The Senate

Select Committee on a National Integrity Commission

Report

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Select Committee on a National Integrity Commission

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Abbreviations

2016 select committee	Select Committee on the Establishment of a National Integrity Commission
AACF	Anti-corruption Commissions Forum
AAT	Administrative Appeals Tribunal
ABF	Australian Border Force
ACC	Australian Crime Commission
ACIC	Australian Criminal Intelligence Commission
ACLEI	Australian Commission for Law Enforcement Integrity
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AEC	Australian Electoral Commission
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979*
AG Act	*Auditor-General Act 1997*
AGD	Attorney-General's Department
AI	Australia Institute
Agriculture	Department of Agriculture and Water Resources
AML Act	*Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
AML/CTF	anti-money laundering and counter-terrorism financing
ANAO	Australian National Audit Office
APS	Australian Public Service
APSC	Australian Public Service Commission
ASD	Australian Signals Directorate

ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
CAFAC	Criminal Assets, Fraud and Anti-Corruption
CC Act (Qld)	*Crime and Corruption Act 2001* (Qld)
CCM Act (WA)	*Corruption, Crime and Misconduct Act 2003* (WA)
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
CJC	Criminal Justice Commission
Commonwealth Ombudsman	Office of the Commonwealth Ombudsman
Corporations Act	*Corporations Act 2001*
CPRs	Commonwealth Procurement Rules
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
DIBP	Department of Immigration and Border Protection
DPA scheme	deferred prosecution agreement scheme
DPMC	Department of Prime Minister and Cabinet
FAC	Fraud and Anti-corruption Centre
FIU	Financial Intelligence Unit
Gilbert + Tobin	Gilbert + Tobin Centre of Public Law
Griffith University	Centre for Governance and Public Policy, Griffith University
HSU	Health Services Union
IBAC	Independent Broad-based Anti-corruption Commission
IBAC Act (Vic)	*Independent Broad-based Anti-corruption Commission Act 2011* (Vic)

ICAC	Independent Commission Against Corruption
ICAC Act (NSW)	*Independent Commission Against Corruption Act 1988* (NSW)
ICAC Act (SA)	*Independent Commissioner Against Corruption Act 2012* (SA)
IC Act (Tas)	*Integrity Commission Act 2009* (Tas)
IPA	Institute of Public Affairs
IPEA	Independent Parliamentary Expenses Authority
IGIS	Inspector-General of Intelligence and Security/ Office of the Inspector-General of Intelligence and Security
IGIS Act	*Inspector General of Intelligence and Security Act 1986*
JCPAA	Joint Committee of Public Accounts and Audit
LCA	Law Council of Australia
LEIC Act	*Law Enforcement Integrity Commissioner Act 2006*
MOP(S) Act	*Members of Parliament (Staff) Act 1984*
MOU	Memorandum of Understanding
NAP	National Action Plan
NIC	National Integrity Commission
NSW	New South Wales
NSWCCL	New South Wales Council of Civil Liberties
NSW ICAC	New South Wales Independent Commission Against Corruption
NT	Northern Territory
Odgers'	*Odgers' Australian Senate Practice*
OECD	Organisation for Economic Co-operation and Development
Office of the Inspector	Office of the Inspector of the Independent Commission Against Corruption

OGP	Open Government Partnership
Ombudsman Act	*Ombudsman Act 1976*
ONA	Office of National Assessments
OPCCC	Office of the Parliamentary Crime and Corruption Commissioner
OPI	Office of Public Integrity
OSU	Operations Support Unit
PCCC	Parliamentary Crime and Corruption Committee
PGPA Act	*Public Governance, Performance and Accountability Act 2013*
PID	Public Interest Disclosure
PID Act	*Public Interest Disclosure Act 2013*
PID Scheme	Commonwealth's whistleblower scheme
PJCCFS	Parliamentary Joint Committee on Corporations and Financial Services
PJCACLEI	Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity
PJSCEM	Parliamentary Joint Committee on Electoral Matters
PS Act	*Public Service Act 1999*
Qld CCC	Queensland Crime and Corruption Commission
RBA	Reserve Bank of Australia
RoLIA	Rule of Law Institute of Australia
SA	South Australia
SA ICAC	South Australian Independent Commissioner Against Corruption
the Fitzgerald Inquiry	Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct
the linkage project	Australian Research Council Linkage Project

TIA	Transparency International Australia
UN	United Nations
WA	Western Australia
WA CCC	Western Australian Corruption and Crime Commission

Recommendations

Recommendation 1

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

Recommendation 2

4.140 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.

Recommendation 3

4.145 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.

Recommendation 4

4.151 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.

Recommendation 5

4.153 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.

Recommendation 6

4.156 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.

Recommendation 7

4.162 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.

Chapter 1

Introduction

Referral and conduct of the inquiry

1.1 On 8 February 2017, the Senate established the Select Committee on a National Integrity Commission (the committee) to inquire and report by 15 August 2017 on:[1]

(a) the adequacy of the Australian Government's legislative, institutional and policy framework in addressing all facets of institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:

(i) the effectiveness of the current federal and state/territory agencies and commissions in preventing, investigating and prosecuting corruption and misconduct,

(ii) the interrelation between federal and state/territory agencies and commissions, and

(iii) the nature and extent of coercive powers possessed by the various agencies and commissions, and whether those coercive powers are consistent with fundamental democratic principles;

(b) whether a federal integrity commission should be established to address institutional, organisational, political and electoral, and individual corruption and misconduct, with reference to:

(i) the scope of coverage by any national integrity commission,

(ii) the legislative and regulatory powers required by any national integrity commission to enable effective operation,

(iii) the advantages and disadvantages associated with domestic and international models of integrity and anti-corruption commissions/agencies,

(iv) whether any national integrity commission should have broader educational powers,

(v) the necessity of any privacy and/or secrecy provisions,

(vi) any budgetary and resourcing considerations, and

(vii) any reporting accountability considerations; and

(c) any related matters.[2]

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1 *Journals of the Senate*, No. 25, 8 February 2017, pp. 860–861.

2 *Journals of the Senate*, 2017, No. 25, 8 February 2017, p. 860.

1.2 On 9 August 2017, the Senate extended the reporting date to 13 September 2017.[3]

1.3 The committee received and published 46 submissions, listed at Appendix 1. A further approximately 2098 campaign submissions were received and not published.

1.4 The committee took evidence from 57 witnesses over five days of public hearings in:

- Sydney on 12 May 2017;
- Brisbane on 15 May 2017;
- Melbourne on 17 May 2017; and
- Canberra on 16 June and 5 July 2017.

1.5 The witnesses who appeared at these hearings are listed at Appendix 2.

1.6 The committee also received a number of additional documents, answers to questions on notice and supplementary submissions, listed at Appendix 3.

1.7 The committee was empowered to access and refer to the evidence received by the Select Committee on the Establishment of a National Integrity Commission during the 44th Parliament, in addition to any new evidence received.

Select Committee on the Establishment of a National Integrity Commission

1.8 This inquiry continues the work commenced by the Select Committee on the Establishment of a National Integrity Commission (2016 select committee) established during the 44th Parliament on 24 February 2016. The 2016 select committee tabled an interim report on 3 May 2016.

1.9 The 2016 select committee received 31 submissions during the 44th Parliament, and held two public hearings in Canberra and Sydney.

1.10 The interim report provided 'an introduction to perceptions of corruption in Australia', and concluded 'with a discussion of the existing national anti-corruption framework, and the potential benefits and drawbacks of creating a national anti-corruption commissioner covering elements of public administration'.[4]

1.11 The interim report contained a single recommendation:

> …that the Australian Government support current and sound future research into potential anti-corruption systems appropriate for Australia including the research led by Griffith University, in partnership with Transparency International Australia.[5]

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3 *Journals of the Senate*, No. 50, 9 August 2017, p. 1636.

4 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 2.

5 Senate Select Committee on the Establishment of a National Integrity Commission, *Interim Report*, May 2016, p. 39.

Structure and scope of this report

1.12 This report comprises four chapters. Chapter 1 outlines the conduct and scope of the inquiry. Chapter 2 considers the Commonwealth's current multi-agency integrity framework. Chapter 3 describes the existing state integrity commissions. Chapter 4 concludes the report by outlining the arguments for and against the establishment of a national integrity commission (NIC).

Scope of the inquiry

1.13 The committee was particularly tasked with considering the adequacy of the current integrity arrangements and to ascertain whether a national integrity commission should be established. As such, and consistent with the 2016 select committee's interim report, this report focuses on the integrity of and anti-corruption measures relating to Commonwealth public administration in Australia.

1.14 The committee received many items of correspondence relating to individual cases of alleged public sector mismanagement and corruption or personal disputes between individuals and public sector agencies. These were not accepted as submissions by the committee on the basis, in the committee's opinion, these were not directly relevant to its terms of reference. However, the volume, complexity and, in some cases, length of time over which many of these cases span serve to demonstrate that the current integrity framework, at both state and federal levels, can be difficult to comprehend and access, with complainants often left wondering how, if at all, their complaint was resolved.

Integrity and corruption: other relevant developments

1.15 Integrity and corruption refer to a broad range of activities and can be conceptualised in a variety of ways. For the purpose of its inquiry, the committee adopted a broad interpretation of integrity and corruption with a view to facilitating wide-ranging discussion reflecting on what has already been done by a number of Australian states but also contemplating what, if anything, ought to be done in the future at the Commonwealth level.

1.16 It is not a static area of policy development and implementation. The committee is aware that its work has occurred at the same time as other developments in public sector integrity and anti-corruption. For example, the Commonwealth government has been engaged for a number of years now in the Open Government Partnership (OGP). In December 2016, the government released the first OGP Action Plan in which it made a number of commitments in relation to reviewing and strengthening the Commonwealth integrity framework (see chapter 2 for a more detailed discussion of the OGP).

1.17 The Commonwealth Public Interest Disclosure (PID) Scheme was implemented in 2013 and provides processes and protections for whistleblowers in the Commonwealth public sector. The PID Scheme is currently the subject of an inquiry by the Parliamentary Joint Committee on Corporations and Financial Services and so

this committee has not endeavoured to consider the scheme in detail.[6] The Joint Committee on Corporations and Financial Services intends to table its report on 14 September 2017.

1.18 Similarly, while within the scope of public sector integrity and this committee's inquiry, the matter of electoral donations, including foreign donations, is the subject of an inquiry by the Joint Standing Committee on Electoral Matters (PJSCEM) and so is not addressed in this report.[7] On 22 August 2017, the PJSCEM announced that, as part of its inquiry, it would conduct a review of political donations.[8] Further consideration of political donations will also be undertaken by the recently established Senate Select Committee into the Political Influence of Donations, which is due to report by 15 November 2017.[9]

1.19 With regard to the work of Parliament and parliamentarians, the Independent Parliamentary Expenses Authority (IPEA) was established on 1 July 2017 as a Commonwealth statutory authority to:

> …audit and report on parliamentarians' work expenses. It will provide advice to parliamentarians and their staff on travel and work related expenses to support them in undertaking their duties, requiring that taxpayer funds be spent appropriately and in compliance with the relevant principles and regulations.[10]

1.20 As an agency, IPEA is in its infancy, however, as the agency becomes more established and further legislative reform is implemented, it is expected that the management and transparency of parliamentary expenses will be further strengthened.

1.21 Other important collaborative work between academia, civil society organisations and government agencies has also been underway. In May 2016, a partnership—comprising Griffith University, Flinders University, the University of the Sunshine Coast, Transparency International Australia, the New South Wales

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6 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower protections in the corporate, public and not-for-profit sectors*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 29 August 2017).

7 Joint Standing Committee on Electoral Matters, *Inquiry into and report on all aspects of the conduct of the 2016 Federal Election and matters related thereto*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Election (accessed 15 August 2017). To date, the committee has released three interim reports.

8 Joint Standing Committee on Electoral Matters, 'Review of political donations commences', Media release, 22 August 2017, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/2016Election/Media_Releases (accessed 29 August 2017).

9 Select Committee into the Political Influence of Donations, further information available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Political_Influence_of_Donations (accessed 29 August 2017).

10 Independent Parliamentary Expense Authority, http://www.ipea.gov.au/ (accessed 29 August 2017).

Ombudsman, the Queensland Integrity Commissioner and the Queensland Crime and Corruption Commission[11]—was funded by the Australian Research Council to establish the Australian Research Council Linkage Project, *Strengthening Australia's National Integrity System: Priorities for Reform* (the linkage project).[12]

1.22 In March 2017, the linkage project released its first discussion paper 'to assist public and expert debate on key issues and options for the strengthening of Australia's systems of integrity, accountability and anti-corruption'.[13] That paper flagged future discussion papers to be released examining:

- Strategic approaches to corruption prevention
- Measuring anti-corruption effectiveness
- Australia's integrity system: more than just a sum of its parts?[14]

Acknowledgements

1.23 The committee thanks those organisations and individuals that contributed to its inquiry.

1.24 The committee extends special thanks to the Parliamentary Library which provided valuable research and background information in support of the inquiry.

Note on references

1.25 References to the *Committee Hansard* may be references to a proof transcript. Page numbers may differ between proof and final transcripts.

11 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. iv.

12 Transparency International Australia, *Submission 21*, p. 3.

13 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. iv.

14 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. iv.

Chapter 2

The current multi-agency framework

2.1 At present, the Commonwealth's approach to public sector integrity and corruption comprises a multi-agency framework in which different agencies have distinct but at times overlapping responsibilities for maintaining the integrity of and addressing corruption within the Commonwealth public sector.

2.2 This chapter considers that multi-agency framework, in particular:

- how the Commonwealth defines corruption;
- the agencies that comprise the framework and the interaction between federal and state integrity agencies.
- other integrity measures that bolster the Commonwealth's integrity framework;
- the role of the Parliament in the integrity framework;
- measures addressing parliamentarians' use of work expenses, and standards governing the ministry and ministerial staff, and
- the role of the media in public sector integrity and accountability.

2.3 Finally, the chapter examines a collaborative project between Griffith University and Transparency International Australia (TIA) et al. assessing how Australia's integrity system can be strengthened and reformed.

The definition of 'corruption'

2.4 The definition of corruption and the extent to which it is desirable to define corruption for the purposes of the Commonwealth's integrity framework were the subject of discussion during the course of the inquiry.

2.5 'Corruption' with regard to the Commonwealth public sector is generally considered to be the dishonest or biased conduct of a public official's function or duties, often for personal benefit or gain, and of a serious nature. The concept of 'integrity' further expands the scope of behaviour or conduct by public officials which might be considered inappropriate but which might also be considered to be less serious or of lower risk than 'corruption'.

2.6 This broad definition of 'corruption' is derived from the Australian Public Service Commission's (APSC) annual Employee Census, which surveys the Australian Public Service (APS) and includes a question about corruption in the service (that is, whether APS employees have perceived, witnessed and/or reported corruption in their workplace). The APSC currently defines corruption as:

> The dishonest or biased exercise of a Commonwealth public official's functions. A distinguishing characteristic of corrupt behaviour is that it

> involves conduct that would usually justify serious penalties, such as termination of employment or criminal prosecution.[1]

2.7 The APSC suggested that particular types of conduct fall within the definition of corrupt conduct but that for its purposes, the term is given a broad interpretation:

> **Senator KAKOSCHKE-MOORE**: So, what is the commission's understanding of corruption, then, for the purposes of your functions?
>
> **Mr Casimir**: The question we put to employees in the census was that we simply asked them to report whether they had seen behaviour in their agency that they considered may be serious enough to be viewed as corruption. We then put a series of things underneath that—things like bribery, domestic and foreign fraud, forgery, embezzlement, theft or misappropriation of assets. The list goes on.
>
> **Senator KAKOSCHKE-MOORE**: So, the conduct you have just listed would be considered corruption for the purposes of the code of conduct?
>
> **Mr Casimir**: It was considered corruption for the purposes of the question, yes.
>
> **Senator KAKOSCHKE-MOORE**: But how do you define it now? Is there a definition you can point me to?
>
> **Mr Casimir**: I think the answer to that is that we try to not change the questions very much from year to year so we get consistent data. This is a definition we use for our purposes. But there are other definitions, as you know, in places like the [*Law Enforcement Integrity Commissioner Act 2006* (LEIC Act)].[2]

2.8 Indeed, certain types of corrupt conduct, such as fraud and bribery, are defined in Commonwealth legislation for the purpose of outlining certain criminal offences. Yet other definitions of 'corruption' exist in Commonwealth legislation for the purpose of articulating the role and functions of some law enforcement agencies. The Commonwealth's current position, articulated by the Attorney-General's Department (AGD), is that beyond these existing definitions, corruption should not be defined too narrowly:

> We are of the view…that we do not want to define 'corruption' too narrowly. Obviously there is a range, and I think we have here about five of the various definitions of 'corruption'. The [LEIC Act], the [*Australian Federal Police Act 1979* (AFP Act)], the Border Force Act, the [*Criminal Code Act 1995* (Criminal Code)] and the Crimes (Superannuation Benefits) Act are examples of those. We have looked at defining it previously and come to the conclusion that the risk of doing so may narrow the approach to corruption. We do discuss with each of the agencies—this is a discussion that we have ongoing with [the Australian Commission for Law

1 2013–14, p. 236; 2014–15, p. 46; 2015–16, p. 27.

2 Mr Paul Casimir, Director, Integrity, Australian Public Service Commission (APSC), *Committee Hansard*, 5 July 2017, p. 16. See also: APSC, answers to questions on notice, 5 July 2017 (received 3 August 2017).

> Enforcement Integrity (ACLEI)], particularly, who have a very broad approach to the definition of 'corruption'. Law enforcement agencies provide them with everything—all of that advice—and then they triage.[3]

2.9 The following sections consider some of the existing definitions of corruption and corrupt conduct, such as those provided in the criminal law and those applicable to agencies comprising the national integrity framework.

Criminal offences

2.10 The criminal law applies in the same way to all natural persons, including public officials and parliamentarians. This means that offences outlined in the Criminal Code apply to public officials and parliamentarians in the same way as they do to other members of the community.

2.11 For example, the Criminal Code outlines a number of offences relating to fraudulent conduct, forgery and bribery of a foreign official. A public official suspected of fraudulent conduct, forgery or bribery of a foreign official is not immune from prosecution under these offences.

2.12 There are, however, a number of Commonwealth offences that apply particularly to public officials.

2.13 Under section 141.1 of the Criminal Code it is an offence for a Commonwealth public official to receive a bribe or corrupting benefit, carrying penalties of imprisonment and/or a fine. Section 142.2 makes it an offence to abuse public office, where a Commonwealth public official:

> (i) exercises any influence that the official has in the official's capacity as a Commonwealth public official;
>
> or
>
> (ii) engages in any conduct in the exercise of the official's duties as a Commonwealth public official; or
>
> (iii) uses any information that the official has obtained in the official's capacity as a Commonwealth public official; and
>
> (b) the official does so with the intention of:
>
> (i) dishonestly obtaining a benefit for himself or herself or for another person; or
>
> (ii) dishonestly causing a detriment to another person.

2.14 These offences have extended geographical jurisdiction: they apply whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct constituting the alleged offence occurs in Australia.

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3 Ms Nicole Rose PSM, Deputy Secretary, Criminal Justice Group, Attorney-General's Department (AGD), *Committee Hansard*, 5 July 2017, p. 28.

Related legislative definition

2.15 The *Crimes (Superannuation Benefits) Act 1989* relates 'to certain superannuation benefits paid or payable to or in respect of certain persons convicted of corruption purposes'. It allows superannuation payments to be withheld from an employee (other than an officer of the Australian Federal Police (AFP)) of the Commonwealth public sector where that person has been convicted of a corruption offence.

2.16 The Act defines a 'corruption offence' as an offence:

> by a person who was an employee at the time when it was committed, being an offence:
>
> (a) whose commission involved an abuse by the person of his or her office as such an employee; or
>
> (b) that, having regard to the powers and duties of such an employee, was committed for a purpose that involved corruption; or
>
> (c) that was committed for the purpose of perverting, or attempting to pervert, the course of justice.[4]

Definitions of corruption for the purposes of law enforcement agencies

2.17 Further definitions of corruption and corrupt conduct are found in legislation establishing and outlining the roles and functions of Commonwealth law enforcement agencies.

Law Enforcement Integrity Commission Act 2006

2.18 Pursuant to the LEIC Act, the legislation governing the ACLEI, all law enforcement agencies are statutorily required to report any allegation, or information, that raises a corruption issue to the Integrity Commissioner.[5]

2.19 A 'law enforcement agency' is defined in the LEIC Act as:

> (a) the AFP; or
>
> (b) the [Australian Crime Commission (ACC)]; or
>
> (ba) the [Department of Immigration and Border Protection (DIBP)]; or
>
> (bb) [the Australian Transaction Reports and Analysis Centre (AUSTRAC)]; or
>
> (bd) the Agriculture Department; or
>
> (c) the former [National Crime Authority]; or
>
> (d) any other Commonwealth government agency that:
>
> (i) has a law enforcement function; and

4 *Crimes (Superannuation Benefits) Act 1989*, s. 2.

5 *Law Enforcement Integrity Commission Act 2006*, s. 19.

(ii) is prescribed by the regulations for the purposes of this paragraph.[6]

2.20 As noted above, there is no definition of 'corruption' in the LEIC Act. The definition of 'corrupt conduct' in the LEIC Act refers to the definition of 'engages in corrupt conduct',[7] which is defined in the Act as follows:

> (1) For the purpose of this Act, a staff member of a law enforcement agency engages in corrupt conduct if the staff member, while a staff member of the agency, engages in:
>
> (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
>
> (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
>
> (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.
>
> (2) If the law enforcement agency is one referred to in paragraph (d) of the definition of law enforcement agency, the staff member engages in corrupt conduct only if the conduct relates to the performance of a law enforcement function of the agency.[8]

2.21 The LEIC Act also contains further definitions of 'serious corruption' and 'systemic corruption.' Serious corruption is defined as:

> …corrupt conduct engaged in by a staff member of a law enforcement agency that could result in the staff member being charged with an offence punishable, on conviction, by a term of imprisonment for 12 months or more.[9]

2.22 Systemic corruption is defined as 'instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a pattern of corrupt conduct in a law enforcement agency or in law enforcement agencies'.[10]

2.23 TIA outlined the benefits of these statutory definitions as demonstrating that:

> …it is possible to differentiate between broad ideas of 'corruption' that may seem mismatched with a commission's strong investigative powers, and others that align more closely with the commission's motivating purpose.[11]

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6 *Law Enforcement Integrity Commission Act 2006*, s. 5.

7 *Law Enforcement Integrity Commission Act 2006*, s. 5.

8 This term is defined at s. 6 of the *Law Enforcement Integrity Commission Act 2006*.

9 *Law Enforcement Integrity Commission Act 2006*, s. 5.

10 *Law Enforcement Integrity Commission Act 2006*, s. 5.

11 Transparency International Australia, *Submission* 21, p. 7.

2.24 The Integrity Commissioner also provided the committee with the following explanation of corruption in the context of an agency head's obligation to notify the Commissioner of a corruption issue:[12]

> It is engaging in conduct—and the legislation refers to abuse of power; it refers to perverting or obstructing the course of justice; and it refers to, having regard to the office of an individual, whether or not what they have done amounts to corruption of any other kind. Now, you might say to me, 'What is corruption?' That is a question I asked myself when I took up the job. As is often the case in legislation, as I am sure you are aware, if there is not a definition, then one reverts to the ordinary everyday meaning. Courts, for a long time, have then gone to the *Macquarie* and looked at the definition, and so I did that. And if you look at the definition of 'corrupt' in *Macquarie*, you will see 'dishonest or lacking in integrity'. If you go to the definition of 'integrity', it is broader. It does not mention 'corrupt' or 'corruption' at all. It talks about 'soundness of moral principle and character'. It talks about the wholeness of the being. So, somewhere in that, I have to consider whether or not a matter that comes before me raises a corruption issue. That is something that occupies a considerable amount of the resourcing...But the bar is quite low.[13]

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity inquiry

2.25 The operation of the LEIC Act was the subject of an inquiry by the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJCACLEI). The PJCACLEI handed down its final report on 7 July 2011 and the government responded to its recommendations in February 2012.[14]

2.26 The PJCACLEI report considered the advantages and disadvantages of a broad definition versus a tightened definition of corruption.[15] It concluded that, while a broad definition of corruption allowed for flexibility, the committee was of the view that:

> …a more detailed and comprehensive definition of corruption is required. The committee considers that further definition of the term would provide greater clarity to the anticorruption work conducted by ACLEI, while serving to more effectively delineate corruption issues from issues better handled by other agencies.[16]

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12 *Law Enforcement Integrity Commission Act 2006*, s. 19.

13 Mr Michael Griffin AM, Integrity Commissioner, Australian Commission for Law Enforcement Integrity (ACLEI), *Committee Hansard*, 5 July 2017, pp. 46–47.

14 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJCACLEI), *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, July 2011.

15 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, July 2011, pp. 21–27.

16 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, July 2011, p. 26.

2.27 The committee recommended that ACLEI, the Commonwealth Ombudsman, the APSC, the Australian National Audit Office (ANAO) and the AGD:

> …develop a more detailed and comprehensive definition of corruption for the purposes of the [LEIC Act]. A proposed definition should be circulated for public consultation, including this committee, no later than November 2011.[17]

2.28 It added that a detailed definition of corruption would also have an added advantage of providing a:

> …stronger basis for the reporting and measurement of corruption issues. An appropriate definition may have applicability to the broader Commonwealth integrity system.[18]

2.29 The government agreed in principle to that recommendation, stating:

> The Government agrees that the definition of corruption must be clear and appropriate, noting that the definition has relevance beyond the [LEIC Act]. The Government accordingly agrees that the [AGD] will work with relevant agencies to clarify the definition of corruption for the purposes of the [LEIC Act] and undertake public consultation on this issue.
>
> The outcome of this work could be either guidance concerning the definition or an amendment to the [LEIC Act] to clarify the definition itself.[19]

2.30 Despite this response, there remains no explicit definition of corruption in the LEIC Act. Further, it is notable that no changes were made to the definitions associated with corruption in the LEIC Act—which remain as they were when the government's response was provided—as a result of this inquiry.

Australian Federal Police Act 1979

2.31 The AFP Act provides that 'corrupt conduct' also means 'engages in corrupt conduct' and refers to the definition in the LEIC Act. This Act also defines 'corruption offence' in respect of the loss of certain superannuation rights and benefits, substantially similar to the definition which appears in the *Crimes (Superannuation Benefits) Act 1989*:

> ***corruption offence*** means an offence by a person who was an AFP employee or an old law member or staff member at the time when it was committed, being an offence:

17 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, July 2011, p. 27.

18 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner ACT 2006: Final Report*, July 2011, p. 27.

19 Commonwealth of Australia, *Australian Government Response to: Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity – Final Report: Inquiry into the Operation of the Law Enforcement Integrity Commission Act 2006*, February 2012, p. 5.

(a) whose commission involved an abuse by the person of his or her office as such a person;

(b) that, having regard to the powers and duties of such a person, as the case may be, was committed for a purpose that involved corruption; or

(c) that was committed for the purpose of perverting, or attempting to pervert, the course of justice.[20]

Australian Border Force Act 2015

2.32 The *Australian Border Force Act 2015* contains its own definition of 'engages in corrupt conduct' specific to DIBP workers:

> …if the worker, while an Immigration and Border Protection worker, engages in:
>
> (a) conduct that:
>
> (i) involves; or
>
> (ii) is engaged in for the purpose (or for purposes including the purpose) of;
>
> the worker abusing his or her position as an Immigration and Border Protection worker; or
>
> (b) conduct that:
>
> (i) perverts; or
>
> (ii) is engaged in for the purpose (or for purposes including the purpose) of perverting;
>
> the course of justice; or
>
> (c) conduct that, having regard to the duties and powers of the worker as an Immigration and Border Protection worker:
>
> (i) involves; or
>
> (ii) is engaged in for the purpose (or for purposes including the purpose) of;
>
> corruption of any other kind.[21]

Definitions of corruption for the purposes of intelligence agencies

2.33 Australia's intelligence agencies—the Australian Security Intelligence Organisation (ASIO); the Australian Secret Intelligence Service; the Australian Signals Directorate (ASD); the Australian Geospatial-Intelligence Organisation; the Defence Intelligence Organisation (DIO); and the Office of National Assessments (ONA)—are overseen by the Inspector-General of Intelligence and

20 *Australian Federal Police Act 1979*, s. 41.

21 *Australian Border Force Act 2015*, s. 4.

Security (IGIS),[22] pursuant to the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).[23]

2.34 The IGIS noted in its submission that it:

> …also has functions under the *Public Interest Disclosure Act 2013* (PID Act) in relation to disclosures by current and former public officials about conduct relating to intelligence agencies. The definition of disclosable conduct in the PID Act includes maladministration, abuse of public trust and corruption.[24]

2.35 Although there is no definition of 'corruption' or 'corrupt conduct' in the IGIS Act or PID Act, in its submission, the IGIS provided some examples of what it considers to be misconduct, noting that no investigations conducted under the IGIS Act or PID Act have 'indicated anything approaching widespread misconduct or corruption':

> For example in 2011 there was an inquiry into allegations of inappropriate security vetting practices; in 2010 there was an inquiry into the possible compromise of a compliance test, and in 2009 there was an inquiry into allegations that ASD had spied on the Defence Minister. Since the introduction of the PID Act the IGIS office has been notified of a small number of disclosures concerning alleged misconduct in procurement and has received a number of disclosures alleging maladministration in staffing matters.[25]

Agencies comprising the multi-agency framework

2.36 The current Commonwealth integrity system is referred to as the 'multi-agency framework'. At its core, the multi-agency framework consists of a number of key agencies with specific legislative responsibilities to address and prevent corruption. These agencies[26] include the:

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22 Ms Margaret Stone, Inspector-General of Intelligence and Security, Office of the Inspector-General of Intelligence and Security (IGIS), *Committee Hansard*, 16 June 2017, p. 46.

23 *Inspector-General of Intelligence and Security Act 1986*, s. 4.

24 IGIS, *Submission 10*, p. 2 (citations omitted).

25 IGIS, *Submission 10*, p. 4 (citations omitted).

26 Other agencies referred to as playing 'a role safeguarding the integrity of government administration' include: the Australian Prudential Regulation Authority; the Department of Human Services; the Department of Defence; the Department of Foreign Affairs and Trade; Treasury; the Australian Taxation Office; the Fair Work Ombudsman; the Australian Competition and Consumer Commission; the Inspectors-General of Taxation, Intelligence and Security and Defence; the Australian Electoral Commission (AEC), the Department of Finance; the Office of National Assessments; and the Parliamentary Service Commissioner. In addition, individual agencies are responsible for implementing internal policies to prevent, detect, investigate and respond to corruption and misconduct under the Commonwealth's fraud control policy, the Australian Public Service (APS) values, the APS Code of Conduct and the *Public Service Act 1999*. See AGD, *Submission 23* [2016], p. 5.

- AGD;
- AFP;
- ACLEI;
- ANAO;
- APSC;
- Commonwealth Ombudsman;
- IGIS;
- Australian Electoral Commission (AEC);
- Australian Securities and Investment Commission (ASIC); and
- AUSTRAC.[27]

2.37 The legislation that governs these agencies, according to the APSC, provides the Commonwealth with:

> …an effective framework defining the reach and expertise of those agencies. It operates to limit their reach to that intended by Parliament. It has also resulted, in practice, in those agencies having specialist expertise in their respective fields.[28]

2.38 The AGD provided the committee with an outline of the Commonwealth's integrity framework, and argued that this 'robust system' provides the Commonwealth with the appropriate 'safeguards against corruption' and supports the government's 'zero-tolerance approach to corruption in all its forms'.[29] The AGD reassured the committee that collaboration between it and its partner agencies ensures that the 'legal and policy frameworks against corruption remain effective'.[30]

2.39 Under the current integrity framework:

> …the strategic dispersion of responsibility amongst a range of agencies promotes accountability and creates a strong system of checks and balances. It protects against abuse of power within Australia's anticorruption framework by ensuring a high level of oversight in the development and implementation of anticorruption policy.[31]

2.40 The AGD argued that the current framework has enabled agencies to develop the necessary expertise and institutional knowledge to combat specific corruption risks. Specialised agencies include the AFP's Fraud and Anti-corruption Centre (FAC), that centralises the:

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27 AGD, *Submission 23* (2016), pp. 2–5.

