Professor A.J. Brown suggested that ideally these functions should be separated into distinct bodies:

...in Queensland experience of the crime commission having been separated out and put back in, the institution itself has found ways to manage that combination of roles. [It] is still fairly high risk. The reason for putting it in there was that the Fitzgerald inquiry pointed to the links between corruption and organised crime and therefore that the investigation of them could travel together. I am sure that is still the case to some degree and provides some advantage, but I think the potential conflict of interest of the commission in its anticorruption function having to oversee itself in relation to its serious and organised crime investigative functions is a very big risk.⁹¹

3.65 Professor Brown also suggested that the combination of these two functions made it possible for the government to effectively erode the anti-corruption function by prioritising the crime function 'in terms of political mandate, legislative authority, legislative obligations, resources'.⁹²

3.66 The Chief Executive Officer of the Qld CCC, Mr Forbes Smith, stated that he believed the manner in which the two functions had been combined within one agency had been legislatively 'a bit clumsy', but that the organisation was well advanced in addressing threats posed by the development of silos and cultural differences.⁹³

90 *Crime and Corruption Act 2001* (Qld), Part 4.

91 Professor A.J. Brown, Program Leader, Centre for Governance and Public Policy, Griffith University (Griffith University), *Committee Hansard*, 15 May 2015, p. 10.

92 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2015, p. 10.

93 Mr Forbes Smith, Chief Executive Officer, Qld CCC, *Committee Hansard*, 15 May 2015, p. 13.

Definition of corruption and jurisdiction

3.67 The Qld CCC investigates reports of corrupt conduct involving Queensland public sector agencies, with a focus on more serious or systemic corrupt conduct.⁹⁴ The CC Act (Qld) contains the following definition of 'corrupt conduct':

- (1) ***Corrupt conduct*** means conduct of a person, regardless of whether the person holds or held an appointment, that—
- (a) adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of—
 - (i) a unit of public administration; or
 - (ii) a person holding an appointment; and
 - (b) results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that—
 - (i) is not honest or is not impartial; or
 - (ii) involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or
 - (iii) involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and
 - (c) is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and
 - (d) would, if proved, be—
 - (i) a criminal offence; or
 - (ii) a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.⁹⁵

3.68 The Queensland Police Service is subject to the above provisions regarding corrupt conduct as well as additional provisions dealing specifically with police misconduct. The CC Act (Qld) defines 'police misconduct' as:

...conduct, other than corrupt conduct, of a police officer that—

- (a) is disgraceful, improper or unbecoming a police officer; or
- (b) shows unfitness to be or continue as a police officer; or

94 Queensland Crime and Corruption Committee, *What the CCC investigates*, <http://www.ccc.qld.gov.au/corruption/what-the-ccc-investigates> (accessed 22 August 2017).

95 *Crime and Corruption Act 2001* (Qld), ss. 15(1).

- (c) does not meet the standard of conduct the community reasonably expects of a police officer.⁹⁶

3.69 Complaints about behaviour that falls into the category of misconduct are generally dealt with by the commissioner of police; however, the Qld CCC plays a monitoring role with respect to police misconduct investigations and has the power to assume responsibility for and complete an investigation.⁹⁷

3.70 The CC Act (Qld) also includes a list of activities that could constitute corrupt conduct; however, this list is not exhaustive and does not limit the above definition.⁹⁸ The CC Act (Qld) explicitly states that 'corrupt conduct' is not limited to conduct by people who currently hold or have held positions in public administration.

3.71 The Qld CCC stated in its submission that this definition of 'corrupt conduct' is quite complex. It summarised the definition in the following way:

It is conduct by any person that could result in a lack of probity in, and could adversely affect, the performance of functions or exercise of powers by the public sector. The conduct must also be of a kind which, if established, would amount to either a criminal offence or, if the person worked (or had worked) in the public sector, a disciplinary breach providing reasonable grounds for dismissal.

The definition also captures the conduct of private individuals who seek to corrupt public officers (current or future). However, the definition does not capture criminal conduct by private entities which seriously and adversely affect the public sector but not in ways that would compromise the integrity of public officials.⁹⁹

3.72 In the opinion of the Qld CCC, this definition could be improved by:

...including in certain categories of public administration, conduct of a person (whether or not a public official) that could impair public confidence in that administration. Similarly, the CCC considers that the principles for performing anti-corruption functions should include the investigation of matters connected with perceived corruption and any matter referred to the anti-corruption agency by parliament.¹⁰⁰

3.73 The Qld CCC suggested that these alterations would capture certain conduct that, at present, is excluded from its remit—for example, 'collusive tendering; fraud in or in relation to applications for licences, permits, approvals or clearances under statutes designed to protect health and safety or designed to facilitate the management and commercial exploitation of natural resources; dishonestly obtaining or assisting or benefiting from the payment or application of public funds or the disposition of public

96 *Crime and Corruption Act 2001* (Qld), Schedule 2.

97 *Crime and Corruption Act 2001* (Qld), s. 47.

98 *Crime and Corruption Act 2001* (Qld), s. 15.

99 Qld CCC, *Submission 36*, pp. 4–5.

100 Qld CCC, *Submission 36*, p. 5.

assets for private advantage; defrauding the revenue; and fraudulently obtaining or retaining employment as a public official.¹⁰¹

3.74 The Australia Institute criticised paragraph 15(1)(d) of the definition of 'corrupt conduct' in the CC Act (Qld) on the grounds that the requirement that the conduct, if proved, amount to a criminal offence or grounds for termination of employment establishes too high a threshold for the commencement of corruption investigations. In particular, the Australia Institute highlighted that state and local elected officials only fall within the Qld CCC's jurisdiction in cases where corrupt conduct would, if proven, amount to a criminal offence.¹⁰²

3.75 The Queensland government introduced the *Crime and Corruption and Other Legislation Amendment Bill 2017* on 23 March 2017. This bill includes proposed changes to the definition of corrupt conduct in the CC Act (Qld). The explanatory notes to the bill state that it will:

...(i) simplify the definition of 'corrupt conduct' to assist UPAs [units of public administration] in their interpretation and understanding; and (ii) widen the definition to include conduct of a person that impairs or could impair public confidence in public administration, consistent with the Commission's overriding responsibility to promote public confidence in the integrity of the public sector. The amendments to widen the definition of 'corrupt conduct' are similar to recent changes in both New South Wales (NSW) and Victoria.

More broadly, the Bill also expands the Commission's investigative jurisdiction with respect to corrupt conduct. This will provide the Commission with greater scope to reduce the opportunities and incentives for corrupt conduct in the Queensland public sector and allow it to more proactively address corruption risks.¹⁰³

3.76 This bill appears to address, among other matters, the concerns of the Qld CCC cited above that it is currently restricted in its ability to address such matters as collusive tendering and fraud. The Australia Institute criticised the provisions of the bill, arguing that the proposed alterations to the definition of corrupt conduct 'weakens rather than strengthens, the CCC'.¹⁰⁴

3.77 The committee discussed with the Chief Executive Officer of the Qld CCC the requirement that complaints be made by way of a statutory declaration, which was in place from 2014 to 2016. Mr Smith provided the following explanation of this now superseded measure:

The previous state government required that complainants put a complaint in by way of a statutory declaration. That was designed to reduce the

101 Qld CCC, *Submission 36*, p. 5, fn. 16.

102 AI, *Submission 14*, p. 9; see also, Qld CCC, *What the CCC investigates*, <http://www.ccc.qld.gov.au/corruption/what-the-ccc-investigates> (accessed 22 August 2017).

103 Crime and Corruption and Other Legislation Amendment Bill 2017, Explanatory notes, p. 2.

104 AI, *Submission 14*, Attachment 1, pp. 6–7.

number of complaints that we were receiving, effectively by making people have to go to significantly greater effort to make their complaint. That resulted in quite a marked fall in complaints to our office. The current government rescinded that requirement, and I think it is probably no coincidence that our complaints have started to increase again.¹⁰⁵

3.78 Mr Smith further explained his opposition to such measures designed to make it more onerous to lodge complaints:

I am very strongly against that. I think it is important to realise that we are a commission for, in our case, all Queensland, and not everybody has the capacity or ability to make a statutory declaration. They should be able to either write a letter or ring us. I think in all complaints agencies the approach agency is that you should make making a complaint as easy as possible. If that leads to frivolous complaints being made, we will just deal with them in the course of business and through education of the public.¹⁰⁶

Powers

3.79 The Qld CCC possesses a range of special powers to enable it to fulfil its corruption and crime functions. Due to the fact that the crime function was separated from the Qld CCC for a period, the tests that apply to the use of some powers differ between the crime and corruption functions.¹⁰⁷

3.80 In addition to dealing with complaints about corrupt conduct, either by itself or in cooperation with other public sector bodies, the Qld CCC is able to conduct corruption investigations on its own initiative.¹⁰⁸ However, before it may begin an investigation under its crime function, the Qld CCC must first receive a reference from the Crime Reference Committee, the establishment and composition of which is described above.¹⁰⁹

3.81 The Qld CCC summarises its investigative powers as follows:

The CCC's investigative powers include search, surveillance and seizure powers as well as the power to conduct coercive hearings that compel people to attend and give evidence, and to produce documents and other material. Where we conduct joint investigations with other agencies, we use these powers as well as our expertise in intelligence, financial analysis, forensic computing and covert investigative techniques.¹¹⁰

3.82 The Qld CCC is also able to conduct controlled operations; however, it must first obtain the approval of the Controlled Operations Committee, which is established under section 232 of the *Police Powers and Responsibilities Act 2000* (Qld). This

105 Mr Smith, Qld CCC, *Committee Hansard*, 15 May 2017, p. 14.

106 Mr Smith, Qld CCC, *Committee Hansard*, 15 May 2017, p. 14.

107 Mr Smith, Qld CCC, *Committee Hansard*, 15 May 2017, p. 13.

108 *Crime and Corruption Act 2001* (Qld) para. 35(1)(e) and para. 35(1)(f).

109 *Crime and Corruption Act 2001* (Qld) s. 25 and s. 26.

110 Qld CCC, *Annual Report 2015–16*, p. 12.

committee consists of the commissioner of police, the chairperson of the Qld CCC and an independent member, who must be a retired supreme or district court judge. The chairperson of the Qld CCC is able to grant applications made by officers to acquire and use assumed identities, having regard to matters such as necessity and the risk of abuse.¹¹¹

3.83 As mentioned above, the Qld CCC is empowered to hold hearings. The CC Act (Qld) states that '[g]enerally, a hearing is not open to the public'.¹¹² However, the legislation establishes a number of conditions under which the commission may make a decision to open a hearing to the public. The commission may open a crime investigation hearing to the public if it 'considers opening the hearing will make the investigation to which the hearing relates more effective and would not be unfair to a person or contrary to the public interest'.¹¹³ In the case of a witness protection function hearing, the commission must consider that a public hearing would not 'threaten the security of a protected person or the integrity of the witness protection program or other witness protection activities of the commission'. In all other cases, the commission may open a hearing to the public if it 'considers closing the hearing to the public would be unfair to a person or contrary to the public interest'.¹¹⁴

3.84 The Chief Executive Officer of the Qld CCC, Mr Smith, made the following comments in relation to the commission's approach to holding public hearings:

I think the commission's position is: we certainly, in the appropriate circumstances, think that public hearings are very important. In fact, we have recently had some in the area of local government, but they are to be used carefully, not routinely, and in the right case. It is very hard to apply a general rule about when you should have them. They are, perhaps, not quite the exception to the rule but are certainly to be used fairly rarely, and that is because of the act.¹¹⁵

3.85 Mr Smith informed the committee that decisions taken by the five-member commission to hold public hearings are generally unanimous. He stated that he believed a majority decision would be effective but, in practice, 'the commission is more comfortable in making important decisions like this when they are all in agreement'.¹¹⁶

3.86 The Parliamentary Crime and Corruption Commissioner, Ms Carmody, made the following comments about the dangers of public hearings:

I am very strong on the view that private hearings should be the preferred way to go, with public hearings only in certain specified situations. We

111 *Crime and Corruption Act 2001* (Qld), s. 146S and s. 146T.

112 *Crime and Corruption Act 2001* (Qld), ss. 177(1).

113 *Crime and Corruption Act 2001* (Qld), ss. 177(1).

114 *Crime and Corruption Act 2001* (Qld), ss. 177(2).

115 Mr Smith, Qld CCC, *Committee Hansard*, 15 May 2017, p. 13.

116 Mr Smith, *Committee Hansard*, 15 May 2017, p. 17.

have to remember that in Australia our ultimate rule of law is that you are innocent until you are proven guilty. To have people paraded through the media, and accusations and allegations made against them, so their careers, livelihood and families are completely destroyed, should not be done lightly, by public hearings.¹¹⁷

3.87 With regard to the limits of its powers, the Qld CCC makes the following points:

The CCC is not a court. Even when it investigates a matter, it cannot determine guilt or discipline anyone. In the context of a crime investigation, the CCC can have people arrested, charged and prosecuted. As a result of a corruption investigation, it can refer matters to the Director of Public Prosecutions with a view to criminal prosecution, to the Queensland Civil and Administrative Tribunal to consider action warranted, or to a CEO to consider disciplinary action.¹¹⁸

3.88 The power of the Qld CCC to itself commence a prosecution, mentioned above, is limited to bringing prosecutions for corrupt conduct in disciplinary proceedings in the Queensland Civil and Administrative Tribunal (QCAT).¹¹⁹ The CC Act (Qld) defines the orders QCAT may make if it finds that corrupt conduct has been proved:

- (1) QCAT may, on a finding of corrupt conduct being proved against a prescribed person, order that the prescribed person—
 - (a) be dismissed; or
 - (b) be reduced in rank or salary level; or
 - (c) forfeit, or have deferred, a salary increment or increase to which the prescribed person would ordinarily be entitled; or
 - (d) be fined a stated amount that is to be deducted from—
 - (i) the person's periodic salary payment in an amount not more than an amount equal to the value of 2 penalty units per payment; or
 - (ii) the person's monetary entitlements, other than superannuation entitlements, on termination of the person's service.

