Chapter 4

Arguments for and against the establishment of a national integrity commission

4.1 Integrity and corruption in the Commonwealth is a growing area of public interest and concern. Throughout the course of its inquiry, the committee received a range of evidence both in support of[1] and against the establishment of[2] a national integrity commission (NIC).

4.2 Those opposed to the establishment of an NIC largely reflected on existing state integrity and anti-corruption commissions and raised concerns about their operation, effectiveness and applicability to a federal context. Others, such as the Commonwealth government, argued that existing arrangements at the federal level are effective at addressing integrity and corruption issues in the Commonwealth public sector and therefore an NIC is unwarranted.

4.3 For example, Mr Chris Merritt, Legal Affairs Editor for *The Australian* expressed the view that there is no room for an NIC:

> If it is vested with orthodox powers that do not infringe the justice system, it will amount to a waste of resources because it will cover the same ground as the existing 26 agencies. However, if it is vested with unorthodox powers along the lines of those enjoyed in the New South Wales by [the Independent Commission Against Corruption (ICAC)], it will raise questions about the separation of powers by having an agency on the executive infringe in the role of the justice system.
>
> 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.[3]

4.4 By contrast, those in favour of establishing an NIC argued that it is naive to suggest that corruption in the Commonwealth public sector is somehow less prevalent or less serious than in the states and territories, and that the existing integrity framework does not adequately mitigate or resolve these risks.

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1 See, for example, Queensland Integrity Commissioner, *Submission 2* [2016], p. 1; Michael Callan, *Submission 5*, p. 9; Mr Trevor Clarke, Director of Industrial and Legal Policy, Australian Council of Trade Unions (ACTU), *Committee Hansard*, 17 May 2017, p. 25.

2 See, for example, Institute of Public Affairs (IPA), *Submission 20* [2016], p. 4; Rule of Law Institute of Australia (RoLIA), *Submission 8* [2016], p. 1.

3 Mr Chris Merritt, Legal Affairs Editor, *The Australian*, *Committee Hansard* 12 May 2017, p. 22.

4.5 For example, the Australia Institute (AI) advocated for an NIC and in so doing, referred to a poll that it commissioned where 82 per cent of respondents supported the establishment of 'a federal ICAC'.[4] The AI's main arguments in support of an NIC were: that it would restore public confidence in government; there are gaps in the current integrity system; '[a] growing number of scandals involving federal politicians are a constant distraction from the core business of policy making and governing'; and, it would prevent corruption at a federal level.[5]

4.6 The interim report of the Senate Select Committee on the Establishment of a National Integrity Commission (the 2016 select committee) set out the arguments for and against the establishment of a federal integrity/anti-corruption agency.[6] This chapter similarly considers arguments for and against the establishment of an NIC, and discusses issues that should be considered if an NIC were established.

Gaps and vulnerabilities

4.7 A number of submitters and witnesses argued that before a decision about the establishment of an NIC is made, a thorough assessment of the existing federal integrity framework should be conducted with a view to identifying gaps and vulnerabilities.

4.8 Professor Gabrielle Appleby argued that a number of questions should be answered when considering whether an NIC is necessary. She stated:

> The higher order question is: do we need and why would we need a national integrity commission? There are two aspects to answering that question. The first is the question of institutional gaps in existing institutions. We recommend a systematic audit of existing institutions…the committee is well aware of this: what types of gaps are we looking at? Are they investigate power gaps of existing mechanisms? Are they jurisdictional gaps of existing mechanisms? Is it a publicity gap that exists? That is one aspect. Is there a gap that would justify the establishment of a new commission?

4.9 In assessing the effectiveness and scope of existing federal integrity mechanisms—namely, the Australian Commission for Law Enforcement Integrity (ACLEI), the Commonwealth Auditor-General and the Commonwealth Ombudsman—Professor Appleby and Dr Grant Hoole[7] identified that '[o]ne clear gap in current institutional capacity is the ability to scrutinise the conduct of ministers and parliamentarians'.[8] They also identified 'a limited ability to investigate government agencies through the convening of hearings – whether in public or in private – outside

4 Australia Institute (AI), *Submission 14*, p. 3.

5 AI, *Submission 14*, pp. 3–7.

6 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, Chapter 3.

7 An outline of Professor Gabrielle Appleby and Dr Grant Hoole's research paper is included in chapter 2 of this report, as part of a current audit into the Commonwealth's integrity framework.

8 Gilbert + Tobin Centre of Public Law (Gilbert + Tobin), *Submission 18*, Attachment 1, p. 11.

the law enforcement context' and 'a seeming lack of coherence in the federal integrity landscape as a whole'.[9]

4.10 Other witnesses similarly commented on 'the gaps and shortcomings' in the prevailing multi-agency approach[10] and argued that 'a national integrity system assessment' is needed because 'it would become plainly obvious as to whether there were gaps and where there are gaps'.[11]

4.11 Professor John McMillan, Acting New South Wales Ombudsman, expressed his general agreement with the Attorney-General's Department (AGD) proposition 'that the Commonwealth's strategy of relying on a multiagency and multifaceted approach has been very successful in addressing corruption risks';[12] however, he also remarked that 'there are weaknesses in the Commonwealth framework'[13] and:

> …there are gaps that could be addressed by a stronger framework. One of the gaps is the application of the anticorruption framework to the parliamentary zone. The other is that some jurisdiction is just focused on law enforcement. As I have said, I see the consequences. If you are looking at it as a member of the public thinking, 'Where do I go,' or, 'Is there integrity in the national system,' it is pretty hard to know where to come into the system or what is happening. That is why I am in favour of strengthening it with a national framework.[14]

4.12 Professor McMillan elaborated:

> Corruption issues tend to have a lower profile in the Commonwealth in discussion within and between agencies than elsewhere. There is no ready source of guidance material on corruption risks. You will get a little bit from the Ombudsman's office, a little bit from ACLEI's website and a little bit from the Public Service Commission, but there is no immediate reference point.
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> Similarly, that means, if a member of the public has a corruption concern, there is no obvious public access point to which they go. Indeed, the most obvious public access point is the Australian Federal Police, and the reality is that many people will not take their corruption concern there; whereas in New South Wales, by contrast, they very easily come to the Ombudsman, ICAC or elsewhere. Even many of the networks that AGD refers to in its submission tend to be ones that are not well known or higher level things—business forums and anticorruption networks at very senior levels of

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9 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 12.

10 Mr Anthony Whealy QC, Chair, Transparency International Australia (TIA), *Committee Hansard*, 17 may 2017, p. 13.

11 Ms Gabrielle Bashir SC, Member, National Criminal Law Committee, Law Council of Australia (LCA), *Committee Hansard*, 16 June 2017, p. 6.

12 Professor John McMillan, Acting New South Wales Ombudsman, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 2.

13 Professor McMillan, NSW Ombudsman, *Committee Hansard*, 12 May 2017, p. 2.

14 Professor McMillan, NSW Ombudsman, *Committee Hansard*, 12 May 2017, p. 7.

> government. So, though the Commonwealth has had success, the thinking about corruption does not penetrate government and public concern as strongly as in the state.[15]

4.13 For this reason, and on the basis that the 'Commonwealth should play a leadership role in a national system in addressing and promoting corruption prevention', Professor McMillan supported the establishment of an NIC.[16]

4.14 Professor A.J. Brown of the Centre for Governance and Public Policy at Griffith University (Griffith University), who also supports the establishment of an NIC, stated that an NIC should 'focus on national-level issues and the Commonwealth's own public sector, and…have the power to coordinate and share information and some incentives and drivers for that'.[17] Professor Brown also identified gaps, remarking there are:

> …gaps in the Commonwealth's current integrity system, particularly in relation to the lack of overall coordination and oversight of how serious misconduct and corruption risks are handled and the role of mandatory reporting regimes in a good integrity system…[18]

4.15 Professor Brown continued:

> The conclusion I keep coming back to, and others keep coming back to, is that when you assess their roles—even if you rationalised them and coordinated them better—there are still some systemic gaps. It is important for the Commonwealth to figure out how to fill those gaps. It is a logical conclusion to say that a federal anti-corruption commission or federal integrity commission could help fill those gaps, but you do not want it to do more than it needs to be doing. There might be other institutional models for filling those gaps. It is just that every time many of us have looked at it to try and figure out how, we come back to a statutory agency that might subsume and replace ACLEI, for example, but have a bigger, broader jurisdiction, as probably the single most logical way to fill those gaps.[19]

4.16 Professor Haig Patapan, also of Griffith University, summarised the Centre for Governance and Public Policy's proposal in relation to an NIC:

> It strikes me that the question, the essential starting point, is: what is the mischief that is to be remedied? Once that question is determined, everything else follows. It is tempting to say we are going to address all of the problems in Australia, which would become a federal approach to the entire integrity system and would raise all the concerns you have. Once you have a federal approach then obviously you will endow these institutions

15 Professor McMillan, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 2.

16 Professor McMillan, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 2.

17 Professor A.J. Brown, Program Leader, Centre for Governance and Public Policy, Griffith University (Griffith University), *Committee Hansard*, 15 May 2017, pp. 6–7.

18 Professor Brown, Griffith University, Committee Hansard, 15 May 2017, p. 2.

19 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, pp. 6–7.

> with the appropriate powers et cetera, so the powers and all those other things follow on from the solution, or the problem, you want to address. Professor Brown's proposal and the other proposals have moved away from an overly ambitious endeavour of the sort that has been described. It cannot do that comprehensive task because of those other institutions. The suggestion we would advance, I think, is a limited body that tries to address the problems at the federal level and plug gaps, and accordingly the new body should be endowed with those limited powers to plug those gaps.[20]

Jurisdiction

4.17 The jurisdiction of an NIC was the subject of some debate during the course of the inquiry. As discussed in chapter 3, the state integrity and anti-corruption commissions have different jurisdictions, with some restricted to public sector agencies and others permitted to also investigate private individuals who seek to improperly influence public functions or decisions. In their evidence to the committee, various submitters and witnesses reflected on the potential jurisdiction of an NIC, in particular whether an NIC should be limited to the Commonwealth public sector, or also capture parliamentarians, contractors and the broader private sector.[21]

Beyond the Commonwealth public sector?

4.18 The committee received a range of evidence about the jurisdiction of an NIC and the extent to which it should extend beyond the Commonwealth public sector.

4.19 For example, the Gilbert + Tobin Centre of Public Law (Gilbert + Tobin)—having undertaken 'a detailed survey of the statutory framework establishing and governing the various anti-corruption commissions in the Australian states' and in so doing, identifying 'a number of key areas' that the committee may consider in respect of jurisdiction, independence, powers and accountability of an NIC[22]—recommended that an NIC be 'limited to investigating serious or systemic misconduct' and 'have wide jurisdiction to investigate the conduct of government and parliamentary officers and agencies as well as government contractors'.[23]

4.20 Professor Charles Sampford submitted that the scope of an NIC should be broader than public officials, and extend to:

> …issues involving business and unions–issues that have generated the interests in the [Australian Building and Construction Commission] and wider issues in business and banking that have been canvassed. I tend to suggest that the NIC should, at least initially, cover the Commonwealth and areas it regulates (which includes business through corporations law) but

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20 Professor Haig Patapan, Director, Griffith University, *Committee Hansard*, 15 May 2017, p. 7.

21 See, for example, LCA, *Submission 18* [2016], p. 12; Ms Kate McClymont, Investigative Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 27; Mr Malcolm Stewart, Vice-President, RoLIA, *Committee Hansard*, 17 May 2017, p. 1; Civil Liberties Australia, *Submission 17*, p. 5.