28 APSC, *Submission 16* (2016), p. 3.

29 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

30 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

31 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

> …capabilities and expertise of a broad range of Commonwealth agencies to address corrupt activities and risks. It has developed expertise in investigating serious and complex corruption offences, including fraud and foreign bribery.[32]

2.41 The AGD also referred to ACLEI as a key agency with:

> …specialist knowledge of corruption risks that face and are likely to face law enforcement agencies. ACLEI draws upon this knowledge and assists agencies with the design of tailored corruption prevention strategies, including developing risk assessments and control plans.[33]

2.42 The Commonwealth Ombudsman informed the committee that, in its view, the current integrity framework is:

> …for the most part, adequate and reasonable. The division of responsibility promotes accountability and transparency and can protect against abuse of power within the anticorruption framework itself.[34]

2.43 This framework, according to the AGD, is also supported by Australia's democratic system of representative government, the judiciary, the press and civil society. These institutions:

> …play an important role in protecting against corruption by enabling and encouraging scrutiny of both the public and private sectors. We are conscious that we must keep lifting the bar to ensure that Australia remains at the forefront of promoting transparency, integrity and accountability.[35]

Attorney-General's Department

2.44 The AGD is the lead government department responsible for the Commonwealth's domestic and international anti-corruption policy, including:

- foreign bribery;
- anti-money laundering
- counter-terrorism financing regimes;
- Commonwealth fraud control; and
- the Protective Security Policy Framework.[36]

2.45 Prior to the 2013 election, the AGD was tasked with developing a National Anti-Corruption Plan, which was not finalised.[37]

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32 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

33 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

34 Ms Doris Gibbs, Acting Commonwealth Ombudsman, Office of the Commonwealth Ombudsman (Commonwealth Ombudsman), *Committee Hansard*, 16 June 2017, p. 47.

35 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

36 AGD, *Submission 23* [2016], p. 3.

37 Senate Standing Committee on Legal and Constitutional Affairs, AGD, Additional estimates 2016-17, *response to Question no. AE16/050*, 9 February 2016, p. 1.

2.46 In addition to its domestic work, the AGD has a key role in Australia's engagement with international anti-corruption forums aimed at combatting corruption, money laundering and foreign bribery. These forums are related to:

- the United Nations (UN) Convention against Corruption;
- the UN Convention against Transnational Organised Crime;
- the G20 Anti-Corruption Working Group;
- the Asia-Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group;
- the Financial Action Task Force;
- the Asia-Pacific Group on Money Laundering; and
- the Organisation for Economic Cooperation and Development (OECD) Working Group on Bribery.[38]

2.47 As the overarching coordinator in the prevention, detection and response to corruption, the AGD endeavours 'to ensure the legal and policy frameworks are effective' and administers the Criminal Code and the Crimes Act. Further, the committee heard that the AGD is also Australia's authority for extradition and mutual assistance arrangements.[39]

2.48 Domestic laws that target corruption, for which the AGD is responsible, include police powers in the Crimes Act, and offences under the Criminal Code, such as:

- foreign bribery;
- misuse of public office; and
- fraud against the Commonwealth.[40]

Australian Federal Police

2.49 The AFP is the primary law enforcement agency responsible for the investigation of serious or complex fraud and corruption against the Commonwealth. A dedicated centre within the AFP, known as the FAC, was established by the government in July 2014. The FAC delivers a whole-of-government approach to investigating fraud and corruption by bringing together the Australian Taxation Office (ATO), ASIC, the Australian Criminal Intelligence Commission (ACIC), AUSTRAC, the DIBP, the Department of Human Services, the Department of Defence and the Department of Foreign Affairs and Trade. The AGD and the Commonwealth Director of Public Prosecutions (CDPP) also act as advisory members of the FAC.[41]

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38 AGD, *Submission 23* [2016], p. 3.

39 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, AGD, *Committee Hansard*, 5 July 2017, p. 27.

40 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

41 AGD, *Submission 23* [2016], p. 3.

2.50 According to the AGD, the FAC is tasked with facilitating:

> …the referral of evaluations, triage and review for FAC matters, provides fraud training for Commonwealth agencies, gather intelligence and facilities agency secondment and joint activity coordination.[42]

2.51 A FAC factsheet describes the referral system. The FAC:

> …will triage and evaluate serious and complex fraud and corruption referrals, where the referring agency has sought an AFP investigation or assistance and the allegation meets the criteria below:
>
> - the allegation relates to an offence of foreign bribery or
> - the allegation relates to any AFP "Fraud" incident type under the AFP Case Categorisation Prioritisation Model (CCPM),[43] and any of the following circumstances exist—
>
> - the investigation is expected to exceed six months;
> - the alleged value of the fraud exceeds $250,000;
> - involves criminal or corrupt behaviour by Australian government employees;
> - involves bribing of Australian Government employees;
> - involves multiple offenders acting together in an organised way to perpetrate the crime;
> - involves the repeated commission of offences over a number of years; [and]
> - exposes a serious vulnerability in government systems, funding or revenue.[44]

2.52 The AGD's submission to the 2016 Select Committee on the establishment of a National Integrity Commission (2016 select committee) provided an overview of the FAC's role in the Commonwealth's integrity framework. The FAC's work focuses on:

- strengthening the capabilities of law enforcement agencies to respond to serious and complex fraud, foreign bribery, corruption by employees of the Commonwealth, and complex identity crime;

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42 Senate Standing Committee on Legal and Constitutional Affairs, AGD, Additional estimates 2016-17, *response to Question no. AE16/050*, 9 February 2016, pp. 1–2.

43 The Case Categorisation and Prioritisation Model (CCPM) assists with the consideration by the Australian Federal Police (AFP) of issues which lead to the acceptance, rejection, termination, finalisation or resourcing of its operations. Corruption is listed as one of the incident types. Further, the CCPM ranks the impact of 'corruption by a public official (including within Australian and bribery of a foreign official in other county)' as high. See, AFP, *The Case Categorisation & Prioritisation Model: Guidance for AFP Clients*, 1 July 2016, https://www.afp.gov.au/sites/default/files/PDF/ccpm-july-2016.pdf (accessed 22 June 2017).

44 AFP, *Fraud and Anti-corruption Centre fact sheet*, https://www.afp.gov.au/sites/default/files/PDF/fac-centre-fact-sheet.pdf (accessed 22 June 2017).

- co-ordinating the Commonwealth's operational response for matters requiring a joint agency approach; and the
- protection of Australia's finances.

2.53 The submission highlighted the FAC's multi-agency framework, noting it allows for the consideration of a 'range of responses based on the contributions of all agencies involved' that may include 'civil and administrative penalties based on the legislation, regulation and policy of the relevant agencies; up to and include criminal prosecution'.[45] Further, the FAC supports:

- the monitoring of financial crime behaviour and identifies policy, regulation and legislative reform;
- collaboration between the public and private sectors to promote financial crime prevention and education;
- 'agencies to address underlying systematic weaknesses and promote structural and cultural change to ensure Commonwealth agencies are robust';[46]
- state and territory integrity agencies if a corruption matter falls outside of the Commonwealth's jurisdiction; and
- joint operations with ACLEI.[47]

2.54 The FAC's headquarters are in Canberra, with teams also based in Melbourne, Sydney, Brisbane, Adelaide[48] and Perth.[49]

Funding

2.55 In July 2015, the FAC received $127.6 in million funding over four years for the Serious Financial Crime Taskforce. This taskforce's focus is on 'identifying and treating the threats posed by serious financial crime'.[50] In April 2016, the government announced a further $14.7 million allocated to the FAC to expand its investigatory capability and 'bolster Australia's capability to respond to foreign bribery'.[51] This funding supported an additional 26 specialist investigators, forensic accountants and litigators.[52] The AFP informed the committee that although the additional funding supplements the capabilities to investigate foreign bribery in its Sydney, Melbourne and Perth offices, it also:

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45 AGD, *Submission 23* [2016], p. 10.

46 AGD, *Submission 23* [2016], p. 10.

47 AGD, *Submission 23* [2016], p. 10.

48 The Hon. Michael Keenan MP, Minister for Justice, 'AFP-Hosted Fraud and Anti-Corruption Centre', *Media release*, 31 July 2014.

49 The Fraud and Anti-corruption Centre team based in Perth was established in September 2016.

50 Senate Standing Committee on Legal and Constitutional Affairs, AGD, Additional estimates 2016-17, *response to Question no. AE16/050*, 9 February 2016, p. 2.

51 AGD, *Submission 11*, p. 4.

52 The Hon. Michael Keenan MP, *Press conference transcript*, 5 September 2016.

> …allowed a sort of flow-on effect of the capabilities that may have been focused on those to be freed up to look at broader fraud and corruption based issues, both in those centres but more broadly across the organisation.[53]

2.56 The AFP also stated:

> Whilst we are allocated funding across the organisation, it is hard to tie it down to specific investigations, because the AFP's budget is such that it covers a range of different capabilities, both investigative, but other specialist skills, that are applied when we determine the most effective treatment that we will put against an issue, and then we work out how we prioritise each of those individual investigations and then we apply the resources to those to get the most effective treatment.[54]

Investigations

2.57 The committee sought clarification from the AFP on the characterisation of its investigations, and whether more work occurs on foreign bribery or domestic corruption. In response, the AFP said it was difficult to clarify because:

> There are a number of high-profile investigations that are currently being undertaken in the foreign bribery space. Importantly, there are the resources that go into some of those investigations and they go over an extended period of time. We previously reported to the committee that, within the findings of the 41 OECD nations, the average investigations in this space go for about 7.3 years and about 46 per cent of those go for between five and 10 years. So our resource commitment to those investigations from start to finalisation is extensive. But that does not mean that, where we are looking at other key issues of both fraud and corruption that exist in the space and sit under the mandate of the AFP, and more broadly within the FAC Centre, it is not prioritised. We prioritise those investigations depending on how they are referred to us.[55]

2.58 The great length of many foreign bribery investigations is due to evidence being sought from international jurisdictions. That said, the committee was advised that the AFP is working with its international and domestic partners to reduce the time frames of these investigations through legislative reforms and new initiatives, such as:

> …looking at different ways of how we manage, in a very proactive way, legal professional privilege. We are looking at proactive ways to address mutual assistance requests with our partners. We are looking to put better analysis and assessment across a range of the offending which occurs over that period of time to try to identify where we might get the best and most effective outcome in terms of where we put our investigative resources. When I say 'our investigative resources', I do not just mean the traditional

53 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, AFP, *Committee Hansard*, 5 July 2017, p. 33.

54 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 33.

55 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 34.

> investigator; I also mean our technical capabilities that sit across the organisation.[56]

2.59 On notice, the AFP further addressed a concern raised with the committee that the FAC is too strongly focused on foreign bribery matters. The AFP acknowledged that foreign bribery investigations:

> …have been a particular area of focus for the AFP in recent years; however the foreign bribery crime type is only one crime type within the remit of the [FAC].[57]

2.60 The AFP further explained that the:

> …increased focus on foreign bribery matters has been in response to specific issues identified by the [OECD], however this has not resulted in foreign bribery matters being progressed at the detriment of other crime types, including allegations of corruption relevant to Commonwealth officials.[58]

2.61 The AFP referred to the CCPM and highlighted that 'corruption matters involving Commonwealth officials are characterised at the same level or higher than foreign bribery matters'.[59]

2.62 The AFP described the process for determining whether to conduct an investigation. The AFP reassured the committee that:

> …no single element of the CCPM is considered in isolation. Instead, the AFP considers a combination of the model's Impact and Priority ratings. Further, each matter is assessed on an individual basis. As a general rule, one referral is not assessed in the context of another.
>
> The FAC Centre brings together the capabilities of 12 Australian Government agencies to assess, prioritise and respond to serious and complex fraud and corruption matters, including corruption by Australian Government employees, foreign bribery and complex identity crime. The FAC Centre places equal priority across these crime types.
>
> The FAC Centre model allows for consultation and negotiation regarding resources to be undertaken in a whole-of-government context and means the AFP can leverage of the resources and capabilities of other agencies.
>
> Following the evaluation of the referral by the FAC Centre, matters which are accepted for investigation by the AFP are then assigned to an AFP investigation team, usually within the Criminal Assets, Fraud and Anti-Corruption (CAFAC) Business Area. The CAFAC Business Area is the same area of the AFP that hosts the FAC Centre.

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56 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 34.

57 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

58 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

59 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

> The AFP and the FAC Centre employs a resource management strategy that ensures the flexible application of resources to activities that are likely to have the greatest impact on criminal networks and security threats, both within Australia and overseas.
>
> In practice this means the AFP is able to redirect resources to high priority matters on an as-needed basis, such as by providing a surge capacity for the FAC Centre to assess a sensitive or time critical referral of corruption or when investigative actions in the CAFAC Business Area move into significant overt phases.[60]

2.63 The AFP detailed the nature of domestic corruption investigations and the collaboration between agencies to identify vulnerabilities and draw together evidence for investigations:

> …people are developing processes or doing things to try to conceal their behaviour. We are looking for ways to not only work with partners to identify where those issues and those vulnerabilities may sit within systems but also how we can more effectively, through analysis and other technical capabilities, bring forward the opportunities for us to draw evidence in those investigations. They are not overly different from some of the challenges we have in broader serious and complex organised crime investigations. The legislation that we may be working with is different and the partners that we work with are different, but overall we have certainly shown in some of those investigations that it is very effective.[61]

2.64 The committee was informed that since the inception of the FAC in July 2014 to 30 April 2017 there were 34 referrals relating to corruption. These include 17 allegations of cases of abuse of public office; five alleged cases of receiving/bribery as a Commonwealth Public Official; two cases of alleged theft; one alleged case of obtaining financial advantage by deception; and nine other offences against the *Corporations Act 2001* (Corporations Act), Criminal Code, and the PID Act.[62]

2.65 Of those 34 referrals: two are subject to evaluation; seven are ongoing investigations; one investigation has been finalised; and 24 were rejected and not investigated by the AFP. The primary reasons for the rejections were insufficient evidence (14 instances); no Commonwealth criminal offence was identified (four instances); five cases were referred to another agency or department for further investigation; and one matter was returned to the complainant, with the AFP recommending it be referred to another agency.[63] The AFP informed the committee that the five matters referred to another agency/department were because: they did not meet the AFP thresholds; the AFP believed the referring agency was best placed to

60 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

61 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 34.

62 AFP, answers to questions on notice (private briefing), 5 May 2017 (received 15 May 2017).

63 AFP, answers to questions on notice (private briefing), 5 May 2017 (received 15 May 2017).

investigate the matter; and/or the matter had already been investigated by or referred to the other agency or department.[64]

2.66 In addition to investigations into corruption, between July 2014 and April 2017 the FAC received 130 referrals relating to matters of fraud, foreign bribery and identity crime.[65]

2.67 The committee was informed that the AFP did not consider current legislation a hindrance to its ability to conduct investigations into allegations of corruption. The AFP remarked:

> …the legislation is effective and provides us options in the initial part of an investigation. If it is something where we would think, 'Clearly this is a fraud or this is a theft', due to the investigation and the way we go about actually exploring it, it might indicate to us there is a different form of offending, which might be an abuse of office or a bribery issue. As it stands, the current legislative framework that we have is effective.[66]

2.68 Further, the AFP added that it works closely with the AGD:

> …on a continuous basis to review the efficacy of the laws and the offences provisions and the powers available to us. It is an ongoing discussion, and that is why there have been reforms over the last few years. There are discussions papers out at the moment regarding deferred prosecution agreements and things of that nature, so while we certainly would not say the regime is perfect, it is, as Officer Crozier said, largely effective, and we continue to refine it where we can.[67]

Collaboration and co-operation

2.69 In addition to its engagement with AGD, the FAC's operations have meant it is able to:

> …understand some of the issues that are happening within agencies and where we may be able not just to assist in terms of a treatment in the criminal space but also to assist agencies identify potential vulnerabilities.[68]

2.70 The value and importance of co-operation in the fraud and anti-corruption space was reflected upon by Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, AFP. Commander Crozier's observation, in his current and previous roles, has been about:

> …the effectiveness of partnerships and being able to bring agencies together. To get a better understanding of what is happening in an area and a potential fraud type, it is always better to get those people who know. For

64 AFP, answers to questions on notice (private briefing), 5 May 2017 (received 15 May 2017).

65 AFP, answers to questions on notice (private briefing), 5 May 2017 (received 15 May 2017).

66 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, pp. 34–35.

67 Mr Tony Alderman, Manager, Government and Communications, AFP, *Committee Hansard*, 5 July 2017, p. 35.

68 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 36.

> a long time, in my experience, I thought I had the answers, but often, if other agencies, who know their policies, their processes and their issues far better than I do, are able to be brought into a centre such as that, we can share that experience and understand what it is we are looking at and what options are available to us to treat those issues.[69]

2.71 One aspect of the co-operation between the AFP and other agencies is that these other agencies are often involved in the AFP's evaluation of a matter. In these instances, consideration is given to whether a matter is a criminal matter, or should be dealt with internally via a code of conduct process. The AFP reassured the committee that, if a matter is referred back to an agency, the AFP would continue to engage in the process to improve and change behaviour. The reason for this level of engagement is that the AFP does not:

> …want an agency being disenfranchised or not being able to deal with an issue and then that issue permeating and going on and on and on and eventually coming back to us in another form because processes have fallen down. We continue to engage, address vulnerabilities and build that resilience within agencies, and, importantly, build those relationships and networks so we can have that exchange.[70]

2.72 Internationally, the AFP also participates in a number of forums relating to anti-corruption, such as the:

- OECD Working Group on Bribery;
- the International Foreign Bribery Taskforce;
- the G20 Anti-Corruption Working Group; and
- the Financial Action Task Force.[71]

Australian Commission for Law Enforcement Integrity

2.73 The ACLEI is the only federal agency dedicated to the 'prevention, detection, investigation and prosecution of corruption'.[72] It was established in 2006 by the LEIC Act. The objectives of the LEIC Act are:

> (a) to facilitate:
>
> (i) the detection of corrupt conduct in law enforcement agencies; and
>
> (ii) the investigation of corruption issues that relate to law enforcement agencies; and
>
> (b) to enable criminal offences to be prosecuted, and civil penalty proceedings to be brought, following those investigations; and

69 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 37.

70 Commander Crozier, AFP, *Committee Hansard*, 5 July 2017, p. 37.

71 AGD, *Submission 23* [2016], p. 11.

72 ACLEI, *Submission 12*, p. 1.

(c) to prevent corrupt conduct in law enforcement agencies; and

(d) to maintain and improve the integrity of staff members of law enforcement agencies.[73]

2.74 ACLEI is an impartial and independent statutory authority whose primary role is 'to detect and investigate law enforcement-related corruption issues, giving priority to systemic and serious corruption' and make 'administrative findings about the conduct of individuals'.[74] The Integrity Commissioner may make recommendations for changes to 'laws and administrative practices of government agencies that might contribute to corrupt practices or prevent their early detection' and 'report annually on any patterns and trends concerning corruption in law enforcement agencies'.[75]

Investigation options and powers

2.75 ACLEI can independently determine how it deals with 'allegations, information and intelligence about corrupt conduct concerning agencies' within its jurisdiction. Priority, however, must be given to serious or systemic corruption. There is no requirement that ACLEI investigate every allegation or all information about corruption and may choose to:

- investigate a corruption issue;
- refer a corruption issue to a law enforcement agency for it to conduct an internal investigation and report its findings to ACLEI;
- refer a corruption issue to the AFP, unless the AFP is implicated;
- investigate a corruption issue in partnership with another government agency or a state integrity agency; or
- take no further action.[76]

2.76 Section 27 of the LEIC Act sets out how the Integrity Commissioner deals with a corruption issue. Priority is given to corruption issues that may:

- indicate a link between law enforcement and organised crime;
- involve suspected conduct[77] that would undermine a law enforcement agency's function;
- bring into doubt the integrity of senior law enforcement managers;
- relate to law enforcement activities with a higher inherent corruption risk;
- warrant the use of the Integrity Commissioner's information-gathering powers, including conducting hearings; or

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73 *Law Enforcement Integrity Commissioner Act 2006*, ss. 3(1).

74 ACLEI, *Submission 12*, p. 3.

75 ACLEI, *Submission 12*, p. 3.

76 ACLEI, *Submission 12*, p. 4.

77 Such as the use of illicit drugs.

- would otherwise benefit from an independent investigation.[78]

2.77 The Integrity Commissioner may also prioritise corruption issues 'that have a nexus to the law enforcement character of the agencies in [ACLEI's] jurisdiction, having regard to the objects of the LEIC Act'.[79]

2.78 Key investigative powers available to the Integrity Commissioner under Part 9 the LEIC Act are:

- notices to produce information, documents or things;
- summons to attend an information-gathering hearing, answer questions and give sworn evidence, and/or to produce documents or things;
- intrusive information-gathering (covert);
    - telecommunications interception;[80]
    - electronic and physical surveillance;[81]
    - controlled operations;[82]
    - assumed identities;[83]
    - scrutiny of financial transactions; and
    - access to specialised information databases for law enforcement purposes;
- search warrants;
- right of entry to law enforcement premises and associated search and seizure powers;
- integrity testing; and
- arrest (relating to the investigation of a corruption issue).[84]

2.79 It is also an offence for an individual 'not to comply with notices, not to answer truthfully in hearings, or otherwise to be in contempt of ACLEI'.[85]

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78 PJCACLEI, Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity, ACLEI, *Submission 1*, p. 3.

79 PJCACLEI, Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity, ACLEI, *Submission 1*, p. 3.

80 Under the *Telecommunications (Interception and Access) Act 1979*.

81 Under the *Surveillance Devices Act 2004*.

82 Under the *Crimes Act 1914*.

83 Under the *Crimes Act 1914*.

84 PJCACLEI, Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity, ACLEI, *Submission 1*, p. 4.

85 PJCACLEI, Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity, ACLEI, *Submission 1*, p. 4.

2.80 The Integrity Commissioner is also an approved authority under the *Witness Protection Act 1994* and is therefore able to provide witness identity protection for operatives.[86]

2.81 On the matter of hearings, the Integrity Commissioner has discretionary power to hold a public or private hearing[87] under section 82 of the LEIC Act.

2.82 The Integrity Commissioner explained to the committee the internal process that must occur when considering a public hearing. ACLEI first considers the intelligence available and then considers what is happening in other environments, such as the courts or police investigations. ACLEI 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 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 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. You might reflect for a moment on the Victorian matter, the IBAC, where it was decided that a public hearing was necessary even though it affected people's reputations. There were matters of very significant public interest there, I think, for the parents of the children at the schools in Victoria where the money that was supposed to be for the children was going into another place. So there was a weighing up there, and I have to look at similar sorts of questions. That then comes to the final test of the public interest, which is affected by the two that have gone before, really—I have to weigh that up as well—and then, finally, any other relevant information, of which there may be a multitude.
>
> 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.[88]

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86 *Witness Protection Act 1994*, s. 3.

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

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

2.83 ACLEI also has the power to exonerate a person if, through a preliminary intelligence review, it considers there to be no cause to suspect alleged wrongdoing. In such instances, ACLEI will report to the head of an agency with its evidence to support the exoneration of an individual.[89]

2.84 Since ACLEI's inception, there have been 33 successful prosecutions (two of which are under appeal). The committee was advised that, as at 7 April 2017 there were a further eight prosecutions in progress.[90]

Corrupt conduct

2.85 Section 6 of the LEIC Act states the meaning of 'engages in corrupt conduct' is when a staff member of a law enforcement agency engages in:

> (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or
>
> (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or
>
> (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.[91]

2.86 Provisions are also made for ACLEI to prosecute its own staff, and members of the public or employees of other government agencies.[92] Section 10 of the LEIC Act defines staff members of law enforcement agencies under ACLEI's jurisdiction, including provisions for secondees and contractors.[93]

ACLEI's jurisdiction

2.87 There have been three iterations of ACLEI's jurisdiction. Initially, ACLEI's jurisdiction included the AFP,[94] the National Crime Authority[95] and the then ACC[96] with the intention of progressively including other law enforcement agencies into its jurisdiction by regulations.[97] ACLEI's jurisdiction first expanded in 2011 to include the then Australian Customs and Border Protection Service (Customs).

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89 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 43.

90 ACLEI, *Submission 12*, p. 8.

91 *Law Enforcement Integrity Commissioner Act 2006*, s. 6.

92 ACLEI, *Submission 12*, p. 8.

93 *Law Enforcement Integrity Commissioner Act 2006*, s. 10.

94 The Australian Capital Territory's police force is also included in ACLEI's jurisdiction.

95 The National Crime Authority was abolished in 2002.

96 The Australian Crime Commission is now known as the Australian Criminal Intelligence Commission.

97 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 29 March 2006, p. 9.

2.88 Further additions were made in 2013, with the inclusion of AUSTRAC, CrimTrac and certain quarantine-related functions of the then Department of Agriculture, Fisheries and Forestry (now the Department of Agriculture and Water Resources[98] (Agriculture)).[99] Which Agriculture staff members are included in ACLEI's jurisdiction is specified under section 7 the *Law Enforcement Integrity Commissioner Regulations 2017*.

2.89 In 2015, ACLEI's jurisdiction was expanded once again to include the entirety of the DIBP including the Australian Border Force (ABF), which had integrated Customs' functions.[100]

2.90 ACLEI investigations frequently focus on corruption-enabled border crime, namely instances of officials facilitating the importation of illicit drugs and other contraband into Australia. Since the inclusion of DIBP in its entirety, ACLEI has seen an increase in the number of corruption investigations into areas of border regulation, such as biosecurity and visa operations. ACLEI's submission stated the:

> …potential impacts of this form of corruption may vary—such as advancing the interests of one business entity over another for economic advantage (resulting from a bribe), or enabling money laundering to occur (as part of organised criminal activity).[101]

2.91 The PJCACLEI has considered ACLEI's jurisdiction on two occasions: initially in a 2011 report on its inquiry into the operation of the *Law Enforcement Integrity Commissioner Act 2006*; and more recently in its inquiry into the jurisdiction of the ACLEI (tabled 5 May 2016).

Inquiry into the operation of the Law Enforcement Integrity Commissioner Act 2006

2.92 The PCJACLEI tabled two reports as part of its inquiry into the operation of the LEIC Act. The interim report recommended that Customs be prescribed as a law enforcement agency under the LEIC Act and that ACLEI become adequately resourced to detect, prevent and investigate corruption 'in an agency of the size and complexity of [Customs]'.[102] These two recommendations were agreed to by

98 ACLEI's oversight of the Department of Agriculture and Water Resources includes approximately 1000 staff and its biosecurity role in screening sea cargo: Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 41.

99 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 2.

100 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, pp. 7–9.

101 ACLEI, *Submission 12*, p. 7.

102 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Interim report*, February 2010, p. vii.

government[103] and subsequently led to Customs being added to ACLEI's jurisdiction in January 2011.[104]

2.93 PJCACLEI's final report considered ACLEI's jurisdiction in more detail, including ACLEI's proposal for a tiered model for its jurisdiction. This model would consist of three tiers:

- Tier one applies to agencies with 'significant law enforcement functions' and 'high inherent corruption risks'. These agencies would have a mandatory relationship with ACLEI and would be compelled by legislation to inform the Integrity Commissioner of any potential corruption issues. ACLEI would be required to provide agencies with a corruption risk assessment, preventing and awareness-raising assistance.[105]
- Tier two applies to agencies with important law enforcement functions and lower inherent corruption risks. These agencies would have the power to use discretion on whether a matter is referred to ACLEI, and could seek assistance with a corruption risk assessment and advice.[106]
- Tier three agencies would include all other Commonwealth agencies that do not have a high or intermediate level of risk. These agencies could seek advice from ACLEI, potentially on either a cost-recovery or fee-for-service basis. These agencies would not have a mandated relationship with ACLEI and would not have the ability to refer a corruption issue to ACLEI.[107]

2.94 The committee provided in-principle support for the tiered model proposed by ACLEI. It stated the first tier was already in existence, through prescribed agencies under the LEIC Act. The second tier, in the committee's view, was desirable for two reasons.

2.95 The first was that it would expand ACLEI's corruption oversight, without impacting adversely on 'ACLEI's effectiveness and ability to manage with current

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103 Government response to PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Interim report*, February 2010 , dated September 2010, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_com_act/index.

104 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 2.

105 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 7.

106 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

107 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

resources'.[108] The committee expressed a concern that expanding ACLEI's jurisdiction would risk overburdening the agency and reduce its effectiveness.[109]

2.96 Secondly, these second tier agencies would form a relationship with ACLEI, 'building resistance to corruption in these agencies through education, awareness raising and ongoing communication'. In addition:

> ACLEI would develop a greater understanding of the corruption risk profile of tier two agencies [and] provide a growing knowledge-base that could prompt future revisions of ACLEI's jurisdiction, including the movement of tier two agencies to tier one agencies'.[110]

2.97 To ensure ACLEI's independence, the committee advocated for the Integrity Commissioner to have the power to initiate an investigation or inquiry into tier two agencies on his or her own initiative.[111]

2.98 The second tier agencies identified in the report were: the ATO, CrimTrac, AUSTRAC, the then Australian Quarantine and Inspection Service and the then Department of Immigration and Citizenship.[112] As of 2017, all of these agencies (current and former), except for the ATO, are now subject to ACLEI's jurisdiction.

2.99 The committee also acknowledged arguments in favour of including under the LEIC Act agencies that provide briefs to the CDPP and those in the Heads of Commonwealth Law Enforcement Agencies group. For this reason, the committee recommended a review be conducted two years after the establishment of a tiered jurisdiction model to determine whether additional agencies should be added to, or existing agencies moved within, the tiered structure.[113]

2.100 The committee was less supportive of the proposed third tier. It acknowledged that ACLEI:

> …should have some involvement in the provision of corruption prevention advice and education about corruption risks to the broader public service. However, the committee does not consider that amendment of the LEIC Act to establish a third tier of jurisdiction is required to achieve this.[114]

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108 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

109 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

110 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

111 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 8.

112 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, pp. 9–16.

113 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 16.

114 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 16.

2.101 The PJCACLEI had two concerns with the proposed third tier. The first concern was that it would divert resources away from ACLEI's core investigatory functions. PJCACLEI's second concern, which accorded with comments made by the APSC, was 'the need to maintain a coordinated approach to public service-wide education and training'.[115] The APSC stated:

> The ethical framework within which the Public Service operates is very broad. The messages that we are sending out are not simply about breaches of the law; our messages are about doing the right thing. It is an ethical construct that is much bigger than a particular focus on corruption. It covers corruption, but it is much bigger than that.[116]

2.102 The APSC also stated:

> One of the important things there is to minimise the number of separate messages being sent. You confuse people when you send messages that appear to be overlapping and kind of unclear. The code of conduct makes it absolutely crystal clear. If you act illegally or abuse power you are in breach of the code of conduct. That is a serious issue. We argue you do not really need another agency to say exactly the same thing.[117]

2.103 The committee reiterated its support for ACLEI to continue its engagement with the APSC and recommended that:

> ACLEI and the Australian Public Service Commission continue to collaborate in the development of ethics training provided to public servants to include corruption prevention using ACLEI's specialised experience and knowledge.[118]

2.104 The government response to the report, received in February 2012, explained that the government would consider whether it would be appropriate to expand ACLEI's jurisdiction to include additional agencies that have a law enforcement function. The government advised the PJCACLEI that no further changes would be made for a period of '12 to 18 months for ACLEI to consolidate its existing jurisdiction following the inclusion of [Customs]' and '[t]hat experience can then be used to properly inform any further expansion of ACLEI's functions'.[119]

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115 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 34.

116 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 34.

117 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, pp. 34–35.

118 PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, p. 35.

119 Government response to PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_com_act/index, p. 3.

2.105 The government did not support the PJCACLEI's recommendation that a second tier function be developed within ACLEI. The government response stated that those agencies:

> …are subject to the [*Public Service Act 1999* (PS Act)] and as such are bound by the APS Values and Code of Conduct. These agencies also have existing internal and external corruption prevention and investigation measures.[120]

2.106 The government supported the PJCACLEI's recommendation for ACLEI and the APSC to:

> …collaborate as appropriate in the development of ethics training provided to public servants to promote the importance of appropriate behaviours, including avoidance of corruption activity.[121]

Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity

2.107 The PJCACLEI reported on ACLEI's jurisdiction again in May 2016.[122] The following agencies were considered in the report:

- ASIC;
- the ATO;
- the AGD;
- the DIBP;[123] and
- other areas within Agriculture.[124]

2.108 The committee also considered the merits of a National Integrity Commission (NIC).[125]

2.109 The PCJACLEI's consideration of each of these agencies, except DIBP, is outlined below.

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120 Government response to PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_com_act/index, p. 3.

121 Government response to PJCACLEI, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, July 2011, available: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Australian_Commission_for_Law_Enforcement_Integrity/Completed_inquiries/2010-13/integrity_com_act/index, p. 4.

122 This reported was in response to the Parliamentary Joint Committee on Law Enforcement's recommending in its report on the gather and use of criminal intelligence that the PJCACLEI consider expanding ACLEI's jurisdiction to include Australian Securities and Investment Commission (ASIC), the AGD and the ATO.

123 The DIBP had been included in ACLEI's jurisdiction as of 1 July 2015.

124 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 2.

125 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 2.