117 Ms Karen Carmody, Parliamentary Crime and Corruption Commissioner, Office of the Parliamentary Crime and Corruption Commissioner (OPCCC), *Committee Hansard*, 15 May 2017, p. 26.

118 Qld CCC, *Special Powers*, <http://www.ccc.qld.gov.au/about-the-ccc/powers> (accessed 23 August 2017).

119 *Crime and Corruption Act 2001* (Qld), s. 50.

- (2) In deciding the amount for subsection (1)(d)(ii), QCAT may have regard to the value of any gain to the prescribed person from the person's corrupt conduct.¹²⁰

Oversight

3.89 The Qld CCC is subject to the scrutiny of the Parliamentary Crime and Corruption Committee (PCCC), which is established under Part 3 of the CC Act (Qld). The PCCC is a seven-member committee which must include four members nominated by the Leader of the House and three members nominated by the Leader of the Opposition. The chair of the PCCC must be nominated by the Leader of the House. Despite this requirement, the present chair of the committee is a member of the opposition rather than the government.¹²¹

3.90 The principal functions of the PCCC are:

- to monitor and review the performance of the functions, and the structure of the Crime and Corruption Commission (CCC or the Commission);
- to report to Parliament on matters relevant to the Commission; and
- to participate in the appointment of Commissioners and the Chief Executive Officer of the Commission.¹²²

3.91 The committee is granted a number of powers under the CC Act (Qld), including the ability to: direct the Qld CCC to undertake a corruption investigation into a matter; to receive complaints about the Qld CCC and, among other responses, refer such complaints to other law enforcement agencies, the parliamentary commissioner or the director of public prosecutions; and to issue guidelines to the Qld CCC about its conduct and activities. Each of these powers is only effective if it is exercised with bipartisan support and any guidelines issued by the committee are disallowable by the Legislative Assembly.¹²³ A further power granted to the committee is the ability to 'appoint persons having special knowledge or skill to help the committee perform its functions'.¹²⁴

3.92 The CC Act (Qld) also establishes a part-time Parliamentary Crime and Corruption Commissioner as an officer of the parliament. The commissioner must either have served or be qualified to serve as a judge of the Supreme Court of Queensland, the Supreme Court of another state, the High Court or the Federal Court.

120 *Crime and Corruption Act 2001* (Qld), s. 291I; see discussion at Gilbert + Tobin, *Submission 19* [2016], p. 35.

121 *Crime and Corruption Act 2001* (Qld), s. 300; the current chair of the Parliamentary Crime and Corruption Committee is the Hon. Lawrence Springborg MP.

122 Queensland Parliament, *Parliamentary Crime and Corruption Committee—overview*, <https://www.parliament.qld.gov.au/work-of-committees/committees/PCCC#> (accessed 23 August 2017).

123 *Crime and Corruption Act 2001* (Qld), s. 294 to s. 296.

124 *Crime and Corruption Act 2001* (Qld), para. 293(2)(a).

The commissioner is appointed by the Speaker subject to the bipartisan approval of the PCCC. The commissioner may be removed from office by the governor in council, with the bipartisan support of the PCCC, on grounds of incapacity or if found guilty of conduct that would warrant dismissal from the public service. The governor may also remove the commissioner on the basis of the bipartisan support of the PCCC for such action accompanied by a resolution of the Legislative Assembly.¹²⁵

3.93 The functions of the Parliamentary Crime and Corruption Commissioner are as follows:

- Audit records kept by the Commission and operational files and accompanying documentary material held by the Commission, including current sensitive operations.
- Investigate, including by accessing operational files of the Commission to which the committee is denied access, complaints made against, or concerns expressed about, the conduct or activities of the Commission or a Commission Officer.
- Independently investigate allegations of possible unauthorised disclosure of information or other material that, under the *Crime and Corruption Act*, is confidential.
- Inspect the register of confidential information kept under the Act to verify the Commission's reasons for withholding information from the committee.
- Review reports by the Commission to the committee to verify their accuracy and completeness, particularly in relation to an operational matter.
- Report, and make recommendations, to the committee on the results of performing the functions above.
- Perform other functions the committee considers necessary or desirable.¹²⁶

3.94 The Office of the Parliamentary Crime and Corruption Commissioner currently consists of only the commissioner and a principal legal officer. The office's current principal legal officer, Mr Mitchell Kunde, informed the committee that the office was initially created in 1997 because the parliamentary oversight committee had 'found access to operational material was difficult and problematic. So the role of the parliamentary commissioner was created as the investigative arm of the committee'.¹²⁷ He also provided the following assessment on the accountability

125 *Crime and Corruption Act 2001* (Qld), Part 4, divisions 1 and 2.

126 Queensland Parliament, *Parliamentary Crime and Corruption Committee—overview*, <https://www.parliament.qld.gov.au/work-of-committees/committees/PCCC#> (accessed 23 August 2017).

127 Mr Mitchell Kunde, Principal Legal Officer, OPCCC, *Committee Hansard*, 15 May 2017, p. 28.

structure involving the Qld CCC, the PCCC and the Parliamentary Crime and Corruption Commissioner:

It is a useful structure, and I think this office is a very useful office, because we focus only on the CCC, and so we can look at every application for warrant, every warrant that they have and every application for a listening device, and we can make sure that they have done those properly and processed all of the things that they need to do. The parliamentary committee oversighting the CCC, and then this office as an investigative arm of the parliamentary committee, is, I think, an ideal model.¹²⁸

3.95 Mr Kunde also identified complaints about unauthorised leaks of confidential information from the Qld CCC and complaints about the extent of investigations undertaken by the Qld CCC as the most common types of complaints received by the office.¹²⁹

3.96 The Parliamentary Crime and Corruption Commissioner, Ms Karen Carmody, noted that the powers of her role are similar to those of the NSW ICAC Inspector, but that these powers 'have been very rarely used to the extent that they could be'.¹³⁰

Western Australia—Corruption and Crime Commission

3.97 The Western Australian Corruption and Crime Commission (WA CCC) commenced operation in January 2004, after the passage of the *Corruption and Crime Act 2003* (WA). Upon its establishment, the WA CCC was required to take over investigations and outstanding case files and complaints from the Kennedy Royal Commission into corrupt or criminal conduct by the Western Australia Police and the existing Anti-Corruption Commission.¹³¹ The *Corruption and Crime Act 2003* was amended multiple times in subsequent years and became, on 1 July 2015, the *Corruption, Crime and Misconduct Act 2003* (CCM Act (WA)). This change in name reflects the fact that the amended act gives the Western Australian Public Service Commissioner responsibility for dealing with less serious public sector misconduct.¹³²

3.98 As noted in the 2016 select committee's interim report, the establishment of the WA CCC and the abolition of the existing Anti-Corruption Commission were early recommendations of the Kennedy Royal Commission, which stated:

In the circumstances, it has been possible at this stage of the work of the Commission to conclude that the identifiable flaws in the structure and powers of the ACC have brought about such a lack of public confidence in

128 Mr Kunde, OPCCC, *Committee Hansard*, 15 May 2017, pp. 25–6.

129 Mr Kunde, OPCCC, *Committee Hansard*, 15 May 2017, p. 26.

130 Ms Carmody, OPCCC, *Committee Hansard*, 15 May 2017, p. 27.

131 WA CCC, *Annual Report 2003–2004*, p. 5.

132 WA CCC, *Fact sheet No. 1—About the CCC*, July 2015, p. [1], <https://www.ccc.wa.gov.au/sites/default/files/Fact%20Sheet%20No.%201%20About%20the%20CCC.pdf> (accessed 9 August 2017).

the current processes for the investigation of corrupt and criminal conduct that the establishment of a new permanent body is necessary.¹³³

Commissioner—appointment and tenure

3.99 The CCM Act (WA) establishes the WA CCC as a body corporate and provides for the appointment of a single commissioner. The Act requires that any commissioner has either served as, or be qualified for appointment as, a judge of the Supreme Court of Western Australia or another state or territory. The commissioner may not be a current or former police officer.¹³⁴

3.100 The Act specifies that the commissioner is to be appointed on the recommendation of the premier by the governor. However, the premier may only recommend the appointment of a person whose name is on a list of three eligible persons provided to the premier by a nominating committee, which in turn consists of the Chief Justice, the Chief Judge of the District Court, and a person appointed by the governor to represent the interests of the community. The premier's nomination must also have the support of a majority of the Joint Standing Committee on the Corruption and Crime Commission, as well as bipartisan support.¹³⁵

3.101 The commissioner is appointed on a full-time basis for a term of five years and may be reappointed once.¹³⁶ The commissioner may be suspended by the governor on grounds of incapacity, incompetence or misconduct; however, the commissioner may only be removed from office on the basis of addresses from both houses of parliament. If such addresses are not made by each house, the commissioner is restored to office.¹³⁷

Functions of the commission

3.102 The CCM Act (WA) confers three main functions on the WA CCC—a serious misconduct function; an organised crime function; and a prevention and education function.¹³⁸

3.103 The WA CCC may fulfil its serious misconduct function by receiving or initiating allegations of serious misconduct, considering whether action is needed, investigating allegations or referring them to other appropriate authorities, monitoring the handling of any allegations it refers to other agencies, making recommendations and making reports; consulting, cooperating and sharing information with the AFP,

133 The Hon. G.A. Kennedy AO QC, *Royal Commission into whether there has been Corrupt or Criminal Conduct by Western Australian Police Officers—Interim report*, December 2002, p. 3.

134 *Corruption, Crime and Misconduct Act 2003* (WA), s. 10.

135 *Corruption, Crime and Misconduct Act 2003* (WA), s. 9.

136 *Corruption, Crime and Misconduct Act 2003* (WA), Schedule 2, s. 1.

137 *Corruption, Crime and Misconduct Act 2003* (WA), s. 12.

138 *Corruption, Crime and Misconduct Act 2003* (WA), s. 18, s. 21 and s. 21AA.

other state and territory police commissioners, the ATO, the ACIC, ASIO, and AusTrac.¹³⁹

3.104 The WA CCC is able, in pursuit of its prevention and education function, to perform the following activities:

- (a) analysing the information it gathers in performing functions under this Act and any other Act, including the intelligence gathered in support of its police misconduct and organised crime functions;
- (b) analysing systems used within the Police Department to prevent police misconduct;
- (c) using information it gathers from any source in support of the prevention and education function;
- (d) providing information to, consulting with, and making recommendations to, the Police Department;
- (e) providing information relevant to the prevention and education function to members of the police service and to the general community;
- (f) ensuring that in performing all of its functions it has regard to the prevention and education function;
- (g) generally increasing the capacity of the Police Department to prevent and combat police misconduct by providing advice and training to the Police Department;
- (h) reporting on ways to prevent and combat police misconduct.¹⁴⁰

3.105 The WA CCC may also consult, co-operate and exchange information with the public service commissioner when performing its education and prevention function.¹⁴¹

3.106 Although one of the purposes of the CCM Act (WA) is to 'combat and reduce the incidence of organised crime', the WA CCC's ability to contribute to this outcome is quite restricted. Under its organised crime function, the WA CCC is limited to receiving applications from the commissioner of police to be granted extraordinary powers, including the ability to compel witnesses to answer questions in private hearings, enhanced entry and search powers, use of assumed identities and conduct of controlled operations.¹⁴² The WA CCC must determine whether to approve the use of such powers based on whether there are reasonable grounds to suspect an offence is being committed, that relevant evidence or information might be obtained by using the powers and that the use of the powers is in the public interest.¹⁴³

139 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 18(2).

140 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 21AA(2).

141 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 21AA(3).

142 *Corruption, Crime and Misconduct Act 2003* (WA), s. 45 to s. 83.

143 *Corruption, Crime and Misconduct Act 2003* (WA), s. 46.

3.107 The WA CCC is not itself empowered to investigate organised crime and in some years it has not been called on to perform any organised crime function as the Western Australian Police have made no applications to make use of the extraordinary powers covered by the CCM Act (WA).¹⁴⁴ The WA CCC has in the past recommended amendments to its organised crime function, stating that 'the expressed intent of the Parliament with regard to its organised crime function, established as the first of the Commission's two main purposes under section 7A of the Act, cannot be achieved under the current legislative arrangements.'¹⁴⁵ In its latest annual report, the WA CCC stated that it had again 'received no applications for the use of exceptional powers or fortification warning notices'.¹⁴⁶

Definition of corruption and jurisdiction

3.108 Section 4 of the CCM Act (WA) defines 'misconduct'. The Act then categorises types of misconduct into 'serious misconduct' and 'minor misconduct' and assigns the WA CCC responsibility for addressing the former and assigns the Western Australian Public Service Commission responsibility for the latter.¹⁴⁷ The term 'corruption' is then used to define 'serious misconduct'. Under the CCM Act (WA) 'serious misconduct' occurs when a public officer:

- acts corruptly or corruptly fails to act in the course of their duties; or
- corruptly takes advantage of their position for the benefit or detriment of any person; or
- commits an offence which carries a penalty of 2 or more years imprisonment.¹⁴⁸

3.109 'Minor misconduct' occurs when a public officer engages in conduct that:

- adversely affects the honest or impartial performance of the functions of a public authority or public officer, whether or not the public officer was acting in their public officer capacity at the time of engaging in the conduct;
- involves the performance of functions in a manner that is not honest or impartial;
- involves a breach of the trust placed in the public officer; or

144 See, for example, WA CCC, *Annual Report 2005–2006*, p. 6; WA CCC, *Annual Report 2006–2007*, p. 2; WA CCC, *Annual Report 2007–2008*, p. 4.

145 WA CCC, *Annual Report 2005–2006*, p. 1.

146 WA CCC, *Annual Report 2015–16*, p. 101.

147 *Corruption, Crime and Misconduct Act 2003* (WA), Part 3 and Part 4A respectively.