22 Gilbert + Tobin, *Submission 19* [2016], p. 13.

23 Gilbert + Tobin, *Submission 19* [2016], p. 3.

> not agencies of the States. If state agencies were covered, the Governance Reform commission would need to report to all the state parliaments and would almost certainly have to have a representative from each state and territory. It might be more feasible if the states and territories established their own government reforms commissions (or, in the case of Queensland, re-established it). These governance reform commissions could collaborate and instigate joint reviews where that made sense to them.[24]

4.21 The New South Wales Council for Civil Liberties (NSWCCL) also considered that the jurisdiction of an NIC should extend beyond the Australian Public Service (APS) to 'encompass all areas of public administration in which serious corruption and misconduct does or could occur…the totality of Government activity and public administration should come within its scope'.[25] Professor Appleby held a similar view, arguing that:

> …an integrity commission should have the power within its jurisdiction to investigate the conduct of third parties, not public officials—which may affect the actions of public officials so that they are unable to fulfil their functions in an appropriate manner—and to hear things like collusion over tendering or applications for licensing et cetera. This is the type of issue that the Cunneen case raised in the High Court. Justice Gageler, in the Cunneen case, made the argument—that was subsequently picked up in the Gleeson McClintock review of the ICAC Act— that, even though that is not actually involving the dishonest improper conduct on the part of the public official, if you think of a national integrity commission as having the purpose of ensuring public confidence in the exercise of government power, that type of conduct can reduce public confidence in the exercise of that power. We make the point that, if you have tailored investigative powers in the commission, it would be appropriate to include that conduct within the jurisdiction of an integrity commission, just as Justice Gageler argued for it in his judgement and has now been picked up in New South Wales.[26]

4.22 Professor Brown of Griffith University suggested that an NIC should be empowered:

> …to follow the dollar and follow the powers. So, if it is Commonwealth money or it is services that are being exercised or delivered on behalf of the Commonwealth as a result of grants programs or whatever, there should be the ability for the commission to follow those dollars and follow those powers.[27]

4.23 Professor Brown also remarked, in response to a question about whether a national integrity commission should include the private sector:

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24 Professor Charles Sampford, *Submission 28* [2016], p. 5.

25 New South Wales Council for Civil Liberties (NSWCCL), *Submission 26*, p. 8.

26 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 14.

27 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, p. 10.

> Not if ASIC and APRA and the AFP and everybody are going to do their job properly, with their expanded resources and regulatory powers for ASIC and all of these good things. If the rest of the integrity system that relates to the private sector is properly equipped and doing its job, then this commission can stay focused on public sector related corruption risks. That is where I would keep it focused.[28]

4.24 Professor Anne Twomey cautioned that consideration must be given, if an NIC were established, to jurisdictional issues such as 'to what extent does that then move into things that are done in relation to the states or by state public servants or state politicians' and:

> …jurisdictional issues from a constitutional point of view as well—for example, if you started trespassing on state parliamentary privilege or those sorts of things. Similar problems have arisen in the past in relation to royal commissions—the extent to which the Commonwealth can institute a royal commission that inquires into state matters. You would have a similar issue in relation to a national integrity commission. You would also want to be looking at your head of power to establish a national integrity commission to begin with. So, you just have to be a bit careful about what source of power you are using and how far you go when it is a national body.[29]

4.25 Professor McMillan proposed a pragmatic approach in which you:

> …start narrower. I would look at the areas where you can get agreement. It is hard enough to get agreement around the need for an anticorruption body and a national integrity commission, but it is much easier if you focus on it having a jurisdiction over public sector agencies of the classic, recognisable kind, and once that is established then you spread out…I would see it as a strategic political thing. It is a bit the same with ACLEI. The government agreed to establish ACLEI because it had a jurisdiction of two agencies, the [Australian Federal Police (AFP)] and the Crime Commission. Then, over time, it has extended its jurisdiction to immigration, agriculture and others. Had that been on the drawing board when ACLEI was being established, I do not think we would have an ACLEI now. It raises so many more issues and potential opposition. So I am a great believer in starting with a less contentious model, and then inevitably it will have to expand.[30]

Oversight of parliamentarians

4.26 The extent to which parliament and parliamentarians are currently subject to integrity and anti-corruption measures, and whether they should be within the jurisdiction of an NIC were raised during the course of the inquiry.

4.27 A number of recent cases involving federal parliamentarians, largely relating to misuse of allowances and acceptance of donations, demonstrate that there is a

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28 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, p. 11.

29 Professor Anne Twomey, *Committee Hansard*, 12 May 2017, p. 17.

30 Professor McMillan, NSW Ombudsman, *Committee Hansard*, 12 May 2017, pp. 10–11.

public appetite for parliamentarians to be subjected to a greater degree of scrutiny.[31] Although there are some existing mechanisms that oversee certain conduct by parliamentarians, many submitters and witnesses were in favour of further oversight. Some witnesses also alerted the committee to possible issues in respect of parliamentary privilege.

Existing oversight mechanisms

4.28 As discussed in chapter 2, the Parliamentary Committees on Senators' and Members' Interests and the newly established Independent Parliamentary Expenses Authority (IPEA) monitor parliamentarians' financial interests and receipt of donations and gifts, and their use of allowances, respectively. Parliamentarians are also subject to the criminal law and can be charged for offences such as bribery and fraud. However, beyond this there is limited external oversight of the conduct of parliamentarians[32] and some critics argue that parliamentarians are in the unique position of assessing the integrity and acceptability of their own behaviour.

4.29 Mr Malcolm Stewart, Vice-President of the Rule of Law Institute of Australia (RoLIA) considered that the existing oversight of parliamentarians is adequate. Mr Stewart argued that, in terms of investigating potential corruption or corrupt behaviour, politicians 'should look after themselves':

> …if it is politicians doing it, it goes to the Federal Police. If there is some body that wants to look at it—a conduct committee or whatever it might be—then I am okay with that, particularly with two-party or more so with three-party bodies. It is going to be carefully looked at, I would imagine. Even if there is a minority and a majority, there can certainly be a minority report. But I do not say that with any great conviction, if I can put it that way.[33]

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31 See Royce Millar, 'Five cases federal anti-corruption body might have investigated', *Sydney Morning Herald*, 25 June 2016, available: http://www.smh.com.au/federal-politics/political-news/five-cases-federal-anticorruption-body-might-have-investigated-20160623-gpq3be.html (accessed 30 August 2017); Michaela Whitbourn, 'Sussan Ley controversy re-opens date about federal ICAC', *Sydney Morning Herald*, 9 January 2017, available: http://www.smh.com.au/federal-politics/political-opinion/sussan-ley-controversy-reopens-debate-about-federal-icac-20170109-gto1qc.html (accessed 30 August 2017); Rosie Lewis, 'Sam Dastyari's Chinese donation 'cash for comment' says PM', *The Australian*, 2 September 2016, available: http://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/1320215/upload_binary/1320215.pdf;fileType=application%2Fpdf - search=%22parliament%20corruption%20MP%20oversight%20federal%20craig%20thomson%22 (accessed 30 August 2017); Lenore Taylor, 'A federal ICAC is voters' best chance at breaking the scandal cycle', *The Guardian*, 17 June 2017, available: https://www.theguardian.com/australia-news/2017/jun/17/a-federal-icac-is-voters-best-chance-at-breaking-the-scandal-cycle (accessed 30 August 2017).

32 Chapter 2 of this report outlines the role Parliament has in the existing multi-agency framework, along with descriptions of the *Statement of Ministerial Standards* and the *Statement of Standards for Ministerial Staff*.

33 Mr Stewart, RoLIA, *Committee Hansard*, 17 May 2017, p. 3.

4.30 RoLIA also emphasised the important role that parliamentary committees play in maintaining 'a level of public scrutiny of government action and potential conflicts of interest', including the Joint Committee on Public Accounts and Audit and the Standing Committees on Members' and Senators' Interests.[34]

4.31 The AGD noted that:

> The conduct of Ministers and Ministerial staff is also governed by the *Standards of Ministerial Ethics and the Code of Conduct for Ministerial Staff*. Both Houses of Parliament may pass censure motions to bring members and Senators to political account for their conduct, and a person may be removed from Parliament if they are convicted of a serious criminal offence, including corruption-related offences.[35]

4.32 The Clerk of the Senate, Mr Richard Pye, emphasised that parliamentarians are not immune from the criminal law:

> All senators are public officials under the [*Criminal Code Act 1995*] and are as able to be dealt with by those courts as any other person is. You do have the protection of parliamentary privilege in relation to a very narrow area, which is in relation to the proceedings of the parliament, but senators and members do not have the protection of privilege or a privilege-like protection in other areas under the criminal law.[36]

4.33 Mr Pye further explained the limitations of parliamentary privilege, reflecting on a case where a former Speaker sought to run an argument in the Supreme Court of the Australian Capital Territory that the alleged misuse of entitlements was connected to proceedings in parliament:

> The court was quite happy to say, 'No, parliamentary business in a broad sense may not necessarily connote the areas of proceedings in parliament that receive the coverage of privilege.' It was quite happy to say, 'You cannot hide; privilege is not a haven from the law in these spaces.' So I do not think there is any case that can sensibly be made for saying that, to the extent that there is a self-regulating nature of the parliament itself, it steps very far beyond the proceedings, the technical proceedings—what we are doing here today and submissions to committees and debate in either house of the parliament. That is where privilege applies, and outside those spaces the ordinary law of the land applies to senators and members as much as it does to anybody else.
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> It is a clearer landscape in the Australian system than it perhaps is in the UK, because we have a written constitution and we have been quite happy to deal with payments to members and senators and the employment of members' and senators' staff, and the employment of my staff, under legislative provisions that make it clear that the responsibility for enforcing

34 RoLIA, *Submission 8* [2016], p. 3.

35 Attorney-General's Department (AGD), *Submission 23* [2016], p. 7.

36 Mr Richard Pye, Clerk of the Senate, Department of the Senate, *Committee Hansard*, 16 June 2017, p. 20.

> those provisions is a purely legal one. It does not depend upon any traditional concepts of what is sometimes called exclusive cognisance—the exclusive jurisdiction of the houses to maintain or regulate their own affairs. It is pure and simple the ordinary law of the land applying to the activities of public officials.[37]

4.34 Irrespective, many submitters and witnesses did not consider that existing oversight of parliamentarians is adequate.[38] Professor Appleby stated that parliamentary committees 'are not able to perform the function of investigating the corrupt conduct', despite having 'a responsibility, as part of the principles of responsible government, to hold parliamentarians and ministers to account', together with parliament more generally.[39] Professor Appleby elaborated:

> …in the systematic review of what are the existing agencies, I think a question that needs to be asked is: if parliamentary committees are a public form of accountability—they have investigative powers, as you know, that are bestowed on them by the houses—why is it that they are not able to perform the function of investigating the corrupt conduct?[40]

4.35 Gilbert + Tobin argued that there is '[l]imited ability to scrutinise the conduct of Ministers and Parliamentarians',[41] and provided the following explanation:

> None of the institutions considered [ACLEI, the Commonwealth Auditor General or the Commonwealth Ombudsman] have express mandates to scrutinise the conduct of members of parliament or of government ministers. The Ombudsman is statutorily restricted from doing so, and the Auditor-General's systemic mandate clearly does not embrace such a role. Of the institutions considered, only the ACLEI has incidental ability to investigate ministers and members of parliament, and this would only occur were such individuals are implicated in a corruption issue under investigation by the Commissioner.
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> Traditionally, the exposure of ministers and parliamentarians to coercive authority has been confined to hearings constituted by parliamentary committees or royal commissions, or to proceedings in the criminal justice system. The principle of responsible government, and Parliament's inherent power to pose questions and demand documents from government ministers, also serve as crucial mechanisms of accountability. The Committee may consider it appropriate that members of parliament and government ministers only fall under coercive scrutiny in the exceptional

37 Mr Pye, Clerk of the Senate, *Committee Hansard*, 16 June 2017, p. 21.

38 See, for example, Ms Jennifer Meyer-Smith, *Submission 6* [2016], p. 1; Mr Adam Presnell, *Submission 2*, p. 3.

39 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 15.