Department of Agriculture and Water Resources

2.110 As noted above, the LEIC Act and associated regulations prescribe certain positions within Agriculture that are included within ACLEI's jurisdiction.[126] These positions include:

- the departmental Secretary;
- Regional Managers;
- members of staff that undertake assessments, clearance or control of vessels or cargo imported into Australia; and
- members of staff that have access to the Integrated Cargo System.[127]

2.111 The PJCACLEI expressed concern about an instance of jurisdictional uncertainty over Agriculture's staff and that:

> …this uncertainty poses a real risk for future ACLEI investigations involving agencies such as Agriculture where partial ACLEI coverage is prescribed.[128]

2.112 A further concern was expressed about 'back office' risks posed by staff such as information technology administrators, which the jurisdictional constraints imposed by the LEIC regulations prevent ACLEI from addressing.[129] ACLEI told the PJCACLEI these back office staff are at risk of corruption because they 'support, or have access to, the agency's law enforcement functions, information, decision-making powers, staff and systems' and 'may be soft targets and are as attractive and vulnerable to subversion or coercion by criminal groups as law enforcement personnel'.[130]

2.113 The PJCACLEI shared this concern, and added that ACLEI's investigations may be artificially constrained by current jurisdictional limitations if an agency is only partially included in its jurisdiction. For this reason, the committee supported ACLEI's call for whole-of-agency coverage and subsequently recommended amendments to the LEIC Act to include Agriculture in ALCEI's jurisdiction in its entirety.

Australian Taxation Office

2.114 The PJCACLEI's consideration of the ATO under ACLEI's jurisdiction continued on from its inquiry into the operation of the LEIC Act. The PJCACLEI noted its earlier recommendation for the ATO to be included in a second tier arrangement; however, it acknowledged that this model had not been adopted by government, and was unlikely to be implemented in the near future. For this reason the PJCACLEI recommended the government 'initiate an independent assessment of

126 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 11.

127 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 11.

128 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 14.

129 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 14.

130 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 15.

the [ATO's] corruption risk profile, together with an examination of the feasibility of including the [ATO] within ACLEI's jurisdiction'.[131]

Attorney-General's Department and the Australian Securities and Investment Commission

2.115 The committee also considered, and rejected, calls for ACLEI to have oversight of the AGD and the ASIC, arguing both agencies' overall corruption risk remain relatively low.[132]

2.116 The Integrity Commissioner informed the committee that PCJACLEI's propositions to expand ACLEI's jurisdiction are under consideration by government.[133] When asked to reflect upon the evolution of ACLEI's jurisdiction, Mr Griffin said:

> If you look at the title of the act and the title of the agency, law enforcement is front and centre there. But that definition has expanded over the 10 years in the three iterations…and I think it is reasonable to conclude that it has moved from the coalface of policing—that is, the AFP and the Crime Commission—into other areas of law enforcement that are equally as important and potentially more susceptible to corruption. That is, these are not people who are trained law enforcement officials in the sense of a police officer and therefore perhaps not as well trained in dealing with the attentions of organised crime and others to corrupt them.[134]

2.117 The Integrity Commissioner agreed that the potential inclusion of the ATO would mean ACLEI would move past the scope of its original Act, and referred to the inclusion in the AFP's FAC of agencies that are not law enforcement agencies, such as the ATO. The Integrity Commissioner stated that such agencies nevertheless 'have at their disposal, in the normal course of their work, information that is of critical importance to government but also extraordinarily valuable in many cases to organised crime'.[135]

Collaboration and co-operation

2.118 The LEIC Act allows ACLEI to work jointly or collaboratively with agencies under its jurisdiction. These activities range:

> …from the joint investigation of information and allegations, to sharing expertise in corporate functions and training. Staff exchanges are also essential to the functioning of ACLEI—both to respond to fluctuations in the number and complexity of investigations, and to assist in building a sector-wide, professional cadre of anti-corruption specialists.[136]

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131 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 28.

132 PJCACLEI, *Inquiry into the jurisdiction of the ACLEI*, May 2016, p. 32.

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

134 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 42.

135 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 42.

136 ACLEI, *Submission 12*, p. 7.

2.119 The heads of agencies under ACLEI's jurisdiction are required, by law, to notify the Integrity Commissioner 'of any information or allegation that raises a corruption issue in his or her agency'[137] and the Integrity Commissioner may disclose information to agency heads if appropriate to do so.[138] Members of the public, other government agencies and the Minister for Justice may also report allegations of corrupt conduct to ACLEI. Further, corruption issues may be referred to ACLEI if they are revealed through telecommunication interception activities (under the *Telecommunications (Interception and Access) Act 1979*), or by whistleblowers.[139] The Integrity Commissioner is also exempt from the operation of the *Privacy Act 1988*, which reflects 'the importance of ACLEI's collection and intelligence-sharing role'.[140]

2.120 ACLEI also educates agencies about possible systemic vulnerabilities identified though its investigation and intelligence gathering functions. These findings contribute to law enforcement 'agencies' own efforts to manage corruption risks and protect integrity'.[141] Agencies may also seek support from ACLEI to design corruption prevention strategies, including risk assessments and control plans, and conducting 'specialised vulnerabilities assessments, which draws together lessons and observations about potential weaknesses in agency operating environments'.[142]

2.121 More broadly, the Integrity Commissioner is of the view that the inflow of work received by ACLEI 'reflects a healthy agency environment where this is a willingness to report corruption'.[143] During Mr Griffin's tenure as Integrity Commissioner, he has seen a:

> …cultural shift in the community and public sector, a heightened awareness of corruption and also a willingness to call it out where it is observed. In the agencies for which I have responsibility and the jurisdiction, what we have seen in that time is a very pronounced emphasis on integrity and corruption, and internal measures to deal with that. That is partly the reason our workload has increased—because the awareness in those agencies of the risk of corruption, the emphasis from strong leadership about calling it out and, also, to a degree, a shift in—I think it is not unreasonable to use the term—what could, once upon a time, have been considered 'you do not dob in your mates in the workplace'. That is the cultural shift that I am observing. We are now seeing an understanding on the part of the people in our jurisdiction that it is not dobbing on your mates but actually protecting the public's interest and protecting the agency's interest. It is a form of self-

137 ACLEI, *Submission 12*, p. 3.

138 ACLEI, *Submission 12*, p. 4.

139 ACLEI, *Submission 12*, p. 4.

140 ACLEI's submission to the PJCACLEI's *Inquiry into jurisdiction of the ACLEI, Submission 1*, p. 2.

141 ALCEI, *Submission 12*, p. 8.

142 ACLEI, *Submission 12*, p. 8.

143 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 43.

> defence. I think that accounts for the increase in the material that is coming to us, because the agencies are maturing themselves and are having that leadership and that cultural approach. I think that is reflected in, as you said, the public reaction to corruption as it is perceived. So the public has moved in that way. I think it is happening across the board.[144]

2.122 Other collaborative arrangements include ACLEI's educative function with respect to various agencies, as well as engaging with other key agencies, such as the APSC and the AGD, to share insights into what is going on in the public sector environment.[145] Further, ACLEI engages with the state integrity agencies and police forces, through mechanisms such as the Australian Anti-corruption Commissions Forum.[146]

Accountability

2.123 ACLEI is held accountable by a number of external bodies, including the judiciary, the Administrative Appeals Tribunal (AAT), the Parliament and the Commonwealth Ombudsman.

2.124 The exercise of some of ACLEI's powers must be approved by a judge, magistrate or designated official from the AAT. A warrant must be sought to: conduct a search; use a surveillance device; intercept telecommunications or access stored communications; order a person to deliver his or her passport; or to arrest an individual. The use of certain powers may also require a report to be submitted to the Attorney-General, the Minister for Justice and in some cases, Parliament.[147]

2.125 The Parliament, through the PJCACLEI, also monitors and reviews ACLEI's performance, its annual reports and any special reports released by the Integrity Commissioner.[148] ACLEI's Integrity Commissioner reported to the committee that he had 'very good engagement with the committee:

> …so much so that the new members of the committee invited me to travel with them as they went to a number of centres around the country and were briefed on the corruption risk issues in those environments. That provided the committee the opportunity to engage with me and with my senior officers. I think that was a very fruitful exercise because it also gave me the benefit first-hand of understanding what it was that was exercising the minds of the members of the committee. So I think it is a very valuable activity. I am not sure if we are the only agency that is the single client of a particular parliamentary joint committee, but it is a very powerful process. We have a good engagement and I will have the opportunity to brief the

144 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 43.

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

146 ACLEI, *Submission 12*, p. 8.

147 ACLEI, *Submission 12*, p. 9.

148 ACLEI, *Submission 12*, p. 10.

> members of the committee regularly during the course of the year—or that has been the case to date.[149]

2.126 Another accountability mechanism is provided by the Commonwealth Ombudsman's power to investigate concerns or complaints from the public about ACLEI, or the conduct of an ACLEI employee. The Commonwealth Ombudsman may also inspect ACLEI's records of its use of certain covert powers, and is required to report to the relevant minister or to Parliament 'on the comprehensiveness and adequacy of ACLEI's records relating to the use of these powers'.[150]

Australian National Audit Office

2.127 The Auditor-General is an independent[151] statutory officer of the Parliament, established by the *Auditor-General Act 1997* (AG Act). The Auditor-General's functions include:

- 'auditing the financial statements of Commonwealth entities, Commonwealth companies and their subsidiaries;
- auditing annual performance statements of Commonwealth entities in accordance with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act);
- conducting performance audits, assurance reviews, or audits of the performance measures of Commonwealth entities, Commonwealth companies and their subsidiaries;
- conducting performance audits of Commonwealth partners as described in section 18B of the [AG Act];
- providing other audit services as required by other legislation or allowed under section 20 of the [AG Act]; and
- reporting directly to the Parliament on any matter or to a minister on any important matter'.[152]

2.128 Professor Gabrielle Appleby and Dr Grant Hoole regard the ANAO's performance audit powers as having the:

> …most robust and flexible capacity to serve as an integrity-promoting institution. The Auditor-General has the broadest jurisdiction of the federal

149 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 45.

150 ACLEI, *Submission 12*, p. 10.

151 Section 8 of the *Auditor-General Act 1997*outlines the independence of the Auditor-General. The Auditor-General has the authority to exercise its functions with complete discretion, and 'is not subject to direction from anyone in relation to: whether or not a particular audit is to be conducted; the way in which a particular audit is to be conducted; or the priority to be given to any particular matter'. The Auditor-General does, however, give consideration to the audit priorities of the Commonwealth Parliament, as determined by the Joint Committee of Public Accounts and Audit. See: Australian National Audit Office (ANAO), *Submission 15*, p. 2.

152 ANAO, *Submission 15*, p. 1–2.

> institutions considered thus far, combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports. Its focus on systemic problems, and capacity to examine issues on a cross-sectoral and inter-institutional basis, lends an indispensable element to the Commonwealth integrity framework.[153]

2.129 The ANAO is overseen by the Joint Committee of Public Accounts and Audit (JCPAA). The JCPAA examines the Auditor-General's reports, considers the ANAO's operations and resources, and reports to Parliament on matters relating to the ANAO's functions and powers.[154]

2.130 According to the ANAO's corporate plan for 2016–20, its purpose is to:

> …drive accountability and transparency in the Australian Government sector through quality evidence based audit services and independent reporting to Parliament, the Executive and the public, with the result of improving public sector performance.[155]

2.131 The ANAO, under the AG Act, has the authority to:

- fully and freely access documents or other property;
- to examine, make copies or take extracts from documents;
- direct a person, by written notice, to provide information, attend and give evidence and produce documents in their custody or under their control; and
- order information and answers to be verified or provided under oath or affirmation.[156]

2.132 Details of the ANAO's financial statement audits, performance audits and other assurance activities were provided in its submission.

Financial statement audits

2.133 Commonwealth entities are held accountable through the ANAO's annual financial statements audits. Through this auditing process, the ANAO will also consider an entity's governance structures and supporting processes such as audit committees, internal audits and fraud control planning. Approximately 250 financial statement audits are conducted by the ANAO annually, informing future programs and potential performance audits.[157]

2.134 In June of each year, the ANAO releases a report entitled *Interim Phase of the Audits of Financial Statements of Major General Government Sector Entities*. This report summarises the interim phase of the audits of portfolio departments and other

153 Gilbert + Tobin Centre of Public Law (Gilbert + Tobin), *Submission 18*, Attachment 1, p. 15.

154 ANAO, *Submission 15*, p. 3.

155 ANAO, *2016–20 Corporate Plan*, https://www.anao.gov.au/work/corporate/anao-2016-20-corporate-plan (accessed 25 August 2017).

156 ANAO, *Submission 15*, p. 3.

157 ANAO, *Submission 15*, p. 3.

entities, accounting for a least 95 per cent of revenues and expenses of the general government sector.[158]

2.135 In December of each year, the second report entitled *Audits of the Financial Statements of Australian Government Entities* is published, detailing the results of the ANAO's financial statements audits completed across the Australian government sector. This report includes descriptions and the implications of any moderate and high risk audit findings.[159] The Auditor-General referenced the ANAO's most recent controls report, which found 25 of the 'major entities that make up the majority of public sector expenditure' had 'risk plans in place, they were up to date, they were being implemented and none of the agencies were identified as having a high risk of fraudulent activity impacting upon their financial statements'.[160]

Performance audits

2.136 The ANAO's performance audits are a:

> …review or examination of the operations of an Australian Government sector entity to provide the Parliament with assurance relating to the administration of entities and programs, including where they involve a Commonwealth partner.[161]

2.137 These performance audits identify issues and promote improved administrative and management practices, by focusing on the entity's:

- economy, such as minimising costs;
- efficiency;
- effectiveness in achieving intended outcomes;
- compliance with legislation and policy; and
- ethical matters.

2.138 Approximately 50 performance audits are conducted each year, across all portfolios of government. These audits include entity-specific audits, broader cross-entity audits, and whole-of-government audits.[162]

2.139 The AG Act specifically excludes persons employed or engaged under the *Members of Parliament (Staff) Act 1984*[163] being considered as a Commonwealth entity.[164]

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158 ANAO, *Submission 15*, p. 3.

159 ANAO, *Submission 15*, p. 3.

160 Mr Grant Hehir, Auditor-General, ANAO, *Committee Hansard*, 5 July 2017, p. 1.

161 ANAO, *Submission 15*, p. 4.

162 ANAO, *Submission 15*, p. 4

163 *Auditor-General Act 1997*, ss. 17(6)(a).

164 ANAO, *Submission 15*, p. 4.

Other assurance activities

2.140 In addition to the above, the ANAO may audit or review a Commonwealth entity if requested by stakeholders, such as parliamentarians, parliamentary committees, community groups and members of the public. The Auditor-General may conduct inquiries into a specific matter, with findings presented in correspondence or a report for tabling in the Parliament.[165]

2.141 The committee was informed that a substantive assurance activity undertaken by the ANAO each year is an assurance review of major Defence equipment acquisition projects. The first review of Defence equipment acquisition projects for 2007–08 was published in 2008. The purpose of the review is to improve 'transparency and public accountability in major Defence procurement'.[166] The development of an annual review was driven by the JCPAA's ongoing interest in major Defence acquisitions since March 2006 and its inquiry into financial reporting and equipment acquisition at the Department of Defence and the Defence Material Organisation.[167]

Corruption and misconduct

2.142 The ANAO informed the committee that its audits and assurance work will sometimes reveal possible misconduct and/or corruption. In these instances, the ANAO 'will generally bring this evidence to the attention of the responsible investigating authority within the affected entity' and this had been done on matters relating to Defence credit cards and the disposal of specialist military equipment.[168]

2.143 Internal investigations may occur based on the outcome of an ANAO audit. This occurred after the ANAO reported on the procurement of garrison support and welfare services for offshore processing centres in Nauru and Papua New Guinea.[169] Finally, the ANAO may also conduct a performance audit specifically focused on agencies' integrity measures. For example, the ANAO is considering a performance audit of the implementation and effectiveness of the DIBP's staff integrity measures to mitigate the risk of fraud and corruption amongst departmental staff.[170]

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165 ANAO, *Submission 15*, p. 4.

166 ANAO, *Defence Material Organisation Major Projects Report 2007–08*, Report No. 9 2008–09, 27 November 2008, p. 11.

167 Ms Sharon Grierson MP, Chair's tabling speech, *Joint Committee of Public Accounts and Audit's Report 411: Progress on equipment acquisition and financial reporting in Defence* p. 1, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jcpaa/defence/tabling.pdf (accessed 28 June 2017).

168 ANAO, *Submission 15*, p. 5.

169 ANAO, *Submission 15*, p. 5.

170 ANAO, *Performance Audit, Staff Integrity Measures (Potential)*, https://www.anao.gov.au/work/performance-audit/staff-integrity-measures (accessed 27 June 2017).

2.144 The Auditor-General, Mr Grant Hehir, informed the committee that in each audit, the ANAO will 'undertake a process of reviewing the frameworks and activities and actions of agencies with respect to managing fraud risk'.[171] As part of its investigation, the ANAO will look at:

> …how effectively the agency implements its fraud prevention framework and…are also looking at what they do when they identify fraud underneath that. It is not just that they have a framework in place, but that they are implementing it and, when they identify potential fraud or actual fraud, that they are taking action to deal with it.[172]

2.145 Misconduct and fraud risks are mostly identified through the ANAO's performance audit work, because it delves deeply into the activity of an agency. If at any point in the investigation, the ANAO identifies something that looks like misconduct or fraud, then the investigation is transferred to an appropriate body, which may be an integrity body in some circumstances.[173] A potential course of action available to the Auditor-General, under section 36 of the AG Act, is the power to disclose particular information to the AFP 'if the Auditor-General is of the opinion that the disclosure is in the public interest'.[174]

2.146 Stakeholders are able to inform the ANAO of any matter relating to an audit. Although rare, the ANAO does receive information from the public on public servants' delivery of services. In these instances, the ANAO would conduct an investigation to determine whether the issues should be passed onto an integrity body. Further:

> If it looks quite serious, we would pass it straight to the relevant integrity body. It depends on the nature of how the issue is raised with us. If there is a lot of evidence that they are giving us, we would just pass it straight to the appropriate body.[175]

2.147 The committee questioned the ANAO on whether it has identified any gaps or vulnerabilities in the current integrity framework. In response, the Auditor-General explained that he had:

> …not seen any area where, when we identify an issue, there is not clearly a body where you can take it to do further work—whether that is the [AFP] or a particular integrity body set up. In defence or security areas or in areas of misconduct it tends to be the accountable authority[176] we would raise it with. In my time in that role when that has happened—and there have only been a handful of times—I have found that we do not have any evidence that issues are not appropriately addressed. What I mean by 'do not have

171 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 1.

172 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 2.

173 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 2.

174 ANAO, *Submission 15*, p. 5.

175 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 2.

176 Accountable authorities referenced by the ANAO are the AFP, ACLEI and IGIS.

> any evidence', when we deal with accountable authorities they tend to tell us that they did something and what they did to address the concern that we raised. From that point of view, I have not seen a gap.[177]

2.148 When asked whether integrity agencies, such as the ANAO, make a difference to the Commonwealth's integrity framework, the Auditor-General responded that there is:

> …a fair amount of evidence that the integrity of financial reporting, which is one of our core roles, is substantially enhanced by the oversight provisions that we undertake. The fact that we are there and people know we are there checking and making sure that systems and processes are robust and reporting is accurate, I would argue, does improve the quality of it. On the performance auditing side, the fact that people know that we are going to come in and check on the performance efficiency, effectiveness, economy and ethical activities within agencies is an important component in the framework of providing assurance to parliament of how well government works in those areas.[178]

2.149 A limitation of the ANAO identified by Professor Appleby and Dr Hoole is that it:

> …is not an intuitive institutional starting-point for investigating corruption and integrity concerns…Its role doesn't include the investigation of complaints, and neither public servants nor individual citizens have standing to raise concerns with the Auditor-General. Moreover, the Auditor-General's contact with integrity and corruption issues is largely incidental to a broader mandate relating to the scrutiny of public sector performance and financial management.[179]

2.150 Further, Professor Appleby and Dr Hoole argue that the ANAO lacks:

> …the institutional flexibility to address integrity and corruption issues in as nuanced or multifaceted way as the ACLEI or the Commonwealth Ombudsman. The Auditor-General may detect and report maladministration, but does not have a clear institutional mandate to forensically study its cause or to correct misconduct.[180]

2.151 Finally, a further criticism of the ANAO's role in the integrity framework is that its identification of corruption is limited to the management of public funds and instances outside of that space may escape the Auditor-General's scrutiny.[181]

177 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 3.

178 Mr Hehir, ANAO, *Committee Hansard*, 5 July 2017, p. 4.

179 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 15.

180 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 16.

181 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 16.

Collaboration and co-operation

2.152 The ANAO noted that it had observed a 'quite active community of practice led in part by the [AGD], which of course has the policy-owner role'.[182] Further to this observation, it has been the ANAO's experience that those agencies actively involved in the 'community of practice…tended to have a more mature internal set of fraud control arrangements'.[183] In the ANAO's view, a key learning from this observation:

> …is to keep abreast of the requirements and the more recent thinking in the community of practice. Compare notes, stay active and keep working the problem continuously. They seem to be the key preconditions for at least having a reasonable prospect of success on the prevention side, because prevention is the thing that is being emphasised more these days around fraud control.[184]

Australian Public Service Commission

2.153 The APSC is responsible for 'upholding the standards of integrity and conduct in the [APS]'.[185] The PS Act is a key component to the APS' integrity framework.[186] The PS Act establishes the behaviour obligations of all APS employees and the APSC is responsible for:

- upholding and promoting the APS Values, Employment Principles and the APS Code of Conduct (integrity principles);
- evaluating each agency's compliance with and incorporation of the APS's integrity principles;
- issuing directions to agency heads regarding investigation procedures for determining suspected breaches of the Code of Conduct and relevant sanctions; and
- investigating alleged breaches of the Code of Conduct by an agency head.[187]

Australian Public Service Code of Conduct

2.154 The APS Code of Conduct is established under section 13 of the PS Act. Integrity measures found in the code include requirements for APS employees to behave honestly and with integrity, comply with applicable Australian laws, maintain confidentiality about dealings with a minister or ministerial staff, avoid any conflict of interest, and not use insider information to:

182 Dr Tom Ioannou, Group Executive Director, ANAO, *Committee Hansard*, 5 July 2017, p. 4.

183 Dr Ioannou, ANAO, *Committee Hansard*, 5 July 2017, p. 4.

184 Dr Ioannou, ANAO, *Committee Hansard*, 5 July 2017, pp. 4–5.

185 APSC, *Submission 16* [2016], p. 3.

186 APSC, *Submission 16* [2016], p. 3.

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

> …gain, or seek to gain, a benefit or an advantage for the employee or any other person, or…cause or seek to cause, detriment to the employee's agency, the Commonwealth or any other person.[188]

2.155 According to the APSC, the reporting and investigating of alleged breaches of the Code of Conduct are important elements of the APS integrity framework. It is the responsibility of all APS employees to report suspected misconduct. Agency heads are obliged to:

> …investigate alleged misconduct or breaches of the Code of Conduct, and can impose sanctions up to and including termination of employment. In the case of serious misconduct, including genuinely corrupt acts, matters are referred to the relevant law enforcement body.[189]

2.156 The APSC also provides APS employees with an ethics advisory service. This service is offered to APS employees who 'wish to discuss and seek advice on ethical issues that occur in the workplace and make sound decisions around these issues'. This service includes advice on:

- the application and interpretation of the APS Values and Code of Conduct (section 10 and 13 of the PS Act);
- ethical decision making in the APS; and
- interpretation of misconduct provisions under the PS Act, as well as advice on related policies and good practice.[190]

2.157 The APSC is not able to provide advice[191] on:

- the technical and operational aspects of the employment policy of the APS;
- other aspects of APS legislation, policy or management;
- internal agency policies and processes unless a request is submitted by an agency head, a senior executive employee or an agency corporate management area; and
- the merits or outcome of a misconduct case.[192]

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188 APSC, *Code of Conduct*, 11 February 2016, http://www.apsc.gov.au/managing-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/code-of-conduct (accessed 26 June 2017).

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

190 APSC, *Ethics Advisory Service*, 11 February 2016, http://www.apsc.gov.au/working-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/ethics-advisory-service (accessed 28 August 2017).

191 The APSC does not: provide counselling or act as an agency's Employee Assistance Programme; undertake case management or provide an advocacy service for APS employees; provide avenue for complain resolution; provide legal advice; and accept whistleblower reports. See APSC, *Ethics Advisory Service*, 11 February 2016, http://www.apsc.gov.au/working-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/ethics-advisory-service (accessed 28 August 2017).

State of the Service report

2.158 The APSC's annual State of the Service reports include data on the number of investigations into misconduct and breaches of the Code of Conduct, including allegations of corrupt conduct. Between 2014 and 2016, there were 1866 investigations into misconduct, with 228 resulting in termination of employment and 888 resulting in employees being reprimanded. In 2015–16, 106 of the 717 finalised investigations were reported to have involved a form of corruption,[193] with the majority involving 'acts of a less serious nature, such as inappropriate use of flex time or misuse of leave'.[194]

2.159 The State of the Service reports include data from APS employee surveys. In these surveys, APS employees are asked whether they had witnessed or reported perceived corruption.[195] The 2016 survey reports that four per cent[196] of respondents 'had witnessed another employee engaging in behaviour they considered' corrupt.[197] Of these respondents:

- 67 per cent reported they had witnessed cronyism;
- 26 per cent reported they had witnessed nepotism;
- 22 per cent reported they had witnessed an APS employee acting, or failing to act, in the presence of undisclosed conflicts of interest; and
- only 33 per cent of those that had witnessed corrupt behaviour had reported it.[198]

2.160 The APSC is of the view that the available data suggests[199] corruption in the APS is low and 'APS agencies are dealing with unlawful and corrupt conduct appropriately when it is identified'.[200]

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192 APSC, *Ethics Advisory Service*, 11 February 2016, http://www.apsc.gov.au/working-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/ethics-advisory-service (accessed 28 August 2017).

193 APSC, *Submission 1*, p. 2.

194 APSC, *Submission 16* [2016], p. 3.

195 APSC survey defines corruption as the 'dishonest or biased exercise of a Commonwealth public official's functions. A distinguishing characteristic of corrupt behaviour is that it involves conduct that would usually justify serious penalties, such as termination of employment or criminal prosecution'.

196 This figure was 3.6 per cent in 2014–15. See, APSC, *State of the Service Report 2014–15*, p. 46.

197 APSC, *State of the Service Report 2015–16*, p. 27.

198 APSC, *State of the Service Report 2015–16*, pp. 27–28.

199 On notice, the APSC provided further information about misconduct inquiries undertaken by the APS agencies into alleged corrupt behaviour between 2013 and 2016. See: APSC, answers to questions on notice, 5 July 2017 (received 19 July 2017).

200 APSC, *Submission 16* [2016], p. 1.

Commonwealth Ombudsman

2.161 The Commonwealth Ombudsman has responsibility for and is empowered to investigate and expose instances of 'systemic maladministration that undermines probity and integrity in government'.[201] According to Professor Appleby and Dr Hoole, the Commonwealth Ombudsman:

> …helps to ensure that official powers are exercised in a non-abusive manner conforming to relevant legislation, policies, and standards. It provides an important point of contact for facilitative, confidential reporting of corruption concerns within the Commonwealth public service. The Ombudsman thus lends important values of conciliation, privacy, and problem-solving to the Commonwealth integrity framework.[202]

2.162 Other responsibilities of the Ombudsman include:

- the shared administration of the Commonwealth's whistleblower scheme (PID Scheme), under the PID Act;
- reviewing law enforcement agencies' statutory compliance with the use of certain covert and intrusive powers;[203]
- the consideration and investigation of complaints from individuals who claim they have been treated unfairly, or unreasonably, by a Commonwealth department or agency or prescribed private sector organisation;
- acting as the ombudsman for private health insurance, overseas students, the Defence Force, law enforcement, the Australian Capital Territory and Norfolk Island;[204] and
- oversight of immigration detention through an assessment of the appropriateness of a person being held in detention for more than two years.[205]

2.163 Powers available under the Commonwealth *Ombudsman Act 1976* (Ombudsman Act) include:

- notices requiring people to give information and produce documents or records (privilege against self-incrimination is abrogated and a use of immunity applies[206]);[207]

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201 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 46.

202 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 10.

203 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 46.

204 AGD, *Submission 23* [2016], p. 5.

205 Commonwealth Ombudsman, *Dealing with the Commonwealth Ombudsman's office*, available: http://www.ombudsman.gov.au/about/what-we-do/information-for-agencies#Jurisdiction (accessed 26 June 2017).

206 *Commonwealth Ombudsman Act 1976*, ss. 9(4).

207 *Commonwealth Ombudsman Act 1976*, s. 9.

- requiring persons to attend examinations (again, privilege against self-incrimination is abrogated and a use of immunity applies);[208] and
- enter the premises occupied by a department or prescribed authority (including contractors) and carrying on an investigation there.[209]

2.164 The Commonwealth Ombudsman also meets with, and works collaboratively with other integrity agencies, thereby referring matters to other agencies if it is unable to investigate.[210] These referral powers include referring matters of corruption[211] to ACLEI.[212]

2.165 The jurisdiction of the Commonwealth Ombudsman[213] includes the administrative actions[214] of most Commonwealth departments, or agencies and prescribed private sector organisations. Its jurisdiction can include the actions of a Commonwealth service provider, such as 'a contractor or subcontractor who provides goods or services for, or on behalf of, an agency to the public'.[215]

2.166 The Commonwealth Ombudsman does not have the jurisdiction to investigate[216] tax complaints (transferred to the Inspector-General of Taxation), Australian intelligence agencies,[217] the Commonwealth Grants Commission, the Defence Force Remuneration Tribunal, and the Remuneration Tribunal. Further, the Commonwealth Ombudsman does not have the jurisdiction to review the

208 *Commonwealth Ombudsman Act 1976*, s. 13.

209 *Commonwealth Ombudsman Act 1976*, s. 14.

210 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 46.

211 The *Commonwealth Ombudsman Act 1979* distinguishes between a *serious* corruption issue and a corruption issue. If a matter is deemed a corruption issue, than the Commonwealth Ombudsman 'may decide not to investigate the complaint, or not to investigate the complaint further, as the case may be, and to refer the allegation or information to the Integrity Commissioner'. If a matter is considered a serious corruption issue, than the Ombudsman 'must not investigate the complaint' and it must be referred to the Integrity Commissioner (for agencies within ACLEI's jurisdiction). See *Commonwealth Ombudsman Act 1976*, ss. 6(16), ss. 6(17).

212 *Commonwealth Ombudsman Act 1976*, ss. 6(16), ss. 6(17).

213 See *Commonwealth Ombudsman Act 1976*, ss. 5(1).

214 The term 'administrative action' is not defined under the *Commonwealth Ombudsman Act 1976*; instead it is broadly interpreted to include 'policy development, commercial conduct, the exercise of statutory responsibilities law enforcement activities, decisions on application for benefits or concessions, compensation decisions, and decisions on applications made under the Freed of Information Act 1982'. See, Commonwealth Ombudsman, *Dealing with the Commonwealth Ombudsman's office*, http://www.ombudsman.gov.au/about/what-we-do/information-for-agencies#Jurisdiction (accessed 26 June 2017).

215 Commonwealth Ombudsman, *Dealing with the Commonwealth Ombudsman's office*, available: http://www.ombudsman.gov.au/about/what-we-do/information-for-agencies#Jurisdiction (accessed 26 June 2017).

216 See *Commonwealth Ombudsman Act 1979*, ss. 5(2).

217 See the IGIS for further details (see paragraph 2.174 to 2.179).

administrative actions of the courts or tribunal registries, and the actions and decisions of members of parliament and ministers are outside the Commonwealth Ombudsman's jurisdiction. However, investigations may take place into advice provided to a minister by a Commonwealth agency.[218]

2.167 The committee was informed that in 2015–16 the Commonwealth Ombudsman received 37 790 complaints. Of these complaints:

- 5339 were determined to be out of its jurisdiction;
- 32 451 were in-jurisdiction complaints;
- 3131 (or 9.6 per cent) were investigated.[219]

2.168 Of these investigated:

- 2540 matters were resolved after a single contact with the relevant agency;
- 582 were resolved after two or more substantive contacts with the relevant agency; and
- nine complaints were investigated using the formal use of powers under the Ombudsman Act.[220]

2.169 The committee was told that the Commonwealth Ombudsman receives information through a number of different channels, which may lead to an investigation into systemic maladministration. These channels include:

- receiving a large number of complaints about one issue;
- receiving a small number of specific complaints (such as its investigation into health cover of international students); and
- the Commonwealth Ombudsman's interaction with external bodies, such as community based agencies.[221]

2.170 If a particular agency or matter of interest receives a large volume of complaints, the Commonwealth Ombudsman will establish a strategy branch.[222] These strategy branches assess the complaints received to determine if there is a systemic issue. Further, the branches have regular engagement with the agencies for which they

218 Commonwealth Ombudsman, *Dealing with the Commonwealth Ombudsman's office*, available: http://www.ombudsman.gov.au/about/what-we-do/information-for-agencies#Jurisdiction (accessed 26 June 2017).