148 WA CCC, *Fact Sheet No. 2—Definition of Serious Misconduct*, July 2015, p. [1], <https://www.ccc.wa.gov.au/sites/default/files/Fact%20Sheet%20No.%202%20Definition%20of%20Serious%20Misconduct.pdf> (accessed 9 August 2017), see *Corruption, Crime and Misconduct Act 2003* (WA), ss.3.

- involves the misuse of information or material that is in connection with their functions as a public officer, whether the misuse is for the benefit of the public officer or the benefit or detriment of another person; and
- constitutes, or could constitute, a disciplinary offence providing reasonable grounds for termination of a person's office or employment.¹⁴⁹

3.110 In the specific case of members of the police force, the CCM Act (WA) states that all misconduct described under section 4, as well as additional conduct that falls within the category of 'reviewable police conduct', is considered 'serious misconduct'. This provision has the effect of making the WA CCC responsible for examining all instances of police misconduct.¹⁵⁰

3.111 Any misconduct by members of parliament, the clerk of a house of parliament, or a local government member is also explicitly excluded from the 'minor misconduct' category, thereby reserving such misconduct for consideration by the WA CCC.¹⁵¹

3.112 With respect to its investigatory capacity, the WA CCC is therefore focused on allegations of serious misconduct by any public officer. It also retains oversight of all misconduct by members of the police force, whether or not such conduct would otherwise be considered minor misconduct. The CCM Act (WA) defines a 'public officer' by reference to the definition contained in section 1 of the Western Australian *Criminal Code*. The definition encompasses the following:

- (a) a police officer;
- (aa) a Minister of the Crown;
- (ab) a Parliamentary Secretary appointed under section 44A of the *Constitution Acts Amendment Act 1899*;
- (ac) a member of either House of Parliament;
- (ad) a person exercising authority under a written law;
- (b) a person authorised under a written law to execute or serve any process of a court or tribunal;
- (c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994*;

149 WA CCC, *Fact Sheet No. 2—Definition of Serious Misconduct*, July 2015, p. [2] <https://www.ccc.wa.gov.au/sites/default/files/Fact%20Sheet%20No.%202%20Definition%20of%20Serious%20Misconduct.pdf> (accessed 9 August 2017); see also *Corruption, Crime and Misconduct Act 2003* (WA), s. 4(d).

150 WA CCC, *Fact Sheet No. 2—Definition of Serious Misconduct*, July 2015, p. [1] <https://www.ccc.wa.gov.au/sites/default/files/Fact%20Sheet%20No.%202%20Definition%20of%20Serious%20Misconduct.pdf> (accessed 9 August 2017).

151 *Corruption, Crime and Misconduct Act 2003* (WA), s. 3, see definition of 'minor misconduct'.

- (ca) a person who holds a permit to do high-level security work as defined in the *Court Security and Custodial Services Act 1999*;
- (cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981*;
- (d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; [or]
- (e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not...¹⁵²

Powers

3.113 The CCM Act (WA) obliges the WA CCC to 'ensure that an allegation about, or information or matter involving, serious misconduct is dealt with in an appropriate way'.¹⁵³ The WA CCC is able to act on allegations of serious misconduct that it receives, as well as to conduct investigations into possible serious misconduct on its own initiative.¹⁵⁴

3.114 With respect to investigatory powers, the WA CCC is able to issue a summons to require a person to attend an examination and to give evidence or produce any record or other thing.¹⁵⁵ Examinations are held in private, except in cases where the commission determines to open an examination to the public. It may take this step if, 'having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so'.¹⁵⁶

3.115 The WA CCC is able apply to a judge of the Supreme Court for a search warrant and, if successful, execute such warrants.¹⁵⁷ In the case of premises of a public authority or public officer, the WA CCC is empowered to authorise its officers to, at any time and without a warrant, enter and inspect such premises, inspect any document or other thing on the premises and make copies of any documents.¹⁵⁸ The WA CCC is also able to make use of assumed identities and to conduct controlled operations and integrity testing programs.¹⁵⁹

152 *Criminal Code Act Compilation Act 1913* (WA), s. 1; see also WA CCC, *Fact Sheet No. 4– Definition of a Public Officer*, July 2015, <https://www.ccc.wa.gov.au/sites/default/files/Fact%20Sheet%20No.%204%20Definition%20of%20Public%20Officer.pdf> (accessed 9 August 2017).

153 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 18(1).

154 *Corruption, Crime and Misconduct Act 2003* (WA), para. 18(2)(e).

155 *Corruption, Crime and Misconduct Act 2003* (WA), s. 96.

156 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 140(2).

157 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 101(2).

158 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 100(1).

159 *Corruption, Crime and Misconduct Act 2003* (WA), Part 6, divisions 3 and 4.

3.116 The WA CCC is able to make recommendations as to whether consideration should or should not be given to either the prosecution of particular persons, or the taking of disciplinary action against particular persons.¹⁶⁰ However, the CCM Act (WA) states:

A recommendation made by the Commission under this section is not a finding, and is not to be taken as a finding, that a person has committed or is guilty of a criminal offence or has engaged in conduct that constitutes or provides grounds on which that person's tenure of office, contract of employment, or agreement for the provision of services, is, or may be, terminated.¹⁶¹

3.117 As noted above, the WA CCC is not itself empowered to investigate organised crime, but does have powers to authorise the use of extraordinary powers outlined in the CCM Act (WA) by the Western Australian Police.¹⁶² The WA CCC also plays an oversight role in the use of controlled operations by the Western Australian Police, the Department of Fisheries and the ACIC. In this capacity, the WA CCC is responsible for inspecting the controlled operations records of these agencies once every 12 months and preparing an annual report for ministers and chief officers.¹⁶³

Oversight

3.118 The CCM Act (WA) establishes both a Parliamentary Inspector of the Corruption and Crime Commission of Western Australia, and a joint standing committee of the Western Australian Parliament.¹⁶⁴ The parliamentary inspector must possess a minimum level of legal experience and is appointed and subject to removal in a manner that mirrors the appointment of the commissioner to the WA CCC. The parliamentary inspector's functions are:

- (aa) to audit the operation of the Act;
- (a) to audit the operations of the Commission for the purpose of monitoring compliance with the laws of the State;
- (b) to deal with matters of misconduct on the part of the Commission, officers of the Commission and officers of the Parliamentary Inspector;
- (cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act;
- (c) to assess the effectiveness and appropriateness of the Commission's procedures;

160 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 43(1).

161 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 43(6).

162 *Corruption, Crime and Misconduct Act 2003* (WA), Part 4.

163 *Criminal Investigation (Covert Powers) Act 2012* (WA), s. 37 and s. 38.

164 *Corruption, Crime and Misconduct Act 2003* (WA), Part 13; s. 216A.

- (d) to make recommendations to the Commission, independent agencies and appropriate authorities;
- (e) to report and make recommendations to either House of Parliament and the Standing Committee;
- (f) to perform any other function given to the Parliamentary Inspector under this or another Act.¹⁶⁵

3.119 The parliamentary inspector is able to hold inquiries for the purpose of carrying out these functions, and in doing so enjoys the powers, protections and immunities of a royal commission, as set out in the *Royal Commissions Act 1968* (WA). Such inquiries must, however, be held in private.¹⁶⁶

3.120 The Joint Standing Committee on the Corruption and Crime Commission is tasked with monitoring and reporting on how both the WA CCC and the parliamentary inspector carry out their functions, as well as inquiring into means by which public sector corruption prevention practices may be enhanced.¹⁶⁷

3.121 Professor Adam Graycar of Flinders University noted recent findings of misconduct within the WA CCC by the parliamentary inspector.¹⁶⁸ The parliamentary inspector made a report in June 2015 concerning allegations of misconduct within the WA CCC's Operations Support Unit (OSU). The inspector made the following the comments about the OSU:

The number and nature of allegations made against OSU officers in this matter, and the systemic nature of the conduct investigated, revealed a disturbing culture of entitlement and unaccountability in the OSU contrary to the standards and values expected of public officers, particularly those employed by the State's anti-corruption body.

In some instances, the conduct which this culture encouraged was suspected of having violated State, and possibly Commonwealth, criminal laws.¹⁶⁹

3.122 The parliamentary inspector made a further report in December 2015 dealing specifically with the abuse of assumed identities, traffic infringement notices and the

165 *Corruption, Crime and Misconduct Act 2003* (WA), ss. 195(1).

166 *Corruption, Crime and Misconduct Act 2003* (WA), s. 197.

167 Parliament of Western Australia, *Joint Standing Committee on the Crime and Corruption Commission—Functions and Powers of the Committee*, http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/c3138602cf10e6a648257b7400159a22?OpenDocument&ExpandSection=4#_Section4, (accessed 12 August 2017).

168 Professor Adam Graycar, *Submission 1* [2016], Attachment 1, p. 12.

169 The Hon. Michael Murray AM QC, Parliamentary Inspector, *Report on Misconduct and Related Matters in the Corruption and Crime Commission*, 10 June 2015, p. 37.

appointment of special constables, and remedial action taken by the WA CCC to prevent further abuses.¹⁷⁰

Tasmania—Integrity Commission

3.123 In 2009 the Parliamentary Joint Select Committee on Ethical Conduct tabled its final report, which contained a recommendation that 'legislation providing for the creation of the Tasmanian Integrity Commission be drafted.'¹⁷¹ The Tasmanian government responded by drafting and introducing the Integrity Commission Bill 2009, which subsequently became law and established the Integrity Commission on 1 October 2010.

Commissioner—appointment and tenure

3.124 The governance structure of the Tasmanian Integrity Commission differs from that of other state integrity commissions in that the *Integrity Commission Act 2009* (Tas) (IC Act (Tas)) establishes a board, a chief commissioner and a chief executive officer. The IC Act (Tas) states that role of the board is to:

- (a) provide guidance to facilitate the functions and powers of the Integrity Commission, under this or any other Act, being performed and exercised by the chief executive officer and staff of the Integrity Commission in accordance with sound public administration practice and principles of procedural fairness and the objectives of this Act; and
- (b) promote an understanding of good practice and systems in public authorities in order to develop a culture of integrity, propriety and ethical conduct in those public authorities and their capacity to deal with allegations of misconduct; and
- (c) monitor and report to the Minister or Joint Committee or both the Minister and Joint Committee on the operation and effectiveness of this Act and other legislation relating to the operations of integrity entities in Tasmania.¹⁷²

3.125 The chief commissioner is the chairperson of the board. Board members are appointed by the governor on the advice of the minister, after consultation with the Joint Standing Committee on Integrity.¹⁷³ The IC Act (Tas) does not appear to require that the committee approve of board appointments, merely that it be consulted.¹⁷⁴ The

170 Mr Murray, *Report on Activities in the Corruption and Crime Commission Relating to Assumed Identities, Traffic Infringement Notices and Special Constable Appointments*, 4 December 2015.

171 Parliamentary Joint Select Committee on Ethical Conduct, *Final Report—'Public Office is Public Trust'*, 2009, p. 160.

172 *Integrity Commission Act 2009* (Tas), s. 13.

173 The *Integrity Commission Act 2009* (Tas) also originally included the auditor-general and the ombudsman as ex officio members of the board; however, this requirement was removed by the *Integrity Commission Amendment Act 2017*.

174 *Integrity Commission Act 2009* (Tas), ss. 14(4).

IC Act (Tas) also requires board members to hold certain types of experience, covering such areas as local government, law enforcement, public administration, business management, legal practice, community service, human resources and industrial relations.¹⁷⁵

3.126 The chief commissioner is also appointed by the governor on the advice of the minister after consultation with the Joint Standing Committee on Integrity. Again, there appears to be no requirement that the committee agree to the appointment. The IC Act (Tas) requires that an appointee be a legal practitioner of not less than seven years standing and must not have been in the preceding five years a member of any Australian parliament or local council, or a member of a political party.¹⁷⁶ The chief commissioner may be reappointed but cannot serve for a total period exceeding 10 years.¹⁷⁷

3.127 The chief commissioner may be suspended from office if he or she is incapable of performing the functions of the office, has become bankrupt, has been convicted of a crime or an offence punishable by a term of 12 months or more, or has engaged in misconduct or misbehaviour.¹⁷⁸ In such a circumstance, the minister must lay a statement setting out the grounds for the suspension before each house of parliament and the houses may then confirm or revoke the suspension. A similar procedure applies to the revocation of the appointment of the chief commissioner at the request of the governor. It does not appear that the houses of parliament can themselves initiate a revocation of an appointment.¹⁷⁹

3.128 The IC Act (Tas) also establishes a parliamentary standards commissioner, whose function is to provide advice to members of parliament and the Integrity Commission:

- (a) about conduct, propriety and ethics and the interpretation of any relevant codes of conduct and guidelines relating to the conduct of Members of Parliament; and
- (b) relating to the operation of the Parliamentary disclosure of interests register, declarations of conflicts of interest register and any other register relating to the conduct of Members of Parliament; and
- (c) relating to guidance and training for Members of Parliament and persons employed in the offices of Members of Parliament on matters of conduct, integrity and ethics; and
- (d) relating to the operation of any codes of conduct and guidelines that apply to Members of Parliament.¹⁸⁰

175 *Integrity Commission Act 2009* (Tas), ss. 14(1).

176 *Integrity Commission Act 2009* (Tas), s. 15.

177 *Integrity Commission Act 2009* (Tas), s. 15A.

178 *Integrity Commission Act 2009* (Tas), s. 15E.

179 *Integrity Commission Act 2009* (Tas), s. 15H to s. 15J.

180 *Integrity Commission Act 2009* (Tas), s. 28.