40 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 15.

41 Gilbert + Tobin, *Submission 19* [2016], p. 11.

> circumstances signified by a royal commission or criminal prosecution, or pursuant to the inherent regulatory powers and privileges of Parliament.[42]

4.36 Professor George Williams AO and Mr Harry Hobbs criticised the newly established IPEA, stating:

> Despite the introduction of the IPEA, Australia's anti-corruption and integrity system still lacks an effective mechanism for holding federal politicians accountable at the same standards as other members of the public. This is clear when contrasted to the [United Kingdom Independent Parliamentary Standards Authority], which operates under an enhanced transparency regime, and with considerable powers of enforcement and sanction.[43]

4.37 AI suggested that:

> Accountability of politicians is even more lacking than the system overseeing the public sector. Politicians' conduct is scrutinised only through elections, the courts and parliamentary committees. Public elections are held too infrequently to act as a day-to-day watchdog on politicians, and people do not vote solely on accountability and integrity issues. The courts have limited power to dismiss members of parliament under section 44 of the constitution, but the scope is narrow and requires the member to have been convicted first through a criminal court. The system of Parliamentary Privileges committees is ineffective and amounts to politicians assessing themselves. History makes it clear that this arrangement often results in minimal or no sanctions being imposed.[44]

4.38 As a supporter of the establishment of an anti-corruption agency, Mr Anthony Whealy QC of Transparency International Australia (TIA) remarked that:

> It seems extraordinary that in all the states around Australia, politicians, for example, are subject to legislation which enables anti-corruption agencies to examine whether there has been any wilful misconduct in public office, and yet at a federal level, there is no investigative body other than, I suppose, the Australian Federal Police to do that. The role of the Australian Federal Police, as it should be, is focused very much on the broad aspects of foreign bribery, terrorism and serious money laundering. One doubts whether they really would have the capacity to handle all this as well. The experience in the other states has been that the police and prosecution bodies are assisted by the efforts of investigative agencies.[45]

Parliamentary privilege

4.39 The interaction between parliamentary privilege and oversight of parliamentarians was discussed by some witnesses.

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42 Gilbert + Tobin, *Submission 19* [2016], p. 11.

43 Professor George Williams AO and Mr Harry Hobbs, *Submission 8*, p. 8.

44 AI, *Submission 14*, p. 5 (footnotes omitted).

45 Mr Whealy, TIA, *Committee Hansard*, 17 May 2017, p. 13.

4.40 For example, Professor Twomey commented that 'there are really interesting and difficult issues about parliamentary privilege' and how it interacts with external investigatory functions. Professor Twomey stated that:

> Nobody would suggest that parliamentary privilege should be protection from being investigated or prosecuted in relation to corruption…we do have to be very careful in enacting legislation to work out how those two things need to interact.[46]

4.41 Mr Stephen Charles QC suggested that 'if parliament sets up a commission and expressly concedes to that body the ability to investigate members of parliament, I would have thought that problems of parliamentary privilege recede'.[47]

4.42 This was also reflected in Professor Twomey's evidence, where she noted:

> …parliament itself can, through its legislation, limit parliamentary privilege and it can refer these issues to outside bodies if it thinks it is appropriate for outside bodies to deal with them. As you would know, members of parliament can commit crimes and can be prosecuted for those crimes. We accept that the courts, under the criminal law, are appropriate places in which members of parliament can be prosecuted and convicted for doing criminal acts. If you are creating a body such as an integrity commission, an ICAC or anything else, the question is: what powers are you conferring upon it and how does it interact with parliamentary privilege or other issues?[48]

4.43 Indeed, as set out in *Odgers' Australian Senate Practice*, parliamentary privilege cannot be changed, except by legislation:

> It is not possible for either a House or a member to waive, in whole or in part, any parliamentary immunity. The immunities of the Houses are established by law, and a House or a member cannot change that law any more than they can change any other law.[49]

Powers

4.44 The committee was provided with both general and specific evidence about the powers to which an NIC should have access. Some submitters also expressed concern at the types of powers that an NIC may possess, and the adverse effects of exercising these powers.

4.45 In advocating for an NIC, Professor Brown made the following comments about the powers an NIC should possess:

> …this would be a body that is exercising executive power, but is not answerable directly to the executive of the day; it is answerable directly to

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46 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 15.

47 Mr Charles, ART, *Committee Hansard*, 17 May 2017, p. 18.

48 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 15.

49 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 96.

> the parliament, and to the people via the parliament. And it needs to have powers and capacities that give it that special direct relationship with the people, but nevertheless its formal accountability is still via the parliament. And therefore it is serving the people via the parliament to oversight integrity and anti-corruption—over a jurisdiction that needs to be determined.[50]

4.46 Mr Samuel Ankamah, also of Griffith University, viewed an NIC as 'an umbrella body within Australia's integrity system', and stressed the importance of this body possessing 'the powers to require any agency within the integrity system to investigate even some of the petty issues that might have been brought to the commission'.[51] Mr Ankamah elaborated:

> So once [people] know that there is an umbrella body and that they are always able to go to such an umbrella body to report corruption then because this body would have the power to require any other body to investigate that issue and also have the power to require that body to report back to the commission, that would actually boost [public] confidence.
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> Also, if such a body had education powers it would be able to educate the public on what does and does not constitute corruption. By so doing, I think that the public would have more confidence in such a body.[52]

4.47 The TIA submitted that an NIC should 'possess the wide range of coercive and investigative powers commonly found in state agencies', similar to the powers held by a Royal Commission,[53] as:

> …an anti-corruption agency is an investigative body. It is not a court of law and does not adjudicate in disputes between citizens nor in disputes between the state and its citizens.
>
> Anti-corruption bodies are susceptible to judicial review where there has been a gross error of law or a genuine denial of natural justice. There are adequate safeguards in the process.[54]

4.48 Gilbert + Tobin recommended the following specific functions and statutory powers:

> (b) The Commission is given non-investigative functions, including those relating to research, education and prevention of corruption, with the following two caveats:
>
> - any non-investigatory functions bestowed upon the Commission must be accompanied by adequate funding; and

50 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, p. 3.

51 Mr Samuel Ankamah, Griffith University, *Committee Hansard*, 15 May 2017, p. 5.

52 Mr Ankamah, Griffith University, *Committee Hansard*, 15 May 2017, p. 5.

53 TIA, *Submission 21*, p. 7.

54 TIA, *Submission 21*, p. 7.

- functions related to the giving of advice on specific ethics and corruption issues are reserved to an institution other than the federal integrity Commission.

> (d) A statute establishing a federal integrity Commission contain a normative statement as to the independence of that Commission, and a statement that it is not subject to the direction or control of the Minister.
>
> …
>
> (k) A statute establishing a federal integrity Commission include the power to impose confidentiality obligations at the discretion of the Commission, taking into account the rights and reasonable interests of persons affected by publication and the public interest at large in publication.[55]

4.49 In its submission, the Law Council of Australia (LCA) discussed the powers exercised by existing state anti-corruption agencies such as holding hearings; gathering evidence; conducting preliminary investigations; mandatory reporting requirements; protected disclosure; and coercive powers.[56] The LCA also identified, in its discussion of those powers, the factors that should be considered with the establishment of an NIC. For example, in relation to coercive powers, the LCA stated:

> The [New South Wales (NSW)] ICAC has extraordinary powers that override a number of fundamental rights, such as the privilege against self-incrimination and the right to silence. It is important to place reasonable limits on the circumstances in which such powers may be exercised to protect the community against unwarranted intrusions on their civil liberties.[57]

4.50 Professor Sampford—who alerted the committee to his past experience with respect to anti-corruption work, including his involvement in the 'Fitzgerald reforms' in Queensland and his position as 'principal legal advisor to the Queensland Scrutiny of Legislation Committee from its inception in 1995 through three hung parliaments until 2002'[58]—recommended that an NIC should possess powers similar to the separate 'Governance Reform Commission' recommended for Queensland following the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Inquiry), as well as anti-corruption commissions.[59] Specifically, Professor Sampford advocated that an NIC should possess powers to enable it to undertake the following functions:

> A. Regular reviews of integrity agencies with a special emphasis on their functions within the national integrity system, how well they are performing them and how the performance of those functions can be improved.

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55 Gilbert + Tobin, *Submission 19* [2016], p. 3.

56 LCA, *Submission 9*, pp. 13–20.

57 LCA, *Submission 9*, p. 17.

58 Professor Sampford, *Submission 28* [2016], p. 2.

59 Professor Sampford, *Submission 28* [2016], p. 5.

> B. Overview of the integrity system and the distribution of functions between integrity agencies – including new functions that appear necessary on the basis of investigations under C below.
>
> C. Identification and investigation of integrity risks (corruption/misconduct, maladministration and other abuses of power) through a mixture of research and specific enquiries into new modes of doing business.
>
> D. Recommendations of risk management strategies and the roles of line agencies and integrity agencies in fulfilling them – especially the agencies that should be charged with the investigation of particular instances.
>
> E. Investigation of particular areas of government, union or business activity where there is evidence that integrity risks may have materialized to produce widespread corruption or misconduct (where the evidence points to maladministration this will usually go to the Ombudsman unless investigation of maladministration looks more like corruption or endemic misconduct).[60]

4.51 Some submitters and witnesses expressed concerns about the powers than an NIC might wield. For example, Mr Stewart of RoLIA expressed his organisation's concern with the establishment of an NIC:

> …not as to the scope of its powers but as to its powers themselves. I do not have any objection to such a commission going beyond the Public Service, as it were, or public administration into other areas, but we do have a concern about the powers because of the potential impact those powers can have on the rule of law in ways that we have seen in Australia—or, I should say, not throughout Australia but particularly in New South Wales…[61]

4.52 The Institute of Public Affairs (IPA) was also concerned about the potential powers of an NIC, based on the experiences of anti-corruption agencies in other jurisdictions:

> …state level anti-corruption agencies wield coercive powers which violate the legal rights of individuals, and play by a different set of rules than the traditional system of justice. A federal agency – necessarily modelled on state agencies – would likewise be lacking in the rigour which produces more just outcomes. This is inconsistent with democratic principles and the rule of law.[62]

4.53 Yet others emphasised that the powers of an NIC must be balanced with appropriated safeguards. The NSWCCL cautiously supported an NIC possessing similar powers to those of state anti-corruption agencies on the condition of:

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60 Professor Sampford, *Submission 28* [2016], p. 4 (footnotes omitted).

61 Mr Stewart, RoLIA, *Committee Hansard*, 17 May 2017, pp. 1–2.

62 IPA, *Submission 20* [2016], p. 4.

> …the inclusion of strong safeguards for individual liberties and rights being incorporated into the legislation. These safeguards should be the strongest that are compatible with operational effectiveness.[63]

Investigative, determinative or prosecutorial?

4.54 The question of whether an NIC should have the power to make findings, prosecute integrity and corruption matters, or simply fulfil an investigative function and work in conjunction with prosecuting authorities was raised by some submitters and witnesses.