219 Commonwealth Ombudsman, answers to questions on notice, 16 June 2017 (received 10 July 2017).

220 Commonwealth Ombudsman, answers to questions on notice, 16 June 2017 (received 10 July 2017).

221 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 48.

222 Strategy branches include the defence force, immigration, law enforcement, the postal industry and private health insurance.

are responsible, as well as stakeholder engagement to assist those people subject to the administration of those agencies.[223]

2.171 As already noted, the Commonwealth Ombudsman has shared responsibility for the administration of the PID Scheme under the PID Act. The PID Scheme will be discussed in more detail later in this chapter.

2.172 Professor Appleby and Dr Hoole identified a number of characteristics of the Commonwealth Ombudsman that they argue are both a source of strength and weakness. The first is the privacy surrounding the work of the Commonwealth Ombudsman, which:

> …facilitates candour and provides a secure environment in which a problem may be resolved constructively between a complainant and the relevant Commonwealth agency.[224]

2.173 However, as with ACLEI, this level of privacy can limit the public's:

> …awareness of the extent to which the Ombudsman succeeds in fostering integrity within the public service, given that public reporting may result in conflict between the Ombudsman and a department. An emphasis on privacy and 'soft power' may diminish the Ombudsman's capacity to deter the worst instances of corruption. Finally, some features of the Ombudsman's procedural flexibility diminish at least the appearance of independence. This is the case in respect of the Ombudsman's duty to consult a Minister before including findings that are critical of government in a public report.[225]

Inspector-General of Intelligence and Security

2.174 The IGIS is an independent statutory officer who is responsible for reviewing the activities of Australia's intelligence agencies. The agencies under the IGIS's jurisdiction are:

- ASIO;
- the Australian Secret Intelligence Service;
- ASD;
- Australian Geospatial-Intelligence Organisation;
- Defence Intelligence Organisation; and the
- ONA.[226]

2.175 The purpose of IGIS is to 'provide assurance that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives,

223 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 48.

224 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 15.

225 Gilbert + Tobin, *Submission 18*, Attachment 1, p. 15.

226 IGIS, *Submission 10*, p. 2.

and acts consistently with human rights'.[227] It achieves this by conducting inspections of operational activities of Australia's intelligence agencies. IGIS is also empowered to conduct a private inquiry and order a person to produce documents and provide information to assist with its investigation.[228] IGIS informed the committee that inquiries have been conducted into:

- allegations of inappropriate security vetting practices (2011);
- possible compromise of a compliance test (2010); and
- an allegation that the ASD had spied on the Defence Minister (2009).[229]

2.176 The activities of Australia's intelligence agencies cannot be disclosed publicly, and for this reason, IGIS is equipped to have oversight of and manage highly classified information. IGIS staff are required to obtain top secret positive vetting clearances.[230] Information obtained through its investigations is dealt with in accordance with IGIS's security requirements and the secrecy provisions found in the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Procedures are also in place to protect the identity of former staff or agents of intelligence agencies.[231]

2.177 IGIS informed the committee that Australia's intelligence agencies have internal mechanisms in place to detect and deter misconduct and corruption. In addition to these internal mechanisms, the security clearance and vetting processes covering intelligence agency staff provide an 'additional layer of scrutiny'.[232] Any individual misconduct may result in a loss of a security clearance, and subsequently an officer's job.[233] It is the role of IGIS to 'oversee the mechanisms in place in the agencies and [IGIS] is an avenue for staff to complain if they consider there has been maladministration or corruption'.[234]

2.178 IGIS expressed the view that corruption and misconduct in Australia's intelligence agencies is very low, and that existing mechanisms in place are sufficient to detect and deter those behaviours. IGIS identified the security vetting processes as a possible reason for the low level of corruption and misconduct.[235]

2.179 IGIS also shares responsibility under the PID Act for matters that relate to intelligence agencies. Since the introduction of the PID Act, IGIS has received a

227 IGIS, *Submission 10*, p. 2.

228 IGIS, *Submission 10*, p. 2.

229 IGIS, *Submission 10*, p. 4.

230 Ms Stone, IGIS, *Committee Hansard*, 16 June 2017, p. 46.

231 IGIS, *Submission 10*, p. 3.

232 IGIS, *Submission 10*, p. 3.

233 IGIS, *Submission 10*, p. 3.

234 IGIS, *Submission 10*, p. 3.

235 IGIS, *Submission 10*, p. 4.

'small number of disclosures concerning alleged misconduct in procurement and has received a number of disclosures alleging maladministration in staffing matters'.[236] Investigations into these allegations have identified areas for improvement, but have not been considered cases of widespread misconduct or corruption. IGIS believes it has sufficient powers under the IGIS Act and the PID Act to conduct an inquiry into these matters.[237]

Australian Electoral Commission

2.180 The AEC is responsible for the integrity of Australia's elections. According to evidence provided by the AEC, there are three major areas in which a 'perception of misconduct' may arise.[238] These areas are:

- political party donations and disclosures;
- the integrity of the electoral role; and
- the handling of electoral offences.[239]

Political party donations and disclosures

2.181 In 1983, the Commonwealth funding and disclosure scheme (disclosure scheme) was established under the *Commonwealth Electoral Act 1918* (Electoral Act) to 'increase the overall transparency and inform the public about the financial dealings of political parties, candidates and others involved in the electoral process'.[240] According to the AEC, the:

> …broad aim of the scheme to provide political parties and candidates with public funding to reduce reliance on private funding and requiring the disclosure of campaign related transactions in the interests of transparency and thereby reducing the risk of corruption.[241]

2.182 Under the disclosure scheme:

> …candidates, registered political parties and their state branches, local branches and sub party units and their associated entities, donors, and other participants in the electoral process, are required to lodge annual or electoral period financial returns with the AEC.[242]

2.183 These financial returns must show:

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236 IGIS, *Submission 10*, p. 4.

237 IGIS, *Submission 10*, p. 4.

238 Mr Tom Rogers, Electoral Commissioner, AEC, *Committee Hansard*, 16 June 2017, p. 35.

239 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

240 AEC, *Financial Disclosure*, 1 February 2017, available: http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/ (accessed 28 June 2017).

241 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

242 AEC, *Financial Disclosure*, 1 February 2017, http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/ (accessed 28 June 2017).

- the total value of receipts received;
- details of the amounts received that are above the disclosure threshold (from 1 July 2017 to 30 June 2018, the disclosure threshold is $13,200);[243]
- the total value of payment received;
- the total value of debts as at 30 June; and
- details of debts outstanding as at 30 June that are more than the disclosure threshold.[244]

2.184 Other details to be included if a total is above the disclosable amount include the name of the person or organisation making the donation, the sum of the amount received, and whether the receipt is a 'donation' or 'other receipt'.[245]

2.185 Once submitted to the AEC, the disclosure returns are made available for the public's inspection. [246]

2.186 Breaches of the disclosure scheme are contained in the Electoral Act. It requires the AEC to refer any breaches to the CDPP, and 'combines relatively low penalties—$100 for some minor offences—with potentially high thresholds for establishing an offence'.[247] The AEC reassured the committee that it is:

> …extremely active in ensuring that all the strictures of the act are met. To that end, we work collaboratively with the various participants in the process, we conduct an active annual regime of compliance reviews and we refer specific cases of non-compliance to relevant Commonwealth agencies for further action where necessary.[248]

Integrity of the electoral roll

2.187 In 2014, the AEC established an electoral integrity unit (EIU) to 'inquire into and strengthen the integrity of the AEC's electoral processes'.[249] The EIU's remit is to 'examine enrolment in election matters to identify and report on issues affecting the

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243 AEC, *Disclosure threshold*, 19 May 2016, http://www.aec.gov.au/Parties_and_Representatives/public_funding/threshold.htm (accessed 28 June 2017).

244 AEC, *Financial Disclosure*, 1 February 2017, http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/ (accessed 28 June 2017).

245 AEC, *Financial Disclosure*, 1 February 2017, http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/ (accessed 28 June 2017).

246 AEC, *Financial Disclosure*, 1 February 2017, http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/ (accessed 28 June 2017).

247 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

248 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

249 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

integrity of the processes', including the 'examination of electoral fraud and reports its findings to the AEC's fraud control manager in accordance with the AEC's fraud control plan'.[250] If the EIU identifies an issue, it will provide a recommendation on whether the matter warrants being referred to the AFP for further investigation.[251]

2.188 The creation of the EIU led to the development of the Electoral Integrity Framework. This framework supports the EIU's work by identifying opportunities to enhance its integrity measures by ensuring the electoral system adheres to the:

> …provisions contained in the [Electoral Act], following AEC policies and procedures, and administering an electoral system where eligible electors cast votes which are counted accurately and promptly.
>
> The framework is focused on AEC processes and procedures and does not comment on the underlying integrity of the legislated systems of enrolment and elections in Australia's electoral system. The framework currently applies to enrolment and elections, and may, in time, apply to other areas of the AEC's work, such as funding and disclosure or industrial and commercial elections.[252]

Handling of electoral offences

2.189 Part 21 of the Electoral Act lists a number of specific electoral offences, including bribery, polling place offences and a range of other campaign-related offences. The AEC is required to uphold the compulsory voting system, and the principle of 'one person, one vote'.[253]

2.190 The AEC reiterated its commitment to address instances of alleged multiple voting, stating section 339 of the Electoral Act 'provides that a person is guilty of an offence if that person votes more than once in the same election but does not have:

> …the authority to prosecute multiple voting offences, but we cooperate with the AFP and the Commonwealth Director of Public Prosecutions on cases of possible multiple voting. Following the most recent election in 2016, the AEC and the AFP worked closely to institute a process for managing the referral, by the AEC to the AFP, of apparent multiple voting cases.[254]

Administrative and enforcement powers

2.191 In her evidence, Professor Anne Twomey suggested that a problem for electoral commissions is whether they are administrative agencies, or enforcement agencies. Professor Twomey argued that there is a difficulty with a single agency

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250 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

251 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

252 AEC, *Electoral Integrity Framework*, http://www.aec.gov.au/About_AEC/Publications/electoral-integrity-framework/framework.htm (accessed 28 June 2017).

253 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

254 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 35.

having both roles, and electoral commissions are not adequately funded to conduct investigations.[255]

2.192 In response, the AEC acknowledged this is an issue other electoral commissions have previously tried to resolve.[256] In the case of the AEC, the committee was assured that it has a number of internal checks and balances that it uses to consider various issues, and ultimately:

> There will be a point when—as we always do with matters that are either under review or investigation and we think sufficient evidence points to the need for further action, and that action is not within our power under the Electoral Act—we refer that for further action to either the AFP or the DPP, depending on the issue.[257]

2.193 It is at this point in the investigation that the AEC will transfer responsibility and it is up to the AFP or CDPP whether to take the investigation forward. This transferral of responsibility is because:

> …the AFP and the CDPP are both bound by the prosecution policy of the Commonwealth. They make their own decisions about whether they can pursue a particular issue, but we are not bound by that. We simply administer the act and the provisions of the act. Where we believe there is an issue, we will refer that on regardless of the prosecution policy of the Commonwealth.[258]

2.194 The AEC used as an example an enrolment issue in the seat of Indi during the 2013 election. The AEC's preliminary investigation indicated that an offence may have occurred, and it was subsequently referred to the AFP.[259]

2.195 The separation of powers, in the AEC view, is important because it puts it, 'to a certain extent, at arm's length so that we are seen as not being politically partisan and we are continuing our role as being neutral in the political sphere'.[260] The AEC is, however, able to prosecute for non-voting offences,[261] and it possesses coercive powers, under section 316 of the Electoral Act, such as the power to ask questions and

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

256 One example the AEC provided was in New South Wales, which had established a 'separate Electoral Funding Authority that was connected to but separate from the New South Wales Electoral Commission'. The outcome of this authority was not optimal, and was subsequently reverted to a single NSW Electoral Commission. See, Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 36.

257 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 36.

258 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 36.

259 Mr Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 36.

260 Mr Paul Pirani, Chief Legal Officer, AEC, Committee Hansard, 16 June 2017, p. 37.

261 Mr Pirani, AEC, *Committee Hansard*, 16 June 2017, p. 36.

seek documentation to determine 'whether a person has complied with the disclosure obligation[s]'.[262]

2.196 The AFP, on notice, informed the committee that it provides an investigative service to the AEC 'in accordance with a memorandum of understanding on investigation of Commonwealth offences'.[263]

2.197 However, the AFP noted it:

> …does not have a view on whether criminal legislation is required that specifies with certainty how political parties can and cannot spend public funding received as part of an election…Where a political party has received public funding as a result of an election and where the party spends the public funding in contravention of its party constitution and where it may constitute a criminal offence, the political party or other may refer to the AFP the matter for investigation. The AFP may evaluate the referral and determine if there has bene any breach of Commonwealth offences.[264]

2.198 The AFP concluded that it does not require any 'additional powers when investigating matters of this nature'.[265]

Comparison with other jurisdictions

2.199 The committee asked the AEC how Australia's electoral system compares with other jurisdictions. In response, the AEC informed the committee of its regular engagement with the United Kingdom, Canada and New Zealand, and the shared view that:

> …it is remarkable just how much respect the various political players in the process have for the process itself. It is very rare that there are parties, candidates or MPs who actually try to do the wrong thing. In our democracy there is a great respect for the process and for citizens as well.[266]

2.200 The AEC referred to the ongoing project called the Electoral Integrity Project, which produces a global survey each year that rates democracies. In May 2017, up to 3000 electoral integrity experts evaluated Australia's 2016 federal election and concluded that it had 'very high integrity'. That said, the AEC notes that there are always issues, including:

> …a general decline in those democracies for people's trust in democracy over many years. The AEC's rating has still gone down with everybody else's, but has remained relatively buoyant. More Australians than not believe in and trust in the outcome of elections. Without going too far down

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262 Mr Pirani, AEC, *Committee Hansard,* 16 June 2017, p. 37.

263 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

264 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

265 AFP, answers to questions on notice, 5 July 2017 (received 16 August 2017).

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

> that path, there are, however, a minority of Australians that believe that fraud does occur during Australian elections.[267]

2.201 On the matter of donation laws, the committee compared the Commonwealth's disclosure threshold to the recent changes to New South Wales and Queensland's donations threshold laws that now require the disclosure of donations above $1000. When this measure was introduced in Queensland, the Premier said the changes would reduce the prospect of corruption.[268] In response, the AEC said it did not have a view on this matter; its role is to administer the Electoral Act.[269]

Australian Securities and Investment Commission

2.202 ASIC 'is Australia's corporate, markets and financial services regulator', established pursuant to the *Australian Securities and Investments Commission Act 2001*.[270] It is overseen by the Parliamentary Joint Committee on Corporations and Financial Services[271] and:

> …investigates breaches of the [Corporations Act] and takes criminal, civil and administrative action in cases of corporate misconduct. Within ASIC, the Office of the Whistleblower monitors the handling of whistleblower reports.[272]

2.203 In order to perform its functions, ASIC has investigation[273] and prosecution[274] powers. ASIC explained how these powers intersect with issues of corruption in its 2014 submission to PJCACLEI in respect of its inquiry into the jurisdiction of the ACLEI:

> The corruption risks present within ASIC arise from our role as a regulator. Potential corruptors may stand to make a financial profit, or otherwise enhance their commercial interests, by obtaining access to the information and intelligence that ASIC collects as a result of ASIC's regulatory functions. Alternatively, potential corruptors may seek to benefit from favourable treatment such as the imposition of lower penalties, improper determinations of relief applications, or other biased decisions.[275]

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

268 Felicity Caldwell, "'Real time" political donations reports to have seven-day delay', *Brisbane Times*, 23 February 2017, http://www.brisbanetimes.com.au/queensland/real-time-political-donations-reports-to-have-sevenday-delay-20170223-gujcom.html (accessed 31 May 2017).

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

270 ASIC, *Our role*, http://asic.gov.au/about-asic/what-we-do/our-role/ (accessed 24 August 2017).

271 *Australian Securities and Investments Commission Act 2001*, s. 243.

272 AGD, *Submission 23* [2016], p. 5.

273 *Australian Securities and Investments Commission Act 2001*, s. 13.

274 *Australian Securities and Investments Commission Act 2001*, s. 63–s. 67.

275 ASIC, *Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity*, p. 6.

2.204 The submission noted that, as a result of these potential motives for corruption, there exists:

> …a risk that ASIC staff may seek to gain a profit or benefit for themselves or others…, may use ASIC powers and discretions for an improper purpose, and may protect unlawful activity by diverting attention or otherwise manipulating surveillance and investigations.[276]

2.205 In examining ASIC's evidence, PJCACLEI noted in its May 2016 report that:

> …the former acting Integrity Commissioner, Mr Robert Cornall, observed that ASIC's written submission and ASIC officers' oral evidence 'supported the position that [ASIC is] not in a high-risk environment'.[277]

2.206 In contrast to this evidence to the PJCACLEI, the committee received evidence that ASIC's budget is not sufficient to carry out its functions in respect of corruption, as:

> ASIC, which should have a major role in supervision of this area, had its budget cut by $120 million over four years, by this government's first budget. ASIC itself submitted to a Senate inquiry into ASIC's handling of financial scandals that it lacked the weapons to deal with bank misbehaviour, and that penalties for misbehaviour are inadequate.[278]

2.207 This comment about the lack of resources was echoed by Mr Trevor Clarke of the Australian Council for Trade Unions, who asserted that the current environment ASIC works in 'is not the ideal environment to take a step back and conceive of yourself as an agency that is about preventing corrupt behaviour in all of its forms', as ASIC is:

> …a compliance body that would receive goodness knows how many hundreds of thousands of forms every day of the week, and are expected to make some conclusions or direct investigative activities about compliance based on this enormous volume of information that they get every day of the week.[279]

2.208 However, in respect of ASIC's resourcing constraints, the AGD informed the committee that:

> In July 2015, the Government announced $127.6 million funding over four years for a Serious Financial Crime Taskforce, which sits within the FAC Centre. In April 2016, the Government announced that it would invest an additional $14.7 million to expand the investigative capability of the FAC Centre and bolster Australia's capability to respond to foreign bribery,

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276 ASIC, *Submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity*, p. 6 (citations omitted).

277 PJCACLEI, *Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity*, May 2016, p. 30.

278 Accountability Round Table, *Submission 31* [2016], p. 3.

279 Mr Trevor Clarke, Director of Industrial and Legal Policy, Australian Council of Trade Unions, *Committee Hansard*, 17 May 2017, p. 26.

> alongside an additional $127.2 million over four years to strengthen the investigative capacity of ASIC.[280]

2.209 Further, AGD noted that a taskforce has been established to review ASIC's enforcement regime, which will 'undertake extensive consultation before submitting a final report to Government in September 2017':

> The ASIC enforcement review will assess the suitability of the existing regulatory tools available to ASIC and whether there is a need to strengthen ASIC's toolkit. Relevantly, the Review's terms of reference include an examination of legislation dealing with corporations, financial services, credit, and insurance as to:
>
> - the adequacy of civil and criminal penalties relating to the financial system, including corporate fraud
> - the need for alternative enforcement mechanisms
> - the adequacy of existing penalties for serious contraventions
> - the adequacy of ASIC's information gathering powers, and
> - any other matters which arise during the course of the Taskforce's review, which appear necessary to address any deficiencies in ASIC's regulatory toolset.[281]

Australian Transaction Reports and Analysis Centre

2.210 As set out in the AGD's 2016 submission, AUSTRAC—'Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regulator and specialist Financial Intelligence Unit [(FIU)]'—has the responsibility of:

> …collecting, analysing and disseminating financial intelligence to its designated law enforcement, national security, revenue collection and social welfare partner agencies. As part of this role, AUSTRAC allows domestic partner agencies (for example the [Australian Taxation Office], ASIC, the ACC and the AFP) on-line access to the AUSTRAC database of financial transaction reports information.
>
> AUSTRAC also has an extensive international network of ties with more than 80 foreign FIUs, which enables AUSTRAC to facilitate the exchange of financial and other intelligence between Australian agencies and overseas counterparts. AUSTRAC also provides on-site training and analytical assistance to those domestic agencies to assist their efforts in combating crime and corruption, revenue evasion, the funding of terrorism and major fraud.
>
> Under the AML/CTF regulatory framework AUSTRAC supervises compliance and transaction reporting obligations of more than 14,000 entities in the banking and finance, gambling, remittance and bullion sectors. The AML/CTF framework provides these regulated entities with the toolkit to identify and combat corruption. The framework obliges

280 AGD, *Submission 11*, p. 4.

281 AGD, *Submission 11*, p. 5.

> regulated entities to identify and verify customers, assess beneficial ownership and control and the source of the customer's funds and identify whether the customer is a politically exposed person. Where a regulated entity identifies any suspicious activity relating to a customer's behaviour or transaction activity, it must be reported to AUSTRAC.[282]

2.211 The AGD subsequently provided the committee with an update on AUSTRAC's work:

> In March 2017, AUSTRAC established the Fintel Alliance, a centre of excellence for financial intelligence. The Fintel Alliance brings together government, industry, and international partners to take a collaborative approach to combating money laundering, terrorism financing, and other financial crimes. It will optimise the use of over 100 million reports from industry each year to produce powerful financial intelligence to target Australia's high money laundering and terrorism financing risks.[283]

Other agencies/contributors to the multi-agency approach

2.212 According to the AGD's submissions, other agencies with responsibilities under the multi-agency integrity framework include the:

- **ACIC**, and its powers to conduct operations against serious and organised crime. It possesses coercive powers to conduct 'special operations and investigations to obtain information where traditional law enforcement methods are unlikely to be successful'.[284]
- **DIBP** and its responsibility to screen non-citizens' risk profile and determine whether a person has 'either alleged or have engaged in corrupt conduct, or have actually been charged with or convicted of corruption offences' and in these instances, the 'non-citizen will have their visa application assessed for refusal on character grounds or, if they are already a visa holder, they will be assessed for possible visa cancellation'.[285]
- **Department of Prime Minister and Cabinet** (DPMC) through its work on the OGP and its responsibility to apply the Ministerial Code of Conduct and the Lobbying Code of Conduct (these are discussed in greater detail later in this chapter).[286]
- **CDPP** that prosecutes crimes against Commonwealth law on matters relating to corruption, fraud, money laundering and commercial offences.[287]

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282 AGD, *Submission 23* [2016], p. 4.

283 AGD, *Submission 11*, p. 4.

284 AGD, *Submission 23* [2016], p. 3.

285 AGD, *Submission 23* [2016], p. 4.

286 AGD, *Submission 23* [2016], p. 5.

287 AGD, *Submission 23* [2016], p. 5.

2.213 Finally, another important component to Australia's integrity system is the judicial system. The AGD submitted:

> Australia's independent and impartial judicial system protects against corruption. Judicial officers act independently of the parliament and the executive. Constitutional guarantees of tenure and remuneration assist in securing judicial independence and impartiality.[288]

2.214 Other agencies noted for having a role in 'safeguarding the integrity of government administration' include the:

- Australian Prudential Regulation Authority (APRA);
- Department of Human Services;
- Department of Defence;
- Department of Foreign Affairs and Trade (DFAT);
- Treasury;
- ATO;
- Fair Work Ombudsman;
- Australian Competition and Consumer Commission (ACCC);
- Department of Finance;
- ONA; and the
- Parliamentary Services Commissioner.

2.215 The AGD advised that each agency is required to implement its own 'internal policies to prevent, detect, investigate and respond to corruption and misconduct as required under the Commonwealth fraud control policy, APS Values, APS Code of Conduct and the PS Act'.[289]

2.216 Further consideration of the multi-agency framework is found in chapter 4. The committee's analysis includes considerations of gaps and vulnerabilities in the multi-agency framework, along with arguments for and against establishing a national integrity commission.

Interaction between federal and state integrity agencies

2.217 The committee received evidence about the interaction between the existing Commonwealth integrity agencies and their state counterparts.

2.218 For example, in its submission to the committee ACLEI noted that it 'has much to gain by working closely with state agency counterparts and with state police forces', and provided the following example:

> …ACLEI's strategy of sensitising state agencies to the likelihood that their criminal intelligence records and investigations will hold incidental insights

288 AGD, *Submission 23* [2016], p. 1.

289 AGD, *Submission 23* [2016], p. 6.

> about the possible compromise of high-risk Commonwealth law enforcement activities is bringing actionable information to light. The longer-term benefit is that pathways will be established that will uncover new information about corruption and play a role in strengthening Australia's integrity arrangements more generally.[290]

2.219 It was also stated that:

> ACLEI conducts its formal relationships with state integrity counterparts under the framework of the Australian Anti-corruption Commissions Forum (AACF)—a regular summit meeting of anti-corruption agencies throughout Australia. ACLEI representatives also participate in the AACF sub-groups—including: the Executive Co-ordination Group (comprising senior executives), the Legal Forum (comprising legal officers) and the Corruption Prevention Practitioners Forum (consisting of corruption prevention experts).[291]

2.220 In his evidence to the committee, the Integrity Commissioner noted that 'we are constantly in engagement with the state agencies on all issues relating to the integrity and anticorruption space that I work in and that they work in'.[292]

2.221 In response to a question on notice from the committee, the Queensland Crime and Corruption Commission (Qld CCC) informed the committee about the particulars of an Memorandum of Understanding (MOU) between the Qld CCC; the South Australian Independent Commission Against Corruption (SA ICAC); the Western Australian Corruption and Crime Commission; the New South Wales Independent Commission Against Corruption (NSW ICAC); the Tasmanian Integrity Commission; the Victorian Independent Broad-based Anti-corruption Commission (IBAC); and ACLEI.[293]

2.222 The Qld CCC stated:

> The MOU was not a general commitment to cooperating with one another. Rather the agency heads agreed to provide staff to a requesting agency to investigate allegations of misconduct by staff members in the requesting agency.
>
> I can say that there are good levels of cooperation between agencies. A very good example is the Australian Public Sector Anti-corruption Conference which is jointly hosted by a number of agencies every two years.[294]

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290 ACLEI, *Submission 12*, p. 8.

291 ACLEI, *Submission 12*, p. 8.

292 Mr Griffin, ACLEI, *Committee Hansard*, 5 July 2017, p. 52.

293 Mr Forbes Smith, Chief Executive Officer, Crime and Corruption Commission (Qld CCC), answers to questions on notice, 15 May 2017 (received 23 May 2017), p. 1.

294 Mr Smith, Qld CCC, answers to questions on notice, 15 May 2017 (received 23 May 2017), p. 1.

Other integrity measures

2.223 In addition to the integrity agencies discussed above, there exist a number of legislative instruments and other mechanisms that contribute to the Commonwealth integrity framework.

2.224 For example, in its 2016 submission, the APSC noted that the PID Act, the PGPA Act and the *Commonwealth Fraud Control Framework 2014* (the framework) underpin the APS integrity framework.[295]

2.225 In its 2016 submission, the AGD identified the following Acts that comprise the government's anti-corruption framework:

- the Criminal Code;
- the *Crimes (Superannuation Benefits) Act 1992*;
- the Corporations Act;
- the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML Act);
- the LEIC Act;
- the PGPA Act;
- the PID Act; and
- the PS Act.[296]

2.226 The AGD also noted that the Fraud Rule—section 10 of the Public Governance, Performance and Accountability Rule 2014—'sets out the key principles of fraud control under the PGPA Act framework and binds all entities'.

2.227 In its 2016 submission, the Law Council of Australia identified that the following acts 'may also be used in pursuing corrupt conduct':

- the AML Act;
- the *Proceeds of Crime Act 2002*;
- the PGPA Act;
- the Corporations Act;
- the LEIC Act;
- the *Australian Border Force Act 2015*; and the
- AFP Act.[297]

2.228 The following sections examine some of these Acts and mechanisms, as well as others that have come to the committee's attention, in greater detail.

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295 APSC, *Submission 16* [2016], p. 3.

296 AGD, *Submission 23* [2016], p. 6.

297 Law Council of Australia, *Submission 18* [2016], p. 6.

Public Interest Disclosure Scheme (whistleblower protections)

2.229 The PID Scheme was established in 2013 and commenced operation on 15 January 2014[298] as a means to promote integrity and accountability in the Commonwealth public sector. The PID Scheme, according to the then Attorney-General, the Hon. Mark Dreyfus MP, was intended to:

> …establish clear procedures for allegations of wrongdoing to be reported by public officials and for findings of wrongdoing to be rectified. The emphasis on the scheme is on the disclosure of wrongdoing being reported to and investigated within government. To this end, the bill places obligations on principal officers of agencies to ensure that public interest disclosures are properly investigated and that appropriate action is taken to deal with recommendations relating to their agency. In short, these are obligations to act on disclosures of wrongdoing and to fix wrongdoing where it is found. A well-implemented and comprehensive scheme should lead to a discloser having confidence in the system, and remove incentive for the discloser to make public information to parties outside government.[299]

2.230 Under the PID Act, public officials are protected from reprisal action for 'disclosing suspected illegal conduct, corruption, maladministration, abuses of public trust, deception relating to scientific research, wastage of public money, unreasonable danger to health or safety, danger to the environment or abuse of position or conduct which may be grounds for disciplinary action'.[300]

2.231 The Commonwealth Ombudsman and the IGIS[301] are the statutory authorities responsible for the promotion of the PID Act, as well as the monitoring and reporting of its operation. The Commonwealth Ombudsman informed the committee that a PID can be either made to an agency itself, or the Commonwealth Ombudsman. If made to the Commonwealth Ombudsman:

> …by and large, [the disclosure] is referred back to the agency. In unique circumstances it is investigated by our office. In relation to corruption, agencies have internal fraud, corruption and compliance mechanisms which they would use for their investigations, and we also have the capacity to refer matters to the policing authorities.[302]

2.232 The committee asked the Commonwealth Ombudsman whether individuals making a PID express reluctance to raise their complaint with the agency concerned.

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298 Commonwealth Ombudsman, *Annual report 2013–14*, p. 66.

299 The Hon. Mark Dreyfus MP, *House of Representatives Hansard*, 19 June 2013, p. 6407.

300 Commonwealth Ombudsman, *Public Interest Disclosure*, http://www.ombudsman.gov.au/about/making-a-disclosure (accessed 29 June 2017).

301 IGIS is responsible for those intelligence agencies under its jurisdiction.

302 Ms Brigid Simpson, Acting Director, Public Interest Disclosure Team, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 49.

The Commonwealth Ombudsman responded that the PID Act is still in its first iteration, and for that reason the office is:

> …going through an educative phase where we are promoting awareness and a pro-disclosure culture across the Commonwealth. A large portion of the Ombudsman's role is actually in educating public servants, current and former, and contracted service providers about the PID scheme. We do get a lot of informal correspondence and telephone calls from public servants who are interested in knowing a bit more about the scheme and potentially where to go. We do often recommend that they go internally to an agency first, but obviously they are able to make a complaint or a disclosure directly to our office.[303]

2.233 More specifically, the Commonwealth Ombudsman provides support by detailing the rules and the levels of protection available to a person once a disclosure is made.[304] Further:

> It is not unforeseeable that individuals would rather not approach the agency at first instance, disclose who they are and then make a decision about whether they are going to proceed or not. We would almost be used as an informational triage point to give some assurance that the mechanisms are in place, that the agency is there to deal with the matter appropriately, and that our office is there to deal with matters if they are not being dealt with appropriately by the agency.[305]

2.234 A part of the Commonwealth Ombudsman's educational responsibilities under the PID Scheme is to seek assurance that agencies conduct a risk assessment for those people who have made a disclosure, and ensure they are looked after internally. If an individual does not think they have been treated appropriately, then he or she may submit a PID complaint.[306] In these instances:

> If a discloser is dissatisfied with the outcome of an investigation, it is open to them to complain to our office. We are able to investigate and provide advice to that agency on administrative best practice. It is quite a positive process that the Ombudsman is involved in where we can give agencies guidance on how to better conduct processes in future. There are also legal avenues under the act for a discloser to access.[307]

2.235 On 15 July 2016, the government released a statutory review of the effectiveness and operation of the PID Act. The report found the experience of whistleblowers under the PID Act was 'not a happy one' and that '[f]ew individuals who made PIDs reported that they felt supported':

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303 Ms Simpson, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 49.