3.129 The parliamentary standards commissioner is appointed by the governor, following consultation by the minister with the Joint Standing Committee on Integrity. The parliamentary standards commissioner is appointed for a five-year term and may be reappointed once.¹⁸¹

Functions of the commission

3.130 The functions of the Integrity Commission are specified by the IC Act (Tas) as follows:

- (a) develop standards and codes of conduct to guide public officers in the conduct and performance of their duties; and
- (b) educate public officers and the public about integrity in public administration; and
- (c) prepare guidelines and provide training to public officers on matters of conduct, propriety and ethics; and
- (d) provide advice on a confidential basis to public officers about the practical implementation of standards of conduct that it considers appropriate in specific instances; and
- (e) establish and maintain codes of conduct and registration systems to regulate contact between persons conducting lobbying activities and certain public officers; and
- (f) receive and assess complaints or information relating to matters involving misconduct; and
- (g) refer complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action; and
- (h) refer complaints or any potential breaches of the law to the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate for action; and
- (i) investigate any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate; and
- (j) on its own initiative, initiate an investigation into any matter related to misconduct; and
- (k) deal with any matter referred to it by the Joint Committee; and
- (l) assume responsibility for, and complete, an investigation into misconduct commenced by a public authority or integrity entity if the Integrity Commission considers that action to be appropriate having regard to the principles set out in section 9 ; and
- (m) when conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for –
 - (i) the prosecution of persons for offences; or

181 *Integrity Commission Act 2009* (Tas), s. 27.

- (ii) proceedings to investigate a breach of a code of conduct; or
- (iii) proceedings under any other Act; and
- (n) conduct inquiries into complaints; and
- (o) receive reports relating to misconduct from a relevant public authority or integrity entity and take any action that it considers appropriate; and
- (p) if the Integrity Commission is satisfied that it is in the public interest and expedient to do so, recommend to the Premier the establishment of a Commission of Inquiry under the Commissions of Inquiry Act 1995 ; and
- (q) monitor or audit any matter relating to the dealing with and investigation of complaints about misconduct in any public authority including any standards, codes of conduct, or guidelines that relate to the dealing with those complaints; and
- (r) perform any other prescribed functions or exercise any other prescribed powers.¹⁸²

3.131 These functions essentially fall into two areas—a misconduct prevention and education function, and a complaint handling and investigation function.¹⁸³

3.132 With respect to its misconduct prevention and education function, which is contained in Part 4 of the IC Act (Tas), the Integrity Commission states:

Wherever possible, misconduct risk management must be undertaken by the public authorities themselves as they have the greatest capacity to recognise and control their risks. The Commission provides advice and assistance through a collaborative and consultative approach that empowers public authorities and public officers to build or maintain capacity to deal with misconduct.¹⁸⁴

3.133 With respect to its complaint-handling and investigation functions, which are contained in parts 5 and 6 of the IC Act (Tas), the Integrity Commission states:

The Operations team deals with complaints about misconduct. It does this at two levels: through investigations, and through the auditing of actions taken by public authorities. Investigations are conducted in private and can be time-consuming due to their nature and the rules of procedural fairness. Investigations are not made public unless they are the subject of a report tabled in Parliament. Where appropriate or as otherwise required by legislation, individuals and organisations involved in an investigation may be given notification of the investigation.¹⁸⁵

182 *Integrity Commission Act 2009* (Tas), ss. 8(1).

183 Integrity Commission, *Annual Report 2015–16*, p. 4.

184 Integrity Commission, *Annual Report 2015–16*, p. 4.

185 Integrity Commission, *Annual Report 2015–16*, p. 4.

3.134 The Integrity Commission also has a role in monitoring misconduct allegations and investigations within Tasmania Police. The Integrity Commission conducts an annual audit of all complaints finalised by Tasmania Police and presents a report on its findings to parliament.¹⁸⁶ The Integrity Commission is empowered to assume responsibility for and complete an investigation commenced by the commissioner of police, and is also able to conduct, on its own motion, an investigation into any matter relevant to police misconduct.¹⁸⁷

3.135 The IC Act (Tas) states that the 'Integrity Commission is not subject to the direction or control of the Minister in respect of the performance or exercise of its functions or powers'.¹⁸⁸

Definition of corruption and jurisdiction

3.136 The IC Act (Tas) does not employ the term 'corruption', but instead focuses on 'misconduct' and 'serious misconduct'. Misconduct is defined as follows:

- (a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –
 - (i) a breach of a code of conduct applicable to the public officer; or
 - (ii) the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or
 - (iii) a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or
 - (iv) a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or
- (b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –

but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament;¹⁸⁹

186 Integrity Commission, *Annual Report 2015–16*, p. 4; see, for example, Integrity Commission, *Report of the Integrity Commission, No. 1 of 2016: An Audit of Tasmania Police complaints finalised in 2015*, November 2016, http://www.integrity.tas.gov.au/__data/assets/pdf_file/0004/361165/Report_of_the_Integrity_Commission_No_1_of_2016_An_Audit_of_Tasmania_Police_complaints_finalised_in_2015.pdf (accessed 17 August 2017).

187 *Integrity Commission Act 2009* (Tas), s. 88 and s. 89.

188 *Integrity Commission Act 2009* (Tas), s. 10.

189 *Integrity Commission Act 2009* (Tas), s. 4.

3.137 Serious misconduct is defined as misconduct by any public officer that could, if proved, be:

- (a) a crime or an offence of a serious nature; or
- (b) misconduct providing reasonable grounds for terminating the public officer's appointment;¹⁹⁰

3.138 The Integrity Commission notes that the definition of misconduct does not encompass the following categories of behaviour:

- decisions or actions by a Supreme Court Judge or Magistrate
- actions or decisions by employees of private companies and businesses
- conduct involving lawyers in private practice
- actions of Members of Parliament during proceedings in Parliament
- administrative decisions or actions by public authorities where there is no suggestions that the decisions were made dishonestly or improperly.¹⁹¹

3.139 In accordance with its objective of promoting and enhancing integrity in government and public authorities, the Integrity Commission is restricted to examining matters relating to public officers and public authorities. Public authorities, as defined in section 5 of the IC Act (Tas), include state government departments, government business enterprises, police, custodial officers, members of parliament, elected members and employees of councils, and employees of the University of Tasmania.¹⁹² The IC Act explicitly excludes the Governor of Tasmania, members of the Tasmanian judiciary and the Integrity Commission itself from the category of public authorities.¹⁹³

3.140 In October 2014, the Integrity Commission released a report highlighting what it believed to be a significant weakness in the legislative regime under which it operates—that is, the lack of a 'misconduct in public office' offence in the Tasmanian criminal code. The Integrity Commission stated:

The Commission has now been established for four years. It therefore has some experience of the type and extent of misconduct that is commonly seen in Tasmania. During its four years of operation, the Commission has

190 *Integrity Commission Act 2009* (Tas), s. 4

191 Integrity Commission, *Investigating and dealing with misconduct—what is misconduct?*, http://www.integrity.tas.gov.au/report_misconduct/what_is_misconduct (accessed 17 August 2017).

192 *Integrity Commission Act 2009* (Tas), s. 5; Integrity Commission, *Investigating and dealing with misconduct—what is misconduct?*, http://www.integrity.tas.gov.au/report_misconduct/what_is_misconduct (accessed 17 August 2017).

193 *Integrity Commission Act 2009* (Tas), s. 5.

encountered examples of serious misconduct which, apart from anything else, have resulted in significant financial loss for the state government.

Although examples of misconduct on this scale appear to be relatively infrequent, it is vital that, in accordance with the objectives of the Commission, they be investigated and dealt with appropriately. The Commission considers that some of the misconduct it has seen has been worthy of criminal punishment, and believes that appropriately dealing with it should have included a referral to Tasmania Police or the Director of Public Prosecutions for potential criminal charges. However, in considering options for prosecuting serious misconduct in Tasmania, the Commission has encountered the problem of the dated and ‘ambiguous’ legislative regime. It has also emerged that Tasmania’s criminal code is lacking the key misconduct offence: the offence of ‘misconduct in public office’ (MIPO). Every other jurisdiction in Australia – including the Commonwealth and both the territories – has some form of this offence.¹⁹⁴

3.141 The Integrity Commission recommended that ‘to bring Tasmania into line with all other Australian jurisdictions, an offence which captures ‘misconduct in public office’ be introduced into the Criminal Code of Tasmania’.¹⁹⁵

Powers

3.142 The Integrity Commission possesses a range of investigatory powers that it may use with respect to misconduct within public authorities. However, it does not possess some powers to conduct covert operations that other state integrity commissions enjoy. Inquiries conducted by the Integrity Commission are directed at establishing the facts of a matter and it does not make findings as to whether misconduct occurred.¹⁹⁶

3.143 In cases where the chief executive officer determines that a complaint warrants investigation, he or she may appoint an investigator to conduct an investigation. The board of the Integrity Commission has the power to initiate own-motion investigations ‘in respect of any matter that is relevant to the achievement of the objectives of this Act in relation to misconduct’. The chief executive officer must then appoint an investigator in such cases.¹⁹⁷ Investigators appointed via either of these processes:

- (a) may conduct an investigation in any lawful manner he or she considers appropriate; and
- (b) may obtain information from any persons in any lawful manner he or she considers appropriate; and

194 Integrity Commission, *Prosecuting Serious Misconduct in Tasmania: the Missing Link*, October 2014, p. 2 (citations omitted).

195 Integrity Commission, *Prosecuting Serious Misconduct in Tasmania: the Missing Link*, October 2014, p. 43.

196 Integrity Commission, *Investigating and dealing with misconduct—investigations*, http://www.integrity.tas.gov.au/report_misconduct/investigations (accessed 18 August 2017).

197 *Integrity Commission Act 2009* (Tas), s. 44 and s. 45.

- (c) must observe the rules of procedural fairness; and
- (d) may make any investigations he or she considers appropriate.

3.144 The IC Act (Tas) further specifies that investigations must be conducted in private unless otherwise authorised by the chief executive officer.¹⁹⁸

3.145 Investigators are able to enter the premises of a public authority without consent or a search warrant, provided they first obtain authorisation from the chief executive officer of the Integrity Commission. Investigators are also able to apply to a magistrate for a warrant to enter premises. While on a premises, investigators are broadly empowered to search for, make copies of or seize items relevant to the investigation.¹⁹⁹ In cases of possible serious misconduct, investigators may, with the approval of the chief executive officer, apply for a warrant to use surveillance devices.²⁰⁰

3.146 At the conclusion of an investigation the chief executive officer must provide a report to the board of the Integrity Commission, recommending: the complaint be dismissed, that the findings of the investigation be provided to other agencies for action, that the board recommend to the premier that a commission of inquiry be established, or that an integrity tribunal be established into the matter.²⁰¹

3.147 If an integrity tribunal is convened by the board, it can be composed of the Chief Commissioner sitting alone, or the Chief Commissioner with up to two other appointees with relevant expertise. Such an integrity tribunal is empowered to exercise powers to enter and search premises as well as use surveillance devices in a similar manner to an investigator, as described above. In addition, an integrity tribunal can direct any person to: appear before it, answer questions, or produce information that may be relevant to its inquiry.²⁰² The Integrity Commission is not, however, empowered to employ covert tactics such as telecommunications intercepts, assumed identities and integrity testing.²⁰³

3.148 The IC Act (Tas) specifies that the hearings of an integrity tribunal are to be open to the public, except in cases where the tribunal determines that there are reasonable grounds to close a hearing to the public, exclude any person from the hearing or make an order prohibiting reporting or other disclosure of a hearing.²⁰⁴ The Integrity Commission states that 'Integrity Tribunal Hearings will generally be

198 *Integrity Commission Act 2009* (Tas), s. 48.

199 *Integrity Commission Act 2009* (Tas), s. 52.

200 *Integrity Commission Act 2009* (Tas), s. 53.

201 *Integrity Commission Act 2009* (Tas), s. 57.

202 *Integrity Commission Act 2009* (Tas), ss. 64(1).

203 Integrity Commission, *Investigating and dealing with misconduct—investigations*, http://www.integrity.tas.gov.au/report_misconduct/investigations (accessed 18 August 2017).

204 *Integrity Commission Act 2009* (Tas), Schedule 6, s. 1.

conducted publicly, although it is possible for an order to be made for a closed hearing, for example if the matter involves a minor'.²⁰⁵

Oversight

3.149 The IC Act (Tas) establishes a six-member Joint Standing Committee on Integrity, and requires that any party with three or more members in the House of Assembly be represented. The committee is assigned an oversight role with respect to the Integrity Commission, the Ombudsman and the Custodial Inspector. The committee is required to monitor and review the performance of these integrity bodies and, where appropriate, report to parliament. It is also required to examine the annual reports of these bodies.²⁰⁶

3.150 The committee is assigned several functions specific to its oversight of the Integrity Commission—to refer matters to the Integrity Commission for investigation or advice and to conduct a review of the functions, powers and operations of the Integrity Commission three years after the commencement of the IC Act (Tas) and provide a report to parliament. This review was completed in 2015 and made a large number of recommendations regarding the functions of the Integrity Commission. Perhaps most significantly, the committee did not unanimously support the continuance of the Integrity Commission's investigative functions.²⁰⁷

3.151 The IC Act (Tas) also requires that an independent review be conducted of the Act as soon as possible after 31 December 2015 and that this review consider the operation of the Act, the Integrity Commission, the parliamentary standards commissioner and the Joint Standing Committee on Integrity.²⁰⁸ This review was completed in May 2016 and responded to by the Tasmanian government in November 2016.²⁰⁹ In May 2017, the Tasmanian Government introduced legislation to amend the IC Act (Tas) in order to address some of the recommendations made by the independent review. The legislation altered, among other matters, the membership, operation and purpose of the board as well as the appointment, suspension and removal provisions governing the board and the chief commissioner.²¹⁰

205 Integrity Commission, *Investigating and dealing with misconduct—investigations*, http://www.integrity.tas.gov.au/report_misconduct/investigations (accessed 18 August 2017).

206 *Integrity Commission Act 2009* (Tas), ss. 24(1).

207 Joint Standing Committee on Integrity, *Three Year Review—Final Report*, June 2015, p. 1.

208 *Integrity Commission Act 2009* (Tas), ss. 106(1).