4.55 Professor McMillan discussed the capacity of an NIC to prosecute or investigate in the context of defining its role, remarking:

> …if the committee does go down the path of supporting a national integrity commission, I urge the committee to keep the focus on the concept of a national 'integrity' commission. The risk in discussion in this area is that it always starts as discussion of an integrity commission and very quickly diverts into a discussion about anticorruption bodies. That tends to alter the dialogue quite significantly. The issues that then become prominent are whether we should have public or private hearings and whether the integrity body should have power to prosecute or just work in conjunction with the prosecuting authorities. Within government, as I have seen particularly in New South Wales, when you are talking about constituting the body, there is a very strong mindset that it has to be somebody with former judicial experience or somebody prominent from the bar. If you stand back and think, 'We're really talking about an integrity body that will have coercive investigation powers but a broader perspective as well on issuing guidance material and training material and promoting the need for integrity in government,' the issues become quite different. The personnel that you require for the body can be quite different as well.[64]

4.56 Professor Appleby similarly argued that an NIC must 'have quite a clear purpose…The idea is that you make decisions about design principles based on where the national integrity commission sits as against the police, the courts and the prosecutorial authorities'.[65] Professor Appleby was supportive of a recent change to the NSW ICAC 'that followed the Cunneen decision and the review in increasing the threshold for when a commission can make findings to only making findings about serious corrupt conduct'.[66]

4.57 Mr Stewart of RoLIA stated 'that a commission that has wide-ranging powers of investigation…to make findings really does not sit well with the Australian legal system, where we have traditionally split investigative functions on a national level'. Mr Stewart continued:

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63 NSWCCL, *Submission 26*, p. 11.

64 Professor McMillan, NSW Ombudsman, *Committee Hansard*, 12 May 2017, p. 2.

65 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 12.

66 Professor Appleby, *Committee Hansard*, 12 May 2017, p. 18.

> Those functions are determinative of whether a contravention or corrupt conduct, or any other type of conduct for that matter, has occurred—into one or more separate bodies. If I can just give by way of obvious example [Australian Securities and Investment Commission] and the [Australian Competition and Consumer Commission], which are continuously investigating many matters regarding corporate governance, market manipulation and competition matters and the like.
>
> As with the Australian Federal Police, we do not give to those organisations the power to make certain findings nor to determine whether there is a breach of the law. That occurs at the level of the independent judiciary, which is entirely disinterested in the outcome. And the independent judiciary obviously has to determine what the facts are based on the admissible cogent evidence, and it applies the laws to those facts where there has been a contravention and imposes the necessary sanction. But to have the investigative functions tied up with any form of determination really means that it runs a serious risk of that body—no matter what it is—reporting its investigation with the necessary finding. The obvious example of that—and you have heard it before and I am sorry to repeat it—is Murray Kear. It is an older one but the problem continues to this day where you have an investigation conducted by NSW ICAC and the evidence put before the public hearing is limited and there is a limit to the material that is in support of the investigation of ICAC. Not surprisingly, without having heard all the information, a finding was made by an ICAC commissioner that Mr Kear engaged in corrupt conduct.[67]

4.58 The Hon. Dr Peter Phelps MLC, a current Member of the Legislative Council of the Parliament of New South Wales, was unequivocal when he stated '[i]t should have no prosecutorial power. It should have no finding power. But all the evidence educed, including compulsorily acquired self-incrimination, should be available for the [NSW Director of Public Prosecutions] and should be useable in court'.[68]

Leadership

4.59 The leadership of state anti-corruption agencies was largely discussed with reference to decisions about public hearings. The leadership composition and expertise for each of the existing state anti-corruption agencies is outlined in chapter 3.

4.60 The most commonly cited cautionary tale with regard to the number and careful selection of commissioners was that of the NSW ICAC and amendments made in 2016 increasing the number of commissioner from one to three. As already noted in chapter 3, this decision was controversial and heavily criticised, in part, for ending the tenure of then commissioner, the Hon. Megan Latham.[69]

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67 Mr Stewart, RoLIA, *Committee Hansard*, 17 May 2017, pp. 1–2.

68 The Hon. Dr Peter Phelps MLC, *Committee Hansard*, 16 June 2017, p. 15.

69 See chapter 3, paragraph 3.14. to 3.15.

4.61 Various witnesses were supportive of the recent changes to ICAC. Ms Kate McClymont and Mr Michael West agreed with the new requirement that a public hearing by NSW ICAC must be approved by a panel of commissioners.[70] The RoLIA noted the changes to ICAC and expressed the view that a change of commissioner, including the introduction of three commissioners, would address the cultural problem in ICAC.[71]

4.62 The Victorian Inspectorate, Mr Robin Brett QC, informed the committee that the Victorian the Independent Broad-based Anti-corruption Commission (IBAC) has a commissioner who presides over quite a number of examinations. There is also a deputy commissioner, who presides over quite a few examinations, along with other deputy commissioners that have been 'appointed temporarily for the purpose of conducting a particular investigation'.[72]

Educative function

4.63 The 2016 select committee's interim report stated that '[p]roviding education services surrounding corruption can increase the resilience of organisations and individuals to corruption, and clarify expectations around what does and does not constitute corrupt behaviours.'[73] This was also reflected in the submissions and evidence received by this committee—a number of submitters and witnesses also supported an educative function for any potential NIC.[74]

4.64 For example, The Hon. Bruce Lander QC, the South Australian Independent Commissioner Against Corruption, supported the creation of a federal anti-corruption agency, noting that:

> The same body should also have the function and responsibility of educating public officers within the jurisdiction in relation to their obligations to act ethically and responsibly and to convince those public officers that they should report conduct that the public officers reasonably suspect raises a potential issue of corruption and, if within jurisdiction, misconduct or maladministration.[75]

4.65 The Commissioner also observed that these educative functions should ensure that members of the public, as well as public officers:

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70 Ms McClymont, Fairfax Media and Mr Michael West, Journalist and Proprietor, michaelwest.com.au, *Committee Hansard*, 12 May 2017, p. 29.

71 Mr Stewart, RoLIA, *Committee Hansard*, 17 May 2017, p. 5.

72 Mr Robin Brett QC, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 10.

73 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 27.

74 See, for example, ART, *Submission 20*, p. 16; TIA, *Submission 21*, p. 6; Mr Clarke, ACTU, *Committee Hansard*, 17 May 2017, p. 26; Mr Ankamah, Griffith University, *Committee Hansard*, 15 May 2017, p. 5.

75 The Hon. Bruce Thomas Lander QC, Independent Commissioner Against Corruption, Independent Commissioner Against Corruption South Australia, *Committee Hansard*, 15 May 2017, p. 30.

> …are entirely sure what the functions, the powers, of the particular body are and what they can expect if a complaint in the case of the public is made—or report, in the case of a public officer, in accordance with the public officer's duties.[76]

4.66 Gilbert + Tobin also supported this function, with two qualifications:

> There are good arguments that, given the powers, functions and therefore expertise and experience of a Commission, it is well-placed to undertake research, educational and preventative functions. However, we would make two qualifications to this statement. The first is that any non-investigatory functions bestowed upon a commission must be accompanied by adequate funding, so as to ensure that they are able to be performed effectively, and that they do not inappropriately take resources away from the Commission's primary function of investigating corruption.
>
> The second concerns the efficacy and propriety of granting a Commissioner an advisory function that includes delivery of advice to officials on factually specific (as opposed to general or systemic) corruption concerns. Public agencies and officials may be unlikely to seek advice and guidance from a Commission that also has power to investigate and make findings against them. As such, we would recommend that this aspect of the advisory function be bestowed on an institution other than the Commission.[77]

4.67 Similarly, Professor Twomey expressed her support for the educative function of an integrity commission or anti-corruption commission, which 'works in a number of ways':

> Firstly, by showing what is corruption and making it plain to people that certain things are not acceptable conduct—so that is important; and secondly, simply establishing fear is sometimes a really good thing because it deters people from behaving in a corrupt manner. Thirdly, the work around exposing administrative practices that are weakened and permit corruption to flourish is incredibly important. 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.[78]

4.68 In speaking about the educative functions of an 'inquisitorial body to examine allegations of corruption by high-level officials' in the context of public hearings,

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76 Mr Lander, Independent Commissioner Against Corruption, *Committee Hansard*, 15 May 2017, p. 34.

77 Gilbert + Tobin, *Submission 19* [2016], p. 21.

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

Dr Phelps considered that the educative functions would still be exercised if the body were to only hold private hearings:

> Critics of an *in camera* model may claim that the educative effect would be diminished. I dispute this. Genuine corruption would now be more easily prosecuted in the court system, and the punishment applied in full public view. That is the way a civil society should operate, not by whisper campaigns, untested claims, dubious assertions, and reputational damage. Sending an official to prison has a much more salutary effect on his or her peers than an ICAC 'finding' that a person has engaged in corrupt activity, only to have it overturned on appeal to the Supreme Court, on the basis that there is a lack of evidentiary proof; or the High Court determines that a definition was misapplied by the ICAC. In those situation[s], nobody wins.[79]

4.69 By contrast, Professor Twomey argued that there was a 'strong educative function in the public hearings':

> …in many cases, they may be a bit too overblown by the media, that is true—and I do not know how you control that—but the other side of it is that it puts a very strong message out there in the community that you should not be doing these sorts of things. That makes sure that people in the future do not do those sorts of things. If it is just a report that ends up sitting on a shelf that nobody bothers reading or caring about, it does not have the same pervasive message being sent out there saying: 'This is bad. We, the state, recognise that this is bad. You should not be doing this.' That is a really powerful effect of the public hearings. I think that no matter how much you say, 'Oh, well, there will be a report and it will be tabled in parliament, and that will get publicity,' it is not going to have the same effect as a public hearing.[80]

4.70 The NSWCCL also expressed its strong support for any NIC to have an educative objective, similar to that of the NSW ICAC.[81]

Public versus private hearings

4.71 The effectiveness and use of public versus private hearings by state anti-corruption agencies, and whether or not an NIC should be empowered to hold public hearings were the subject of lengthy debate during the course of the inquiry.

4.72 Submitters and witnesses expressed differing views as to whether an NIC should be able to conduct public hearings, and if so, the means by which it comes to that decision. The committee also heard from ACLEI, regarding its power to conduct hearings.

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79 Dr Phelps, *Submission 24*, p. 6.

80 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 21.

81 NSWCCL, *Submission 26*, p. 15.

Public or private hearings?

4.73 Gilbert + Tobin outlined arguments both for and against an NIC having the option to hold public hearings:

> Public hearings into government corruption have the capacity to increase public awareness of government impropriety and increase confidence in the work of an anti-corruption commission. However, there are serious costs associated with public hearings, particularly in relation to the potential impact they have on the privacy and reputation of individuals involved. There is also the possibility that public hearings will jeopardise ongoing investigations. Further, as the research at the start of this submission revealed, there is often a negative correlation between public confidence in government administration and the public revelation of government impropriety, at least in the short term.[82]

4.74 Some submitters and witnesses opposed public hearings. For example, and as discussed in chapter 3, Mr Lander supported private hearings on the grounds that:

> 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.[83]

4.75 Mr Merritt argued strongly in favour of private hearings, describing public hearings in NSW as 'show trials'[84] and stating:

> The other great infringement on the justice system comes about because of ICAC's practice of conducting investigations in public. These sessions are commonly referred to as public hearings, but anyone who examines the legislation will see that they are actually investigations. In my view they threaten the integrity of any future criminal proceedings—forget about privacy and reputation, it is the criminal process that is important here. They generate publicity that has the potential to taint the pool of potential jurors because they are, in reality, merely investigations. They should be conducted in private, in the same manner as police investigations. On this point I invite the committee to consider the recent convictions of former New South Wales politicians Eddie Obeid and Ian Macdonald. Both convictions followed jury trials. As a result of public hearings by ICAC, the pool of potential jurors in New South Wales was subjected to years of media reports that described these men, before their trials, as either corrupt, disgraced or both.[85]

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82 Gilbert + Tobin, *Submission 19* [2016], p. 29.