304 Mr Rodney Lee Walsh, Acting Deputy Ombudsman, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 49.

305 Mr Walsh, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 49.

306 Ms Doris Gibb, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 46.

307 Ms Simpson, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 49.

> Some felt that their disclosure had not been adequately investigated or that their agency had not adequately addressed the conduct reported. Many disclosers reported experiencing reprisal as a result of bringing forward their concerns.[308]

2.236 The report found the experience of the agencies showed difficulties applying the PID Act, noting the bulk of the disclosures received 'related to personal employment-related grievances and were better addressed through other processes' and 'the PID Act's procedures and mandatory obligations upon individuals are ill-adapted to addressing such disclosures'.[309]

2.237 The AGD stated that the 33 recommendations found in the report will be considered alongside any findings made by the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) in respect of its inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.[310]

2.238 In the 2016–17 federal budget, the government announced the introduction of new arrangements to better protect tax whistleblowers to further tackle tax misconduct. A consultation paper was also released by the Treasury on 20 December 2016, seeking public comment on a review of Australia's tax and corporate whistleblower protections. In particular, the paper 'sought comment on whether corporate sector protections and similar provisions under financial system legislation should be harmonised with whistleblower protections in the public sector'.[311] The evidence available in the paper was also intended to inform the inquiry by the PJCCFS into whistleblower protections.[312] Submissions to the consultation paper closed on 10 February 2017.

Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors

2.239 At the time of the committee's inquiry into an NIC, the PJCCFS was simultaneously conducting an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

2.240 The PJCCFS was scheduled to table its report on 17 August 2017, but on 15 August 2017 was granted an extension of this reporting date to 14 September 2017. For this reason, the committee has decided against considering in further detail the PID Scheme. However, the committee notes that, if an NIC is established, consideration will need to be given to the impact of the NIC on the PID Scheme.

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308 Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, p. 6.

309 Mr Moss, *Review of the Public Interest Disclosure Act 2013*, p. 6.

310 AGD, *Submission 11*, p. 6.

311 AGD, *Submission 11*, p. 5.

312 AGD, *Submission 11*, p. 6.

Jurisdiction of the PID Act

2.241 Initially, the PID Act's jurisdiction applied to 191 agencies and prescribed authorities.[313] The Act also applied to 'small authorities, committees and Commonwealth companies' with 'a separate legal identity' that sourced most of their resources from larger agencies.[314]

2.242 In the first of the Commonwealth Ombudsman's annual reports that discussed the new scheme, it was stated that principal officers of an agency are required to foster an environment that encourages public officials to disclose suspected wrongdoing, as '[i]t is only through strong agency commitment that public officials will have the confidence to trust and use the scheme and make disclosures'.[315]

2.243 The most recent annual report of the Commonwealth Ombudsman states that the PID Act applies to 175 agencies, and is 'increasingly being used by contracted service providers'.[316]

2.244 The following table provides further statistical information about the use of PIDs from their first introduction to 2015–16.

313 Commonwealth Ombudsman, *Annual report 2013–14*, p. 68.

314 Commonwealth Ombudsman, *Annual report 2013–14*, p. 69.

315 Commonwealth Ombudsman, *Annual report 2013–14*, p. 68.

316 Commonwealth Ombudsman, *Annual report 2015–16*, p. 72.

Table 1: statistical data on the use of PIDs

Year	
2013–14	Number of agencies that made a disclosure: 48 (out of 191 agencies)
2014–15	Number of agencies that made a disclosure: 58 (out of 185 agencies) Number of PIDs made: 639. Agencies identified 707 kinds of disclosable conduct. Conduct engaged in for the purpose of corruption: 25 out of 707 (4 per cent)
2015–16	Number of agencies that made a disclosure: 69 (out of 175 agencies). Number of PIDs made: 612. Agencies identified 707 kinds of disclosable conduct. Conduct engaged in for the purpose of corruption: 25 out of 707 (4 per cent)

Public Governance, Performance and Accountability Act 2013

2.245 The PGPA Act came into force on 1 July 2014, replacing the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*.[317]

2.246 The objects of the PGPA Act are:

> (a) to establish a coherent system of governance and accountability across Commonwealth entities; and
>
> (b) to establish a performance framework across Commonwealth entities; and
>
> (c) to require the Commonwealth and Commonwealth entities:
>
> > (i) to meet high standards of governance, performance and accountability; and
> >
> > (ii) to provide meaningful information to the Parliament and the public; and

317 Department of Finance, *Transitional arrangements*, http://www.finance.gov.au/resource-management/pgpa-legislation/transition/ (accessed 23 August 2017).

(iii) to use and manage public resources properly; and

(iv) to work cooperatively with others to achieve common objectives, where practicable; and

(d) to require Commonwealth companies to meet high standards of governance, performance and accountability.[318]

2.247 The PGPA Act 'establishes a coherent system of governance and accountability for public resources, with an emphasis on planning, performance and reporting' and 'applies to all Commonwealth entities and Commonwealth companies'.[319]

Commonwealth Fraud Control Framework

2.248 The AGD's 2016 submission discussed in detail the Commonwealth Fraud Control Framework. It was stated that the framework consists of three key documents, as follows:

- the Fraud Rule, which 'sets out the key principles of fraud control for all entities under the PGPA Act framework' and requires entities to conduct risk assessments and identify fraud risks;
- the *Commonwealth Fraud Control Policy*, which 'binds non-corporate Commonwealth entities and sets out key procedural requirements for fraud training, investigation, response and reporting'; and
- the *Fraud Guidance*, which 'provides better practice advice on fraud control arrangements'.[320]

2.249 The framework's fraud policy identifies the AFP as the primary law enforcement agency responsible for the investigation of serious or complex fraud against the Commonwealth. Agencies and entities under the Commonwealth:

> …must refer all stances of potential serious or complex fraud offences to the AFP in accord with the [Attorney-General's Information Service (AGIS)] and AFP referral process, except in the following circumstances:
>
> a) entities that have the capacity and the appropriate skills and resources needed to investigate potential criminal matters and meet the requirements of the…CDPP in preparing briefs of evidence and the AGIS for gathering evidence, or
>
> b) where legislation sets our specific alternative arrangements.[321]

2.250 Information was also provided about how the framework operates:

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318 *Public Governance, Performance and Accountability Act 2013*, s. 5.

319 Department of Finance, *PGPA Act 2013*, http://www.finance.gov.au/resource-management/pgpa-act/ (accessed 23 August 2017).

320 AGD, *Submission 23* [2016], pp. 7–8.

321 AGD, *Commonwealth Fraud Control Framework*, 2014, https://www.ag.gov.au/CrimeAndCorruption/FraudControl/Documents/CommonwealthFraudControlFramework2014-NotAccessible.pdf (accessed 28 August 2017), pp. B2–B3

> Under the Framework, each entity is responsible for its own fraud control arrangements, including investigating and responding to fraud incidents that are not handled by law enforcement agencies. Each entity is also responsible for its own fraud control arrangements, with oversight provided by the Independent Audit Committees, annual reporting and certification requirements under the PGPA Act, and independent audits conducted by the ANAO. The Framework covers a range of incidents considered to be corruption.[322]

2.251 The AGD did not refer to the framework in its 2017 submission, or discuss the framework during its appearance before the committee.

Open Government Partnership

2.252 Australia has been a member of the OGP since 2015.[323] The OGP requires its 70 member countries to engage with civil society[324] to 'co-create a National Action Plan [NAP] every two years, with independent reporting on progress'. These plans aim to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance.[325]

2.253 In December 2016, the government released the first NAP under the OGP. Ms Nicole Rose PSM of AGD, provided the committee with the following background to the NAP:

> In December 2016, the government released Australia's first national action plan under the Open Government Partnership. This plan includes 15 commitments to enhance public sector integrity and transparency. This is a considerable development and represents a significant commitment by government to promote open, transparent and accountable government. The department is responsible for relevant commitments under the plan, relating to combating corporate crime and a national integrity framework. Under the first, the government is actively exploring reforms to help improve our approach to corporate corruption, including a proposed model for deferred prosecution agreements and reforms to our foreign bribery offence to remove unnecessary impediments to successful prosecution. Some of the staff here today are experts in that area.[326]

2.254 As noted by Ms Rose, the NAP makes a number of commitments relevant to matters of integrity. These include:

- improving whistleblower protections in the tax and corporate sectors;

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322 *Submission 23* [2016], p. 8.

323 Department of Prime Minister and Cabinet (DPMC), *Open Government Partnership – Australia*, available: http://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18/introduction (accessed 30 June 2017).

324 Civil society refers to people and organisations outside of government, including non-government organisations, businesses, academia, community groups and the public.

325 AGD, *Submission 11*, p. 4.

326 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 25.

- improving transparency of beneficial ownership;
- enhance disclosure of extractive industry payments and government revenue from oil, gas and mining sectors;
- strengthening Australia's ability to prevent, detect and respond to corporate crime, bribery of foreign officials, money laundering and terrorism financing;
- enhancing the integrity of the electoral system by working with Parliament and the public to investigate the 2016 election, utilise technology in elections and consider the framework of donations to political parties and other political entities;
- develop a national integrity framework aimed at preventing, detecting and responding to corruption in the public sector through the Government Business Roundtable on Anti-corruption (held on 31 March 2016)327 and reviewing the jurisdiction and capabilities of the AFP and the ACLEI; and
- review the Commonwealth's compliance with the Open Contracting Data Standard.[328]

2.255 The DPMC coordinates Australia's involvement in, overall delivery of and reporting for the OGP. As of July 2017, the interim working group had been provided with reporting on each of the OGP's commitments. The DPMC is also currently in the process of developing a website to include a dashboard with the most up-to-date information on the delivery of the OGP.[329]

2.256 To monitor and drive the implementation of the NAP, the DPMC informed the committee that the government will establish an Open Government Forum, comprising both government and civil society representatives.[330] This forum will replace the interim working group[331] and will drive the delivery of the OGP's commitments, develop the next NAP and raise awareness of open government more

327 The Government Business Roundtable on Anti-corruption was held on 31 March 2016. This roundtable brought together representatives from government and business to consider the cooperation and consultation on anti-corruption work, including discussion about steps to be taken to better protect Australian businesses from corruption. See, AGD, *Submission 11*, p. 5.

328 DPMC, *Australia's first Open Government National Action Plan 2016–18*, http://ogpau.pmc.gov.au/australias-first-open-government-national-action-plan-2016-18 (accessed 30 June 2017).

329 Mr William Story, Assistant Secretary, Strategic Coordination Unit, DPMC, *Committee Hansard*, 5 July 2017, p. 6.

330 Civil society representatives are from groups interested in open data, anti-corruption, integrity measures and accountability, expertise in international matters and legal groups. See, Mr Story, DPMC, *Committee Hansard*, 5 July 2017, p. 7.

331 DPMC, *Join Australia's first Open Government Forum*, http://ogpau.pmc.gov.au/2017/06/08/join-australias-first-open-government-forum (accessed 30 June 2017).

generally.[332] The forum will also provide feedback on any improvements to the DPMC's reporting of the OGP.[333]

2.257 The committee was informed that a review of the jurisdiction and capabilities of ACLEI and the AFP's FAC are planned under the NAP. This review will 'occur in the context of public consultations to develop Australia's second NAP', scheduled to be completed by 30 June 2018.[334]

2.258 The committee queried DPMC about the Open Government Forum and whether it will be tasked with informing the public about the Commonwealth's multi-agency approach to corruption, integrity and maladministration. In response, DPMC said it was recommended:

> …that the forum have a role in increasing awareness of open government. The forum, when it first meets, will need to consider how it does that. I only make the general comment, which may be most helpful, that I would expect that its work in that respect will be focused on both current commitments and broader aspirations around opportunities for more open government.[335]

2.259 Two key aspects of the NAP are the foreign bribery reforms and the creation of a deferred prosecution agreement scheme.

Foreign bribery reforms

2.260 The AGD outlined the government's reform agenda to improve the effectiveness of offences in the Criminal Code to address foreign bribery and remove possible impediments to successful prosecution.

2.261 To assist with the government's reforms, a consultation paper was released on 4 April 2017, which 'sought comment on possible new offences of recklessly bribing a foreign public official and failure to prevent foreign bribery'.[336]

2.262 The AGD, AFP and the CDPP contributed to the consultation paper. These three agencies looked at the formulation of Australia's foreign bribery offences, including the OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*,[337] and through this process identified:

> …potential issues with the offence that may be difficult to prove beyond a reasonable doubt to that criminal standard. So, essentially, the reforms that we laid out in the discussion paper look at both possible amendments to the

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332 Mr Story, DPMC, *Committee Hansard*, 5 July 2017, p. 7.

333 Mr Story, DPMC, *Committee Hansard*, 5 July 2017, p. 6.

334 AGD, answers to questions on notice, 5 July 2017 (received 28 July 2017).

335 Mr Story, DPMC, *Committee Hansard*, 5 July 2017, p. 8.

336 AGD, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx (accessed 22 August 2017).

337 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Paris, 17 December 1997, entry into force 17 December 1999, [1999] ATS 21.

> existing offence in section 70.2 of the Criminal Code and, also, possible new offences that could be introduced to assist with enforcing our foreign bribery offence.[338]

2.263 The AGD website notes that submissions to the consultation paper closed on 1 May 2017, and publishes the 16 submissions received.[339] Ms Rose informed the committee of the status of these reforms, noting that the AGD has publicly consulted on a number of reforms, including those in respect of foreign bribery, and that it is 'working on those as we speak'.[340]

Deferred Prosecution Agreement Scheme

2.264 The government is also currently considering a Deferred Prosecution Agreement Scheme (DPA scheme). Under the proposed DPA scheme, if a company 'has engaged in a serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement to comply with a range of specified conditions'.[341] Conditions of the DPA scheme are likely to include:

- the requirement that companies cooperate with any investigation;
- paying a financial penalty;
- admitting to agreed facts; and
- implementing a program to improve the company's future compliance.[342]

2.265 If an agreement is reached and a company fulfils its obligations under the agreement, a company would not be prosecuted for its actions.[343]

2.266 On 31 March 2017, the government released a consultation paper outlining the proposed model of the DPA scheme. The AGD received 18 responses to the

338 Mr Tom Sharp, Acting Director, Criminal Law Reform Section, AGD, *Committee Hansard*, 5 July 2017, p. 27.

339 AGD, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, https://www.ag.gov.au/Consultations/Pages/Proposed-amendments-to-the-foreign-bribery-offence-in-the-criminal-code-act-1995.aspx (accessed 22 August 2017).

340 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 26.

341 AGD, *Proposed model for a deferred prosecution agreement scheme in Australia*, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 30 June 2017).

342 AGD, *Proposed model for a deferred prosecution agreement scheme in Australia*, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 30 June 2017).

343 AGD, *Proposed model for a deferred prosecution agreement scheme in Australia*, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 30 June 2017).

consultation paper.[344] As with the foreign bribery reforms, Ms Rose commented that AGD is working on the DPA scheme.[345]

Register of beneficial ownership

2.267 The AGD submission noted that, on 13 February 2017, a public consultation paper was released by Treasury 'seeking views on options to increase transparency of the beneficial ownership of companies', including 'views on the details, scope, and implementation of a beneficial ownership register for companies'.[346] This was '[a] key milestone' for the government's commitment 'to improve transparency of information on beneficial ownership and control of companies available to relevant authorities' under the new NAP.[347]

2.268 The AGD stated that:

> The consultation delivers on commitments made by Australia at the UK Anti-Corruption Summit in May 2016 and in the National Action Plan. Additionally, at the G20 Leaders' Summit in September 2016, Australia agreed to the G20 2017-2018 Anti-Corruption Action Plan, which stated that transparency over beneficial ownership is critical to preventing and exposing corruption and illicit finance.[348]

2.269 No further updates were provided in evidence to the committee at its hearings, and no other submitters or witnesses commented on this register.

AusTender reporting

2.270 The AGD's 2016 submission set out the following information in respect of procurement rules and AusTender:

> The Department of Finance is responsible for the 2014 Commonwealth Procurement Rules (CPRs) which bind non-corporate Commonwealth entities and prescribed corporate Commonwealth entities. The CPRs combine both Australia's international obligations and good practice, and represent the framework under which entities govern and undertake their own procurement. The CPRs enable agencies to design processes that are robust, transparent and instil confidence in government procurement. The CPRs also require that entities subject to the PGPA Act report their procurement contracts on AusTender, the Australian Government's procurement information system.[349]

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344 AGD, *Proposed model for a deferred prosecution agreement scheme in Australia*, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 30 June 2017).

345 Ms Rose, AGD, *Committee Hansard*, 5 July 2017, p. 26.

346 AGD, *Submission 11*, p. 7.

347 The Treasury, *Increasing transparency of the beneficial ownership of companies*, http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2017/Beneficial-ownership-of-companies (accessed 22 August 2017).

348 AGD, *Submission 11*, p. 7.

349 AGD, *Submission 23* [2016], p. 8.

2.271 The AGD's 2017 submission referred to this earlier information, and also provided the following additional information:

> The CPRs require entities subject to the [PGPA Act] to report their procurement contracts valued at $10,000 and above on AusTender, the Australian Government's procurement information system. Finance is currently undertaking a review of Austender reporting's compliance with the Open Contracting Data Standard. The review is a commitment under the Open Government National Action Plan.[350]

2.272 No further information was provided in evidence to the committee at its hearings, and no other submitters or witnesses commented on AusTender.

The role of the Australian Parliament

2.273 The Australian Parliament plays an important role in the Commonwealth integrity framework. The Parliament facilitates oversight of Commonwealth departments and agencies, as well as parliamentarians themselves. For example, departments and agencies are subjected to scrutiny via a range of parliamentary mechanisms such as the Senate estimates process, the Joint Committee of Public Accounts and Audits (JCPAA), other committee inquiries, questions to ministers, and orders for the production of documents.

2.274 The integrity of parliamentarians themselves is subjected to scrutiny via mechanisms such as the Committees of Privileges and Senators' or Members' Interests.

Senate estimates

2.275 In accordance with Senate standing orders, 'annual and additional estimates, contained in the documents presenting the particulars of proposed expenditure and additional expenditure' are referred to Senate legislative and general purpose committees for examination and report.[351] These committees also have the power to inquire into and report on annual reports and the performance of departments and agencies allocated to them.[352] The examination of annual reports often occurs in conjunction with consideration of estimates; however, separate reports are presented.

2.276 *Odgers' Australian Senate Practice* describes estimates as:

> …a key element of the Senate's role as a check on government. The estimates process provides the major opportunity for the Senate to assess the performance of the public service and its administration of government policy and programs. It has evolved from early efforts by senators to elicit basic information about government expenditure to inform their decisions about appropriation bills, to a wide-ranging examination of expenditure with an increasing focus on performance. Its effect is cumulative, in that an

350 AGD, *Submission 11*, p. 8.

351 The Senate, *Standing Orders and other orders of the Senate*, August 2015, SO 26.

352 The Senate, *Standing Orders and other orders of the Senate*, August 2015, SO 25(2)(a) and 25(20).

> individual question may not have significant impact, but the sum of questions and the process as a whole, as it has developed, help to keep executive government accountable and place a great deal of information on the public record on which judgments may be based.[353]

2.277 A particular feature of Senate estimates, in contrast with other inquiries by Senate legislative and general purpose committees, is the requirement that estimates—both hearings and written answers to questions taken on notice—must be in public: there is no capacity for estimates committees to receive confidential material (in the absence of a specific resolution of the Senate to that effect). This, combined with the broad scope of Senate estimates ('there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise'[354]), mean that senators are empowered to question Commonwealth departments and agencies on virtually all aspects of public administration.

2.278 The estimates process also serves to highlight the importance and role of other agencies that form the national integrity framework. For example, reports by the ANAO are sometimes relied upon during questioning of agencies in relation to their financial and governance arrangements:

> **Senator JOHNSTON:** Is it fair to say that this new contract is for garrison health services?
>
> **Rear Adm. Walker:** Yes.
>
> **Senator JOHNSTON:** In paragraph 23 of the ANAO report of 2010 said that they thought the real cost of delivering garrison health services was somewhere between—and this is the cause of a little consternation—$455 million and $654 million per annum. Defence's figures were down as low as $293 million. They questioned the reliability of those figures given the growth rate in the community as opposed to the cost growth rates inside Defence, which they saw as much less than the community average, which they did not accept.
>
> I want to come back to my original question. This new contract is very interesting. I think the jury is still a little out on it, if I can be so bold. What are the savings to Defence? I then want to talk to you about the delivery of service and the maintenance of service to service personnel. What other savings to Defence do you perceive in the budget with this contract for $1.3 billion over four years?
>
> **Rear Adm. Walker:** It is not really a question of savings. We know that the cost of the increase of the cost of health care in the civilian community, within the Australian community, is significantly above the CPI historically, so we know the cost of health care continues to rise as people's

353 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 478.

354 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 655.

> expectations of health care and their requirements rise. This is not about cost savings because we will still provide the full range of health care, the quality of health care. But if we can do it a little more efficiently, it means I have more money in the budget to apply to healthcare delivery and that helps to mediate some of those increases in healthcare delivery that we know occur. But it is also that, if I do it more efficiently, then I can potentially either have more staff which can reduce waiting times or I can provide different health promotion type activities.
>
> **Senator JOHNSTON:** So you think it will be better.
>
> **Rear Adm. Walker:** We would not be doing it if we did not think it was going to be better.
>
> **Senator JOHNSTON:** That is given. How do you propose to measure and gauge whether it is in fact better?
>
> **Rear Adm. Walker:** I think, as I said in my opening remarks, that in our previous contracts we have never had really any good quality key performance indicators and for me it is about the delivery of quality health care. Under the new contractual arrangements, there is a requirement for our contractors to participate in what we call clinic and governance activities, clinical reviews. This is about where we measure what health care we are providing, how we measure complaints, how we address complaints, how we look at if there are issues and about the performance. We have never had that before and we have now improved our own clinical governance regime…[355]

2.279 Integrity matters can and do arise in Senate estimates hearings. For example, in 2014, the Secretary of the DIBP made the following statement to the Senate Legal and Constitutional Affairs Legislation Committee during supplementary budget estimates:

> On indulgence, this is a rather unusual circumstance that I need to advise the committee of. When I last appeared before you I was in the role of chief executive. I had been providing, as you would be well aware, periodic updates on matters pertaining to integrity and corruption within our service. When we met on 26 May, I was not in a position to disclose—largely because I did not know, for reasons I am about to disclose— the circumstances pertaining to the prosecution of my brother, Mr Fabio Pezzullo, who was a former officer of the Customs and Border Protection Service. I had intended at that time to include whatever updates there were pertaining to that matter once the court proceedings pertaining to that matter had been concluded. That occurred in June, when I was still the chief executive. I issued an all staff message to explain the circumstances in the highly unusual circumstance where the head of an agency was in a direct sibling relationship with a former officer who was the subject of criminal proceedings. I advised my then staff on 12 June about those circumstances.

355 Senator the Hon. David Johnston and Rear Admiral Robyn Walker AM, Commander Joint Health Command, Department of Defence, Senate Foreign Affairs, Defence and Trade Legislation Committee, *Committee Hansard*, 17 October 2012, pp. 31–32.

> With your permission, Chair, I would like to read out relevant extracts from that all staff message and then, subject to your review of the relevant document, I would like to table that document. This is a document that is dated 12 June, so please bear with me and understand that it is contemporaneous to that period:
>
> With the conclusion of his trial, I am now able to make a few brief remarks about the situation regarding my brother, the former Customs and Border Protection officer Mr Fabio Pezzullo. Now that these matters have been heard in court and are likely to be resolved before the next meeting of the Senate estimates committee—which of course is tonight—I intend to include an appropriate public summary of these matters in any future updates on integrity I provide to the Senate.
>
> Since that time, I was elevated to the secretaryship, so this is really my only opportunity to discharge that commitment.
>
> For obvious reasons to do with preventing any conflict of interest or perceived conflict of interest, I have been kept at arm's length from this matter both as Chief Operating Officer prior to September 2012, as the acting CEO of the service from September 2012 to February 2013 and as CEO since February 2013. Successive ministers have been briefed on this matter and arrangements were put in place when I became the CEO to ensure that I was shielded from relevant information concerning the case and would not be placed in a position of having to make any decisions regarding former officer Pezzullo should it have ever come to that. The fact that such arrangements were to be put in place was advised to the relevant Senate estimates committee in February 2013 in public evidence given by the then Secretary of the [AGD], Mr Wilkins.
>
> The all staff message then goes on to talk about the highly unusual circumstance that this gave rise to and the need for such separation to be put in place. It concluded with the following statement:
>
> This case, involving my brother, shows that no-one is above the law and the matter has been dealt with in accordance with the law, as should always be the case.
>
> I am now in a position to advise the committee that there are no further proceedings pending. When we last met, the matter was sub judice. I would like to consider the matter closed.[356]

2.280 While in this instance the integrity matter was not first uncovered during an estimates hearing, it serves to demonstrate that Commonwealth public servants and senators alike view estimates as a forum in which it is appropriate to disclose and discuss such matters. More broadly, and as already highlighted, Senate estimates hold Commonwealth public sector agencies to account and require them to assess and explain their performance, including their integrity.

Joint Committee of Public Accounts and Audit

2.281 The JCPAA is one of the Parliament's longest standing committees, having been established in 1913.[357] The JCPAA is established by the *Public Accounts and*

356 Mr Michael Pezzullo, Secretary, Department of Immigration and Border Protection (DIBP), *Committee Hansard*, 20 October 2014, pp. 142–143.

Audit Committee Act 1951 and is required, among other matters, to examine the accounts of the Commonwealth, examine the financial affairs of Commonwealth authorities, and examine all reports of the Auditor-General. The JCPAA also oversees the ANAO itself.[358]

2.282 The JCPAA's role in examining all reports of the Auditor-General mean it regularly undertakes detailed scrutiny of and makes recommendations on the administration of commonwealth agencies and the expenditure of public funds. For example, the JCPAA recently examined two reports of the Auditor-General on Commonwealth infrastructure spending in relation to the East West Link Project in Melbourne and the WestConnex Project in Sydney and made a series of recommendations about the Department of Infrastructure and Regional Development's administration of this expenditure.[359]

Committee inquiries

2.283 Senate and House Standing Committees, as well as Joint Parliamentary Committees, inquire into matters referred to them by Parliament and, in the case of House committees, a minister, and in the case of certain joint committees, may self-refer matters for inquiry and report.

2.284 Committees largely give consideration to 'proposed laws, the scrutiny of the conduct of public administration and consideration of policy issues'[360] and the role of committees in allowing 'citizens to air grievances about government and bring to light mistreatment of citizens by government'[361] is well recognised.

2.285 For example, in 2012 the House Standing Committee on Economics undertook detailed scrutiny of the knowledge and actions of the board of the Reserve Bank of Australia (RBA) with respect to foreign bribery allegations involving its subsidiaries, Note Printing Australia and Securency International. The committee undertook this scrutiny by way of its regular examination of the RBA's annual report, rather than a specific reference.[362]

2.286 The PJCACLEI reported in 2013 on its examination of the integrity of overseas Commonwealth law enforcement operations. This report also addressed the

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357 Parliament of Australia, *Joint Standing Committee on Public Accounts and Audit—Role of the Committee*, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/Role_of_the_Committee#history (accessed 29 August 2017).

358 *Public Accounts and Audit Committee Act 1951*, ss. 8(1).

359 Joint Parliamentary Committee on Public Accounts and Audit, *Report 462: Commonwealth Infrastructure Spending*, June 2017.

360 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 461.

361 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, 2016, p. 462.

362 House of Representatives Standing Committee on Economics, *Review of the Reserve Bank of Australia Annual Report 2011 (Second Report)*, October 2012, pp. 16–20.

Securency International and Note Printing Australia allegations, as well as the Commonwealth's integrity system more generally.[363]

2.287 The Senate Rural and Regional Affairs and Transport References Committee has recently been tasked with inquiring into the integrity of the water market in the Murray-Darling, following allegations that Commonwealth-owned environmental water had, in effect, been stolen and used for irrigation purposes.[364]

2.288 The PJSCEM recently tabled a report on foreign donations as part of its broader inquiry into the conduct of the 2016 federal election. This report was a response to 'ongoing community concern that there is potential for foreign actors to use donations to influence domestic policy decision making and electoral outcomes', and recommended, among other matters, 'a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties'.[365] The closely related matter of how influential political donations are on public policy decision making will be further examined by the recently established Senate Select Committee into the Political Influence of Donations.[366]

Questions to ministers

2.289 The Senate makes provisions for questions to be asked of ministers in a number of ways: as discussed earlier, questions are put to ministers and public officials during the Senate estimates process; questions without notice may be put to ministers on public affairs during question time on each sitting day; and questions may also be provided on notice to the Clerk of the Senate.

2.290 Whilst senators are able to ask questions of ministers during question time, there is no obligation for ministers to provide an answer.[367] However, rulings on this matter relate to the 'conduct of question time and do not preclude the Senate taking some separate action to obtain the required information'.[368]

2.291 Senators may submit questions on notice to the Clerk of the Senate. These questions are placed on the Notice Paper. According to *Odgers'* '[a] senator who asks a question on notice and does not receive an answer within 30 days may seek an explanation and take certain other actions'.[369] Other actions include:

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363 PJCACLEI, *Integrity of overseas Commonwealth law enforcement operations*, June 2013.

364 *Journals of the Senate*, 16 August 2017, p. 1733.

365 Joint Standing Committee on Electoral Matters, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*, March 2017, pp. xii–xiv.

366 *Journals of the Senate*, 17 August 2017, p. 1760.

367 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 620.

368 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 620.

369 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 623.

- the senator may ask the relevant minister for an explanation;
- at the conclusion of the explanation, the senator may move without notice 'that the Senate take note of the explanation'; or
- 'in the event that the minister does not provide an explanation, the senator may, without notice, move a motion with regard to the minister's failure to provide either an answer or an explanation'.[370]

Orders for the production of documents

2.292 Under standing order 164, the Senate may make an order for the production of documents.[371] The Senate uses orders for documents to obtain information about matters of concern to the Senate. These orders:

> …usually relate to documents in the control of a minister, but may refer to documents controlled by other persons. Documents called for are often the subject of some political controversy, but may simply relate to useful information not available elsewhere.[372]

2.293 An order for the production of documents may be directed to a person or body in possession of documents, or a person or body having the information to compile documents. The Senate has the power to order the production of documents on a permanent basis, requiring periodic production of documents for an indefinite period.[373]

2.294 *Odgers'* notes the importance of this power:

> Orders for production of documents are among the most significant procedures available to the Senate to deal with matters of public interest giving rise to questions of ministerial accountability or the accountability of statutory bodies or officers.[374]

2.295 A refusal by government to comply with an order for documents is commonly based on an argument that to produce the document would not be in the public interest.[375]

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370 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 623.

371 The Senate, *Standing Orders and other order of the Senate*, August 2015, SO 164.

372 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 581.

373 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 582.

374 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 588

375 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 586

2.296 A refusal to comply with such an order may result in the Senate treating the refusal as a contempt of the Senate. However, in cases of government refusal without due cause, the Senate:

> …has preferred political remedies. In extreme cases the Senate, to punish the government for not producing a document, could resort to more drastic measures than censure of the government, such as refusing to consider government legislation.[376]

Committees of Privileges and Senators' and Members' Interests

2.297 The Committees of Privileges and Senators' and Members' Interests play important roles in maintaining the integrity of the parliamentary process and also the integrity of senators and members by requiring them to declare financial interests.

2.298 The Privileges Committees inquire into privilege matters referred to them by their respective Houses; these privilege matters largely relate to cases of alleged interference with senators or members and committees, as well as responses by persons to statements made about them in the Senate or the House. Privilege matters also include those where it is alleged that a senator or member may have acted contrary to parliamentary privilege, for example by misleading a House.[377]

2.299 The Senators' Interests Committee was first established on 17 March 1994 as a commitment given by the government as part of a package of accountability measures in the wake of the forced resignation of the Minister for Environment, Sport and Territories over the alleged misallocation of certain cultural and sporting grants. The House of Representatives has a single Committee of Privileges and Members' Interests.

2.300 Resolutions of the Senate and the House of Representatives require senators and members to declare specified interests both for themselves and also interests of their partner and dependent children of which they are aware. In relation to senators, the register of senators' interests is publicly available; that relating to partners and dependent children is not. The Register of Members' Interests makes publicly available interests of members and their partner and dependent children.

2.301 A registrable interest is:

- a shareholding in public and private companies;
- family and business trusts and nominee companies in which a beneficial interest is held and in which the senator or member, senator's or member's spouse or partner, or a dependent child is a trustee;
- real estate;

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376 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th Edition, Department of the Senate, p. 588.

377 See for example the House of Representatives Standing Committee on Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, March 2016.

- registered directorships of companies;
- partnerships;
- liabilities;
- the nature of bonds, debentures and like investments;
- saving or investment accounts;
- any other assets (excluding household and personal effects) each valued at more than $7500;
- the nature of any other substantial sources of income;
- gifts valued at more than $750 received from official sources or at more than $300 or more where received from other than official sources;
- any sponsored travel or hospitality received where the value of the sponsorship or hospitality exceeds $300;
- being an officeholder of or a financial contributor donating $300 or more in any single calendar year to any organisation; and
- any other interests where a conflict of interest with a senator's public duties could foreseeably arise or be seen to arise.