209 The Hon. William Cox QC, *Report of the Independent Reviewer*, May 2016, http://www.integrityactreview.tas.gov.au/__data/assets/pdf_file/0006/347649/Report_of_the_Independent_Review_of_the_Integrity_Commission_Act_2009_-_May_20162.PDF (accessed 18 August 2017); Tasmanian Government, *Tasmanian Government Response—Independent Review of the Integrity Commission Act 2009*, November 2016, http://www.integrity.tas.gov.au/__data/assets/pdf_file/0003/361713/Government_Response_to_Independent_Review_of_the_Integrity_Commission_Act.pdf (accessed 18 August 2017).

210 The Hon. Mr Matthew Groom MP, Acting Attorney-General, *Tasmanian House of Assembly Hansard*, 4 May 2017, pp. 58–60.

Victoria—Independent Broad-based Anti-corruption Commission

3.152 The Victorian Independent Broad-based Anti-corruption Commission (IBAC) was established by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (IBAC Act (Vic)). It replaced the Office of Police Integrity, which was an anti-corruption agency narrowly focused on Victoria Police, that had been operating since 2004. The IBAC was formally established on 1 July 2012 but only became fully operational in February 2013 with the enactment of its investigative powers.²¹¹

3.153 Although it has been in operation for a short period of time, some significant changes have been made to the remit of IBAC. In 2012, the IBAC Act (Vic) was amended to 'grant IBAC certain investigative powers as well as define its main areas of jurisdiction'.²¹² As it was initially established, IBAC was restricted in its activities by a relatively narrow definition of relevant offences and corrupt conduct under the IBAC Act (Vic); however, the passage of the *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) has expanded the scope of matters that IBAC can address. These changes came into effect on 1 July 2016.²¹³

Commissioner—appointment and tenure

3.154 The IBAC Act (Vic) provides for the appointment of one commissioner. The Act specifies that neither IBAC nor the commissioner are subject to the direction or control of the minister in respect of the performance of duties and functions and the exercise of powers.²¹⁴ The IBAC commissioner is also designated an 'independent officer of the Parliament', although the IBAC Act (Vic) states that this status does not imply any functions, powers, rights, immunities or obligations beyond what is specified in the Act.²¹⁵

3.155 The IBAC commissioner is appointed by the governor in council on the recommendation of the minister. A person appointed to be commissioner must be qualified for appointment as, or have served as, a judge of the High Court, the Federal Court, the Supreme Court of Victoria or another state or territory.²¹⁶ The minister must not make a recommendation for appointment to the governor unless he or she has first submitted the proposed recommendation to the IBAC Committee of the Victorian Parliament. The committee has the power to veto the recommendation, but must do so within 30 days.²¹⁷ The commissioner's term must not exceed five years and the commissioner is not eligible for re-appointment.

211 IBAC, *Annual Report 2015–16*, p. 11.

212 IBAC, *Annual Report 2015–16*, p. 11.

213 IBAC, *Annual Report 2015–16*, p. 11.

214 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 18 and s. 19.

215 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 19(1) to ss. 19(3).

216 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 20.

217 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 21.

3.156 The governor in council, on the recommendation of the minister, may also appoint one or more deputy commissioners. At least one deputy commissioner must be a lawyer and the minister must first obtain the agreement of the commissioner before making a recommendation to appoint a deputy commissioner.²¹⁸

3.157 The governor in council may suspend the commissioner on the following grounds:

- (a) misconduct;
- (b) neglect of duty;
- (c) inability to perform the duties of the office;
- (d) any other ground on which the Governor in Council is satisfied that the Commissioner is unfit to hold office.²¹⁹

3.158 Following such a suspension, the minister must present a statement of the grounds of suspension to each house of the parliament. If each house declares by resolution that the commissioner ought to be removed from office, the governor in council must then remove the commissioner. If either house of parliament does not pass such a resolution, the commissioner must be restored to office.²²⁰

Functions of the commission

3.159 As noted above, the IBAC Act (Vic) has been amended several times. As it was originally established, the specified functions of IBAC were limited to education and prevention activities. The *Independent Broad-Based Anti-corruption Commission Amendment (Investigative Functions) Act 2012* (Vic) and the *Independent Broad-Based Anti-corruption Commission Amendment (Examinations) Act 2012* (Vic) provided IBAC with investigative powers and examination powers respectively. The *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) also made a number of changes to the functions of IBAC.

3.160 As it currently stands, IBAC is responsible for 'exposing and preventing police misconduct and corrupt conduct across the public sector, including members of Parliament, the judiciary, and state and local government'.²²¹ IBAC summarises its current functions as follows:

- identify, investigate and expose serious corrupt conduct and police misconduct
- assist in the prevention of corrupt conduct and police misconduct
- educate the public sector, police and community of the risks and impacts of corruption and police misconduct

218 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 23.

219 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 26.

220 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 26; this method of removing a commissioner was discussed at Gilbert + Tobin, *Submission 19* [2016], p. 26.

221 IBAC, *Submission 21* [2016], p. 1.

- assist in improving the capacity of the public sector to prevent corrupt conduct and police misconduct.²²²

3.161 IBAC also summarises its role in relation to police misconduct as follows:

IBAC has a broad role in relation to assessing police conduct, and investigating and preventing misconduct by police. IBAC can receive complaints about the conduct of sworn members of Victoria Police, unsworn members who assist in the administration of police, police recruits and Protective Services Officers.²²³

3.162 IBAC's 2015–16 annual report lists oversight of Victoria Police as a current challenge for the organisation and states:

There is continuing public debate about how to ensure the most efficient and effective model of independent police oversight and, in particular, the balance of responsibility between IBAC and Victoria Police itself in investigating police complaints.²²⁴

3.163 IBAC attempts to reserve the most serious and systemic matters for its own investigation, while allowing Victoria Police 'to appropriately retain primary responsibility for the integrity and professional conduct of their own employees'.²²⁵

3.164 With respect to its prevention role, IBAC noted that the Victorian public sector includes approximately 3,500 entities and over 300,000 employees. It has therefore developed a strategy targeting the following areas:

- engaging with the community and the public sector to improve understanding of corruption and its detrimental effects
- improving reporting of corruption and helping to build the public sector's capacity to address reports
- alerting organisations to the latest information and intelligence regarding corruption risks to assist them strengthen their resistance to corruption.²²⁶

3.165 IBAC also stated that its approach to corruption prevention depends on public sector bodies retaining primary responsibility for their own integrity and corruption resistance.²²⁷

Definition of corruption and jurisdiction

3.166 As noted above, the definition of 'corrupt conduct' under which IBAC operates was recently amended by the *Integrity and Accountability Legislation*

222 IBAC, *Submission 21* [2016], pp. 1–2.

223 IBAC, *Submission 21* [2016], p. 2.

224 IBAC, *Annual Report 2015–16*, p. i.

225 IBAC, *Annual Report 2015–16*, p. i.

226 IBAC, *Submission 5*, p. 1.

227 IBAC, *Submission 5*, p. 1.

Amendment (A Stronger System) Act 2016 (Vic). In a 2013 special report, IBAC made the following comments regarding the threshold it was then required to overcome before conducting a corrupt conduct investigation:

Concerns have been raised publicly that the legislative threshold for IBAC to commence an investigation in its public sector jurisdiction is vague, too high and therefore liable to challenge in the Supreme Court.

Under the IBAC Act, IBAC is required to identify conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a prescribed indictable offence. Additionally, IBAC must be reasonably satisfied that alleged corrupt conduct constitutes serious corrupt conduct.

Parliament has clearly sought to balance the need for an effective integrity system against the need to protect individuals and public sector entities from arbitrary invasions of their privacy and property. When a statute prescribes reasonable grounds for a state of mind, it requires facts which are sufficient to induce that state of mind in a reasonable person.²²⁸

3.167 IBAC also stated in the same report:

There have been corrupt conduct allegations where IBAC has not felt able to commence investigations because of threshold restrictions in the IBAC Act. Not all of these were suitable for referral elsewhere. This constraint has possibly undermined IBAC's ability to perform and achieve its principal objects and functions.

Whilst the balance between an effective integrity system and civil liberties is quite properly a matter for the Parliament to determine, this constraint should be a matter of concern and further consideration.²²⁹

3.168 The passage of the *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) saw an expansion of IBAC's remit. It is now empowered to assess and investigate all corrupt conduct, rather than just serious corrupt conduct, although it is required to give priority to investigating allegations of serious or systemic corruption and misconduct. It is also now able to investigate allegations of misconduct in public office, which can be 'any conduct by a public sector employee which is unlawful or fails to meet the ethical or professional standards required in the performance of duties or the exercise of powers entrusted to them'.²³⁰

228 IBAC, *Special report following IBAC's first year of being fully operational*, April 2014, p. 25.

229 IBAC, *Special report following IBAC's first year of being fully operational*, April 2014, p. 25. The shortcomings of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) with respect to these threshold questions, prior to its recent amendment, were highlighted by several submitters, including: Gilbert + Tobin, *Submission 18*, Attachment 1, p. 19; Law Council of Australia, *Submission 18* [2016], pp. 16–17, Accountability Round Table (ART), *Submission 31* [2016], p. 5.

230 IBAC, *Summary: Changes to the IBAC Act*, p. 1, <http://www.ibac.vic.gov.au/docs/default-source/education-resources/summary-of-changes-to-the-ibac-act.pdf?sfvrsn=14> (accessed 24 August 2017).

3.169 IBAC is also now able to conduct preliminary inquiries into a matter prior to making a decision as to whether to investigate. As part of a preliminary inquiry IBAC may request further information from a public body, issue a summons requiring a person to produce documents or other things and issue confidentiality notices. It cannot, however, use its full investigative powers during such a preliminary inquiry.²³¹

3.170 IBAC is also now able to commence an investigation when it has 'reasonable grounds' to suspect corrupt conduct. It was previously limited to investigating only when it was 'reasonably satisfied the alleged conduct would constitute serious corrupt conduct'.²³²

3.171 As it now stands, IBAC is able to take complaints about: taking or offering bribes; dishonestly using influence; committing fraud, theft or embezzlement; misusing information or material acquired at work; and conspiring or attempting to engage in the above corrupt activity. IBAC may investigate corruption that has occurred through: improper or unlawful actions by public sector staff or agencies; the inaction of public sector staff or agencies; and the actions of private individuals who attempt to improperly influence public sector functions and decisions.²³³ As mentioned above, IBAC is now also empowered to investigate allegations of misconduct in public office.

Powers

3.172 IBAC may commence investigations after receiving complaints from individuals and notifications from public sector bodies about corrupt conduct and police misconduct. However, IBAC is also able to begin investigations on its own motion at any time and in relation to any matter within its jurisdiction.²³⁴

3.173 IBAC possesses the following powers to investigate allegations of public sector corruption and police misconduct:

- compel the production of documents and objects
- enter and search premises
- seize documents and objects
- use surveillance devices
- intercept telecommunications

231 IBAC, *Summary: Changes to the IBAC Act*, p. 1, <http://www.ibac.vic.gov.au/docs/default-source/education-resources/summary-of-changes-to-the-ibac-act.pdf?sfvrsn=14> (accessed 24 August 2017).

232 IBAC, *Summary: Changes to the IBAC Act*, p. 1, <http://www.ibac.vic.gov.au/docs/default-source/education-resources/summary-of-changes-to-the-ibac-act.pdf?sfvrsn=14> (accessed 24 August 2017).

233 IBAC, *What is corruption?*, <http://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-corruption> (accessed 24 August 2017).

234 IBAC, *Our investigative powers* <http://www.ibac.vic.gov.au/investigating-corruption/our-investigative-powers> (accessed 24 August 2017).

- hold private and public hearings
- require people to give evidence at a hearing.²³⁵

3.174 The IBAC Act (Vic) states that IBAC examinations are to be held in private unless the IBAC considers on reasonable grounds:

- (a) there are exceptional circumstances; and
- (b) it is in the public interest to hold a public examination; and
- (c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.²³⁶

3.175 With respect to determining whether it is in the public interest to hold a public examination under paragraph (b) above, IBAC may take into account:

- (a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;
- (b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;
- (c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.²³⁷

3.176 In the event that IBAC decides to hold a public examination, it must inform the Victorian Inspectorate of its intention.²³⁸

3.177 IBAC's power to obtain search warrants is defined in Division 4 of the IBAC Act (Vic). Authorised officers may seek a search warrant via an application to a Supreme Court judge. Such applications must be authorised by the IBAC commissioner.²³⁹ IBAC officers may be authorised under these provisions to:

- (a) to enter and search the premises or vehicle, vessel or aircraft named or described in the search warrant and inspect any document or thing at those premises or on or in that vehicle, vessel or aircraft; and
- (b) to make a copy of any document relevant, or that the person reasonably considers may be relevant, to the investigation; and
- (c) to take possession of any document or other thing that the person considers relevant to the investigation.²⁴⁰

235 IBAC, *Our investigative powers* <http://www.ibac.vic.gov.au/investigating-corruption/our-investigative-powers> (accessed 24 August 2017).

236 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 117(1).

237 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 117(4).

238 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 117(5).

239 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 91(1) and ss. 91(2).

240 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss. 91(3).

3.178 IBAC has specific powers with respect to 'police personnel premises'. Provided they 'reasonably believe there are documents or other things that are relevant to an investigation which are on police personnel premises', authorised officers are able to enter and search such premises, as well as inspect or copy any documents found there.²⁴¹ Authorised officers are not required to obtain a warrant in these circumstances and members of Victoria Police are required to give any assistance reasonably required during such a search.²⁴²

3.179 Powers to undertake covert operations involving surveillance, telecommunications interceptions and the use of assumed identities are granted to IBAC under the *Surveillance Devices Act 1999* (Vic), *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) and the *Crimes (Assumed Identities) Act 2004* (Vic) respectively.