83 Mr Lander, Independent Commission Against Corruption South Australia, *Committee Hansard*, 15 May 2017, p. 31.

84 Mr Merritt, The Australian, *Committee Hansard* 12 May 2017, p. 30.

85 Mr Merritt, The Australian, *Committee Hansard*, 12 May 2017, p. 23.

4.76 Dr Phelps claimed that the NSW system 'is nothing more than a legalised defamation of character', commenting that it is:

> …a disgrace, and it is not merely a disgrace because of the personnel that have been involved in investigations to date; it is a disgrace because it has institutional structural problems which cannot be undone without a major reformation of that organisation.[86]

4.77 Dr Phelps argued that hearings should be held *in camera*, as 'the rights and reputations of non-implicated witnesses, and those found not to have engaged in corrupt conduct, deserve to be protected'.[87]

4.78 The RoLIA stressed the importance of protecting the rule of law and individual rights by holding private hearings:

> If it is kept in house, if it is not publicised but, should prosecution arise out of it, obviously it will be publicised at that particular point in time when a prosecution has arisen out of it, then I think that is the right way to do it because that way you have the educational and all the preventative measures that seem to be operating properly because you can at least bring a prosecution, and most of those will go before an independent Director of Public Prosecutions.[88]

4.79 Mr John Nicholson SC, Acting Inspector, Office of the Inspector of the Independent Commission Against Corruption in NSW, was concerned that the conduct of public hearings before the NSW ICAC led to the misperception that ICAC is a judicial proceeding:

> …because it is staffed by former judges, because everybody bows to the commissioner when he or she comes in, because objections are taken, because, notwithstanding the act wanting less formality and procedure, there is a fair bit of formality in the procedure. Witnesses are called, and it is in a room which is clearly set up like a courtroom. It is very difficult to avoid telescoping one into the other, particularly when people who are in the court are addressing the commissioner as 'Your Honour' or 'Judge'. These are people who are legal practitioners who ought to know better.
>
> The short answer is that there is confusion. The consequence of that is that the pronouncements of a commissioner are given and accorded the status they would get, in my view, if the High Court had made the pronouncement, and that is because there is much more media attention on somebody who has gone through an ICAC inquiry in respect of $600,000 or $700,000 worth of corrupt dealings than somebody who is picked up by the police and goes to the local court or to the district court in respect of the very same matter. The media publicity unit is designed to educate people, so it says, on the work of ICAC with a view to getting some sort of deterrence to work. Anybody who knows anything about deterrence knows

86 Dr Phelps, *Committee Hansard*, 16 June 2017, p. 13.

87 Dr Phelps, *Submission 24*, p. 5.

88 Mr Stewart, RoLIA, *Committee Hansard*, 17 May 2017, p. 6.

> it does not work. It has been the myth of legal situations, particularly sentencing, for centuries. In America, they tell me that if you execute somebody, within moments people commit copycat crimes. Where is the deterrence?[89]

4.80 Conversely, Professor Twomey expressed to the committee her preference for public over private hearings, as:

> …if too much happens in private it will be seen to be, itself, involving a degree of corruption. Remember, often with ICAC, for example, what it does is lower-level people working in railways, local government or whatever, but sometimes the people involved in ICAC inquiries are very prominent people. There is a risk that it will be seen that the system is protecting its own. That is a difficulty if the people involved are politicians, prosecutors, judges or whoever. If you do all of those sorts of things behind closed doors, then there will be a perception that the system is protecting its own. I think that we have got to be careful about that.
>
> I also think that there is a strong educative function in the public hearings.[90]

4.81 Professor Twomey noted that, even if a public report of a private hearing is produced that will subsequently receive publicity, 'it is not going to have the same effect as a public hearing'.[91]

4.82 AI argued that public hearings are one of the 'two main tools' available to anti-corruption agencies to expose corruption (the other being public reporting),[92] arguing that 'the act of hiding hearings from public view threatens the proper function of the commission'.[93] The AI advocated for an NIC 'based on the NSW model, particularly the definition of corrupt conduct and legislated public hearings as the norm'.[94]

4.83 Ms Kate McClymont, Investigative Journalist, Fairfax Media, considered that although the public hearing process at the NSW ICAC had not been flawless:

> …[ICAC's] successes are in public and its failures are in public. I think that is how it should be. Organisations can never improve if their failures are not exposed as well as their successes. I think that is one of the reasons why we should have a public body: because all aspects of it can be reviewed, questioned, challenged. I think that to have anything behind closed doors is always going to raise questions of cover-ups et cetera. I think that there is always room for improvement.[95]

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89 Mr John Nicholson SC, Acting Inspector, Office of the Inspector of the Independent Commission Against Corruption, *Committee Hansard*, 12 May 2017, p. 42.

90 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 21.

91 Professor Twomey, *Committee Hansard*, 12 May 2017, p. 21.

92 AI, *Submission 14*, p. 10.

93 AI, *Submission 14*, p. 10.

94 AI, *Submission 14*, Attachment 1, p. 2.

95 Ms McClymont, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 29.

4.84 Indeed, Mr Whealy suggested that the ICAC test for whether to conduct public hearings 'has been perhaps abused in the past'.[96] He explained how ICAC determines whether to hold a public hearing:

> The test in New South Wales…is that it will only be a public hearing if the public interest demands it, and there are certain stipulations that must be taken into account. Unfair harm to a person's reputation is a very important consideration. It has been sometimes said in the past that that has been overlooked in ordering a public hearing in New South Wales. Whether that is a fair criticism or not is not for me to say, but I am well aware of the criticisms.[97]

4.85 Mr Whealy also observed that the courts could intervene to overturn the decision of any anti-corruption commission to hold a public hearing, 'if there were an overall error of law or a denial of procedural fairness, but it has not happened'.[98]

4.86 Mr Geoffrey Watson QC, who has 'been involved in assisting with several investigations in ICAC and in the Police Integrity Commission', spoke in favour of holding public hearings in certain circumstances, as:

> The public hearing creates a general sense that something can be done, that something is being done and that wrongs can be righted. I am keenly aware that public engagement is a powerful positive influence on the investigation itself. When the matters become open it is my direct personal experience that members of the public come forward with important information. I can give examples of this in due course if you wish them. Some people who previously thought that there was no point in fighting it anymore finally get their opportunity to speak. Others who were literally scared to do so before become emboldened to do so. I would suggest that the power to conduct a public hearing is essential to restoring public confidence.[99]

4.87 In discussing whether constraints should be placed on an NIC in respect of its operations or the media with respect to public hearings, Mr Watson warned the committee that, 'if you put any further statutory cogs on that broad discretion [for a commissioner to determine whether holding public hearings is in the public interest], you will get into trouble'.[100]

4.88 Mr Charles also supported the power of anti-corruption agencies to hold public hearings, and expressed to the committee his opinion that:

> It is perfectly clear that IBAC believes, ICAC believes, and the High Court supports the view that public hearings are an important investigatory tool. The argument is that a public hearing gathers evidence and information from witnesses and, because it is public, other people come forward to give

96 Mr Whealy, TIA, *Committee Hansard*, 17 May 2017, p. 14.

97 Mr Whealy, TIA, *Committee Hansard*, 17 May 2017, p. 14.

98 Mr Whealy, TIA, *Committee Hansard*, 17 May 2017, p. 14.

99 Mr Geoffrey Watson QC, *Committee Hansard*, 16 June 2017, p. 27.

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

> evidence about it. It informs the public sector about the detrimental impact of corrupt conduct. It highlights how corruption can be prevented. It deters further wrongdoing. It prompts immediate public service response, to change the conduct, and it leads to a spike in public allegations of corruption.[101]

4.89 However, both Mr Charles and Mr Whealy agreed that the Victorian and Queensland approaches to holding public hearings are more protective of people's reputations:

> **Senator SMITH**: Turning to the comment about loss of reputation, do you think that the Victorian regime better protects against the loss of reputation, Mr Charles?
>
> **Mr Charles**: Better than ICAC?
>
> **Senator SMITH**: Yes.
>
> **Mr Charles**: Oh yes.
>
> **Mr Whealy**: And I would agree that both Victoria and Queensland are more protective of reputation.[102]

4.90 Gilbert + Tobin supported the power of an NIC to hold public hearings, with the caveat that the power is 'statutorily circumscribed to matters where the Commissioner determines it is in the public interest to do so', as is the case under section 31 of the ICAC Act.[103] Gilbert + Tobin Centre recommended that the statute establishing an NIC provides 'a clear, immediate and efficient avenue to review Commission decisions to conduct such a hearing'.[104]

4.91 Professor Brown similarly suggested that it should be at the discretion of an NIC whether to hold public hearings, when to do so would be in the public interest.[105]

4.92 The NSWCCL also advocated that 'the NIC should have the discretionary power to hold public hearings of its investigations',[106] making the following recommendations:

> Recommendation 9
>
> NSWCCL considers the power to hold public hearings – consistent with appropriate criteria – are indispensable for the overall effectiveness of broad based [anti-corruption agencies].

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101 Mr Charles, ART, *Committee Hansard*, 17 May 2017, p. 16.

102 Mr Charles, ART and Mr Whealy, TIA, *Committee Hansard*, 17 May 2017, p. 22.

103 Gilbert + Tobin, *Submission 19* [2016], p. 32.

104 Gilbert + Tobin, *Submission 19* [2016], p. 4, p. 32.

105 Professor Brown, Griffith University, *Committee Hansard*, 15 May 2017, pp. 7–8.

106 NSWCCL, *Submission 26*, p. 15.

> Recommendation 10
>
> NSWCCL recommends the [NIC] have the power to hold public hearings as part of its investigations. The decision to exercise this power in individual investigations should be decided on the basis of public interest and fairness criteria similar to those in section 31 of the [ICAC Act].
>
> Recommendation 11
>
> The power to hold public hearings should be discretionary on the basis of consideration of the specified criteria and procedural guidelines and should not be constrained by specification of either public or private hearings as the default position.[107]

4.93 The LCA was supportive of the ability of an NIC to hold public hearings but advocated for the Queensland approach:

> 51. If the implementation of a NIC includes the power to hold public hearings, it is important that there be an appropriate balance between transparency and the abrogation of rights and reputation of individuals appearing before such a Commission.
>
> 52. The Law Council considers that the approach in Queensland which enables the [Queensland Crime and Corruption Commission (Qld CCC)] to conduct private hearings should be the default model adopted in proceedings before a federal [anti-corruption agencies].[108]

4.94 So too did TIA:

> Public hearings are essential in proper cases. The real question is what statutory barrier should be in place to ensure that public hearings do not occur as a matter of course. The decision of the NSW ICAC to take this approach, at times, has been the primary trigger for it to come under political and media attacks, notwithstanding that its power to do so has never been successfully challenged in any court process.
>
> As a result, there are now those who advocate against public hearings in any circumstances. However, in NSW, the Gleeson/McClintock Review noted that public hearings are essential in a proper case to the uncovering of serious corruption and to facilitate the prevention of corruption. Public hearings may also be necessary to allow witnesses to come forward and provide useful information to the continuation of the investigation. 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.[109]

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107 NSWCCL, *Submission 26*, p. 15.

108 LCA, *Submission 9*, p. 14.

109 TIA, *Submission 21*, pp. 7–8.

4.95 Mr Brett and Mr Forbes Smith, Chief Executive Officer at the Qld CCC, reflected on the approaches of IBAC and the Qld CCC, respectively, and how those agencies resolve whether to hold a public hearing.