2.302 The Senate requires senators to provide a statement of registrable interests:

> Within:
>
> (a) 28 days after the first meeting of the Senate after 1 July first occurring after a general election; and
>
> (b) 28 days after the first meeting of the Senate after a simultaneous dissolution of the Senate and the House of Representatives; and
>
> (c) 28 days after making and subscribing an oath or affirmation of allegiance as a senator for a Territory or appointed or chosen to fill a vacancy in the Senate…[378]

2.303 The House requires members to provide a statement of registrable interests within 28 days of making and subscribing an oath or affirmation as a member of the House of Representatives.[379]

2.304 Both houses require senators and members to update their statement where changes occur to their registrable interests: the Senate within 35 days of the change and the House within 28 days.

2.305 Senators and members who knowingly fail to provide, fail to provide within specified time frames and/or provide a false or misleading declaration are guilty of a contempt and are to be dealt with by the Senate or the House accordingly.

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378 The Senate, *Registration and declaration of senators' interests*, 17 March 1994.

379 The House of Representatives, *Registration of Members' interests*, 9 October 1984.

Oversight of parliamentarians' conduct by Privileges Committees

2.306 As stated above, the Privileges Committees are able to examine the conduct of members of their respective houses where that conduct may have interfered with the proceedings of either house or with the performance by a member of their duties. The ability of the Senate and the House of Representatives to make findings of contempt, generally following a recommendation of their respective Privileges Committees, is subject to a statutory test established by section 4 of the *Parliamentary Privileges Act 1987*,[380] which specifies that:

> Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

2.307 As part of a series of resolutions concerning parliamentary privilege agreed to on 25 February 1988, the Senate established criteria to be taken into account by the Committee of Privileges when examining possible contempts[381] and identified a number of matters that may be treated as contempts of the Senate. These matters include activities that go to the integrity of senators in the performance of their duties, including the following:

> **Improper influence of senators**
>
> (2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a senator in the senator's conduct as a senator or induce a senator to be absent from the Senate or a committee.
>
> **Senators seeking benefits etc.**
>
> (3) A senator shall not ask for, receive or obtain, any property or benefit for the senator, or another person, on any understanding that the senator will be influenced in the discharge of the senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a senator, or pursuant to which the senator is in any way to act as the representative of any outside body in the discharge of the senator's duties.[382]

2.308 The *House of Representatives Practice* also identifies several relevant categories of behaviour that could be punished as contempts by the House, including

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380 For a discussion of this statutory test, see Senate Standing Committee of Privileges, *162nd Report: Inquiry into possible false or misleading evidence given to the former Nauru select committee*, May 2016, pp. 2–3.

381 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, p. 789.

382 Harry Evans and Rosemary Laing, eds, *Odgers' Australian Senate Practice*, 14th edition, Department of the Senate, 2016, pp. 791–792.

'[c]orruption in the execution of their office as Members' and '[l]obbying for reward or consideration'.[383] These specific categories of behaviour are further outlined below in the discussion regarding the former Member for Dunkley, the Hon. Bruce Billson.

2.309 The following sections briefly describe instances where the Privileges Committees have received references that broadly concern the integrity of parliamentarians. While the following examples are drawn from the federal Parliament, the committee notes that the privileges committees of state parliaments play similar roles in examining the conduct of parliamentarians and that further examples can be drawn from these jurisdictions.[384]

Senate Standing Committee of Privileges—150th and 142nd reports

2.310 The Senate Standing Committee of Privileges dealt with allegations concerning the integrity of senators' conduct in its 150th and 142nd reports. The following matter was the subject of its 150th report:

> Having regard to matters raised by Senator Kroger relating to political donations made by Mr Graeme Wood, arrangements surrounding the sale of the Triabunna woodchip mill by Gunns Ltd and questions without notice asked by Senator Bob Brown and Senator Milne:
>
> (a) whether any person, by the offer or promise of an inducement or benefit, or by other improper means, attempted to influence a senator in the senator's conduct as a senator, and whether any contempt was committed in that regard; and
>
> (b) whether Senator Bob Brown received any benefit for himself or another person on the understanding that he would be influenced in the discharge of his duties as a senator, or whether he entered into any contract, understanding or arrangement having the effect, or possibly having the effect, of controlling or limiting his independence or freedom of action as a senator or pursuant to which he or any other senator acted as the representative of an outside body in the discharge of their duties as senators, and whether any contempt was committed in those regards.[385]

2.311 The President of the Senate summarised the matter and the seriousness of the allegations in a statement to the Senate on 23 November 2011:

> The matter concerns a possible relationship between Senator Bob Brown and Mr Graham Wood and whether, on the one hand, Senator Brown sought a benefit from Mr Wood in the form of political donations on the

383 Bernard Wright, ed, *House of Representatives Practice*, 6th edition, Department of the House of Representatives, 2012, pp. 752–753.

384 See, for example: Queensland Parliament, Ethics Committee, Report No. 155, *Matter of privilege referred by the Speaker on 20 May 2014 relating to an alleged inducement offered to a member and associated matters*, June 2015; Queensland Parliament, Ethics Committee, Report No. 172, *Matter of privilege referred by the Speaker on 15 September 2016 relating to an alleged deliberate misleading of the Parliament*, December 2016.

385 *Journals of the Senate*, No. 71, 24 November 2011, p. 1945.

> understanding that he would act in Mr Wood's interests in the Senate or, on the other hand, whether Mr Wood, through large political donations, improperly influenced Senator Brown and other Australian Greens senators, including Senator Milne, in the discharge of their duties as senators, including by the asking of questions without notice.
>
> ...there is no question that the matters raised by Senator Kroger are very serious ones. The freedom of individual members of parliament to perform their duties on behalf of the people they represent and the need for them to be seen to be free of any improper external influence are of fundamental importance. Matters such as these go directly to the central purpose of the law of parliamentary privilege, which is to protect the integrity of proceedings in parliament.[386]

2.312 The Committee of Privileges agreed the allegations were serious and also noted that they centred on forms of contempt that it had not previously dealt with. Specifically, the allegations went to the improper influence of senators 'by the offer or promise of any inducement or benefit' and to senators seeking benefits, as set out in privilege resolutions 6(2) and 6(3).[387]

2.313 At the conclusion of its inquiry into this matter, having considered submissions from senators Brown and Milne and from Mr Wood in addition to the material supplied by Senator Kroger to support the reference, the Committee of Privileges came to the following conclusion:

> Given that the committee has found that the evidence before it did not support the contentions in either paragraph of the terms of reference, the committee **concludes** that **no question of contempt arises** in regard to the matter referred.[388]

2.314 The 142nd report of the Committee of Privileges dealt with two references arising from the Senate Economics Legislation Committee hearing on 19 June 2009. The report includes the following summary of the complex background to these two references:

> Late in 2008, as the global financial crisis took hold, two major providers of wholesale floorplan finance to car dealers announced that they would be quitting the Australian market. This action was expected to have a major impact on car dealers who could struggle to secure alternative finance to fund their showroom vehicles. On 5 December 2008, the Prime Minister and Treasurer announced that a Special Purpose Vehicle, also known as

386 The Hon. John Hogg, President of the Senate, *Senate Hansard*, 23 November 2011, p. 9380.

387 Senate Standing Committee of Privileges, *150th Report: Whether there was any improper influence in relation to political donations made by Mr Graeme Wood and questions without notice asked by Senator Bob Brown and Senator Milne*, March 2012, pp. 4–5. The relevant parts of Privilege Resolution 6 are quoted above at paragraph 3.308.

388 Senate Standing Committee of Privileges, *150th Report: Whether there was any improper influence in relation to political donations made by Mr Graeme Wood and questions without notice asked by Senator Bob Brown and Senator Milne*, March 2012, p. 12 (emphasis in original).

> OzCar, would be established to assist in restoring confidence to the market. A trust was created in January 2009 and a program manager selected to administer funds provided by the four major banks from the issuing of securities. The Commonwealth Government would provide a guarantee to securities issued by the scheme with less than a AAA credit rating. A bill, the Car Dealership Financing Guarantee Appropriation Bill 2009, was drafted to appropriate money to fund any claims made on the government's guarantee.9 Mr Godwin Grech was the Treasury fficial chosen to oversee the implementation of the policy. He reported to his senior officers in Treasury, Mr David Martine and Mr Jim Murphy.
>
> Mr Grech subsequently alleged that the Prime Minister and the Treasurer (or their offices) had made representations on behalf of a particular car dealer in Queensland who had lent the Prime Minister an ageing utility to use for electorate business. Thus the affair became known in the media as 'Utegate' and the Opposition pursued the Prime Minister and Treasurer over allegations of political interference and of misleading Parliament, some of the most serious allegations that can be made against ministers. It later emerged that Mr Grech had provided information to Mr Turnbull and Senator Abetz and had shown them a copy of an email which was subsequently revealed to be fabricated. There is no suggestion that any one other than Mr Grech was aware of this fact at the time. The information was used in questions in the House and in Senate committee hearings. Mr Turnbull and Senator Abetz subsequently admitted to having been misled by Mr Grech.[389]

2.315 The first reference to the Committee of Privileges was initiated by Senator Bill Heffernan and concerned possible adverse actions taken against a witness, in this case Mr Grech, as a consequence of his evidence. The alleged adverse actions included threats, public and private intimidation, 'political backgrounding in the media', and the AFP conducting a search of Mr Grech's house.[390] In respect of this element of its inquiry, the committee found that no contempt was committed.[391]

2.316 The second reference, which goes more directly to the integrity of parliamentarians, was initiated by Senator Chris Evans and concerned the possible provision of false or misleading evidence to a committee, or the improper interference with a committee hearing. The reference was made in the following terms:

> In relation to the hearing of the Economics Legislation Committee on 19 June 2009 on the OzCar Program:

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389 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, pp. 3–4.

390 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, pp. 1–2.

391 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 99.

> (a) whether there was any false or misleading evidence given, particularly by reference to a document that was later admitted to be false;
>
> (b) whether there was any improper interference with the hearing, particularly by any collusive prearrangement of the questions to be asked and the answers to be given for an undisclosed purpose,
>
> and, if so, whether any contempt was committed in that regard.[392]

2.317 With respect to the first element of this reference, the Committee of Privileges found that there was evidence that the 'the Economics Legislation Committee was misled by the references to a document later admitted to be false'.[393] The committee also determined that:

> Senator Abetz did not give false or misleading evidence to, or cause any improper interference with, the hearing of the Economics Legislation Committee. He did not know at the time that it was a false document. The committee does not dispute that Senator Abetz was acting in good faith in using material supplied by a source he did not doubt.[394]

2.318 With respect to the second element of the reference, the committee stated:

> - There was no inappropriate pre-arrangement by Senator Abetz of questions and answers for the hearing of the Economics Legislation Committee.
> - Questions which may have a political motive are a commonplace and unremarkable part of the processes employed by senators for holding governments to account.[395]

2.2 The Committee of Privileges determined Mr Grech's evidence to the Economics Legislation Committee was 'objectively false and misleading', and that the committee was 'also misled by references to an email later revealed to have been fabricated by Mr Grech'.[396] However, the Committee of Privileges was not able to make findings about Mr Grech's state of mind at the time of these events and was therefore unable to make a finding of contempt by misleading the Senate against him

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392 *Journals of the Senate*, No. 79, 12 August 2009, pp 2278–79.

393 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 100.

394 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 100.

395 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 101.

396 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 102.

as such a finding depends on establishing the existence of a subjective intention to mislead the Senate.[397]

The Thomson matter

2.319 On 24 November 2014, the House of Representatives referred the following matter to the House Committee of Privileges and Members' Interests:

> Whether, in the course of his statement to the House on 21 May 2012, and having regard to the findings of the Melbourne Magistrates Court on 18 February 2014 in relation to Mr Thomson, the former Member for Dobell, Mr Craig Thomson, deliberately misled the House.[398]

2.320 The statement in question was made by Mr Thomson in response to a report of Fair Work Australia addressing his conduct as the national secretary of the Health Services Union (HSU) prior to entering Parliament.[399] Mr Thomson criticised the process employed by Fair Work Australia and denied any wrongdoing in relation to his expenditure of HSU funds. Mr Thomson's use of a HSU credit card was then the subject of legal proceedings and he was eventually found guilty by the County Court of Victoria with respect to 13 charges of theft.[400]

2.321 The Committee of Privileges and Members' Interests examined the circumstances of Mr Thomson's statement and came to the following conclusion in its report of March 2016:

> The committee could find no evidence to support Mr Thomson's version of what took place in relation to himself or of his claims about the truth of his statement, and finds the explanation in the statement to be implausible. From all the circumstances, the committee believes it can draw the inference that Mr Thomson, the then Member for Dobell, in the course of his statement to the House on 21 May 2012, deliberately misled the House.[401]

2.322 The committee also found:

> …the deliberate misleading of the House in the circumstances of this case would be likely to amount to an improper interference with the free exercise

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397 Senate Standing Committee of Privileges, *142nd Report: Matters arising from the Economics Legislation Committee Hearing on 19 June 2009 (referred 24 June and 12 August 2009)*, November 2009, p. 102.

398 *House of Representatives Votes and Proceedings*, No. 19, 24 February 2014, p. 311.

399 House of Representatives Standing Committee of Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, March 2016, p. 8; *House of Representatives Hansard*, 21 May 2012, pp. 4715–4728.

400 House of Representatives Standing Committee of Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, March 2016, pp. 9–10.

401 House of Representatives Standing Committee of Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, March 2016, pp. 17–18.

> by the House of its authority or functions, and finds Mr Thomson's conduct in deliberately misleading the House constitutes a contempt of the House.[402]

2.323 While noting that the imposition of a punishment for a contempt of the House is a matter to be determined by the House, the committee recommended that an appropriate penalty in this instance would be for the House to reprimand Mr Thomson. The House agreed to the proposed punishment on 4 May 2016.[403]

The Billson matter

2.324 On 15 August 2017, the Manager of Opposition Business in the House of Representatives, the Hon. Tony Burke MP, raised as a matter of privilege media reports that the former Member for Dunkley, the Hon. Bruce Billson, was appointed as director of the Franchise Council of Australia whilst still a member of the House of Representatives (the Billson matter).[404] Upon becoming the director, Mr Billson reportedly began receiving a salary of $75 000 per year. Mr Burke raised a number of concerns, including, but not limited to:

> …whether his conduct as a member of the House both in and outside of the chamber was influenced by the payments he received from the Franchise Council of Australia, including whether any contributions he made in debates in the House may have matched public positions held by the Franchise Council of Australia; whether Mr Billson advocated for, or sought to advance, the interests of the Franchise Council of Australia while a member of the House, owing to the payments he received from the Franchise Council of Australia; whether Mr Billson sought to influence the conduct of other members or ministers to benefit the Franchise Council of Australia, owing to the payments he received from this lobby group; and whether the Franchise Council of Australia, through its payments, sought to influence Mr Billson in his conduct as a member of the House both in and outside of the chamber.[405]

2.325 Mr Burke tabled documents, which in the Opposition's view were evidence of Mr Billson's advocacy for the interests of the Franchise Council of Australia whilst he was in office (in particular, Mr Billson's commentary about amendments to section 46

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402 House of Representatives Standing Committee of Privileges and Members' Interests, *Report into whether the former Member for Dobell, Mr Craig Thomson, in a statement to the House on 21 May 2012 deliberately misled the House*, March 2016, p. 18.

403 *House of Representatives Votes and Proceedings*, No. 5, 4 May 2016, p. 75.

404 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard,* 15 August 2017, p. 34.

405 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard,* 15 August 2017, p. 34.

of the *Competition and Consumer Act 2010*[406] and his advocacy for a Small Business and Family Enterprise Ombudsman).[407]

2.326 Mr Burke also questioned whether Mr Billson 'sought to influence other members of parliament to advance the interests of the Franchise Council of Australia', stating:

> These matters raise serious concerns about the motivation for every action Mr Billson took as a member of parliament while he was reportedly being secretly paid by the Franchise Council of Australia. I also note that, contrary to the House resolution on the registration of members' interests, it is reported that Mr Billson failed to declare both his new position and the income he received in respect of this employment. It is not clear whether this apparent non-disclosure was knowing or unknowing. In relation to this matter, I understand the shadow Attorney-General has, in accordance with practice, written directly to the Committee of Privileges and Members' Interests.[408]

2.327 On 4 September 2017, the Speaker of the House of Representatives further considered the Billson matter. The Speaker, referring to *House of Representatives Practice*, provided two relevant matters that could be considered as contempts. The first, quoting directly from *Erskine May's treatise on the law, privileges, proceedings and the usage of Parliament*, was corruption in the execution of a member's office as a member:

> The acceptance by a Member of either House of a bribe to influence him in his conduct as a Member, or of any fee, compensation or reward in connection with the promotion of or opposition to any bill, resolution, matter or thing submitted or intended to be submitted to either House, or to a committee is a contempt.[409]

2.328 With regard to the second, lobbying for reward or consideration, the Speaker said:

> No Members of the House shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, …advocate or initiate any cause or matter on behalf of any outside body or individual; or urge any Member of either House of Parliament, including Ministers, to do so, by

406 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard,* 15 August 2017, p. 34.

407 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard,* 15 August 2017, p. 35.

408 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard,* 15 August 2017, p. 35.

409 The Hon. Tony Smith MP, Speaker, *House of Representatives Hansard,* 4 September 2017, p. 20.

> means of any speech, Question, Motion, introduction of a bill, or amendment to a Motion or Bill.[410]

2.329 The Speaker commented that 'these matters are not unrelated and there could be a fine distinction between them' and concluded that he was not in a 'position to determine the nature of any connection between the appointment of Mr Billson to the Franchise Council and his subsequent statements and actions'.[411] The Speaker added that the question of these matters being a contempt must meet the test found under section 4 of the *Parliamentary Privileges Act 1987*, conduct that is 'intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions'.[412]

2.330 The Speaker continued that he was not in a position to determine whether there is a prima facie case. However, the Speaker reflected upon the existence of a House of Commons' Code of Conduct, and the absence thereof in the House of Representatives:

> …in the United Kingdom, matters to do with lobbying for reward or consideration would now generally be dealt with as matters of conduct under the House of Commons' Code of Conduct. The House of Representatives does not have a similar code for members, even though a case such as this raises matters that may, potentially, be more to do with appropriate conduct than contempt. In this regard, I note that the Committee of Privileges and Members' Interests has responsibility under the standing orders for questions about a code of conduct for members. I am willing to give precedence to a motion for matters to do with contempt or conduct in relation to the circumstances raised by the Manager of Opposition Business to be referred to the Committee of Privileges and Members' Interests. In doing so, I reiterate that I have not made a determination that there is a prima facie case, but I'm sufficiently concerned by the matters raised to consider that they should be examined by the committee.[413]

2.331 The House of Representatives subsequently agreed to refer the Billson matter to the Committee of Privileges and Members' Interests. The committee will examine the conduct of Mr Billson and the Franchise Council of Australia during the time Mr Billson was in Parliament, and whether this:

> …amounts to corruption in the execution of his office as a member of the House such as to constitute a contempt of the House, and whether his conduct amounts to lobbying for reward or consideration such as to constitute a contempt of the House and whether the Franchise Council, or

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410 The Hon. Tony Smith MP, Speaker, *House of Representatives Hansard,* 4 September 2017, p. 20.

411 The Hon. Tony Smith MP, Speaker, *House of Representatives Hansard,* 4 September 2017, p. 20.

412 The Hon. Tony Smith MP, Speaker, *House of Representatives Hansard,* 4 September 2017, p. 20.

413 The Hon. Tony Smith MP, Speaker, *House of Representatives Hansard,* 4 September 2017, pp. 20–21.

> any of its staff or directors, has by appointing and paying Mr Billson as a director of that lobby group while he was still a member of the House, sought to bribe, or has bribed a member of the House, such as to constitute a contempt of the House.[414]

A parliamentary code of conduct

2.332 Both the House of Representatives and the Senate have previously considered the merits of a parliamentary code of conduct.

2.333 In 2011, the House of Representatives Committee of Privileges and Members' Interests released a discussion paper considering a draft code of conduct for Members. The House committee preferred 'a code of conduct based on aspirational principles and values' but ultimately 'decided not to reach a concluded view on the merits of adopting a code of conduct'.[415] It acknowledged a code of conduct would make a modest contribution to improve the perception of Parliament and parliamentarians in the community; however, argued that a code would not 'guarantee against the behaviour of members being found to fall short of the standard set by the code'.[416] With reference to 'recent scandals at Westminster', the committee remarked:

> …that mistakes can be made and misconduct can occur even when a code of conduct for members is in place. The Committee notes also that the number of cases of proven misconduct was relatively small although the media reports might lead to a different impression. When these events were revealed the individual Members could be and were measured against the code and this provided certainty.[417]

2.334 In 2012, the Committee of Senators' Interests inquired into the development of a code of conduct for senators, including the House committee's discussion paper.[418] The Senate committee stated that it was:

> not convinced that there is any objective evidence showing that the adoption of an aspirational, principles-based code has improved the

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414 The Hon. Tony Burke MP, Manager of Opposition Business, *House of Representatives Hansard*, 4 September 2017, p. 21.

415 Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament*, Discussion Paper, November 2011, http://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Completed_inquiries/43/Code_of_Conduct (accessed 6 September 2017), p. 5.

416 Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament*, Discussion Paper, November 2011, http://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Completed_inquiries/43/Code_of_Conduct, (accessed 6 September 2017), p. 27.

417 Standing Committee of Privileges and Members' Interests, *Draft Code of Conduct for Members of Parliament*, Discussion Paper, November 2011, http://www.aph.gov.au/Parliamentary_Business/Committees/House/Privileges_and_Members_Interests/Completed_inquiries/43/Code_of_Conduct, (accessed 6 September 2017), p. 27.

418 Committee of Senators' Interests, *Code of Conduct Inquiry*, Report 2/2012, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/reports, (accessed 6 September 2017), p. 1.

> perceptions of parliaments and parliamentarians in other jurisdictions. Accordingly, the committee does not recommend that the Senate go down that path.[419]

2.335 The Senate committee continued:

> the committee does not consider it necessary to put in place a formal code in order to better articulate the standards expected of parliamentarians. The committee sees value in bringing together the raft of existing provisions relating to the conduct of senators and related obligations.
>
> The areas covered by existing regimes would continue to contain specific, enforceable provisions; whereas the general principles would provide a frame of reference against which anyone may make their own judgements about how well parliamentarians are meeting these requirements.
>
> …
>
> If the aim is an improvement in standards, the approach that has been shown to work is to identify particular concerns and devise systems of regulation that are appropriate to address them. An advantage of bringing these provisions together in a structured way is the opportunity to identify whether there are any gaps in the coverage of that framework, and then to make decisions about how to properly address those gaps, with targeted measures, rather than with a generic and largely unenforceable code.[420]

2.336 The Senate committee concluded that the Senate should not adopt a code of conduct 'unless it is meaningful, workable and reasonable likely to be effective' nor should it adopt the code contained in the House committee's discussion paper.[421] Instead, the Senate committee argued a better approach would be to improve existing parliamentary standards by:

- consolidating the numerous provisions which regulate the conduct of senators;
- identifying existing gaps in conduct or ethical matters; and
- implementing specific measures to address those gaps.[422]

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419 Committee of Senators' Interests, *Code of Conduct Inquiry*, Report 2/2012, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/reports (accessed 6 September 2017), p. 16.

420 Committee of Senators' Interests, *Code of Conduct Inquiry*, Report 2/2012, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/reports (accessed 6 September 2017), p. 17.

421 Committee of Senators' Interests, *Code of Conduct Inquiry*, Report 2/2012, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/reports (accessed 6 September 2017), p. 18.

422 Committee of Senators' Interests, *Code of Conduct Inquiry*, Report 2/2012, November 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Senators_Interests/reports, (accessed 6 September 2017), p. 18.

Other integrity measures concerning parliamentarians and the ministry

2.337 The following measures concern the oversight of Commonwealth parliamentarians with respect to their work expenses, as well as standards of ministerial and ministerial staff behaviour.

Independent Parliamentary Expenses Authority

2.338 On 13 January 2014, Prime Minister Malcolm Turnbull announced changes to the administration of parliamentarians' work expenses, which included the establishment of the Independent Parliamentary Expenses Authority (IPEA).[423]

2.339 The IPEA was established with the passage of the *Independent Parliamentary Expenses Authority Act 2017* (IPEA Act). The IPEA was initially established as an executive agency under the PS Act,[424] and commenced operation as an independent statutory body on 1 July 2017.[425]

2.340 IPEA's core functions include:

- Giving advice to parliamentarians and [*Members of Parliament (Staff) Act 1984* (MOP(S) Act)] staff about travel expenses and travel allowances.
- Monitoring the travel expenses and travel allowances of parliamentarian and MOP(S) Act staff.
- Preparing regular reports relating to:
  - all work expenses, travel expenses and travel allowances claimed by parliamentarians
  - travel expenses and travel allowances claimed by MOP(S) Act staff.
- Conducting audits relating to:
  - all work expenses, travel expenses and travel allowances claimed by parliamentarians
  - travel expenses and travel allowances claimed by MOP(S) Act staff.
- Processing claims relating to travel expenses and travel allowances of parliamentarians and their staff.[426]

2.341 Originally, reports on parliamentarians' expenditure were done through the Department of Finance and released every six months. The IPEA will now initially report on a quarterly basis, and progressively move towards a monthly reporting

423 Senator the Hon. Scott Ryan, Special Minister of State, 'Establishment of the Independent Parliamentary Expenses Authority and abolition of the Life Gold Pass', *Media release*, 7 February 2017.

424 AGD, *Submission 11*, p. 3.

425 Independent Parliamentary Expense Authority (IPEA), *Home*, http://www.ipea.gov.au/ (accessed 30 June 2017).

426 IPEA, *IPEA Functions*, http://www.ipea.gov.au/about/ipea-functions.html (accessed 30 June 2017)

regime 'to improve transparency and accountability for both parliamentarians' and MOP(S) Act staff work expenses'.[427]

2.342 With respect to the establishment of the IPEA, Professor John McMillan, the Acting New South Wales Ombudsman, stated that its creation 'has taken away quite a bit of the ground of difficulty, it seems to me, in getting adoption of an anticorruption body with jurisdiction over the parliament as well'.[428]

2.343 Professor A.J. Brown of Griffith University also spoke in favour of the establishment of the IPEA, expressing his opinion that 'it is a very significant development'.[429]

Statement of Ministerial Standards

2.344 The Statement of Ministerial Standards is a set of standards that ministers and assistant ministers are expected to follow to 'ensure public confidence in them and in the government'.[430] The principles provided in the document include how ministers and assistant ministers are to carry out their duties. In general terms these include:

- acting with integrity through lawful and disinterested exercise of the statutory and other powers available to them and their office;
- observing fairness in making official decisions;
- accepting accountability for the exercise of their powers and functions of their office; and
- accepting the full implications of the principle of ministerial responsibility.[431]

2.345 The statement specifies that ministers are not to use public office for private purposes and must not use 'information that they gain in the course of their official duties, including in the course of Cabinet discussions, for personal gain or the benefit of any other person'.[432]

2.346 Further, ministers must declare and register their personal interests, and notify the Prime Minister within 28 days if there is any significant change in their private interests. A failure to do so is considered a breach of these standards.[433]

2.347 The committee heard that there is capacity for the Prime Minister to seek advice from the head of the DPMC as to whether a matter might be a perceived conflict of interest. If a minister is seeking advice, then DPMC said:

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427 IPEA, *Reporting*, http://www.ipea.gov.au/reporting/index.html (accessed 30 June 2017).

428 Professor John McMillan, Acting New South Wales Ombudsman, New South Wales Ombudsman, *Committee Hansard*, 12 May 2017, p. 3.

429 Professor A.J. Brown, Program Leader, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 15 May 2017, pp. 3–4.

430 Commonwealth of Australia, *Statement of Ministerial Standards*, September 2015, p. ii.

431 Commonwealth of Australia, *Statement of Ministerial Standards*, September 2015, p. 2.

432 Commonwealth of Australia, *Statement of Ministerial Standards*, September 2015, p. 3.

433 Commonwealth of Australia, *Statement of Ministerial Standards*, September 2015, p. 3.

> …it would normally be through the Prime Minister, but I would not want to rule out the possibility that ministers might seek advice outside. But the statement of standards refers to advice being sought and the Prime Minister being able to seek advice. It might be possible that ministers seek advice in other circumstances; you just would not necessarily know.[434]

2.348 The ministerial standards do not set out particular sanctions if a minister is in breach of any of the standards outlined in the document.[435] The DPMC did not confirm that these ministerial standards are a component of the Commonwealth's integrity framework, but did argue that 'it certainly goes to expectations…[with] references in there to standards of integrity and expectations of the ministry'.[436]

Statement of Standards for Ministerial Staff

2.349 Ministerial staff, including the staff of Parliamentary Secretaries, are bound by the Statement of Standards for Ministerial Staff which 'sets out the standards that Ministerial staff are expected to meet in the performance of their duties'.[437] For example, ministerial staff must:

> 8. Make themselves aware of the Values and Code of Conduct which bind [APS] and Parliamentary Service employees.'
>
> …
>
> 19.Comply with all applicable Australian laws.
>
> 20.Comply with all applicable codes of conduct, including the Lobbying Code of Conduct.[438]

2.350 Ministerial staff are employed pursuant to the MOP(S) Act; however, this act does not impose any specific requirements on staff with respect to their conduct, and no delegated legislation is currently in force.[439]

Lobbying Code of Conduct and Register of Lobbyists

2.351 The Lobbying Code of Conduct and the Register of Lobbyists (the register) serves as a means to monitor the contact between representatives of the Australian

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434 Ms Philippa Lynch, First Assistant Secretary, Government Division, DPMC, *Committee Hansard*, 5 July 2017, p. 6.

435 Ms Lynch, DPMC, *Committee Hansard*, 5 July 2017, p. 10.

436 Ms Lynch, DPMC, *Committee Hansard*, 5 July 2017, p. 10.

437 Senator the Hon. Scott Ryan, Special Minister of State, *Statement of Standards for Ministerial Staff*, available: http://www.smos.gov.au/resources/statement-of-standards.html (accessed 22 August 2017).

438 Senator the Hon. Scott Ryan, Special Minister of State, *Statement of Standards for Ministerial Staff*, available: http://www.smos.gov.au/resources/statement-of-standards.html (accessed 22 August 2017).

439 Section 33 of the *Members of Parliament (Staff) Act 1984* empowers the Governor-General to make regulations, consistent with the act, in respect of matters required or permitted by the act to be prescribed; or necessary or convenient to be prescribed for carrying out or giving effect to the act.

government and lobbyists, and ensure contact is in accordance with 'public expectations of transparency, integrity, and honesty'.[440]

2.352 The Lobbyist Code of Conduct provides details of:

- what constitutes a lobbyist and lobbyist activities;
- the principles that lobbyist will observe when engaging with a government representative;
- rules that prohibit contact between government representatives and an unregistered lobbyist;
- rules that prohibit ministers and parliamentary secretaries from becoming a lobbyist for a period of 18 months after they cease to hold office; and
- the requirement that government representatives report breaches of the code to the secretary of the DPMC.[441]

2.353 The Lobbying Code of Conduct and the register are administered by the DPMC.

Role of the media

2.354 An integral part of the current integrity framework is the role of the media, or 'fourth estate'. The committee heard evidence that highlighted the importance of the media's part in conducting investigations and holding public officials, including parliamentarians, to account. Further, the committee discussed interactions between the media and state integrity commissions.