3.180 Having completed an investigation, IBAC is empowered to: refer a matter to another body for investigation; make a recommendation to the relevant principal officer, responsible minister or the premier, including the power require a report on whether such a recommendation has been followed; make a report to the parliament, which will then become public; advise a complainant or other person of any action taken; do a combination, all or none of the above; or determine to make no finding or take no action.²⁴³

3.181 Section 190 of the IBAC Act (Vic) allows either IBAC or a sworn IBAC officer authorised by the commissioner to bring '[p]roceedings for an offence in relation to any matter arising out of an IBAC investigation'.²⁴⁴

3.182 The Gilbert + Tobin Centre of Public Law (Gilbert + Tobin) made the following comments on the undesirability of combining investigation and prosecution roles in a single body, as has occurred with IBAC and the Qld CCC:

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.²⁴⁵

Oversight

3.183 IBAC is subject to the scrutiny of the IBAC Committee, which is constituted under section 12A of the *Parliamentary Committee Act 2003* (Vic). The committee is established as one of a number of 'Joint Investigatory Committees', which must have between five and 10 members, with at least one member from each house of parliament. The Act states that the committee must elect a chairperson and deputy

241 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 86.

242 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 86.

243 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 164; see discussion at Gilbert + Tobin, *Submission 19* [2016], p. 34.

244 *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), s. 190.

245 Gilbert + Tobin, *Submission 19* [2016], p. 35.

chairperson and does not specify whether the chairperson must be a government or opposition member.²⁴⁶ The current chair of the IBAC Committee is a member of the opposition.²⁴⁷

3.184 The committee's functions are:

- (a) to monitor and review the performance of the duties and functions of the IBAC;
- (b) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;
- (c) to examine any reports made by the IBAC;
- (d) to consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the *Independent Broad-based Anti-corruption Commission Act 2011*;
- (e) to carry out any other function conferred on the IBAC Committee by or under this Act or the *Independent Broad-based Anti-corruption Commission Act 2011*;
- (f) to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers or Ombudsman officers;
- (g) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers;
- (h) to examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers;
- (i) to consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the Victorian Inspectorate Act 2011.²⁴⁸

3.185 The committee may not undertake the following actions:

- (a) investigate a matter relating to the particular conduct the subject of—
 - (i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
 - (ii) a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint;

246 *Parliamentary Committees Act 2003* (Vic), s. 22.

247 The Hon. Kim Wells MP.

248 *Parliamentary Committees Act 2003* (Vic), ss. 12A(1).

- (b) review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act;
- (b) review any findings, recommendations, determinations or other decisions of the IBAC in relation to—
 - (i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
 - (ii) a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint; or
 - (iii) a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*;
- (ca) review any determination by the IBAC under section 26(3) of the *Protected Disclosure Act 2012*;
- (d) disclose any information relating to the performance of a function or the exercise of a power by the IBAC which may—
 - (i) prejudice any criminal investigation or criminal proceedings; or
 - (ii) prejudice any investigation being conducted by the IBAC; or
 - (iii) contravene any secrecy or confidentiality provision in any relevant Act.²⁴⁹

3.186 Similar restrictions are applied to the committee's activities with regard to its oversight of the Victorian Inspectorate.²⁵⁰

3.187 IBAC is also subject to the oversight of the Victorian Inspectorate, which was established by the *Victorian Inspectorate Act 2011* (Vic) and commenced operation in February 2013.²⁵¹ The Inspectorate performs a number of functions with respect to overseeing other agencies within the Victorian integrity system, including the Public Interest Monitor, the Auditor-General and the Chief Examiner. Its functions in relation to IBAC include:

- (a) to monitor the compliance of the IBAC and IBAC personnel with the *Independent Broad-based Anti-corruption Commission Act 2011* and other laws;

249 *Parliamentary Committees Act 2003* (Vic), ss. 12A(1A).

250 *Parliamentary Committees Act 2003* (Vic), ss. 12A(2).

251 Victorian Inspectorate, *About us*, <http://vicinspectorate.vic.gov.au/home/about-us/> (accessed 25 August 2017).

- (b) to oversee the performance by the IBAC of its functions under the *Protected Disclosure Act 2012*;
- (c) to assess the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of IBAC's activities;
- (d) to receive complaints in accordance with this Act about the conduct of the IBAC and IBAC personnel;
- (e) to investigate and assess the conduct of the IBAC and IBAC personnel in the performance or exercise or purported performance or purported exercise of their duties, functions and powers;
- (f) to monitor the interaction between the IBAC and other integrity bodies to ensure compliance with relevant laws;²⁵²

3.188 IBAC is required to do the following to facilitate the Inspectorate's oversight activities:

- To report to the VI within 3 days of the issue of any summons, stating the reasons for its issue
- To make audio and video recordings of all coercive examinations
- To provide a copy of each recording to the VI as soon as practicable after the examination is concluded.²⁵³

3.189 The current Inspector, Mr Robin Brett SC, explained that the Inspectorate reviews every coercive examination undertaken by IBAC and that, in doing so, it seeks to ensure that a number of requirements are met:

What we look for in those is two classes of things. There are a number of requirements that are mandatory when IBAC exercises coercive powers when they summon somebody. There are service requirements: it has to be a minimum of seven days beforehand, save in exceptional circumstances; it is not permitted to examine underage people; there are provisions about legal representation; and there are provisions about independent persons being present. We check that all of those requirements have been complied with. Also there are requirements about what is required to be stated in the summons and what information is to be given to people about their rights and obligations. So we check for all of that.

In addition, we review the actual questioning. Essentially we are looking to see that the questioning remains relevant to the purpose of the investigation. It never, actually, does not; there is no reason why it should. We also look for things which we just class the propriety of the questioning—whether, for example, the witness might have been misled or given false or misleading information in order to try to induce a particular type of answer,

252 *Victorian Inspectorate Act 2011* (Vic), ss. 11(2).

253 Victorian Inspectorate, *Submission 13*, p. 3.

whether the witness has been badgered and that sort of thing. So that is what we are looking for.²⁵⁴

3.190 In addition, Mr Brett explained the Inspectorate's role in receiving complaints and monitoring compliance with legislation:

As well as reviewing coercive examinations we can receive complaints about IBAC. We receive about 50 or 60 of those a year. Most of those are from persons who have made complaints to IBAC. They have complained perhaps about police misconduct or some corrupt conduct they think they have seen somewhere and IBAC has refused to investigate it. They complain to us because they think it should have been investigated. Ninety-nine times out of 100 IBAC had every reason not to investigate.

It is also possible for people who are summoned and are coercively examined to complain to us. We have had some complaints about those. We are in fact currently conducting an investigation into a number of complaints arising out of a particular series of examinations.

What else can we do? We have a general monitoring function as well. The act requires us to monitor IBAC's compliance with its governing legislation. We have, in particular, to focus on their functions under the Protected Disclosure Act, which is our whistleblowers act. That is basically what we do. What my submission proposes is that that should be something the committee ought, with respect, to consider and that I would suggest is an appropriate thing for there to be. Also, there is an IBAC parliamentary committee, which is active but they do not have power to inquire into particular matters whereas we do.²⁵⁵

3.191 Mr Brett noted that the Inspectorate has a wide range of functions when compared to similar oversight bodies in New South Wales, Queensland and Western Australia, and that, with 13 staff members, it was also much larger.²⁵⁶ He also noted the steep increase in the use of coercive examinations by IBAC, which rose from 52 in 2013–14 to 179 in 2015–16.²⁵⁷

3.192 With respect to the fundamental rationale for establishing oversight bodies such as the Victorian Inspectorate, Mr Brett argued that they are an important check on the extensive powers granted to anti-corruption bodies:

Coercive powers abrogate fundamental rights possessed by all citizens. They represent a major infringement of civil liberties. Their use is justified for the IBAC on the grounds that they are available only in the course of investigating public sector corruption, and that their use is subject to scrutiny by an external, independent body with extensive investigatory powers of its own, i.e., the VI. The IBAC is responsible to the Parliament and also reports to a special Parliamentary Committee. The VI reports to

254 Mr Robin Brett QC, Inspector, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 8.

255 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 8.

256 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 7.

257 Victorian Inspectorate, *Submission 13*, p. 2.

the same Committee. The VI is effectively the "eyes and ears" of the Parliament.²⁵⁸

3.193 Regarding the effectiveness of IBAC's operations, the IBAC Committee's 2015–16 review of IBAC's performance contained the following discussion:

While the IBAC Commissioner considers that IBAC is operating effectively, he stressed the need for it to continue to take 'a more strategic, intelligence-based approach, rather than being a reactive, complaints-driven body'. This would, he said, allow it to most efficiently use its resources to detect, investigate and expose serious cases of corruption and police misconduct.

The IBAC Commissioner has emphasised that as IBAC matures as an organisation it is important that it is proactive in relation to identifying and exposing corruption. This is especially the case given the 'inherently clandestine nature of corruption'. IBAC does this in part by undertaking strategic assessments every 12–18 months. These involve literature reviews, assessment of other integrity agencies' reports, analyses of complaints and notifications and consultations with stakeholders.²⁵⁹

3.194 The IBAC Committee's review also discussed the need to harmonise legislative provisions governing the IBAC, the Victorian Auditor-General and the Victorian Ombudsman with respect to: definitions of the public sector; information gathering and sharing; oversight and accountability arrangements; and appointment, tenure, immunity, removal and remuneration for independent officers of parliament.²⁶⁰

3.195 The IBAC Committee also noted, and undertook to examine further, the IBAC Commissioner's suggestion that giving the IBAC the power to 'follow the dollars'—that is, access documentation of private individuals and organisations in receipt of government funding to provide services or perform other functions—would enhance its ability to fully investigate matters of serious corrupt conduct.²⁶¹

South Australia—Independent Commissioner Against Corruption and Office of Public Integrity

3.196 The South Australian Independent Commissioner Against Corruption (SA ICAC) was established by the *Independent Commissioner Against Corruption Act 2012* (SA) (ICAC Act (SA)), which came into effect on 1 September 2013. This Act

258 Victorian Inspectorate, *Submission 13*, p. 2.

259 Independent Broad-based Anti-corruption Commission Committee, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate 2015/16*, November 2016, p. 22 (citations omitted).

260 Independent Broad-based Anti-corruption Commission Committee, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate 2015/16*, November 2016, p. 23 (citations omitted).

261 Independent Broad-based Anti-corruption Commission Committee, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate 2015/16*, November 2016, pp. 23–4.

established two offices—the Independent Commissioner Against Corruption and the Office of Public Integrity—both of which are responsible to a single commissioner.

Commissioner—appointment and tenure

3.197 The ICAC Act (SA) provides for the appointment by the governor of a single commissioner for a term not exceeding seven years. The commissioner is eligible for reappointment, but may not serve for longer than 10 years in total. To be eligible for appointment, a commissioner must possess a minimum level of legal experience—seven years of legal practice, or be a former judge of the High Court or Federal Court, or of the Supreme Court or other courts or any state or territory.²⁶²

3.198 The appointment of a commissioner may only proceed if it is referred by the attorney-general to the Statutory Officers Committee and the committee either approves the proposal or does not respond within a specified period.²⁶³ The Statutory Officers Committee is a joint committee of the South Australian Parliament established under the *Parliamentary Committees Act 1991* (SA), which must include government, opposition and crossbench representation.²⁶⁴

3.199 The commissioner may be removed from office by the governor on receipt of an address from both houses of parliament. The governor may also suspend the commissioner for the following reasons: contravening a condition of employment, misconduct, failure or incapacity to perform official duties, or failure to provide information to the attorney-general as required by the Act.²⁶⁵ In the event of a suspension, the governor must lay a statement of reasons before the parliament. Either house of parliament may restore the commissioner to office by way of an address to the governor.²⁶⁶

3.200 The ICAC Act (SA) explicitly states that the commissioner is not subject to the direction of any person in relation to any matter, including the manner in which functions are carried out, powers are exercised and the priority which is given to particular matters.²⁶⁷

Functions of the ICAC and the Office of Public Integrity

3.201 The ICAC Act (SA) establishes both the SA ICAC and the Office of Public Integrity (OPI). The SA ICAC is a law enforcement body and its functions include identifying, investigating and referring for prosecution corruption in public administration. It is also responsible for assisting other agencies to identify and deal with misconduct and maladministration, conducting evaluations of public authorities and delivering an education program aimed at preventing or minimising corruption,

262 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 8(1) to ss. 8(3).

263 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 8(5).

264 *Parliamentary Committees Act 1991* (SA), Part 5C.

265 *Independent Commissioner Against Corruption Act 2012* (SA), s. 10.

266 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 8(11) and ss. 8(13).

267 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 7(2).

misconduct and maladministration. The ICAC Act (SA) describes these functions in the following terms:

- (a) to identify corruption in public administration and to—
 - (i) investigate and refer it for prosecution; or
 - (ii) refer it to a law enforcement agency for investigation and prosecution;
- (b) to assist inquiry agencies and public authorities to identify and deal with misconduct and maladministration in public administration;
- (c) to refer complaints and reports to inquiry agencies, public authorities and public officers and to give directions or guidance to public authorities in dealing with misconduct and maladministration in public administration, as the Commissioner considers appropriate;
- (ca) to identify serious or systemic misconduct or maladministration in public administration;
- (cb) to exercise the powers of an inquiry agency in dealing with serious or systemic maladministration in public administration if satisfied that it is in the public interest to do so;
- (cc) to exercise the powers of an inquiry agency in dealing with serious or systemic misconduct in public administration if the Commissioner is satisfied that the matter must be dealt with in connection with a matter the subject of an investigation of a kind referred to in paragraph (a)(i) or a matter being dealt with in accordance with paragraph (cb);
- (d) to evaluate the practices, policies and procedures of inquiry agencies and public authorities with a view to advancing comprehensive and effective systems for preventing or minimising corruption, misconduct and maladministration in public administration;
- (e) to conduct or facilitate the conduct of educational programs designed to prevent or minimise corruption, misconduct and maladministration in public administration;
- (f) to perform other functions conferred on the Commissioner by this or any other Act.²⁶⁸

3.202 The OPI's functions include receiving and assessing complaints and reports about public administration, as well as referring matters for investigation by other bodies. As described by the ICAC Act (SA), these functions are:

- (a) to receive and assess complaints about public administration from members of the public;
- (b) to receive and assess reports about corruption, misconduct and maladministration in public administration from inquiry agencies, public authorities and public officers;

268 *Independent Commissioner Against Corruption Act 2012 (SA)*, ss. 7(1).