4.96 In Victoria, although IBAC has the ability to hold public hearings, the approach has been to favour private hearings. Mr Brett explained how IBAC comes to this decision:

> In Victoria the act provides that all investigations should be conducted by IBAC in private save in circumstances where IBAC thinks that there is some particular purpose in conducting it in public.
>
> Some of the things that can be taken into account in making that decision are educating the public and preventing corrupt conduct in the public sector. When there is a public inquiry in Victoria, it usually gets a lot of publicity.[110]

4.97 In terms of oversight of this decision, Mr Brett informed the committee that the Victorian Inspectorate has the power to review IBAC's decisions to conduct public examinations[111] and that IBAC is required to report its reason(s) for holding a public hearing.[112] To date, the Inspectorate has 'not had occasion to inquire into a decision that IBAC has made in that regard'.[113]

4.98 Mr Smith explained when the Qld CCC would decide to hold a public hearing:

> Our act provides that hearings should generally be held in private, but there are circumstances in which they can be held in public. As far as corruption is concerned, we can open a hearing to the public if the commission: considers closing the hearing to the public would be unfair to a person or contrary to the public interest—it is a bit of a reverse of what you would ordinarily expect; and approves that the hearing be a public hearing. The act clearly states the circumstances in which we can have a public hearing: it must be a commission decision—that is, essentially the board—and it cannot be delegated. We have a permanent chair, a part-time deputy chair and three part-time commissioners. Those four part-time people are all independent people, and they have to make the decision about having a public hearing.
>
> 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

110 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 10.

111 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 11.

112 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 11.

113 Mr Brett, Victorian Inspectorate, *Committee Hansard*, 17 May 2017, p. 11.

> the exception to the rule but are certainly to be used fairly rarely, and that is because of the act.[114]

4.99 Indeed, Ms Karen Carmody, the Queensland Parliamentary Commissioner with oversight of the Qld CCC, supported private hearings as the standard practice, with public hearings taking place 'only in certain specified situations', on the basis 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.[115]

ACLEI's power to hold public hearings

4.100 Federally, ACLEI has the discretion to determine whether it will conduct hearings in public. To date, in 10 years of operation, ACLEI has not done so.[116] The Integrity Commissioner, Mr Michael Griffin AM stated that the discretion to conduct hearings in private:

> …is necessary for the types of operations that we typically undertake. As you have heard from other agencies, investigations, particularly in the corruption area, can take considerable time, because you need to unravel deeply concealed corrupt conduct. Now, we do not want to alert suspects or persons of interest too early in that process.[117]

4.101 Mr Griffin discussed the 'balancing exercise' he undertakes when determining whether to hold a public or private hearing:

> On each occasion, there is a rigorous internal process where we will look at the intelligence that is available and we will look at what else is happening in other environments—in the courts, for example, and police investigations. We will cast our net very wide and then I will go to the criteria that are in the act. The first of those is to consider whether or not confidential information will be disclosed. As you would appreciate, that is a very broad brush. It might be commercial in confidence, contractual matters or personal financial circumstances. It might be medical in confidence, it might be psychology in confidence or it might be legal in confidence—the full range of issues that I must address there.
>
> The second limb of that first test is: will there be information that gives rise to the possible commission of an offence, a criminal offence? Again, that has to be a broad consideration because there may be police investigations

114 Mr Forbes Smith, Chief Executive Officer, Crime and Corruption Commission, Queensland, *Committee Hansard*, 15 May 2017, p. 13.

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

116 Mr Michael Griffin AM, Integrity Commissioner, Australian Commission for Law Enforcement Integrity (ACLEI), *Committee Hansard*, 5 July 2017, p. 42.

117 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 41.

> underway into the same or similar matters. If I were to conduct a public hearing, I might prejudice those police investigations or there may be court proceedings and I would run the risk of prejudicing a fair trial to a person. So the issues surrounding that second limb of the first test are many.
>
> Having addressed the first limb, I then move to consider the unfair prejudice to the persons involved. As you would appreciate, that is a complex consideration as well. The [statutory] test does not talk about unfairness to an individual; it talks about unfair prejudice to the reputation of a person. There are a number of concepts involved in that phraseology. It is not just a simple unfairness test.
>
> ...
>
> We do that on each and every occasion. We document it. It is a reviewable document. It is a statement of reasons under the Administrative Decisions (Judicial Review) Act, or the Federal Court can review it. It is there.[118]

Budgetary and resourcing considerations

4.102 Although the committee received limited information about budgetary and resourcing considerations for a possible NIC, the evidence received generally supported the allocation of sufficient resources to enable an NIC to adequately perform its role.

4.103 For example, in commenting on existing mechanisms at the federal level, TIA submitted that the AFP Fraud and Anti-Corruption Centre 'is neither appropriately placed nor resourced to provide comprehensive leadership with respect to investigation and prevention of serious public sector corruption risks',[119] and noted:

> Whatever the structure [of an NIC], it must be appropriate to manage the additional workload. A fundamental feature of the new agency must be the presence of ample resources to enable it to carry out the difficult tasks it will be required to perform.[120]

4.104 Further, the LCA stated that:

> … appropriate resources should be provided to ensure that any federal NIC can proactively share all disclosable information, such as admissible evidence and exculpatory matters, with the relevant prosecutorial service should it have the capacity to refer matters for prosecution, and consideration should be given to what mechanisms will best ensure that all disclosable information can be shared.[121]

4.105 Despite this, the Australian Public Service Commission (APSC) did not consider that the establishment of an NIC would necessarily 'provide value for money

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118 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 44.

119 TIA, *Submission 21*, p. 4.

120 TIA, *Submission 21*, p. 9.

121 Ms Bashir, LCA, *Committee Hansard*, 16 June 2017, p. 2.

in what appears to be a low corruption environment', or 'any additional assurance about the prevention and management of corruption in the APS'.[122]

4.106 However, in advocating for sufficient resources, some submitters also raised Australia's obligations under the *United Nations Convention against Corruption.*[123] Article 36 of that convention provides:

> Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized [sic] in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.[124]

Oversight of a national integrity commission

4.107 Some submitters and witnesses who advocated for the establishment of an NIC also advocated for some form of accountability mechanism to oversee such a body.[125]

4.108 According to Gilbert + Tobin, the importance of 'robust accountability and oversight mechanisms' is underscored by '[t]he extraordinary powers possessed by standing anti-corruption bodies, and the fact that their powers will, in many cases at least, be exercised in private'.[126] Indeed, Gilbert + Tobin made the following recommendations in respect of accountability:

> (a) a federal integrity Commission be subject to oversight by a bi-partisan parliamentary committee;
>
> (b) extraordinary investigation powers, should they be conferred, be subject to judicial review and should trigger compulsory parliamentary reporting obligations.
>
> (c) timely and accessible review processes be available for individuals and agencies affected by the exercise of a Commission's powers, mitigating recourse to court proceedings; and
>
> (d) that operational reviews of the Commission's statutory framework be conducted by an independent and competent review body.[127]

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122 Australian Public Service Commissioner (APSC), *Submission 16* [2016], p. 3.

123 See, for example, ART, *Submission 20*, Appendix 3, p. 2;

124 *United Nations Convention Against Corruption*, Mexico, 9 December 2003, entry into force 6 January 2006, [2006] ATS 2, Chapter III, Article 36.

125 See, for example, ART, *Submission 31* [2016], p. 7; Mr Chesney O'Donnell, *Submission 15* [2016], pp. 5–6; Mr Nicholas McKenzie, Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, pp. 26–27.

126 Gilbert + Tobin, *Submission 19* [2016], p. 38.

127 Gilbert + Tobin, *Submission 19* [2016], p. 40.

4.109 Mr Chesney O'Donnell advocated for oversight in the form of both a parliamentary committee and a parliamentary inspector, and submitted that:

> The Inspector is an independent statutory officer whose duty is to hold the NIC accountable in the way they carry out their functions. This can be set out when a legislation [sic] is created (i.e. *National Integrity Commission Act*). The Inspector's job is to undertake audits and ensure compliance, deal with complaints regarding the conduct of officers and proceedings and assess the NIC's effectiveness. Their powers are extensive to include investigation and can sit as a Royal Commissioner so as to conduct investigations while respecting the NIC's authority to continue with their independence. The Inspector's accountability [sic] lies primarily with what will be a newly established bi-partisan NIC Committee. The Committee's duties are to appoint a new Inspector, monitor and review the Inspector's functions while reporting back to both Houses. They will also conduct research to highlight trends and changes in corrupt behaviour over the years.[128]

4.110 The following sections will look at possible oversight mechanisms for an NIC, namely a parliamentary committee and a parliamentary inspector.

Parliamentary committees

4.111 As discussed in chapter 3, all state anti-corruption agencies are overseen by a parliamentary committee, as are certain Commonwealth integrity agencies such as the ACLEI and the AFP. The role of parliamentary committees and whether an NIC should be overseen by such a committee was raised by some submitters and witnesses during the course of the inquiry.

4.112 For example, the NSWCCL stated that '[t]he NIC should be subject to strong and effective oversight including Parliamentary oversight and non-merit judicial review'.[129] The Accountability Round Table recommended that a comprehensive independent integrity system be subject to parliamentary oversight,[130] while Mr Nicholas McKenzie, a journalist at Fairfax Media, argued that an NIC 'would need to be subject to significant oversight, be it by some sort of inspector-general or some sort of a parliamentary committee'.[131]

4.113 The RoLIA identified the important role played by existing parliamentary committees, stating that:

> Committees ranging from the Joint Committee on Public Accounts and Audit, to the Standing Committees on Members' and Senators' Interests, maintain a level of public scrutiny of government action and potential conflicts of interest.[132]

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128 Mr O'Donnell, *Submission 15* [2016], pp. 5–6 (footnotes omitted).

129 NSWCCL, *Submission 26*, p. 16.

130 ART, *Submission 31*, p. 7.

131 Mr McKenzie, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 27.

132 RoLIA, *Submission 8* [2016], p. 3.

4.114 The AGD similarly acknowledged the 'important role' played by existing parliamentary committees in the Commonwealth's integrity framework:

> The Joint Standing Committee on Public Accounts and Audit holds Commonwealth agencies to account for the lawfulness, efficiency and effectiveness with which they use public monies. Furthermore, there are at least three Parliamentary Committees currently inquiring into anti-corruption-related matters, including the Senate Select Committee inquiry into a national integrity commission and the Senate Committee inquiries into foreign bribery and into criminal, civil and administrative penalties for white collar crime. Additionally, the Parliamentary Joint Committee on ACLEI is currently conducting an inquiry into whether the Integrity Commissioner's jurisdiction should be further extended to other Commonwealth agencies with law enforcement functions that may also operate in high corruption-risk environments.[133]

4.115 However, Professor McMillan noted that, unlike in NSW, which has a 'joint parliamentary committee that has a statutory role in relation to the Ombudsman, the Crime Commission, the Law Enforcement Conduct Commission and the Information Commissioner', there is 'no Commonwealth parliamentary committee with a dedicated responsibility for the corruption bodies'.[134]

4.116 Although TIA recognised that '[s]pecial-purpose parliamentary committees have an increasingly important role in Australia's integrity and anti-corruption systems' including in respect of their functions, 'there is little coherence to this important element of the integrity system' at the Commonwealth level. TIA recommended the:

- Review and rationalization of the Commonwealth Parliament's Joint Parliamentary Committee structures to provide a lesser number of more integrated, and better resourced, statutory committees with integrity, accountability and anti-corruption oversight functions;
- Specific inclusion of the Commonwealth Ombudsman and the Australian Information Commissioner within statutory Parliamentary Committee oversight arrangements.[135]

4.117 Indeed, Gilbert + Tobin recommended that 'a federal integrity commission be subject to oversight by a bi-partisan parliamentary committee'.[136] Gilbert + Tobin noted that:

> The extraordinary powers possessed by standing anti-corruption bodies, and the fact that their powers will, in many cases at least, be exercised in private, underscores the importance of having robust accountability and oversight mechanisms. Most state jurisdictions contain provision for the

133 AGD, *Submission 23*, p. 7.

134 Professor McMillan, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 5.

135 TIA, *Submission 11* [2016], p. 20.

136 Gilbert + Tobin, *Submission 19* [2016], p. 40.

> Commissions to report to and be overseen by a parliamentary committee. It will be important that such a Committee is not government dominated, and this should be mandated in the statute.[137]

A federal parliamentary commissioner?