2.355 The AGD's submission identified Australia's free and open media as playing an integral part 'in protecting against corruption by enabling scrutiny of both the public and private sectors'.[442]

2.356 The importance of the media, particularly in the scrutiny of politicians and their expenses, was also noted by the Clerk of the House of Representatives, Mr David Elder. Mr Elder said the media plays a very important role in the protective regime, and:

> I am sure senators are very much aware of the scrutiny the media give to all those returns that are made by individual members and senators. They are now connecting declaration of interest statements with travel arrangements and making some interesting connections as a result. Members and senators are feeling the impact of that. That enormous amount of transparency—I think we need to recognise just how significant it is and therefore the degree of scrutiny that is available of individual activities, of individual

440 AGD, *Submission 23* [2016], p. 7.

441 DPMC, *Lobbying Code of Conduct*, available: http://lobbyists.pmc.gov.au/conduct_code.cfm (accessed 30 June 2017).

442 AGD, *Submission 23* [2016], p. 1.

> members and senators, as a result of what is available already in the system.[443]

2.357 Other witnesses highlighted the importance of the federal media and its scrutiny of political expenses. Professor McMillan said '[t]here is no doubt, too, that at the national level the media is much more zealous in uncovering defaults by parliamentarians than perhaps at state level'.[444]

2.358 The Hon. Dr Peter Phelps MLC made a comparison between media coverage and investigative powers of the Commonwealth press gallery versus the NSW press gallery:

> And you have a great press gallery. Why does corruption flourish at a local government level? Because there is very little press coverage of it. There is press coverage of the state gallery and the federal gallery. If you were an official and you were to call up Kylar Loussikian or Sharri Markson and Bevan Shields say, 'Mate, have I got a yarn for you,' you have also got that outlet. You have a very professional—not that the New South Wales press gallery is not professional, but it is small and it is overworked. The federal press gallery is large, and it is also overworked, but it has a greater capacity to do that sort of investigative journalism. Why is there so much corruption in the local government? Because it is done in the dark. No-one pays too much account to it, especially in the media.[445]

2.359 The AEC and Commonwealth Ombudsman also referred to the role the media has in informing their activities. The AEC said allegations of corruption may be reported by the media and in these cases the AEC would look at the material to evaluate the situation.[446] The Commonwealth Ombudsman noted the 'media will sometimes draw attention to things, so we are very astute to what is happening in there'.[447]

2.360 Despite the role and success of the media in identifying and reporting on corruption and misconduct, Mr Nick McKenzie from Fairfax noted the media's limitations. When discussing the investigation into Eddie Obied, Mr McKenzie said that without the NSW ICAC:

> …there would have been no exposure of Eddie Obeid. The media played a small but important role in putting some of Eddie Obeid's conduct on the public record but, without ICAC's extraordinary powers of exposure, the depth of his corruption and the way it stained and infiltrated much of the New South Wales political system would not have been exposed.[448]

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443 Mr David Elder, Clerk of the House of Representatives, *Committee Hansard*, 16 June 2017, p. 21.

444 Professor McMillan, Acting NSW Ombudsman, Committee Hansard, 12 May 2017, p. 4.

445 The Hon. Dr Peter Phelps MLC, *Committee Hansard*, 16 June 2017, p. 17.

446 Mr Tom Rogers, AEC, *Committee Hansard*, 16 June 2017, p. 42.

447 Ms Gibbs, Commonwealth Ombudsman, *Committee Hansard*, 16 June 2017, p. 48.

448 Mr Nick McKenzie, Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 23.

Audit of the existing Commonwealth integrity framework

2.361 As noted in chapter 1, a partnership—between Griffith University, Flinders University, the University of the Sunshine Coast, TIA, the New South Wales Ombudsman, the Queensland Integrity Commissioner and the Crime and Corruption Commission, Queensland—is currently reviewing the national integrity system. This project, funded through the Australian Research Council (ARC) Linkage Project, is titled *Strengthening Australia's National Integrity System: Priorities for Reform* and its purpose is to assist the debate on 'key issues and options for the strengthening of Australia's system of integrity, accountability and anti-corruption'.[449]

2.362 The first discussion paper, titled *A Federal Anti-Corruption Agency for Australia* was released in March 2017. This discussion paper's opening chapter outlines TIA's support for a broad-based federal anti-corruption agency 'to ensure a comprehensive approach to corruption risks beyond the criminal investigation system, and support stronger parliamentary integrity'.[450] A number of gaps and weaknesses are identified, including:

- current federal agencies' anti-corruption efforts are unsupervised (other than criminal conduct reported to the AFP) and approximately half of the total federal public sector are not in the jurisdiction of the APSC;
- limited independent oversight exists to support federal parliamentary integrity, other than AFP investigations into criminal conduct and the IPEA;
- prevention, risk assessment and the monitoring of activities are unco-ordinated; and
- the AFP's criminal law enforcement prioritises foreign bribery, anti-money laundering and other crimes, with limited capacity to investigate 'soft' or 'grey area' corruption across the federal sector.[451]

2.363 The opening chapter also notes that a:

> …federal anti-corruption agency will not provide solutions to these gaps, unless it—or alternative strategies—are well designed to achieve the intended purpose.[452]

2.364 A further issue identified in the opening chapter is TIA's view that there is no clear understanding of 'best practice' principles for the design and implementation of anti-corruption agencies in Australia. Further, TIA argues that governments in all jurisdictions 'need to agree on, and implement, best practice principles for the powers

449 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017.

450 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 4.

451 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 4.

452 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 4.

and accountabilities of their' anti-corruption agencies.[453] The authors refer to the Council of Australian Government's Law, Crime and Community Safety Council as a possible forum to address this matter.[454]

2.365 The second chapter comprises a research paper by Professor Appleby and Dr Hoole titled *Integrity of Purpose: Designing a Federal Anti-Corruption Commission*.

2.366 Broadly, in their research paper Professor Appleby and Dr Hoole consider an integrity of purpose theory that provides a 'vision of how accountability institutions can be designed'. This is followed by the application of this theory to the 'design of a prospective federal anti-corruption commission in Australia'.[455]

2.367 The paper supports the establishment of a national integrity commission, but the authors caution against rushing to introduce such a body. Professor Appleby and Dr Hoole highlight the importance of 'considering fundamental questions of design in a coherent and principled fashion'.[456]

2.368 The authors address a number of key design elements for a federal anti-corruption agency. These include surveying the current federal integrity landscape with the goal of identifying vulnerabilities and gaps within the existing framework. This survey would then inform the conceptualisation of a new anti-corruption body's functions and how they should be performed. Professor Appleby and Dr Hoole provide a brief overview of the key Commonwealth integrity agencies.[457]

2.369 The paper considers a number of vulnerabilities and gaps in the current integrity framework. The gaps noted are:

- the capacity to scrutinise the conduct of ministers and parliamentarians;[458]
- the limited ability to investigate government agencies through the convening of hearings—whether in public or in private—outside the law enforcement context';[459] and

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453 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 4.

454 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 4.

455 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 7.

456 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 33.

457 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 14.

458 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 16.

459 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 17.

- the lack of coherence across the Commonwealth's integrity landscape as a whole.[460]

2.370 Professor Appleby and Dr Hoole then consider these gaps and vulnerabilities 'to sketch a possible legislative statement of purpose for a new federal anti-corruption commission'. The legislative statement provided is:

> The object of this Act is to suppress corruption and foster public confidence in the integrity of the Commonwealth government by empowering an independent commission with authority to investigate Commonwealth government activities, including through consideration of public complaints, with the goal of identifying and reporting instances of serious or systemic corruption.[461]

2.371 They argue for a commission with broad oversight, including oversight of elected officials 'for the purpose of suppressing corruption and fostering public confidence in the integrity of the Commonwealth government'.[462] Consideration is also given to 'expanding the availability of strong investigative and hearing powers to seeing where those are desirable but currently lacking' and 'introduce a high profile and accessible venue for citizens and public servants to report corruption concerns, bringing greater coherence and simplicity to the integrity landscape'.[463]

2.372 This discussion paper also considers the model of an anti-corruption commission, its jurisdiction, and the agencies and individuals subject to its jurisdiction. Finally, the authors consider how integrity of purpose would inform the commission's power to hold hearings and require a prohibition on the commission making findings of guilt or initiating prosecutions.[464]

2.373 As noted in chapter 1, a further three discussion papers are scheduled as part of this project. These papers are titled:

- *Strategic approaches to corruption prevention;*
- *Measuring anti-corruption effectiveness;* and
- *Australia's integrity system: more than just a sum of its parts?*[465]

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460 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 17.

461 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 19.

462 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 17.

463 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, p. 17.

464 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017, pp. 20–33.

465 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform,* March 2017.

Chapter 3

State, territory and international integrity commissions

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

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

3.2 The Northern Territory (NT) does not yet have an integrity commission but is in the process of establishing one. On 26 August 2015, the Legislative Assembly of the NT resolved to establish an independent anti-corruption body and noted the intention of the government to appoint an independent person to provide advice on possible models.[1] Mr Brian Martin AO QC was appointed to complete this task and delivered his report on 27 May 2016.[2] This report recommends that the NT adopt the model of the SA Independent Commission Against Corruption and that the current Independent Commissioner Against Corruption in South Australia, the Hon. Bruce Lander QC, be appointed on a part-time basis as the first head of the NT's commission.[3] The NT government has developed draft legislation in response to the Martin report and is currently conducting a public consultation process on its content.[4]

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

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

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

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

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

most effective and efficient model for the ACT'.[5] On 15 December 2016 the Legislative Assembly for the ACT established a Select Committee on an Independent Integrity Commission, which is due to report by 31 October 2017.[6]

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

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

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

New South Wales—Independent Commission Against Corruption

3.6 The New South Wales Independent Commission Against Corruption (NSW ICAC) was established by the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act (NSW)), and commenced operation in 1989.[8] The commission's mandate is to:

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

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

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

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

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

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

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

> In recent years, in New South Wales we have seen: a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge; the former Deputy Commissioner of Police charged with bribery; a series of investigations and court cases involving judicial figures including a High Court Judge; and a disturbing number of dismissals, retirements and convictions of senior police officers for offences involving corrupt conduct.
>
> …
>
> Nothing is more destructive of democracy than a situation where the people lack confidence in those administrators and institutions that stand in a position of public trust. If a liberal and democratic society is to flourish we need to ensure that the credibility of public institutions is restored and safeguarded, and that community confidence in the integrity of public administration is preserved and justified.[10]

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

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

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

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

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

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

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

Commissioner—appointment and tenure

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

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

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

(a) dies, or

(b) completes a term of office and is not re-appointed, or

(c) holds office for longer than the relevant period mentioned in clause 5, or

(d) resigns the office by instrument in writing addressed to the Governor, or

(e) becomes the holder of a judicial office of the State or elsewhere in Australia, or

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

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

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

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

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

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

(f) is nominated for election as a member of the Legislative Council or the Legislative Assembly or as a member of a House of Parliament of another State or of the Commonwealth, or

(g) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors or makes an assignment of his or her remuneration for their benefit, or

(h) becomes a mentally incapacitated person, or

(i) is convicted in New South Wales of an offence that is punishable by imprisonment for 12 months or more or is convicted elsewhere than in New South Wales of an offence that, if committed in New South Wales, would be an offence so punishable[17]

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

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

> Currently, the ICAC is established in a single person – the Commissioner – and he or she is solely responsible for making the many significant decisions necessary to fulfil the ICAC's functions. These decisions can have serious consequences for the individuals affected and the Committee has decided that more weight should be placed on the most significant ones.
>
> For this reason, the Committee has recommended the re-structure of the ICAC, to replace the single Commissioner with a panel of three Commissioners, the 'three member Commission'. Under this proposal, the most significant decisions – those to proceed to a compulsory examination or public inquiry – could no longer be made by a single Commissioner. Instead, a decision to proceed to a compulsory examination or public inquiry would need majority approval of the three member Commission.[19]

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

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

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

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

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

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

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

Functions of the commission

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

> (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:
>
> (i) corrupt conduct, or
>
> (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
>
> (iii) conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur,
>
> (b) to investigate any matter referred to the Commission by both Houses of Parliament,
>
> (c) to communicate to appropriate authorities the results of its investigations,
>
> (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,

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

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

(e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration promoted,

(f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,

(g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,

(h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,

(i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,

(j) to enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration,

(k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.[22]

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

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

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

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

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

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

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

3.20 The NSW ICAC does not investigate complaints concerning the conduct of New South Wales police officers or the New South Wales Crime Commission. This function has resided with the Police Integrity Commission from its creation in 1997.[25] The Police Integrity Commission was replaced in 2017 by the Law Enforcement Conduct Commission, which also took on the functions of the former Police Compliance Branch of the New South Wales Ombudsman.[26]

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

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

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

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

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

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

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

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

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

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

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

Definition of corruption and jurisdiction

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

(1) Corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:

(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),

(b) bribery,

(c) blackmail,

(d) obtaining or offering secret commissions,

(e) fraud,

(f) theft,

(g) perverting the course of justice,

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

(h) embezzlement,

(i) election bribery,

(j) election funding offences,

(k) election fraud,

(l) treating,

(m) tax evasion,

(n) revenue evasion,

(o) currency violations,

(p) illegal drug dealings,

(q) illegal gambling,

(r) obtaining financial benefit by vice engaged in by others,

(s) bankruptcy and company violations,

(t) harbouring criminals,

(u) forgery,

(v) treason or other offences against the Sovereign,

(w) homicide or violence,

(x) matters of the same or a similar nature to any listed above,

(y) any conspiracy or attempt in relation to any of the above.

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.[30]

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

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

(a) a criminal offence, or

(b) a disciplinary offence, or

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

(d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.[31]

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

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

> The majority of the Court accepted that Ms Cunneen's alleged conduct did not fall within the statutory definition of 'corrupt conduct' because, first, it allegedly involved Ms Cunneen in her personal capacity (not in her capacity as a Crown prosecutor); and second, while it might have affected or hindered the police officer from conducting the investigation, it did not involve dishonest or improper conduct *on the part of the police officer*.
>
> Justice Gageler, in dissent in the case, noted that the majority's interpretation of s 8 to exclude such conduct consequently obstructed the Commission's power to investigate conduct that might amount to defrauding a public official, state-wide endemic collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under New South Wales statutes. The type of conduct that Gageler J identified clearly has the capacity to undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials. This conduct also has the capacity to affect the integrity of government

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

32 [2015] HCA 14.

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

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

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

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

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

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

3.30 TIA also supported the NSW definition of corrupt conduct:

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

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

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

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

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

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

Powers

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

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

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

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

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

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

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

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

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

> (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
>
> (b) the seriousness of the allegation or complaint being investigated,
>
> (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
>
> (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.[42]

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

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

> Former assistant NSW ICAC Commissioner Anthony Whealy QC has said "there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost."
>
> …
>
> Former NSW ICAC Commissioner David Ipp QC has said that "Its main function is exposing corruption; this cannot be done without public hearings."[44]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> There is no doubt the public perception of a finding of a person engaged in corrupt conduct amounts to a label, a label as potent as any criminal label short of murderer. Staff at the office of the inspector have seen many cases come to us where a person has been labelled as engaging in corrupt conduct, which, in the mind of the public, in circumstances where the DPP has been unwilling to convert that finding into a criminal charge, is nonetheless labelled by others as a 'corrupt person'. The problem with the present approach as reflected in legislation is that it undermines or, to put that colloquially, trashes the presumption of innocence, which is supposed to apply to all people who remain unconvicted of an offence.
>
> So it is worth asking: how does this impact upon the presumption of innocence differ from other rights legally set aside by legislation to enhance and facilitate investigation? Those other rights which are put aside have been legally set aside only for the duration of the investigation. If those court proceedings occur, those rights are reactivated and restored. But the presumption of innocence, if trashed, is trashed for ages.[56]

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

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

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

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

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

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

> Given that the Commission must conduct its investigations with a view to determining whether corrupt conduct has occurred, is occurring or is about to occur, it is appropriate that, at the conclusion of an investigation, the Commission state whether or not such conduct has actually occurred. A finding of corrupt conduct provides a succinct statement of the improper conduct engaged in by the affected person. There will be cases where it is clear that a person has acted corruptly, even though there may be insufficient admissible evidence to warrant a criminal prosecution or the taking of other action. If a person is charged with a criminal offence and acquitted, any finding of corrupt conduct stands. In such cases a finding of corrupt conduct may be the only adverse consequence the person incurs.
>
> The ability to make findings of corrupt conduct is also relevant to the Commission's deterrence and education roles.[57]

Oversight

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

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

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

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

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

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

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

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

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

(a) to investigate a matter relating to particular conduct, or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.[62]

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

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

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

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

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

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

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

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

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

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

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

(b) is entitled to full access to the records of the Commission and to take or have copies made of any of them, and

(c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and

(d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and

(e) may investigate and assess complaints about the Commission or officers of the Commission, and

(f) may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and

(g) may recommend disciplinary action or criminal prosecution against officers of the Commission.[66]

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

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

> Significantly and in my submission regrettably, the Office of the Inspector to the ICAC was not included in the initial 1988 bill. The office of inspector was legislated some 17 years later in 2005. Let me make clear: all previous holders, at least as best as I can ascertain, of the statutory position of the Inspector to the ICAC have sought by their actions to enhance the functioning of the ICAC—that is, we are not the enemy of the ICAC; we simply seek to enhance its functioning, although in more recent times the level of critical observation by the inspector has been sharper than in previous years.
>
> Consequently, there has been a view about in more recent times that there is a tension between the ICAC and the office of the inspector. Both offices of course link specific functions to the person of the commissioner or the inspector, as the case may be. By and large, however, the relationships between the commissioner and the inspector are fulfilled in a highly professional spirit. However, the legislative parameters of the office of

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

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

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

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

Queensland—Crime and Corruption Commission

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

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

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

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

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

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

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

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

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

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

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

Commissioner—appointment and tenure

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

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

(a) the Minister has consulted with—

(i) the parliamentary committee; and

(ii) except for an appointment as chairperson—the chairperson; and

(b) the nomination is made with the bipartisan support of the parliamentary committee.[80]

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

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

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

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

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

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

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

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

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

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

Functions of the commission

3.60 The CC Act (Qld) divides the Qld CCC's functions into four areas: prevention; crime; corruption; and research, intelligence and other functions.[84] The Qld CCC's prevention function was removed in 2014 but restored in 2016.[85] As the legislation is currently framed, the Qld CCC can fulfil this function in the following ways:

(a) analysing the intelligence it gathers in support of its investigations into major crime and corruption; and

(b) analysing the results of its investigations and the information it gathers in performing its functions; and

(c) analysing systems used within units of public administration to prevent corruption; and

(d) using information it gathers from any source in support of its prevention function; and

(e) providing information to, consulting with, and making recommendations to, units of public administration; and

(f) providing information relevant to its prevention function to the general community; and

(g) ensuring that in performing all of its functions it has regard to its prevention function; and

(h) generally increasing the capacity of units of public administration to prevent corruption by providing advice and training to the units and, if asked, to other entities; and

(i) reporting on ways to prevent major crime and corruption.[86]

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

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

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

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

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

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

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

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

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

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

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

(i) assessing the appropriateness of systems and procedures adopted by a unit of public administration for dealing with complaints about corruption;

(j) providing advice and recommendations to a unit of public administration about dealing with complaints about corruption in an appropriate way.

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

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

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

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

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

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

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

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

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

Definition of corruption and jurisdiction

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

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

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

> ...conduct, other than corrupt conduct, of a police officer that—
>
> (a) is disgraceful, improper or unbecoming a police officer; or
>
> (b) shows unfitness to be or continue as a police officer; or

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

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

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

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

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

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

> It is conduct by any person that could result in a lack of probity in, and could adversely affect, the performance of functions or exercise of powers by the public sector. The conduct must also be of a kind which, if established, would amount to either a criminal offence or, if the person worked (or had worked) in the public sector, a disciplinary breach providing reasonable grounds for dismissal.
>
> The definition also captures the conduct of private individuals who seek to corrupt public officers (current or future). However, the definition does not capture criminal conduct by private entities which seriously and adversely affect the public sector but not in ways that would compromise the integrity of public officials.[99]

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

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

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

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

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

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

99 Qld CCC, *Submission 36*, pp. 4–5.

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

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

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

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

> …(i) simplify the definition of 'corrupt conduct' to assist UPAs [units of public administration] in their interpretation and understanding; and (ii) widen the definition to include conduct of a person that impairs or could impair public confidence in public administration, consistent with the Commission's overriding responsibility to promote public confidence in the integrity of the public sector. The amendments to widen the definition of 'corrupt conduct' are similar to recent changes in both New South Wales (NSW) and Victoria.
>
> More broadly, the Bill also expands the Commission's investigative jurisdiction with respect to corrupt conduct. This will provide the Commission with greater scope to reduce the opportunities and incentives for corrupt conduct in the Queensland public sector and allow it to more proactively address corruption risks.[103]

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

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

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

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

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

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

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

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

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

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

Powers

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

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

3.81 The Qld CCC summarises its investigative powers as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oversight

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

3.90 The principal functions of the PCCC are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Western Australia—Corruption and Crime Commission

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

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

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

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

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

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

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

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

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

Commissioner—appointment and tenure

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

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

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

Functions of the commission

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

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

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

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

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

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

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

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

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

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

(a) analysing the information it gathers in performing functions under this Act and any other Act, including the intelligence gathered in support of its police misconduct and organised crime functions;

(b) analysing systems used within the Police Department to prevent police misconduct;

(c) using information it gathers from any source in support of the prevention and education function;

(d) providing information to, consulting with, and making recommendations to, the Police Department;

(e) providing information relevant to the prevention and education function to members of the police service and to the general community;

(f) ensuring that in performing all of its functions it has regard to the prevention and education function;

(g) generally increasing the capacity of the Police Department to prevent and combat police misconduct by providing advice and training to the Police Department;

(h) reporting on ways to prevent and combat police misconduct.[140]

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

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

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

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

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

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

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

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

Definition of corruption and jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) a police officer;

(aa) a Minister of the Crown;

(ab) a Parliamentary Secretary appointed under section 44A of the *Constitution Acts Amendment Act 1899*;

(ac) a member of either House of Parliament;

(ad) a person exercising authority under a written law;

(b) a person authorised under a written law to execute or serve any process of a court or tribunal;

(c) a public service officer or employee within the meaning of the *Public Sector Management Act 1994*;

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

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

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

(ca) a person who holds a permit to do high-level security work as defined in the *Court Security and Custodial Services Act 1999*;

(cb) a person who holds a permit to do high-level security work as defined in the *Prisons Act 1981*;

(d) a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law; [or]

(e) any other person holding office under, or employed by, the State of Western Australia, whether for remuneration or not…[152]

Powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oversight

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

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

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

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

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

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

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

(d) to make recommendations to the Commission, independent agencies and appropriate authorities;

(e) to report and make recommendations to either House of Parliament and the Standing Committee;

(f) to perform any other function given to the Parliamentary Inspector under this or another Act.[165]

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

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

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

> The number and nature of allegations made against OSU officers in this matter, and the systemic nature of the conduct investigated, revealed a disturbing culture of entitlement and unaccountability in the OSU contrary to the standards and values expected of public officers, particularly those employed by the State's anti-corruption body.
>
> In some instances, the conduct which this culture encouraged was suspected of having violated State, and possibly Commonwealth, criminal laws.[169]

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

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

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

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

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

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

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

Tasmania—Integrity Commission

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

Commissioner—appointment and tenure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Functions of the commission

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

(a) develop standards and codes of conduct to guide public officers in the conduct and performance of their duties; and

(b) educate public officers and the public about integrity in public administration; and

(c) prepare guidelines and provide training to public officers on matters of conduct, propriety and ethics; and

(d) provide advice on a confidential basis to public officers about the practical implementation of standards of conduct that it considers appropriate in specific instances; and

(e) establish and maintain codes of conduct and registration systems to regulate contact between persons conducting lobbying activities and certain public officers; and

(f) receive and assess complaints or information relating to matters involving misconduct; and

(g) refer complaints to a relevant public authority, integrity entity or Parliamentary integrity entity for action; and

(h) refer complaints or any potential breaches of the law to the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate for action; and

(i) investigate any complaint by itself or in cooperation with a public authority, the Commissioner of Police, the DPP or other person that the Integrity Commission considers appropriate; and

(j) on its own initiative, initiate an investigation into any matter related to misconduct; and

(k) deal with any matter referred to it by the Joint Committee; and

(l) assume responsibility for, and complete, an investigation into misconduct commenced by a public authority or integrity entity if the Integrity Commission considers that action to be appropriate having regard to the principles set out in section 9 ; and

(m) when conducting or monitoring investigations into misconduct, gather evidence for or ensure evidence is gathered for –

(i) the prosecution of persons for offences; or

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

(ii) proceedings to investigate a breach of a code of conduct; or

(iii) proceedings under any other Act; and

(n) conduct inquiries into complaints; and

(o) receive reports relating to misconduct from a relevant public authority or integrity entity and take any action that it considers appropriate; and

(p) if the Integrity Commission is satisfied that it is in the public interest and expedient to do so, recommend to the Premier the establishment of a Commission of Inquiry under the Commissions of Inquiry Act 1995 ; and

(q) monitor or audit any matter relating to the dealing with and investigation of complaints about misconduct in any public authority including any standards, codes of conduct, or guidelines that relate to the dealing with those complaints; and

(r) perform any other prescribed functions or exercise any other prescribed powers.[182]

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

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

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

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

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

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

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

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

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

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

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

Definition of corruption and jurisdiction

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

> (a) conduct, or an attempt to engage in conduct, of or by a public officer that is or involves –
>
> (i) a breach of a code of conduct applicable to the public officer; or
>
> (ii) the performance of the public officer's functions or the exercise of the public officer's powers, in a way that is dishonest or improper; or
>
> (iii) a misuse of information or material acquired in or in connection with the performance of the public officer's functions or exercise of the public officer's powers; or
>
> (iv) a misuse of public resources in connection with the performance of the public officer's functions or the exercise of the public officer's powers; or
>
> (b) conduct, or an attempt to engage in conduct, of or by any public officer that adversely affects, or could adversely affect, directly or indirectly, the honest and proper performance of functions or exercise of powers of another public officer –
>
> but does not include conduct, or an attempt to engage in conduct, by a public officer in connection with a proceeding in Parliament;[189]

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

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

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

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

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

(a) a crime or an offence of a serious nature; or

(b) misconduct providing reasonable grounds for terminating the public officer's appointment;[190]

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

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

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

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

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

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

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

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

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

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

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

Powers

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

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

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

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

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

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

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

(c) must observe the rules of procedural fairness; and

(d) may make any investigations he or she considers appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

Oversight

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

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

3.151 The IC Act (Tas) also requires that an independent review be conducted of the Act as soon as possible after 31 December 2015 and that this review consider the operation of the Act, the Integrity Commission, the parliamentary standards commissioner and the Joint Standing Committee on Integrity.[208] This review was completed in May 2016 and responded to by the Tasmanian government in November 2016.[209] In May 2017, the Tasmanian Government introduced legislation to amend the IC Act (Tas) in order to address some of the recommendations made by the independent review. The legislation altered, among other matters, the membership, operation and purpose of the board as well as the appointment, suspension and removal provisions governing the board and the chief commissioner.[210]

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

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

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

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

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

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

Victoria—Independent Broad-based Anti-corruption Commission

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

3.153 Although it has been in operation for a short period of time, some significant changes have been made to the remit of IBAC. In 2012, the IBAC Act (Vic) was amended to 'grant IBAC certain investigative powers as well as define its main areas of jurisdiction'.[212] As it was initially established, IBAC was restricted in its activities by a relatively narrow definition of relevant offences and corrupt conduct under the IBAC Act (Vic); however, the passage of the *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) has expanded the scope of matters that IBAC can address. These changes came into effect on 1 July 2016.[213]

Commissioner—appointment and tenure

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

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

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

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

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

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

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

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

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

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

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

(a) misconduct;

(b) neglect of duty;

(c) inability to perform the duties of the office;

(d) any other ground on which the Governor in Council is satisfied that the Commissioner is unfit to hold office.[219]

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

Functions of the commission

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Definition of corruption and jurisdiction

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

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

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

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

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

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

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

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

> Concerns have been raised publicly that the legislative threshold for IBAC to commence an investigation in its public sector jurisdiction is vague, too high and therefore liable to challenge in the Supreme Court.
>
> Under the IBAC Act, IBAC is required to identify conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a prescribed indictable offence. Additionally, IBAC must be reasonably satisfied that alleged corrupt conduct constitutes serious corrupt conduct.
>
> Parliament has clearly sought to balance the need for an effective integrity system against the need to protect individuals and public sector entities from arbitrary invasions of their privacy and property. When a statute prescribes reasonable grounds for a state of mind, it requires facts which are sufficient to induce that state of mind in a reasonable person.[228]

3.167 IBAC also stated in the same report:

> There have been corrupt conduct allegations where IBAC has not felt able to commence investigations because of threshold restrictions in the IBAC Act. Not all of these were suitable for referral elsewhere. This constraint has possibly undermined IBAC's ability to perform and achieve its principal objects and functions.
>
> Whilst the balance between an effective integrity system and civil liberties is quite properly a matter for the Parliament to determine, this constraint should be a matter of concern and further consideration.[229]

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

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

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

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

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

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

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

Powers

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

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

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

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

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

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

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

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

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

(a) there are exceptional circumstances; and

(b) it is in the public interest to hold a public examination; and

(c) a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing.[236]

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

(a) whether the corrupt conduct or the police personnel conduct being investigated is related to an individual and was an isolated incident or systemic in nature;

(b) the benefit of exposing to the public, and making it aware of, corrupt conduct or police personnel misconduct;

(c) in the case of police personnel conduct investigations, the seriousness of the matter being investigated.[237]

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

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

(a) to enter and search the premises or vehicle, vessel or aircraft named or described in the search warrant and inspect any document or thing at those premises or on or in that vehicle, vessel or aircraft; and

(b) to make a copy of any document relevant, or that the person reasonably considers may be relevant, to the investigation; and

(c) to take possession of any document or other thing that the person considers relevant to the investigation.[240]

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

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

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

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

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

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

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

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

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

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

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

> It is our view that the more desirable position is to retain the traditional division between investigative and prosecutorial functions, and that a Commission should not be involved in prosecutions beyond referring the matter for consideration for prosecution by another agency.[245]

Oversight

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

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

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

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

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

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

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

3.184 The committee's functions are:

(a) to monitor and review the performance of the duties and functions of the IBAC;

(b) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;

(c) to examine any reports made by the IBAC;

(d) to consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the *Independent Broad-based Anti-corruption Commission Act 2011*;

(e) to carry out any other function conferred on the IBAC Committee by or under this Act or the *Independent Broad-based Anti-corruption Commission Act 2011*;

(f) to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers or Ombudsman officers;

(g) to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers;

(h) to examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers;

(i) to consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the Victorian Inspectorate Act 2011.[248]

3.185 The committee may not undertake the following actions:

(a) investigate a matter relating to the particular conduct the subject of—

(i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or

(ii) a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint;

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

247 The Hon. Kim Wells MP.

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

(b) review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act;

(b) review any findings, recommendations, determinations or other decisions of the IBAC in relation to—

(i) a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or

(ii) a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint; or

(iii) a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*;

(ca) review any determination by the IBAC under section 26(3) of the *Protected Disclosure Act 2012*;

(d) disclose any information relating to the performance of a function or the exercise of a power by the IBAC which may—

(i) prejudice any criminal investigation or criminal proceedings; or

(ii) prejudice any investigation being conducted by the IBAC; or

(iii) contravene any secrecy or confidentiality provision in any relevant Act.[249]

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

3.187 IBAC is also subject to the oversight of the Victorian Inspectorate, which was established by the *Victorian Inspectorate Act 2011* (Vic) and commenced operation in February 2013.[251] The Inspectorate performs a number of functions with respect to overseeing other agencies within the Victorian integrity system, including the Public Interest Monitor, the Auditor-General and the Chief Examiner. Its functions in relation to IBAC include:

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

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

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

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

(b) to oversee the performance by the IBAC of its functions under the *Protected Disclosure Act 2012*;

(c) to assess the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of IBAC's activities;

(d) to receive complaints in accordance with this Act about the conduct of the IBAC and IBAC personnel;

(e) to investigate and assess the conduct of the IBAC and IBAC personnel in the performance or exercise or purported performance or purported exercise of their duties, functions and powers;

(f) to monitor the interaction between the IBAC and other integrity bodies to ensure compliance with relevant laws;[252]

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

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

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

> What we look for in those is two classes of things. There are a number of requirements that are mandatory when IBAC exercises coercive powers when they summon somebody. There are service requirements: it has to be a minimum of seven days beforehand, save in exceptional circumstances; it is not permitted to examine underage people; there are provisions about legal representation; and there are provisions about independent persons being present. We check that all of those requirements have been complied with. Also there are requirements about what is required to be stated in the summons and what information is to be given to people about their rights and obligations. So we check for all of that.
>
> In addition, we review the actual questioning. Essentially we are looking to see that the questioning remains relevant to the purpose of the investigation. It never, actually, does not; there is no reason why it should. We also look for things which we just class the propriety of the questioning—whether, for example, the witness might have been misled or given false or misleading information in order to try to induce a particular type of answer,

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

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

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

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

> As well as reviewing coercive examinations we can receive complaints about IBAC. We receive about 50 or 60 of those a year. Most of those are from persons who have made complaints to IBAC. They have complained perhaps about police misconduct or some corrupt conduct they think they have seen somewhere and IBAC has refused to investigate it. They complain to us because they think it should have been investigated. Ninety-nine times out of 100 IBAC had every reason not to investigate.
>
> It is also possible for people who are summoned and are coercively examined to complain to us. We have had some complaints about those. We are in fact currently conducting an investigation into a number of complaints arising out of a particular series of examinations.
>
> What else can we do? We have a general monitoring function as well. The act requires us to monitor IBAC's compliance with its governing legislation. We have, in particular, to focus on their functions under the Protected Disclosure Act, which is our whistleblowers act. That is basically what we do. What my submission proposes is that that should be something the committee ought, with respect, to consider and that I would suggest is an appropriate thing for there to be. Also, there is an IBAC parliamentary committee, which is active but they do not have power to inquire into particular matters whereas we do.[255]

3.191 Mr Brett noted that the Inspectorate has a wide range of functions when compared to similar oversight bodies in New South Wales, Queensland and Western Australia, and that, with 13 staff members, it was also much larger.[256] He also noted the steep increase in the use of coercive examinations by IBAC, which rose from 52 in 2013–14 to 179 in 2015–16.[257]

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

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

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

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

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

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

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

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

> While the IBAC Commissioner considers that IBAC is operating effectively, he stressed the need for it to continue to take 'a more strategic, intelligence-based approach, rather than being a reactive, complaints-driven body'. This would, he said, allow it to most efficiently use its resources to detect, investigate and expose serious cases of corruption and police misconduct.
>
> The IBAC Commissioner has emphasised that as IBAC matures as an organisation it is important that it is proactive in relation to identifying and exposing corruption. This is especially the case given the 'inherently clandestine nature of corruption'. IBAC does this in part by undertaking strategic assessments every 12–18 months. These involve literature reviews, assessment of other integrity agencies' reports, analyses of complaints and notifications and consultations with stakeholders.[259]

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

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

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

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

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

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

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

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

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

Commissioner—appointment and tenure

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

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

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

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

Functions of the ICAC and the Office of Public Integrity

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

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

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

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

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

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

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

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

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

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

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

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

(c) to refer complaints and reports to inquiry agencies, public authorities and public officers in circumstances approved by the Commissioner or make recommendations to the Commissioner in relation to complaints and reports;

(ca) to give directions or guidance to public authorities in circumstances approved by the Commissioner;

(d) to perform other functions assigned to the Office by the Commissioner.[269]

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

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

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

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

Definition of corruption and jurisdiction

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

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

(i) bribery or corruption of public officers;

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

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

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

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

(ii) threats or reprisals against public officers;

(iii) abuse of public office;

(iv) demanding or requiring benefit on basis of public office;

(v) offences relating to appointment to public office; or

(b) an offence against the *Public Sector (Honesty and Accountability) Act 1995* or the *Public Corporations Act 1993*, or an attempt to commit such an offence; or

(ba) an offence against the *Lobbyists Act 2015*, or an attempt to commit such an offence; or

(c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the *Criminal Law Consolidation Act 1935*) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or

(d) any of the following in relation to an offence referred to in a preceding paragraph:

(i) aiding, abetting, counselling or procuring the commission of the offence;

(ii) inducing, whether by threats or promises or otherwise, the commission of the offence;

(iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;

(iv) conspiring with others to effect the commission of the offence.