- (c) to refer complaints and reports to inquiry agencies, public authorities and public officers in circumstances approved by the Commissioner or make recommendations to the Commissioner in relation to complaints and reports;
- (ca) to give directions or guidance to public authorities in circumstances approved by the Commissioner;
- (d) to perform other functions assigned to the Office by the Commissioner.²⁶⁹

3.203 The current commissioner, the Hon. Bruce Lander QC, made the following comments on the effectiveness of the separation of complaint receiving and assessing functions from investigatory functions under this model:

I think the people with whom we deal and, certainly, public authorities now do understand that the Office of Public Integrity is there to receive complaints and reports and to assess them and that it will then be a separate body, albeit under the same leadership, who either will investigate the matters as corruption or will cause them to be investigated as corruption or cause them to be investigated as misconduct or maladministration. I think there is some utility in dividing the functions between what are the two offices.²⁷⁰

3.204 The commissioner also noted that there is a significant disparity between complaints received from members of the public and reports from public officers in terms of how many are assessed as requiring action. Approximately 80 per cent of complaints from members of the public are assessed by the OPI as requiring no action, whereas 60 per cent of reports from public officers are investigated.²⁷¹ The commissioner explained why this might be the case:

I think the reason why there is such a difference is because members of the public made their complaints as victims or see themselves as victims. The public officers are making their reports because they suspect someone has committed conduct of a kind that needs to be reported.²⁷²

Definition of corruption and jurisdiction

3.205 The ICAC Act (SA) defines 'corruption in public administration' as conduct that constitutes:

- (a) an offence against Part 7 Division 4 (Offences relating to public officers) of the *Criminal Law Consolidation Act 1935*, which includes the following offences:
 - (i) bribery or corruption of public officers;

269 *Independent Commissioner Against Corruption Act 2012* (SA), s. 17.

270 The Hon. Bruce Thomas Lander QC, Independent Commissioner Against Corruption, SA ICAC, *Committee Hansard*, 15 May 2017, p. 37.

271 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, pp. 34–35.

272 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p. 35.

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- (ii) threats or reprisals against public officers;
 - (iii) abuse of public office;
 - (iv) demanding or requiring benefit on basis of public office;
 - (v) offences relating to appointment to public office; or
- (b) an offence against the *Public Sector (Honesty and Accountability) Act 1995* or the *Public Corporations Act 1993*, or an attempt to commit such an offence; or
- (ba) an offence against the *Lobbyists Act 2015*, or an attempt to commit such an offence; or
- (c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or
- (d) any of the following in relation to an offence referred to in a preceding paragraph:
- (i) aiding, abetting, counselling or procuring the commission of the offence;
 - (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
 - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
 - (iv) conspiring with others to effect the commission of the offence.

3.206 The ICAC Act (SA) therefore defines 'corruption in public administration' by referring to a range of criminal offences defined under other acts. Commissioner Lander emphasised this point, stating that: 'Corruption in South Australia must be a criminal offence. So what I am investigating at any given time is a criminal offence.'²⁷³

3.207 Although it restricts the definition of corrupt conduct in public administration to the commission of or involvement in various criminal offences, the ICAC Act (SA) also defines two further categories of behaviour—'misconduct in public administration' and 'maladministration in public administration'. These two categories deal with contraventions of a code of conduct or other misconduct by public officers, and conduct of public officers or authorities resulting in irregular and unauthorised use of public money or substantial mismanagement by public officers.²⁷⁴ The

273 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p. 30.

274 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 5(3) and ss. 5(4).

commissioner may assist other agencies and public authorities to identify and deal with these two categories of conduct or investigate such conduct directly.²⁷⁵

3.208 The ICAC Act (SA) provides a list of those who are to be considered a 'public officer' and therefore fall under the definition of corruption outlined above. The list includes, among others: the governor, members of both houses of parliament; members of local governments; judicial officers; police officers; and public service employees.²⁷⁶ There is currently no provision for the SA ICAC to investigate people or organisations that are not public officers or authorities but who may be in receipt of public funds. Commissioner Lander stated that he believed this situation to be a mistake:

In South Australia the jurisdiction is confined to public authorities and public officers. That sometimes means that persons or organisations that are funded by the state are not subject to the scrutiny of the commissioner. I think that is a mistake. I think organisations that are provided with public funds ought to be the subject of an investigation if in fact they or their officers engage in corruption.²⁷⁷

Powers

3.209 The SA ICAC is provided with a range of powers that it may use to investigate matters raised in complaints from members of the public or reports from public officers. It is also open to the commissioner to assess and investigate any other matter identified while acting on his or her own initiative, or in the course of the commissioner and the office performing functions under the Act.²⁷⁸

3.210 The commissioner is empowered to issue a warrant, either at his or her own initiative or on application by an investigator, to enter and search a place or vehicle used by 'an inquiry agency, public authority or public officer'. A warrant to enter and search other places and vehicles may be granted by a Supreme Court judge.²⁷⁹

3.211 With respect to covert operations, the commissioner is empowered under the *Criminal Investigation (Covert Operations) Act 2009* (SA) to grant approval for investigators to conduct undercover operations, to acquire and use assumed identities, and protect the identity of witnesses. In each case, the commissioner must consider a number of criteria before granting an approval.²⁸⁰ In the case of listening devices, the commissioner is required by the *Listening and Surveillance Devices Act 1972* (SA) to issue a written approval stating that a 'warrant is reasonably required for an

275 Independent Commission Against Corruption, *About Us*, <https://icac.sa.gov.au/content/about-us-0> (accessed 30 August 2017).

276 *Independent Commissioner Against Corruption Act 2012* (SA), Schedule 1.

277 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p. 30.

278 *Independent Commissioner Against Corruption Act 2012* (SA), s. 23.

279 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 31(1) and ss. 31(2).

280 *Criminal Investigation (Covert Operations) Act 2009*, Part 2, Part 3 and Part 4.

investigation' before an application for a warrant can be put before a judge of the Supreme Court.²⁸¹

3.212 The commissioner is able to conduct examinations and is able to summon witnesses to attend and to give evidence. The commissioner may also require the production of documents or other things.²⁸²

3.213 Unlike other state integrity commissions, the SA ICAC is required to hold all of its examinations relating to corruption in public administration in private. While stating that the commissioner is to perform his or her functions in a manner that is as 'open and accountable as is practicable', the ICAC Act (SA) requires that all 'examinations relating to corruption in public administration must be conducted in private'.²⁸³

3.214 Commissioner Lander explained that he viewed this restriction as justifiable, given that the definition of corruption with which he operates is restricted to criminal offences:

It seems to me that if I am investigating criminal conduct it ought to be done in private. Police organisations and law enforcement agencies investigate criminal conduct in private. And, for that reason, I support private hearings. The examinations that are conducted pursuant to an investigation are a means of obtaining further evidence. If at the end of the investigation there is no evidence or insufficient evidence to support a prosecution, it would seem to me that a person who has been examined in public, if that be the case, would suffer reputational harm from which that person might not recover.²⁸⁴

3.215 The commissioner further emphasised that his role is not to make findings as to whether certain conduct amounts to corruption, but rather to investigate the facts of a case and, where appropriate, refer the resulting evidence to the Director of Public Prosecutions:

My function in relation to complaints of corruption is purely investigative. I do not make any decision as to whether any particular conduct amounts to corruption. My principle function is to obtain evidence for the purpose of providing that evidence to the Director of Public Prosecutions in South Australia, for him to determine whether a prosecution should follow. My agency, therefore, is dissimilar to the Independent Commission Against Corruption in New South Wales, which is empowered to make decisions as to whether a person has engaged in corrupt conduct.²⁸⁵

3.216 The commissioner agreed that it is possible that the use of public hearings by integrity commissions can act as a means of eliciting further information relevant to

281 *Listening and Surveillance Devices Act 1972 (SA)*, ss. 6(2).

282 *Independent Commissioner Against Corruption Act 2012 (SA)*, Schedule 2, s. 5 and s. 6.

283 *Independent Commissioner Against Corruption Act 2012 (SA)*, ss. 7(4).

284 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, pp. 30–1.

285 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p. 30.

an investigation. However, he stated that, in cases where it might be necessary to appeal to the public for information, the ICAC Act (SA) allows him to make public statements and he would do so if he thought it necessary.²⁸⁶

3.217 Transparency International Australia (TIA) criticised the requirement that examinations must be conducted in private, stating:

The danger of driving investigations underground and conducting the investigations entirely in secrecy is obvious. The South Australian legislation does this, and has been quite roundly criticised even by the South Australian Commission itself.²⁸⁷

3.218 Commissioner Lander has previously argued that the requirement that all examinations take place in private should be overturned in the case of misconduct and maladministration matters, while remaining in place for corruption matters.²⁸⁸

3.219 A further power possessed by the SA ICAC is the ability to 'exercise the powers of an inquiry agency' when investigating potential serious or systemic misconduct or maladministration matters. The ICAC Act (SA) defines an 'inquiry agency' as the Ombudsman, the Police Ombudsman or a person declared by regulation to be an inquiry agency.²⁸⁹ The commissioner must be satisfied that it is in the public interest to exercise the powers of an inquiry agency.²⁹⁰

3.220 The commissioner's powers to report to parliament on the findings of examinations and investigations are uniquely restricted in comparison to integrity commissions in other states. The situation was summarised by Gilbert + Tobin:

Across Australia, South Australia is unique in not allowing the ICAC to make reports to Parliament on specific investigations. Under ss 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012* (SA), the Commissioner may report to Parliament on its more general review and recommendation powers, for example, its evaluation of practices, policies and procedures of government agencies, and recommendations it has made that government agencies change or review practices, policies or procedures. But under s 42(b), a report must not identify or be about a particular matter that was the subject of an assessment, investigation or referral under the Act.²⁹¹

286 Mr Lander, SA ICAC, *Committee Hansard*, 15 May 2017, p. 31; ICAC Act (SA), s. 25.

287 TIA, *Submission 21*, p. 8.

288 Leah MacLennan, 'South Australia's ICAC Commissioner says fractured relationship with Police Ombudsman is "improving"', *ABC News*, 10 November 2015, <http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066> (accessed 16 August 2017); see also discussion at Gilbert + Tobin, *Submission 18*, Attachment 1, p. 26.

289 *Independent Commissioner Against Corruption Act 2012* (SA), s. 4.

290 *Independent Commissioner Against Corruption Act 2012* (SA), ss. 24(2).

291 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 27.

3.221 Commissioner Lander described this restriction in his 2014–15 annual report and noted that it conflicted with his obligations to report to parliament on recommendations made to an inquiry agency or public authority as a result of an investigation and his ability to publish such reports when exercising the powers of the ombudsman. Commissioner Lander recommended that the restriction on making reports to parliament about particular matters be removed.²⁹² The commissioner reiterated his dissatisfaction with the reporting restrictions contained in the ICAC Act (SA) in his 2015–16 annual report.²⁹³

Oversight

3.222 The SA ICAC is required to produce and provide to both houses of parliament an annual report. The ICAC Act (SA) specifies a range of matters that must be detailed in such an annual report, including statistics on complaints, reports, investigations, referrals, evaluations and education activities.²⁹⁴

3.223 The SA ICAC is subject to the oversight of the Crime and Public Integrity Policy Committee, which is established under the *Parliamentary Committees Act 1991* (SA) as a six-member joint committee that must include two representatives each from the government and opposition, with the remaining two positions not allocated to a specific party.²⁹⁵ The committee is required, among other things, to examine the SA ICAC's annual reports, to examine each report on a review of the SA ICAC conducted under section 46 of the ICAC Act (SA), and to inquire into and consider the operation of the SA ICAC and the operation of the ICAC Act (SA) as to its effectiveness and whether or not it has, to an unreasonable extent, adversely affected persons not involved in corruption, misconduct or maladministration.²⁹⁶

3.224 The ICAC Act (SA) requires the attorney-general to appoint a reviewer:

- (a) to conduct annual reviews examining the operations of the Commissioner and the Office during each financial year; and
- (b) to conduct reviews relating to relevant complaints received by the reviewer; and
- (c) to conduct other reviews at the request of the Attorney-General or the Committee; and
- (d) to perform other functions conferred on the reviewer by the Attorney-General or by another Act.²⁹⁷

3.225 The reviewer must be a person who would also be eligible for appointment as the commissioner. Their task is to undertake an annual review of the commissioner's

292 SA ICAC, *Annual Report 2014–2015*, p. 47.

293 SA ICAC, *Annual Report 2015–2016*, p. 52.

294 *Independent Commissioner Against Corruption Act 2012*, s. 45.

295 *Parliamentary Committees Act 1991*, s. 15N.

296 *Parliamentary Committees Act 1991*, s. 15O.

297 *Independent Commissioner Against Corruption Act 2012* (SA), Schedule 4, ss. 2(1).

use of powers, the efficiency and effectiveness of the practices and procedures of the ICAC and the OPI, and whether any operations of the ICAC and OPI have made any appreciable difference to the prevention or minimisation of corruption, misconduct and maladministration.²⁹⁸ The reviewer's reports are provided to the attorney-general, who must then provide any such report to the presiding officers of both houses of parliament.²⁹⁹

3.226 In his 2015–16 review of the operations of the SA ICAC and the OPI, the reviewer made the following comments with respect to the effectiveness of the commissioner's activities:

The statistics relating to the Commissioner's role in investigating alleged corruption appear in his Report. Any assessment of this role is not to be determined by reference to the number of investigations or the numbers of charges laid as a result of ICAC investigations. On the other hand, it is pertinent to have regard to the manner in which those investigations are conducted and the effect which this has had on revealing corruption and misconduct which has occurred. The confidentiality provisions in the Act prevent me from giving details of matters investigated, but I repeat my confidence in the ability of ICAC to expose corrupt conduct where it exists and in this respect the organisation is having the effect for which it was created.