4.118 As outlined in chapter 3, in Queensland a Parliamentary Commissioner is appointed as an officer of the parliament who assists the Parliamentary Crime and Corruption Committee in the conduct of its oversight functions. A similar position exists in Western Australia (a parliamentary inspector), while in NSW the Inspector of the ICAC exercises similar responsibilities (see chapter 3).

4.119 In correspondence to the committee, the Parliamentary Joint Committees on ACLEI and Law Enforcement advised that their work could be strengthened, and in the case of the Law Enforcement Committee, expressed some frustration about the statutory limitation on its oversight, preventing that committee from considering or examining the work of the AFP in relation to terrorism. With regard to a Parliamentary Commissioner, both committees expressed some reservations, the Law Enforcement Committee noting that it already has the capacity to appoint a specialist consultant, with the approval of the Presiding Officers, if needed.

A federal integrity commissioner?

4.120 As discussed in chapter 3, in Queensland and Tasmania parliamentarians and (in Queensland only) senior public servants can seek advice in relation to ethical and entitlement matters from an integrity commissioner. There is also an ethics adviser in NSW—currently a former clerk of the Legislative Council—from whom parliamentarians can seek advice in relation to ethical and entitlement issues.[138]

4.121 Of relevance to the current inquiry, in November 2010, the House of Representatives Standing Committee of Privileges and Members' Interests was referred an inquiry in relation to developing a draft code of conduct for members of parliament, including the role of a proposed 'Parliamentary Integrity Commissioner'.[139]

4.122 In its report, the House committee stated that if a code of conduct was established, it would 'see value' in the appointment of an Integrity Commissioner 'whose central role would be to receive and investigate complaints under the proposed code of conduct'.[140] The committee further described the role of an Integrity Commissioner:

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137 Gilbert + Tobin, *Submission 19* [2016], p. 38.

138 Dr Phelps, *Committee Hansard*, 16 June 2017, p. 10.

139 House of Representatives Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament: Discussion Paper*, November 2011, p. viv.

140 House of Representatives Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament: Discussion Paper*, November 2011, p. 43.

> In addition to a central role of receiving and investigating complaints of breaches of a code, the Committee considers a Parliamentary Integrity Commissioner could have related roles of:
>
> - providing advice to members on matters relating to the code of conduct and ethical issues generally, subject to such advice not creating a potential conflict with any possible investigations;
> - periodically (every Parliament) reviewing the code of conduct and reporting to the relevant House Committee; and
> - undertaking an educative role for Members in relation to the code and ethics matters generally.[141]

4.123 The House committee's report was subsequently considered by the Senate Committee of Senators' Interests. In relation to the appointment of an Integrity Commissioner the Senate committee stated:

> 1.63 The Senators' Interests Committee sees a difficulty in combining a highly aspirational code with a complaints and enforcement mechanism that is more appropriate for specific, prescriptive rules. This difficulty is recognised in the House Committee's proposals by providing an independent investigator with the power to filter out or dismiss complaints according to stated criteria, for instance where complaints are frivolous or vexatious, or inherently political.
>
> 1.64 The Senators' Interests Committee is not convinced, however, that the model proposed in the discussion paper is the right one, particularly because of the somewhat artificial nature of the process by which complaints are to be filtered out.[142]

4.124 The Senate committee stated that it saw 'no need for the appointment of a commissioner as investigator', but did consider there was value in the Senate considering the appointment of an ethics advisor, who could 'provide advice to senators on ethical matters, including in relation to conflicts of interest'.[143]

4.125 However, the Senate committee stated that should the Senate determine to appoint an investigator, this office should be separate to the role of the ethics advisor, accepting the reasoning of the then Clerk of the Senate, Dr Rosemary Laing:

> There is an inherent conflict between the provision of advice in relation to conduct and the subsequent investigation of it. In his or her advisory role, for example, the commissioner could effectively endorse or clear proposed conduct. That conduct could then be the subject of a complaint and the commissioner, having investigated it, might come to a different conclusion. The commissioner is conflicted and the member has been treated unfairly by being penalised for conduct which the investigating authority has

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141 House of Representatives Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament: Discussion Paper*, November 2011, pp. 43–44.

142 Senate Committee of Senators' Interests, *Code of Conduct Inquiry*, November 2012, p. 13 (citations omitted).

143 Senate Committee of Senators' Interests, *Code of Conduct Inquiry*, November 2012, p. 15.

> previously cleared. If the investigation cleared the member, doubt would nonetheless be cast on the integrity of the process because the investigator would be perceived as compromised by the advice previously given. There could be no confidence in such a system.[144]

4.126 At present, there is no agency or official with the role of providing ethical advice to federal parliamentarians. In this regard, the Clerk of the Senate stated:

> I am in favour of the idea of senators and members having access to that ethical-type advice. It is a model that is used in a few states. I think Tasmania has a Parliamentary Standards Commissioner—I think that is the title. I am not sure if he is still the commissioner, but I spoke to former senator Reverend Professor Michael Tate during his time as commissioner about some issues and about the practices and approaches that we have here…I would suggest that the people who are going to be able to advise you most about ethical matters about running your offices and running your business, if you like—your 'small business' as a senator—are probably people who have been in similar roles in the past.
>
> I recall both my predecessor and her predecessor giving advice to Senate committees in the past along the lines of saying that it is important, if you do go down the path of having an ethics adviser in the parliamentary space, that you separate that role from the role, for instance, of an investigator. There is an intractable conflict of interest, I think, if you try to tie the two roles up within the same body. I think that is a difficulty.
>
> …
>
> I do think there is space there to have someone come in to give ethical guidance or to pose some testing questions that you can dwell on from time to time. But if I was asked for advice on ethical matters I would say: be ethical.[145]

4.127 As discussed elsewhere, Gilbert + Tobin was critical of existing oversight of parliamentarians and suggested that 'institutionalised means of enhancing integrity compliance within Parliament itself, such as through the establishment of an independent parliamentary ethics officer' should be considered.[146]

4.128 By contrast, Dr Phelps criticised the use of a parliamentary ethics adviser in NSW, on the basis such advice 'has no legal standing. If ICAC were to make a subsequent investigation and I were to wave around the advice from the ethics advisor, it would have no legal effect'.[147]

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144 Senate Committee of Senators' Interests, *Code of Conduct Inquiry*, November 2012, p. 16 (citations omitted).

145 Mr Pye, Clerk of the Senate, *Committee Hansard*, 16 June 2017, p. 22.

146 Gilbert + Tobin, *Submission 19* [2016], p. 11.

147 Dr Phelps, *Committee Hansard*, 16 June 2017, p. 10.

A national integrity commission?

4.129 As stated elsewhere, the Commonwealth government's position, in relation to an NIC, is that:

> The Australian Government is committed to stamping out corruption in all its forms. The Government does not support the establishment of a National Integrity Commission. The Government has a robust, multi-faceted approach to combating corruption…[148]

4.130 The Commonwealth agencies that provided submissions or appeared before the committee were consistent in this view, arguing that the current integrity framework addresses integrity and corruption measures in the Commonwealth public sector appropriately and effectively. The APSC maintained that corruption in the Australian Public Service (APS) is low and that:

> …existing anti-corruption and accountability arrangements of the APS are robust and effective. However, agencies are not complacent. They continue to focus on managing risks, including the risk of corruption. Across the APS generally there is a strong focus on integrity risks and their management.[149]

4.131 The APSC reflected that each agency in the current Commonwealth integrity framework is:

> …clear about where we have the lead, and our roles are actually different. We are also clear about when we need to collaborate across those boundaries. I think the current system where it is very clear that the Public Service Commissioner has responsibility for the integrity and conduct of the Public Service and the Integrity Commissioner has his specific role actually serves us very well. We are also very clear about when something needs to be handed from one jurisdiction to the other, and we have, I think, a seamless history of doing that effectively.
>
> …
>
> …each of the responsible officers is able to bring their particular expertise to bear, so that we get the best possible result in each of the areas, rather than a kind of conglomerate, which might not be specifically expert in any one of the areas. If there were gaps between them then that would be a problem, but that is not my experience.[150]

4.132 The APSC ultimately argued that an NIC 'would be neither simple nor inexpensive' and that '[i]t is open to conjecture whether the creation of such a body would materially reduce the current levels of corrupt and unlawful behaviour'.[151]

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148 AGD, *Submission 23* [2016], p. 2.

149 APSC, *Submission 16* [2016], p. 2.

150 Ms Stephanie Foster, Deputy Public Service Commissioner, APSC, *Committee Hansard*, 5 July 2017, p. 54.

151 APSC, *Submission 16* [2016], p. 4.

Proposal for a lead coordination role

4.133 As an alternative to an NIC, the Commonwealth Ombudsman proposed that 'a lead coordination role' could be assigned:

> …on a permanent basis to one of the already established oversight bodies. A clear champion of the whole-of-government integrity system may strengthen public confidence in that system. It would also allow for a 'one-stop-shop' for members of the public seeking guidance on Australia's anti-corruption and integrity bodies.[152]

4.134 Other Commonwealth agencies were unfamiliar with this suggestion and as such, were unable to offer a comprehensive assessment of its merits. However, some agencies did raise questions in response; for example, the Australian National Audit Office remarked:

> It depends on what the lead role was to do. As I said previously, I have not come across a situation where it was not clear to me who I should go to with an issue. So I am not certain what a lead role would do in that context.[153]

4.135 The APSC expressed concern with the proposal, and argued that such an approach would have some risks:

> The areas are very diverse. As you look around the table you can see the various responsibilities of the parties here, and to have a particular agency conversant in the various nuances, interactions and overlaps of the boundaries in the various bodies here, I think, would be quite challenging and may not deliver the apparent efficiencies that are suggested in that quote.[154]

Committee view

4.136 It is apparent to the committee that the current Commonwealth integrity framework comprises a multiplicity of agencies, as well as other mechanisms and projects, resulting in a complex and poorly understood system that can be opaque, difficult to access and challenging to navigate, particularly for complainants unfamiliar with the Commonwealth public sector and its processes more broadly.

4.137 The committee does not wish to suggest that the individual agencies comprising the Commonwealth integrity framework are not successfully addressing integrity and corruption matters arising in their jurisdictions; however, it seems clear that collectively, the system must be better explained and understood if a coherent strategy to address integrity and corruption issues across the Commonwealth public sector is to be achieved. Indeed, during the course of the inquiry, Commonwealth

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152 Commonwealth Ombudsman, *Submission 30* [2016], p. 2.

153 Mr Grant Hehir, Auditor-General, Australian National Audit Office, *Committee Hansard*, 5 July 2017, p. 3.

154 The Hon. John Lloyd, Australian Public Service Commissioner, APSC, *Committee Hansard*, 5 July 2017, p. 53.

agencies struggled to explain to the committee how their individual roles and responsibilities inter-connect to form a seamless Commonwealth government-wide approach to integrity and corruption issues. As a result, some commentators and critics also misunderstand the powers and responsibilities of current integrity agencies.