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

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

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

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

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

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

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

Powers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oversight

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

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

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

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

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

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

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

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

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

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

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

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

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

> The statistics relating to the Commissioner's role in investigating alleged corruption appear in his Report. Any assessment of this role is not to be determined by reference to the number of investigations or the numbers of charges laid as a result of ICAC investigations. On the other hand, it is pertinent to have regard to the manner in which those investigations are conducted and the effect which this has had on revealing corruption and misconduct which has occurred. The confidentiality provisions in the Act prevent me from giving details of matters investigated, but I repeat my confidence in the ability of ICAC to expose corrupt conduct where it exists and in this respect the organisation is having the effect for which it was created.
>
> There is also ample evidence in the files which I have read which establishes the extensive attention which is given to instructing other agencies as to the manner in which to investigate and deal with misconduct and maladministration and also to rigorously supervise the investigation of the matters which have been referred to them for investigation.[300]

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

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

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

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

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

International integrity commission models

Corruption Perception Index

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

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

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

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

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

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

International comparisons

OECD analysis

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

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

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

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

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

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

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

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

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

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

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

3.234 The OECD discussed the following models:

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

Evidence to the committee

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

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

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

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

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

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

> The HK ICAC was established in 1974 amidst an atmosphere of systemic corruption within the police force whereby money was extorted by constables on the streets which would then be syphoned up through the ranks and to the highest levels of the agency. Historically going back to the colony's creation in 1842 a culture of extortion and the payment of illicit fees to government officials had existed and thrived. The British colonial policy was to not disturb such 'Chinese customary practices' unless it directly affected the colonial law enforcement agencies and became an epidemic. Prior to HK ICAC's establishment the Anti-Corruption Branch of the Police was given the authority to investigate. This was problematic since the catalyst for the creation of the HK ICAC was in fact police corruption and not necessarily politicians.
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> …
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> The eventual creation of the HK ICAC came to fruition when the Chief Superintendent in the Hong Kong Police Force Peter Godber was issued with a notice under s10 of the [Prevention of Bribery Ordinance] concerning the possession of unexplained property and the existence of disproportionate assets when compared with his official income. Godber first fled to Britain only to be extradited back to Hong Kong in January 1975 to face trial in Hong Kong and eventually served four years in jail. In the four months from October 1973 to February 1974 Hong Kong citizens saw the creation of the HK ICAC without a single dissenting voice in their Legislative Council. It was an independent body whose Commissioner reported directly to the Hong Kong Governor.[313]

3.237 Mr O'Donnell concluded that:

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

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

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

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

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

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

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

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

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

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

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

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

Electoral integrity

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

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

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

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

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

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

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

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

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

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

Committee comment

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

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

3.245 Such diversity is attributable to the varying contexts in which each agency was established. The oldest of the state integrity commissions, the NSW ICAC, was established in response to a series of corruption scandals involving senior members of the executive, the judiciary and the police force in New South Wales[322], while the Qld CCC and the WA CCC were both established as recommendations of royal commissions dealing with serious police corruption in each state. The remaining commissions are of more recent vintage and have been established in response to a parliamentary committee inquiry in the case of Tasmania, an independent review of existing integrity arrangements in Victoria and as a 'pre-emptive' measure and 'safeguard' against future corruption in South Australia.[323]

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

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

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

322 See para. 3.7 above.

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

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

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

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

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

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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.
>
> 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

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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.
>
> 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.
>
> 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.
>
> 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

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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.
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> …
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> …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

Additional Comments from NXT

1.1 At the outset the NXT would like to acknowledge the work of this committee. The majority report explores many of the issues relating to integrity commissions around the country, including their successes and their drawbacks. We are encouraged that both the major parties have taken the issue of establishing a national integrity commission so seriously, however we believe that given the weight of the evidence received by the committee this inquiry has missed an important opportunity to recommend the establishment of a national integrity commission. The NXT strongly believes that a national integrity commission should be established.

Recommendation 1

1.2 The NXT recommends that the Commonwealth government establish a national integrity commission with broad scope to address integrity and corruption matters. The Commonwealth should strongly consider extending the powers of an existing agency to perform this function.

1.3 The Commonwealth would benefit from a single umbrella commission that can direct complaints regarding corruption and integrity. There is currently no single point for making a complaint regarding corruption, and evidence indicates this creates public confusion as to where to report concerns. As outlined by Mr Samuel Ankamah of Griffith University:

> 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.[1]

1.4 A federal national integrity commission would be of benefit as a useful first point of contact for people wishing to report corruption.

1.5 The establishment of a national integrity commission also has the ability to provide the public with clarity and certainty regarding what can, and is investigated, without having to report to numerous agencies. During committee hearings, Senator Kakoschke-Moore questioned Professor Gabrielle Appleby on importance of having a single agency to which corruption can be reported, ensuring that the ability of individual agencies to undertake their functions is supported.

> **Senator KAKOSCHKE-MOORE:** One of the things that I have noticed throughout the evidence in the submissions that we have received is that there does seem to be a level of public confusion about what exactly corruption is and then, once you have identified behavioural conduct that you think does not stack up, there is uncertainty about where you should go to report that.

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

> …
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> I would be interested to know your views on whether that is because the complaints received were not about corrupt conduct per se or whether they were just directed to the wrong body. The ombudsman had similar statistics that demonstrated that most of the reports made were not within the purview of the Ombudsman.
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> **Prof. Appleby:** I think this goes to a few points that have already been discussed by Professor Twomey and Professor McMillan earlier on the issue about public understanding and public education—where you might go to lodge a particular complaint about a particular agency, and at what level. At the Commonwealth level, the diffusion of agencies is such that there is confusion. There is no one-stop point to make a complaint, and people do need to have some understanding. I think that that actually undermines the ability of individual agencies to fulfil their functions. It may actually dissuade people from coming forward because they are confused. 'Should I go to the ombudsman? Should I go to ACLEI?' That sort of thing.
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> …
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> I think I am much more persuaded by Professor McMillan's suggestion this morning that maybe there should be a one-stop button that you press for a complaint and then there is a triage system that sits behind that. I do not think it is fair for the public to have to understand the nuances of what might be the jurisdictional bar for one particular agency over another. If they have concerns and they want to be able to have them addressed by the most appropriate agency, the Commonwealth should create a funnel for those complaints.[2]

1.6 The NXT supports the committee's view that consideration could be made to extend the existing powers and jurisdiction of the Australian Commission for Law Enforcement Integrity rather than establishing a new agency, as long as it is appropriately resourced. The NXT is wary of implementing an entirely new body within the existing integrity framework that may replicate the scope of other agencies and add to increasing public confusion regarding the current federal framework.

Recommendation 2

1.7 The NXT recommends that the Australian National Audit Office (ANAO) undertake an audit of the national integrity framework prior to implementing a national integrity commission, with the aim of identifying vulnerabilities and gaps within the existing framework.

1.8 The ANAO has the broadest jurisdiction of the federal institutions through its performance audit powers, and possesses the greatest transparency within its reporting capabilities. The Commonwealth should utilise these powers and require the ANAO to undertake a cross-sectoral and inter-institutional investigation into the existing national integrity framework. This investigation should be completed prior to the

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

implementation of a new national integrity agency in order to assess the effectiveness and scope of existing integrity mechanisms.

1.9 A 'systemic audit of existing institutions' is also recommended by Professor Gabrielle Appleby as a method to determine whether there are institutional gaps in existing organisations.[3] Similarly, Ms Gabrielle Bashir SC, member of the Law Council of Australia, argued that a 'national integrity system assessment' is required to determine whether and where gaps within the existing framework are located.[4] The NXT agree with the suggestion in Griffith University's submission that a new national integrity commission will not provide a solution to gaps in the current framework, unless this new commission is 'well designed to achieve the intended purpose'.[5] An audit of the existing framework would provide a new agency with the ability to ensure the Commonwealth has a strong anti-corruption framework.

Recommendation 3

1.10 The NXT recommends that the new national integrity commission be empowered to hold public hearings.

1.11 NXT believes in transparency and accountability in the investigation process. The Australian public have lost confidence in the processes undertaken by integrity agencies, in part due to the closed-door approach to many investigations. Greater transparency in the investigation of corruption is required at a federal level. This can be achieved in part by undertaking public hearings for corruption matters, which provides people with an insight into how issues of corruption can be managed and resolved.

1.12 The NXT support the model followed by the NSW ICAC which requires that any public hearing must be approved by a panel of three commissioners who determine whether the process would be in the public interest. This restructure was recommended by the Committee on the Independent Commission Against Corruption in its October 2016 report: *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*.[6] Investigative journalists Ms Kate McClymont and Mr Michael West who have reported extensively on state corruption matters, agreed with the new requirement that a public hearing by NSW ICAC must be approved by a panel of commissioners.[7] Requiring a panel of

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

4 Ms Bashir SC, Law Council of Australia, *Committee Hansard*, 16 June 2017, p. 6.

5 Australian Research Council Linkage Project, *Discussion Paper #1: Strengthening Australia's National Integrity System: Priorities for Reform*, March 2017, p. 4.

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

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

commissioners to consider each matter separately would ensure that every matter is subject to additional scrutiny and discussion, which the NXT believes is in the public interest.

1.13 The Australia Institute advocates for public hearings and argued that the 'regular conduct of public hearings' in NSW 'greatly contributed to its success in investigating and exposing corruption'.[8] In their submission to the inquiry the Australia Institute also quoted former officers of the NSW ICAC, including former assistant NSW ICAC Commissioner Anthony Whealy QC, who has stated that 'there are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost', and former NSW ICAC Commissioner David Ipp QC who said of the ICAC that '[i]ts main function is exposing corruption; this cannot be done without public hearings'.[9]

1.14 Public hearings allow members of the public to access important information about the issues, and encourage people with relevant further information to approach the agency and provide evidence. The use of public hearings is supported by Transparency International, who noted the importance of potential witnesses coming forward and providing useful information after the dissemination of initial information through the public hearing process.[10] The Chief Executive Officer of the Qld CCC, Mr Smith, has stated that in appropriate situations public hearings are very important, but notes that they should be carefully used in the right circumstances.[11] The NXT believe public hearings encourage greater information gathering processes which lead to better investigations and better outcomes.

1.15 The SA ICAC is required to hold all of its examinations relating to corruption in public administration in private. Previously, SA ICAC's Commissioner Bruce Lander has argued that no examinations should be held in private especially in the case of misconduct and maladministration matters.[12] The Australia Institute claims that the SA ICAC's inability to hold public hearings makes it the least effective of all of the state ICAC bodies, relying on data such as referral numbers to determine

8 The Australia Institute, *Submission 14*, p. 9.

9 The Australia Institute, *Submission 14*, p. 9 (citations omitted).

10 Transparency International Australia, *Submission 21*, pp 7-8.

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

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

'success'.[13] Any national integrity agency should have the power to hold public hearings. The NXT believe that the SA ICAC's inability to hold public hearings is a gross failure of the design of that commission.

1.16 Public hearings also have the benefit of maintaining public confidence in an integrity and corruption commission process. Professor Anne Twomey expressed her preference for public over private hearings. She argued that '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'.[14] During committee hearings Senator Kakoschke-Moore put questions to Mr Ankamah from Griffith University regarding the connection between a public perception of corruption and public hearings:

> **Senator KAKOSCHKE-MOORE:** I would like to go to the issue of a potential federal anti-corruption, pro-integrity commissioner's relationship with the public, because certainly from what I have read and the evidence we have heard it seems that the absence of a federal anti-corruption body is perhaps contributing to the perception that there is corruption at a Commonwealth level. Mr Ankamah, I wonder if you could tell the committee a little more about your thoughts about how that relationship should be developed. In particular, I would be interested to know your thoughts on the public hearings.
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> **Mr Ankamah:** Thanks very much, Senator. I think that is a very good question. Public hearings are very significant for such a body. In addition to the agency being able to hold private hearings, in my view, and in my own research, which I am conducting right now, there are three main things about public hearings. One of the things they do is that they are able to flush out more evidence for the agency's own investigations, and they are also able to build support and make confidence in such an agency. One thing I know is that when there is so much secrecy in investigations or operations, the public tends to see it as too secretive and not to believe in what the agency is doing. That is where the perception comes from that they are being controlled by some power somewhere. Once there are public hearings then people are able to participate and to know what is going on. Even those who are not able to participate are able to read excerpts in newspapers, and so it garners public support when the reports of such investigations come out. It is also very important, as sometimes it leads to identification of more systemic corruption. Sometimes, as was in one of the submissions, the issue is the tip of the iceberg and it might lead into the lower part of the iceberg. So public hearings are also very significant in that aspect.[15]

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13 Miles Kemp, 'Report finds SA ICAC least effective in Australia because hearings are kept secret', *The Advertiser*, July 31 2017, available: http://www.adelaidenow.com.au/news/south-australia/report-finds-sa-icac-least-effective-in-australia-because-hearings-are-kept-secret/news-story/dc31ca2a1ef1eb334dbee39774de6d4c (accessed 11 September 2017).

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

15 Mr Ankamah, *Committee Hansard*, 15 May 2017, p. 4.

The NXT believes that public hearings are vital in the anti-corruption process as they ensure public confidence in government bodies remains high.

1.17 The NXT acknowledges that without appropriate safeguards, public hearings may have serious consequences for a person's reputation, especially where a person is required to answer questions in public in relation to an inquiry. This potential is amplified when procedures of commissions mirror court proceedings, or are conducted in conjunction with police investigations. Mr Michael Griffin, the Integrity Commissioner of the ACLEI noted that in considering whether to hold a public hearing he first considers whether there are police investigations afoot as, '[i]f 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'.[16] The NXT believes that the decision to hold a public hearing should only occur if the majority of commissioners determine it is overwhelmingly in the public interest to do so. Similarly, the procedures adopted by a national integrity commission should not mirror too closely practices used by the courts. This will assist in reducing the public perception that being questioned by the integrity commission is akin to being prosecuted for an offence.

Recommendation 4

1.18 The NXT recommends that the new national integrity commission be empowered to investigate non-government organisations and agencies who receive public funds.

1.19 There is currently no purview in South Australia for the state ICAC to investigate people or organisations who are recipients of public funds, and who are not public officers or authorities. The inability of the SA ICAC to initiate these investigations is another failure. SA ICAC Commissioner Lander supports the investigation of organisations that are provided with public funds 'if in fact they or their officers engage in corruption'.[17] Any new federal integrity agency should have the power to follow the path of public funds and investigate where matters of corruption arise.

1.20 A number of witnesses and submissions to this inquiry support the extension of integrity agencies powers to include the ability to investigate non-government organisations and agencies who receive public funds. The Gilbert and Tobin Centre of Public Law recommended that a federal integrity agency have the power to investigate agencies as well as government contractors.[18] Professor Brown of Griffith University suggested that a new federal integrity agency be empowered 'to follow the dollar and follow the powers'.[19] This would ensure that where any Commonwealth money or

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

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

18 Gilbert + Tobin, *Submission 18*, p. 3.

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

services 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'.[20] The Independent Broad-based Anti-corruption Commission Committee also noted that giving the commission the power to access documentation of individuals and organisations in receipt of government funding would enhance their ability to investigate corruption.[21] Public funds should be put to public use and any misuse of public funds should not be tolerated. The NXT believes that there is currently not enough oversight of non-government organisations and agencies who receive public funds and that this should be addressed by a new national integrity commission.

Recommendation 5

1.21 The NXT recommends that the new national integrity commission should be empowered to initiate own investigations into systemic matters of integrity and corruption.

1.22 A new federal national integrity commission should be able to initiate investigations into all relevant concerns regarding systemic corruption. This would ensure that an investigation can be launched without a specific complaint being made. Professor Appleby stated that 'any national integrity commission should be investigating serious or systemic corruption', with serious corruption being defined as 'corrupt conduct that would reduce public confidence in government and systemic corruption as corruption that demonstrates a pattern of behaviour'.[22] Investigative journalist Mr Nick McKenzie of Fairfax media noted that the 'need for an ICAC type body arises when you have systemic corruption involving a number of public officials perhaps'.[23]

1.23 The SA ICAC Commissioner has the power to initiate own inquiries and the committee heard from Commissioner Lander who noted that:

> [t]here are some matters that, on reflection, I think I should have investigated but did not. I think there are a couple of matters where it would have been better if I had acted on my own initiative where we did not receive complaints and investigated two particular matters, and I regret doing that, but the time has passed to make it not relevant any longer.
>
> …
>
> They were a couple of matters I read about in the media, and I thought at the time, 'Well, this doesn't seem appropriate,' but did not act on my own

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

21 Independent Broad-based Anti-corruption Commission Committee, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate 2015/16, November 2016*, pp 23–24.

22 Professor Appleby, *Committee Hansard*, Friday 12 May 2017 p. 13.

23 Mr Nicholas McKenzie, Journalist, Fairfax Media, *Committee Hansard*, 12 May 2017, p. 36.

> initiative. I should have, I think. They were not reported to me later, but I think, with the benefit of hindsight, it would have been better if I had initiated my own investigation into those matters. I think I probably did not because nobody complained about them, but that really is not a satisfactory explanation. As I say, I think I should have done that.[24]

1.24 The example above indicates that the power to hold own motion inquiries is essential, however it is equally essential that commissioners use this power whenever it is required. The NXT supports the new national integrity commission having own motion powers in order to investigate matters of systemic corruption.

Senator Skye Kakoschke-Moore
Deputy Chair

24 The Hon. Bruce Thomas Lander QC, Independent Commissioner Against Corruption, SA ICAC, *Committee Hansard*, 15 May 2017, p. 36.

Australian Greens – Dissenting Report

1.1 Public trust and confidence in our democratic institutions, especially the federal parliament, is very low. It is crucial that we address both the perception of corruption and actual risk of corruption. A recent poll commissioned by the Australia Institute found that 80% of respondents were supportive of establishing a federal anti-corruption commission.[1]

1.2 Scandals continue to dog the federal parliament and public service. There are many recent examples which give rise to the perception of corruption. Investigation of these scandals, and the perception that they were investigated rigorously, could have benefitted from a federal anti-corruption commission:

- Both the Liberal and Labor parties accepted donations from compromised Chinese Nationals after ASIO expressly asked them not to.
- The Minister of Finance, Senator Mathias Cormann, signed a lease over a building which a key crossbench Senator Bob Day owned – against the Department of Finance's advice.
- The Minister for Agriculture, Barnaby Joyce relocated an entire department to his electorate with no compelling reason.
- Liberal MP Stuart Robert went to China to seal a deal between the Chinese government and a millionaire donor to the Liberal Party, Paul Marks director of coal company, Nimrod Resources – which Stuart Robert also held shares in.
- $45,000 was paid by the Australian Hotels and Hospitality Association to the Menzies 200 Club, a fundraising vehicle linked to Member for Menzies, Kevin Andrews, at the same time that Mr Andrews was personally developing the government's gambling policy.
- Former Speaker of the House Bronwyn Bishop spent $5000 on a helicopter flight from Melbourne to Geelong when a train ride costs $12.
- When Senator Sam Dastyari was state secretary, NSW Labor accepted donations from a black market tobacco importer.
- Senator Pauline Hanson put her face and party logo on a plane that was gifted by a property developer, and One Nation travelled the country in this plane which was never declared.
- Brickworks donated hundreds of thousands of dollars before the election to the Liberals, then were awarded a multi-million dollar government contract from a clean energy scheme after that program had been closed down.

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1 The Australia Institute, *Support for a federal ICAC [POLL]*, available: http://www.tai.org.au/content/support-federal-icac-poll.

- The Top Education Institute made a donation to cover Senator Dastyari's travel budget overspend.
- Former Small Business Minister, Bruce Billson, was getting paid a salary by the Franchise Council of Australia, while still sitting as a Member of Parliament.
- Fresh from negotiating the Chinese Free Trade Agreement, Minister for Trade, Andrew Robb immediately commenced working for a billionaire closely linked to the Chinese Communist Party, earning $880,000 a year.
- Minister Barnaby Joyce appointed an irrigation lobbyist to the Murray Darling Basin Authority, despite her being a vocal opponent of delivering water into the river system.
- Liberal MP for Swan, Steve Irons, charged taxpayers $2000 to attend his own wedding and again flew up to the Gold Coast for activities which included a round of golf.

1.3 Most of the existing functions of various anti-corruption bodies are concerned with individual cases of personal fraud or misconduct. Most of the inquiry was similarly concerned with such matters. However the public is also concerned with systemic corruption across political institutions and the public service, especially around political donations buying favour from ministers or influencing party policy, and indirect payments by lobby groups to ensure favourable outcomes from the incumbent government or policy decisions by a major party. These concerns are not addressed by any existing anti-corruption body.

1.4 The committee's report notes that 'Commonwealth 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'.[2]

1.5 This was noted in a number of submissions including from the Australia Institute, who quotes Transparency International: 'the Commonwealth's present arrangements are the result of decades of largely uncoordinated developments in administrative law, criminal law and public sector management, together with political accident'.[3]

1.6 The Australia Institute concludes:

> there are gaps in our current integrity system, with no body currently able to investigate systemic corruption at a parliamentary or ministerial level. Ongoing scandals at a federal level show that this systemic corruption may

2 See pp 217-218.

3 *Submission 14*, p. 5.

> be happening in our federal government, but we have no way of knowing if this is the case.[4]

1.7 The government's argument is that a new commission is not required because our existing anti-corruption mechanisms are underpinned by a democratic system of representative government and the separation of powers. However, the Law Council of Australia notes:

> it is well-established that corruption has the potential to undermine democratic institutions. Therefore it cannot be assumed that democratic institutions alone will insulate Australia from the impact of corruption in the absence of a national strategy for addressing corruption.[5]

1.8 There are legitimate concerns regarding balancing civil liberties with extraordinary powers, the likes of which are held by state-based anti-corruption bodies. The NSW Council for Civil Liberties considered this balance and argued that:

> the balance between greater public good and greater public harm has shifted. In this evolving context, if the public interest is to be protected against corruption, NSWCCL acknowledges that the establishment of anti-corruption agencies equipped with extraordinary investigative powers—with proper constraints and safeguards—is necessary and proportionate.[6]

Recommendation 1

1.9 The Australian Greens recommend that the government begin work immediately to establish a National Integrity Commission with broad investigative powers to oversee the entire federal public service and Members of Parliament.

Recommendation 2

1.10 The Australian Greens recommend that any new body be empowered to conduct public hearings where it is in the public's interest to do so.

Senator Lee Rhiannon
Australian Greens Democracy Spokesperson

4 *Submission 14*, p. 11.

5 *Submission 9*, p. 12.

6 *Submission 26*, p. 3.

Additional comments from Senator Hinch

A National Independent Commission Against Corruption should be established.

This independent commission should be called the National Independent Commission Against Corruption (NICAC).

This national corruption commission should follow the recommendations from Griffith University, namely the national commission being an umbrella with which all Commonwealth integrity and corruption complaints could be lodged.

Senator Derryn Hinch
Senator for Victoria

Appendix 1

Submissions received

Submission Number	Submitter
1	Australian Public Service Commission
2	Mr Adam Presnell
3	Mr Brett Gerrity
4	Mr Michael Bates
5	Independent Broad-based Anti-corruption Commission
6	Mr Ted Bushell
7	Rev Graham Dempster
8	Mr George Williams AO & Mr Harry Hobbs
9	Law Council of Australia
10	Inspector-General of Intelligence and Security
11	Attorney-General's Department
12	Australian Commission for Law Enforcement Integrity
13	Victorian Inspectorate
14	The Australia Institute
15	Australian National Audit Office
16	GetUp!
17	Civil Liberties Australia
18	Gilbert + Tobin Centre of Public Law
19	Ms Bernadine Tucker
20	Accountability Round Table
21	Transparency International Australia
22	NSW Ombudsman

23	Name Withheld
24	The Hon Dr Peter Phelps MLC
25	Ms Madonna Waugh
26	NSW Council of Civil Liberties
27	Confidential
28	Confidential
29	Mathematicians Party Australia
30	Ms Rosemary Glaisher
31	Mr Alistair Ping
32	Mr Phil Patterson
33	Mr Kevin Lindeberg
34	Professor Tim Prenzler
35	Mr Philip Gorman
36	Crime and Corruption Commission Queensland
37	Dr Marie dela Rama
38	Ms Mona Krombholz
39	Mr Steve Davies
40	Confidential
41	Name Withheld
42	Mr Neil Westbury
43	Dr Dawn Casey
44	Queensland Whistleblowers Action Group (QWAG)
45	Ms Beverley Goode
46	Mr Allan Warren

Appendix 2

Answers to questions on notice

1. Answers to Questions on Notice - Public Hearing, 12 May 2017, Sydney - NSW Ombudsman (received 2 June 2017).

2. Answers to Questions on Notice - Public Hearing, 15 May 2017, Brisbane - Crime and Corruption Commission Queensland (received 23 May 2017).

3. Answers to Written Questions on Notice - SA Independent Commissioner Against Corruption (received 29 May 2017).

4. Answers to Questions on Notice - Public Hearing, 16 June 2017, Canberra - Commonwealth Ombudsman (received 10 July 2017).

5. Answers to Questions on Notice - Public Hearing, 16 June 2017, Canberra - Australian Electoral Commission (received 3 August 2017).

6. Answers to Question on Notice - Public hearing, 5 July 2017, Canberra - Australian National Audit Office (received 20 July 2017).

7. Answers to Questions on Notice - Public Hearing, 5 July 2017, Canberra - Department of the Prime Minister and Cabinet (received 20 July 2017).

8. Answers to Questions on Notice - Public Hearing, 5 July 2017, Canberra - Australian Public Service Commission (received 19 July 2017).

9. Answers to Question on Notice (Additional) - Public Hearing, 5 July 2017, Canberra - Australian Public Service Commission (received 3 August 2017).

10. Answers to Questions on Notice - Public Hearing, 5 July 2017, Canberra - Australian Federal Police (received 16 August 2017).

11. Answers to Questions on Notice - Public Hearing, 5 July 2017, Canberra - Attorney-General's Department (received 28 July 2017).

Appendix 3

Public hearings and witnesses

Friday 12 May 2017 – Sydney

NSW Ombudsman

Professor John McMillan, Acting NSW Ombudsman

Associate Professor Gabrielle Appleby (Private capacity)

Professor Anne Twomey (Private capacity)

Fairfax Media

Ms Kate McClymont, Senior Reporter, Sydney Morning Herald

Mr Nick McKenzie, Investigative Journalist

The Australian

Mr Chris Merritt, Legal Affairs Editor

Mr Michael West, Investigative Journalist (Private capacity)

Office of the Independent Commission Against Corruption (NSW)

Mr John Nicholson SC, Acting Inspector

Ms Susan Raice, Principal Legal Adviser

Monday 15 May 2017 – Brisbane

Centre for Governance and Public Policy, Griffith University

Professor Haig Patapan, Director

Professor A.J. Brown, Program Leader

Mr Samuel Ankamah

Queensland Crime and Corruption Commission

Mr Forbes Smith, Chief Executive Officer

Queensland Integrity Commissioner

Mr Richard Bingham, Commissioner

Office of the Parliamentary Crime and Corruption Commissioner (Qld)

Ms Karen Carmody, Commissioner

Mr Mitchell Kunde, Principal Legal Officer

Independent Commissioner Against Corruption South Australia

The Hon Bruce Lander QC, Commissioner

Wednesday 17 May 2017 – Melbourne

Rule of Law Institute

Mr Malcolm Stewart, Vice President

Victorian Inspectorate

Mr Robin Brett QC, Inspector

Transparency International Australia

The Hon. Anthony Whealy QC, Chair

Accountability Round Table

The Hon. Stephen Charles QC

Australian Council of Trade Unions

Mr Trevor Clarke, Director of Industrial and Legal Policy

Friday 16 June 2017 – Canberra

Law Council of Australia

Ms Gabrielle Bashir SC, Member, National Criminal Law Committee

Mr Greg Golding, Chair, Working Party on Foreign Corrupt Practices, Business Law Section

Hon Peter Phelps MLC (Private capacity)

Department of the Senate

Mr Richard Pye, Clerk of the Senate

Department of the House of Representatives

Mr David Elder, Clerk of the House of Representatives

The Australia Institute

Dr Richard Denniss, Chief Economist

Mr Geoffrey Watson SC (Private capacity)

Australian Electoral Commission

Mr Tom Rogers, Electoral Commissioner

Mr Paul Pirani, Chief Legal Officer

Commonwealth Ombudsman

Ms Doris Gibb, Acting Commonwealth Ombudsman

Mr Rodney Lee Walsh, Acting Deputy Ombudsman

Ms Erica Welton, Acting Senior Assistant Ombudsman, Integrity

Ms Brigid Simpson, Acting Director Public Interest Disclosure Team

Inspector-General of Intelligence and Security

Ms Margaret Stone, Inspector-General

Mr Jake Blight, Deputy Inspector-General Rule

Wednesday 5 July 2017 – Canberra

Australian National Audit Office

Mr Grant Hehir, Auditor-General

Ms Rona Mellor PSM, Deputy Auditor-General

Dr Tom Ioannou, Group Executive Director

Department of Prime Minister and Cabinet

Ms Philippa Lynch, First Assistant Secretary

Mr William Story, Assistant Secretary

Ms Maia Ablett, Acting Assistant Secretary

Australian Public Service Commission

Hon John Lloyd PSM, Commissioner

Ms Stephanie Foster, Deputy Commissioner

Mr Paul Casimir, Director, Integrity

Attorney-General's Department

Ms Nicole Rose PSM, Deputy Secretary, Criminal Justice Group

Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch

Ms Anne Sheehan, Assistant Secretary, Communications Security and Intelligence Branch

Mr Tom Sharp, Acting Director, Criminal Law Reform Section

Australian Federal Police

Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption

Mr Tony Alderman, Manager, Government and Communications

Acting Commander Paul Hopkins, Acting Manager, Crime Operations

Australian Commission for Law Enforcement Integrity

Mr Michael Griffin AM, Integrity Commissioner

Ms Penny McKay, General Counsel

Ms Sarah Marshall, Executive Director, Operations