There is also ample evidence in the files which I have read which establishes the extensive attention which is given to instructing other agencies as to the manner in which to investigate and deal with misconduct and maladministration and also to rigorously supervise the investigation of the matters which have been referred to them for investigation.³⁰⁰

3.227 The commissioner is also required to keep the attorney-general informed of the 'general conduct of the functions of the Commissioner and the Office', and to provide information on request to the attorney-general, unless the commissioner is of the opinion that this would compromise the proper performance of his functions.³⁰¹

298 *Independent Commissioner Against Corruption Act 2012* (SA), Schedule 4, s. 3.

299 *Independent Commissioner Against Corruption Act 2012* (SA), Schedule 4, ss. 3(6) to ss. 3(8).

300 The Hon. K. P. Duggan AM QC, *Report of a review of the operations of the Independent Commissioner Against Corruption and the Office for Public Integrity for the period 1 July 2015 to 30 June 2016*, 3 September 2016, p. 24.

301 *Independent Commissioner Against Corruption Act 2012* (SA), s. 49.

International integrity commission models

Corruption Perception Index

3.228 Australia ranks 13th of 176 countries on Transparency International's 2016 *Corruption Perception Index*.³⁰² At the time of the interim report of the 2016 select committee, Australia also ranked 13th, but out of 168 countries.³⁰³ It was noted that:

Of the 12 countries ahead of Australia on the [Transparency International] table only Singapore has a national anti-corruption body—and of the top 20 countries only two have [a National Anti-corruption Commission (NAC)]—highlighting that a NAC is not a panacea to preventing corruption.³⁰⁴

3.229 The Attorney-General's Department (AGD) in its submission noted that this ranking 'places Australia on par' with Canada, the United Kingdom, Germany, Belgium and the United States.³⁰⁵ It was also noted that '[o]f the countries ranked higher than Australia in the 2016 CPI, there is only one country (Singapore) with a national anti-corruption commission'.³⁰⁶

3.230 However, the Accountability Round Table in its 2016 submission to the committee did not look at Australia's ranking favourably:

In 2012, Australia was rated seventh on the International Corruption Index maintained by Transparency International. In the ensuing years, Australia has dropped six places to 13th, and it can safely be predicted that recent developments will be followed by a further fall.³⁰⁷

3.231 The New South Wales Council for Civil Liberties (NSWCCL) also commented on this slip in ranking in its submission to the committee, stating that 'while not a dramatic decline [the slip] is a useful warning indicator that all may not be well'.³⁰⁸

International comparisons

OECD analysis

3.232 The Organisation for Economic Co-operation and Development (OECD) stated in 2013 that:

302 Transparency International, *Corruption Perceptions Index 2016*, https://www.transparency.org/news/feature/corruption_perceptions_index_2016 (accessed 24 August 2016).

303 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 14.

304 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 14.

305 Attorney-General's Department (AGD), *Submission 11*, p. 2.

306 AGD, *Submission 11*, p. 2.

307 ART, *Submission 31* [2016], p. 14.

308 NSWCCL, *Submission 26*, p. 4.

While most transition and developing countries have one or many specialised anti-corruption bodies, only few have proven to be successful, but so far, the success of Hong Kong or Singapore has not been repeated elsewhere.³⁰⁹

3.233 In discussing various patterns and models of anti-corruption institutions worldwide, which were 'difficult to identify', the OECD noted that:

...views in the international anti-corruption literature vary as to whether it is better to establish a single anti-corruption agency or rather direct efforts at strengthening those institutions existing in a country that form already part of the integrity infrastructure, such as the supreme audit institutions, the tax administrations, traditional law enforcement authorities, the internal control departments in various state agencies, etc. It is often argued that wider sector reforms, such as public administration or judiciary reforms, if done well, will strengthen a country's anti-corruption capacity more than the establishment of a single institution that may fail to meet the necessary prerequisites to live up to its mandate.³¹⁰

3.234 The OECD discussed the following models:

- multi-purpose corruption agencies—a single-agency approach based on three key pillars: investigation, prevention and public outreach and education—as in Hong Kong and Singapore;
- law enforcement, which 'takes different forms of specialisation, and can be implemented in detection, investigation and prosecution bodies'. Examples include Norway, Belgium and Spain; and
- preventative institutions, which are the broadest model, but can be broken down into anti-corruption coordinating councils, as in Ukraine and Russia; dedicated corruption prevention bodies, as in Slovenia and France; and public institutions not explicitly referred to as 'anti-corruption institutions'.³¹¹

Evidence to the committee

3.235 The committee received little evidence that examined other countries' models of a national integrity commission (NIC) in great detail. Those that did discuss agencies in other countries focused mainly on the International Commission Against Corruption (ICAC) in Hong Kong.

3.236 For example, in his submission, Mr Chesney O'Donnell stated that the 'HK ICAC may not be an appropriate comparison when establishing whether or not the NIC should possess prosecutorial powers', due to the 'socio-economic histrionics

309 Organisation for Economic Co-operation and Development (OECD), *Specialised anti-corruption institutions: review of models: second edition*, OECD Publishing, Paris, 2013, p. 39.

310 OECD, *Specialised anti-corruption institutions: review of models: second edition*, OECD Publishing, Paris, 2013, p. 39.

311 OECD, *Specialised anti-corruption institutions: review of models: second edition*, OECD Publishing, Paris, 2013, pp. 40–41.

which influenced the HK ICAC's formation in the first place'.³¹² Mr O'Donnell elaborated:

The HK ICAC was established in 1974 amidst an atmosphere of systemic corruption within the police force whereby money was extorted by constables on the streets which would then be syphoned up through the ranks and to the highest levels of the agency. Historically going back to the colony's creation in 1842 a culture of extortion and the payment of illicit fees to government officials had existed and thrived. The British colonial policy was to not disturb such 'Chinese customary practices' unless it directly affected the colonial law enforcement agencies and became an epidemic. Prior to HK ICAC's establishment the Anti-Corruption Branch of the Police was given the authority to investigate. This was problematic since the catalyst for the creation of the HK ICAC was in fact police corruption and not necessarily politicians.

...

The eventual creation of the HK ICAC came to fruition when the Chief Superintendent in the Hong Kong Police Force Peter Godber was issued with a notice under s10 of the [Prevention of Bribery Ordinance] concerning the possession of unexplained property and the existence of disproportionate assets when compared with his official income. Godber first fled to Britain only to be extradited back to Hong Kong in January 1975 to face trial in Hong Kong and eventually served four years in jail. In the four months from October 1973 to February 1974 Hong Kong citizens saw the creation of the HK ICAC without a single dissenting voice in their Legislative Council. It was an independent body whose Commissioner reported directly to the Hong Kong Governor.³¹³

3.237 Mr O'Donnell concluded that:

...the HK [ICAC] is not a suitable comparison to use for the creation of a Commonwealth NIC. Australia has had a history of inquiries concerning police misconduct in the past and has established agencies like the NSW Special Crime and Internal Affairs to deal with it.³¹⁴

3.238 Indeed, Professor Charles Sampford, commenting on the development of the Qld CCC stated:

By the late 1980s, the most favoured institutional model for responding to corruption was that attempted in Hong Kong. This involved a single, very powerful, anti-corruption agency along the lines of the Hong Kong [ICAC] enforcing very strong anti-corruption law. This was the model followed by the Premier of New South Wales in 1988. However, following a ground breaking Inquiry into corruption in Queensland, the Inquiry's head,

312 Mr Chesney O'Donnell, *Submission 15* [2016], p. 15.

313 Mr O'Donnell, *Submission 15* [2016], pp. 15–16 (citations omitted).

314 Mr O'Donnell, *Submission 15* [2016], p. 4

Hon Tony Fitzgerald AC QC, recommended a much more extensive, intensive and systematic approach to reform.³¹⁵

3.239 In recommending a national integrity commission, the NSWCCCL noted that:

The current Australian context is not open to consideration of a comprehensive anti-corruption body encompassing all sectors along the lines of the Hong Kong agency - although there are merits in such a comprehensive approach.³¹⁶

3.240 In providing his opinion about international models, Mr Michael Callan submitted that:

While the Hong Kong ICAC and the Singaporean Corrupt Practices Investigation Bureau (CPIB) are powerful organizations with the ability to arrest and charge corrupt individuals, in the main their establishment was due to corruption in the police force (OECD 2013). In the Australian context there is the Australian Commission for Law Enforcement Integrity which fulfills [sic] the function of police oversight.³¹⁷

3.241 Mr O'Donnell also examined the situation in the United Kingdom, where the Parliamentary Standards Commissioner at the House of Commons—who 'investigates alleged breaches of the Rules of Conduct as set out in Part V53 of the *House of Commons Code of Conduct*'—'remains a useful guide as to how the NIC can be assisted and what troubles it may face in the future if created'.³¹⁸

Electoral integrity

3.242 In relation to electoral integrity, Australia's Electoral Commissioner, Mr Tom Rogers, informed the committee about the rating Australia received from the Electoral Integrity Project, which in partnership with Harvard University and Sydney University, produces an annual global survey on democracies:

In May 2017, the perceptions of electoral integrity experts—they have about 3,000 of these worldwide experts that look at it—evaluated Australia's 2016 federal election as having, in their words, 'very high integrity'. There is a great report there that indicates where countries sit on that scale, with a whole range of dimensions. We always do very well compared to our peer agencies.³¹⁹

3.243 Despite this, Mr Rogers noted that '[t]here are always issues', stating that:

There has been a general decline in those democracies for people's trust in democracy over many years. The AEC's rating has still gone down with everybody else's, but has remained relatively buoyant. More Australians

315 Professor Charles Sampford, *Submission 28* [2016], Appendix one, p. 3 (citations omitted).

316 NSWCCCL, *Submission 26*, p. 4.

317 Mr Michael Callan, *Submission 5* [2016], p. 10.

318 Mr O'Donnell, *Submission 15* [2016], p. 18.

319 Mr Tom Rogers, Electoral Commissioner, Australian Electoral Commission (AEC), *Committee Hansard*, 16 June 2017, p. 40.

than not believe in and trust in the outcome of elections. Without going too far down that path, there are, however, a minority of Australians that believe that fraud does occur during Australian elections. We were aware of that in any case.³²⁰

Committee comment

3.244 The preceding survey of state integrity commissions demonstrates that, beneath their common aims of exposing and preventing corruption in their respective public sectors, there is considerable diversity in the institutional designs adopted by each state. As Professor A.J. Brown, Professor of Public Policy and Law at Griffith University, has stated:

...there is no 'one size fits all' among Australia's multiple anti-corruption bodies. While there are similarities in objectives, there are also fundamental differences in the powers, structures and accountabilities of each and every agency, right down to variations in statutory definitions of 'corruption' itself.³²¹

3.245 Such diversity is attributable to the varying contexts in which each agency was established. The oldest of the state integrity commissions, the NSW ICAC, was established in response to a series of corruption scandals involving senior members of the executive, the judiciary and the police force in New South Wales³²², while the Qld CCC and the WA CCC were both established as recommendations of royal commissions dealing with serious police corruption in each state. The remaining commissions are of more recent vintage and have been established in response to a parliamentary committee inquiry in the case of Tasmania, an independent review of existing integrity arrangements in Victoria and as a 'pre-emptive' measure and 'safeguard' against future corruption in South Australia.³²³

3.246 It is also notable that state agencies have, in general, not been left to continue as they were originally established. The three older commissions, the NSW ICAC, Qld CCC and WA CCC, have each had their enabling legislation significantly amended at various times, including changes to such fundamental matters as the number of commissioners appointed, the definition of corruption or misconduct they are to focus on, the removal or addition of serious and organised crime functions, the establishment of stronger oversight mechanisms, and alterations to the types of

320 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 40.

321 Professor Brown, *A new federal integrity system in the making? The case for a Commonwealth anti-corruption agency*, Australian Public Law Blog, 11 August 2017, <https://auspublaw.org/2017/08/a-new-federal-integrity-system-in-the-making/> (accessed 28 August 2017).

322 See para. 3.7 above.

323 See: Parliamentary Joint Select Committee on Ethical Conduct, *Public Office is Public Trust*, Tasmania, 2009; State Services Authority, *Review of Victoria's integrity and anti-corruption system*, Melbourne, 2010; and the Hon. T.R. Kenyon, Minister for Employment, Higher Education and Skills, Minister for Science and the Information Economy, Minister for Recreation and Sport, *House of Assembly Hansard*, 2 May 2012, p. 1357.

conduct on which public findings may be made. Of the three newer commissions, the Tasmanian Integrity Commission and the IBAC have both also been the subject of significant reforms, and the South Australian Independent Commissioner Against Corruption has expressed dissatisfaction with some elements of the South Australian legislation.

3.247 The structure and history of these six state agencies provides a wealth of information as to how different institutional designs have fared in practice, including areas that have proved either controversial or have limited the effectiveness of anti-corruption efforts. However, given this diversity and continuing evolution, the committee considers that there is no clear best-practice model that emerges from an examination of these agencies that could simply be adopted wholesale at a federal level, in the event that a national integrity commission were to be established. Rather, the committee believes careful consideration would need to be given to the distinct nature of the federal public sector and the precise role any national integrity commission is intended to play, before adopting elements of institutional design from the various state integrity commissions.

3.248 Of particular interest to the committee is the enhanced oversight of anti-corruption agencies afforded by such bodies as the: Inspector of the Independent Commission Against Corruption in New South Wales; the Victorian Inspectorate; the Parliamentary Crime and Corruption Commissioner in Queensland; the Reviewer of the Independent Commissioner Against Corruption in South Australia; and the Parliamentary Inspector of the Corruption and Crime Commission in Western Australia. These bodies, which possess strong investigative powers in their own right, appear to substantially strengthen the oversight of the respective integrity agencies and greatly assist the work of parliamentary oversight committees. Further discussion of the relevance of this model for the federal integrity system is contained in the following chapter.