4.138 The committee considers it vitally important that there is a coherent, comprehensible and accessible Commonwealth integrity framework. The committee is aware of both work, such as the Open Government Partnership (OGP), and research, for example by Griffith University and TIA et al.,[155] currently underway that will inform the future direction of integrity and anti-corruption measures in the Commonwealth public sector and assist the government with its consideration of the way forward.

4.139 The committee urges the Commonwealth government to reflect upon and review the current system. The committee is of the view that the government has work to do to make the Commonwealth integrity framework more coherent, comprehensible and accessible, and that this work ought to be a priority.

Recommendation 1

4.140 The committee recommends that the Commonwealth government prioritises strengthening the national integrity framework in order to make it more coherent, comprehensible and accessible.

4.141 On the basis of the evidence before it, the committee also believes that the Commonwealth government should carefully weigh whether a Commonwealth agency with broad scope to address integrity and corruption matters—not just law enforcement or high risk integrity and corruption—is necessary. It is certainly an area of great interest to the public and irrespective of whether it is achieved by way of a new federal agency or by some other mechanism(s), current arrangements must be strengthened.

Recommendation 2

4.142 The committee recommends that the Commonwealth government gives careful consideration to establishing a Commonwealth agency with broad scope and jurisdiction to address integrity and corruption matters.

4.143 If the government is of a mind to establish a new integrity agency, detailed consideration should be given to the matters raised in this report: the effectiveness of any new agency will rely on appropriate decisions being made with regard to its jurisdiction, powers, leadership, educative function, capacity to hold public hearings and in what circumstances, resourcing, and oversight. Lessons can and should be learned from existing state anti-corruption agencies, particularly with regard to the

155 The ARC-funded Research Linkage Project is a collaboration between Griffith University, Flinders University, the University of the Sunshine Coast, TIA, the NSW Ombudsman, the Queensland Integrity Commissioner and the Queensland Crime and Corruption Commission.

powers and purpose of such an agency, the careful selection of the commissioner(s), and the judicious use of public hearings.

4.144 The committee sees value in the suggestion from Griffith University that any new national integrity agency should be an 'umbrella' agency with which all Commonwealth integrity and corruption complaints could be lodged, but where the umbrella agency has the powers to require any other agency within the integrity framework to investigate integrity and corruption issues—even minor issues—and report back. Such an approach is intended to build public confidence: at present, given the complexity and inaccessibility of the current Commonwealth framework, complainants 'often do not even know where to report issues of corruption, because it is so fragmented'.[156]

4.145 Under the OGP, the jurisdiction and capabilities of ACLEI and the AFP's Fraud and Anti-Corruption Centre (FAC) will be reviewed 'in the context of developing Australia's next [OGP] National Action Plan' in early to mid-2018.[157] The committee understands that the draft of the final report for the ARC Linkage Project by Griffith University and TIA et al is expected to be released in March 2019.

4.146 In accordance with these time frames and taking into account the conclusions of the OGP review and the Griffith University and TIA et al research, the committee encourages the Senate to review the question of a national integrity commission using the work of this and previous inquiries.

Recommendation 3

4.147 The committee encourages the Senate to review the question of a national integrity commission following the release of the Open Government Partnership review and the Griffith University and Transparency International Australia et al research, with a view to making a conclusive recommendation based on the evidence available at that time.

4.148 It is clear that extraordinary and coercive powers, such as those currently entrusted to ACLEI, are necessary to effectively investigate integrity and corruption matters in the Commonwealth. The committee considers that one way in which the Commonwealth government could establish a national integrity agency is to broaden the jurisdiction and scope of ACLEI to become an 'umbrella' agency as suggested by Griffith University, rather than establishing an entirely new agency. As noted elsewhere in this report, the committee is aware that ACLEI's jurisdiction has been the subject of past parliamentary consideration, in 2006 and 2016; in both instances, expansion of ACLEI's jurisdiction was recommended.

4.149 While not the subject of evidence before the committee, the committee is also of the opinion that reform of current parliamentary oversight of Commonwealth

156 Mr Ankamah, Griffith University, *Committee Hansard*, 15 May 2017, p. 5.

157 Department of Prime Minister and Cabinet, *Open Government Partnership – Australia: 4.2-National Integrity Framework*, available: https://ogpau.pmc.gov.au/commitment/42-national-integrity-framework (accessed 6 September 2017).

integrity agencies should be strengthened. The committee is aware that in 2005, the then Parliamentary Joint Committee on the Australian Crime Commission and in 2002, the Senate Legal and Constitutional Affairs Legislation Committee have previously considered the question of a single parliamentary joint committee to oversee federal law enforcement and integrity agencies; on both occasions, the government of the day rejected suggestions that there should be a single committee. The committee also notes the evidence of Professor McMillan in this regard, where he discussed the benefits of the single parliamentary joint committee in NSW that has 'a statutory role in relation to the Ombudsman, the Crime Commission, the Law Enforcement Conduct Commission and the Information Commissioner'.[158] As Professor McMillan suggested, a single parliamentary oversight committee can have the effect of strengthening and formalising collaboration and links, and enable the committee to develop a more thorough and nuanced understanding of integrity and corruption matters across government.

4.150 The committee sought advice from the Parliamentary Joint Committees on the ACLEI and Law Enforcement in relation to their roles, powers and responsibilities. As discussed earlier, those committees suggested that their work could be strengthened and, in the case of the Parliamentary Joint Committee on Law Enforcement, unrestricted in terms of scope.[159]

4.151 The committee is attracted to the model in Queensland whereby a Parliamentary Commissioner (this committee will refer to a Parliamentary Counsel or Advisor) assists and complements the work of the relevant parliamentary oversight committee. Again, such a proposal at the Commonwealth level was not the subject of discussion during the course of the inquiry; however, the committee sees value in the Parliamentary Joint Committees on the ACLEI and Law Enforcement having available to them, as needed, a Parliamentary Counsel or Advisor to assist them to exercise their roles and responsibilities with diligence and rigour. The committee believes it is important that a Parliamentary Counsel or Advisor is empowered, at the request of the joint committees, to investigate complaints on their behalf as well as the capacity to refer integrity and corruption matters to the relevant integrity agency, and assist the parliamentary joint committees to guide ongoing policy development about how best to pursue integrity and corruption issues. In this regard, and as stated above, the committee notes the difficulties currently encountered by some parliamentary joint committees when they are statutorily prevented from pursuing certain lines of inquiry and are therefore inhibited in the fulfilment of their oversight role.

4.152 If a Parliamentary Counsel or Advisor is made available to the Parliamentary Joint Committees on the ACLEI and Law Enforcement, consideration should be given to the powers of the Counsel or Advisor (for example to what extent they may access

158 Professor McMillan, NSW Ombudsman, *Committee Hansard*, 12 May 2017, p. 5.

159 For example, para. 7(2)(g) of the *Parliamentary Joint Committee on Law Enforcement Act 2010* prohibits the Parliamentary Joint Committee on Law Enforcement from 'monitoring, reviewing or reporting on the performance by the Australian Federal Police of its functions under Part 5.3 of the [*Criminal Code Act 1995*]' (terrorism).

the records and premises of the relevant agencies, or pursue own-motion investigations) and adequate resourcing allocated.

Recommendation 4

4.153 The committee recommends that the Parliament considers making available to the Parliamentary Joint Committees on the Australian Commission for Law Enforcement Integrity and Law Enforcement, as needed, a Parliamentary Counsel or Advisor to assist them in their important roles.

4.154 The other proposal of interest to the committee is that of a federal Parliamentary Integrity Commissioner. In the view of the committee, if a Commonwealth integrity agency is established and parliamentarians fall within the agency's jurisdiction, it is appropriate for parliamentarians to have access to advice from a Parliamentary Integrity Commissioner in relation to matters of ethics. The committee acknowledges the support of the Clerk of the Senate for such an approach. The committee also heeds the advice of the former Clerk of the Senate, Dr Rosemary Laing, that if appointed, a Parliamentary Integrity Commissioner should be restricted to an advisory role and should be explicitly prevented from having an investigatory role in relation to complaints about alleged breaches of ethics by parliamentarians. The committee envisages that where complaints are made about the ethical conduct of senators and members, those would be referred to the national integrity agency as appropriate.

Recommendation 5

4.155 The committee recommends that, if a national integrity agency is established, the Parliament appoints a Parliamentary Integrity Commissioner to provide advice on matters of ethics to senators and members.

4.156 Reflecting on existing oversight of parliamentarians and the standards expected of senators and members, the Houses already have the capacity to refer some conduct by senators and members to their Privileges Committees for investigation.

4.157 The committee acknowledges that the House of Representatives Committee of Privileges and Members' Interests and the Senate Committee of Senators' Interests have previously considered a code of conduct for members and senators (see paragraphs 2.332 to 2.336). The Senators' Interests committee rejected the code of conduct proposed by the House committee as it 'was not convinced that an aspirational, principles-based code would necessarily improve perceptions of parliamentarians and their behaviour'.[160] However, as highlighted in chapter 2, certain conduct by senators and members, such as asking for, receiving or obtaining any property or benefit for the purpose of influencing the discharge of the senator's duties, may be dealt with as a contempt. The committee suggests that the Houses of Parliament be diligent in using their Privileges Committees to investigate and restrain senators or members where conduct by them may be contrary to parliamentary privilege.

160 Department of the Senate, *Procedural Information Bulletin No. 269*, 30 November 2012, p. 6.

Recommendation 6

4.158 The committee recommends that the Senate and the House of Representatives diligently use their Privileges Committees where it is alleged that a senator or member has acted improperly and contrary to parliamentary privilege.

4.159 The recent referral of matters involving the former Member for Dunkley, the Hon. Bruce Billson, to the House of Representatives Committee of Privileges and Members' Interests, as well as other examples of references to both state and federal privileges committees,[161] reinforce the committee's view that privileges committees are capable of playing an important role in examining apparently improper behaviour by parliamentarians.

4.160 The committee further notes that in respect of the standards of behaviour required of ministers there is a perception that the current *Statement of Ministerial Standards* is not rigorously applied or enforced. The Billson matter also serves to highlight this point.

4.161 Although Mr Billson was no longer a minister at the time he was appointed as director of the Franchise Council of Australia, the *Statement of Ministerial Standards* requires that ministers:

> …undertake that, for an eighteen month period after ceasing to be a Minister, they will not lobby, advocate or have business meetings with members of the government, parliament, public service or defence force on any matters on which they have had official dealings as Minister in their last eighteen months in office. Ministers are also required to undertake that, on leaving office, they will not take personal advantage of information to which they have had access as a Minister, where that information is not generally available to the public.[162]

4.162 Mr Billson's appointment to the Franchise Council of Australia occurred before this 18-month period had expired. However, neither his appointment nor his subsequent conduct were identified as a breach of the *Statement of Ministerial Standards* and were therefore not investigated. The committee notes that the *Statement of Ministerial Standards* does not set out specific sanctions that apply in cases where breaches are established, nor is there an established procedure for investigating alleged breaches, beyond the Prime Minister seeking advice from the head of DPMC.[163]

4.163 The committee notes these weaknesses in the application of the *Statement of Ministerial Standards*. The committee urges the Commonwealth government to establish stronger procedures for the identification, investigation and punishment of

161 See discussion at paragraph 2.310 to 2.331.

162 Commonwealth of Australia, *Statement of Ministerial Standards*, September 2015, p. 6.

163 See discussion at paragraphs 2.333 and 2.334.

breaches of the *Statement of Ministerial Standards* so that ministers are better held to account for their conduct in office.

Recommendation 7

4.164 The committee recommends the Commonwealth government considers implementing measures to strengthen the application of the *Statement of Ministerial Standards*, including measures to improve the identification, investigation and punishment of breaches.

Senator the Hon. Jacinta Collins
Chair