

INQUIRY INTO AN INDEPENDENT INTEGRITY COMMISSION

SELECT COMMITTEE ON AN INDEPENDENT INTEGRITY COMMISSION

OCTOBER 2017

COMMITTEE MEMBERSHIP

Mr Shane Rattenbury MLA (Chair)

Mrs Giulia Jones MLA (Deputy Chair)

Ms Bec Cody MLA

Ms Elizabeth Lee MLA

Mr Chris Steel MLA

SECRETARIAT

Dr Andréa Cullen AGIA ACIS

Committee Secretary

Dr Brian Lloyd

[Assistance with summarising views put forward at hearings]

Ms Lydia Chung

Administrative assistance

CONTACT INFORMATION

Telephone	02 6205 0142
Post	GPO Box 1020, CANBERRA ACT 2601
Email	committees@parliament.act.gov.au
Website	www.parliament.act.gov.au

RESOLUTION OF APPOINTMENT

At its meeting on Thursday, 15 December 2016, the Assembly passed the following resolution:

"That:

- (1) a select committee be established to inquire into the most effective and efficient model of an independent integrity commission for the ACT and that the committee make recommendations on the appropriateness of adapting models operating in other similarly-sized jurisdictions, as well as:
 - (a) the personnel structure of the commission to ensure the appropriate carriage of workload;
 - (b) governance and funding that delivers independence;
 - (c) the powers available to a commission;
 - (d) the educative functions of a commission;
 - (e) issues regarding retrospectivity, including human rights, and the timeframes around which former actions can be assessed;
 - (f) the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT; and
 - (g) any other relevant matter;
- (2) the select committee shall consist of the following number of members, composed of:
 - (a) two Members to be nominated by the Government;
 - (b) two Members to be nominated by the Opposition;
 - (c) one Member to be nominated by the Crossbench; and
 - (d) the Chair shall be a Crossbench member;
- (3) the select committee be provided with necessary staff, facilities and resources;
- (4) the select committee to report by the end of August 2017¹;
- (5) if the Assembly is not sitting when the committee has completed its inquiry, the committee may send its report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publishing and circulation;
- (6) the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders; and
- (7) nominations for membership of the committee be notified in writing to the Speaker within two hours following conclusion of the debate on the matter." ²

¹ On 6 June 2017, at its meeting, the Assembly agreed to amend the reporting date to by the end of October 2017.

² Legislative Assembly for the ACT, *Debates*, 15 December 2016, pp. 253–254.

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EXECUTIVE SUMMARY

There have been regular calls for the establishment of an independent integrity body in the ACT since self-government—it was raised at the outset of self-government in 1989, again in 2001 and again in 2016.

At the 2016 ACT General Election all three parties represented in the Assembly committed to act on integrity in government, including through the establishment of an independent integrity commission for the ACT. On 15 December 2016, the Legislative Assembly established the Committee to inquire into the most effective and efficient model of an independent integrity commission for the ACT and make recommendations on the appropriateness of adapting models operating in other jurisdictions.

As part of its considerations, the Committee has invited and received a range of submissions from interested organisations and individuals, as well as briefings from governance and integrity experts. The Committee visited anti-corruption bodies in other Australian jurisdictions and heard from witnesses through public hearings in July and September 2017.

This process has reinforced the Committee's view that the ACT community and taxpayer has a right to expect that the social contract between government and the people is working in its interest. The Committee acknowledges the correlation between the establishment of an effective anti-corruption and integrity type body and improved accountability and trust in government.

Accordingly, the Committee has **recommended** that the Government establish a standing ACT Anti-Corruption and Integrity Commission (ACIC) to investigate, expose and prevent corruption and foster public confidence in the integrity of the ACT Government. The Committee has **recommended** that the Government finalise the establishment of an ACT ACIC by the end of 2018.

The Committee considers that it is important that an ACT ACIC be established and operational during this Assembly.

This report sets out the Committee's views and recommendations regarding the design, form, functions and powers of an ACT ACIC. It is presented in four parts—the context to the inquiry, views from submitters, views put forward in hearings, and finally the views of the Committee and its recommendations. The report makes **79** recommendations relating to the ACT's integrity framework, the jurisdiction, scope and powers of an ACT ACIC, accountability and independence, staffing and resourcing, legislative application and other issues.

Key recommendations from the Committee are that an ACT ACIC should:

- cover all public officials, and parties delivering contracted work or services on behalf of government **(Recommendation 10)**;
- have the following functions: (a) investigation, referral and reporting; (b) corruption prevention (including research and risk mitigation); and (c) public education **(Recommendation 5)**;
- have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community **(Recommendation 12)**;
- have oversight over Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers **(Recommendation 14)**;
- have a definition of ‘corrupt conduct’ based on Part 3 of the NSW *Independent Commission Against Corruption Act 1988* **(Recommendation 17)**;
- be visible, accessible and a contact point for: (a) citizens and public servants to make complaints/and report corruption concerns; (b) referrals from within government (ACT Public Service); (c) referrals from other integrity stakeholders/bodies; and (d) referrals from other designated stakeholders **(Recommendation 23)**;
- have the power to make findings of fact that corruption has occurred and that such a finding is not to be taken as a finding of guilt **(Recommendation 38)**;
- be empowered to refer suspected instances of criminality to appropriate authorities **(Recommendation 45)**;
- not be limited as to the timeframes around which former actions can be assessed, but have an operational focus that is largely prospective and focused on current matters **(Recommendation 52)**;
- have the power to hold public examinations. The decision on whether to hold public or private examinations should be informed by a public interest test³ **(Recommendation 54)**; and
- be an Officer of the Assembly **(Recommendation 58)**.

Additionally, the Committee has recommended that mandatory reporting should apply in the ACT Public Service—such that Directors-General (and equivalents) have a duty to notify an ACT ACIC of any information or allegation that raises a corruption issue in his or her agency **(Recommendation 27)**.

The Committee acknowledges that the ACT is a human rights jurisdiction and that there needs to be appropriate safeguards in the enabling legislation of an ACT ACIC to ensure procedural fairness and to guard against its investigative and coercive powers being abused. The Committee is of the view

³ Mr Chris Steel MLA and Ms Bec Cody MLA expressed a preference for the IBAC Victoria model of a default for private examinations ‘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’ (Section 117(1), *Independent Broad-based Anti-corruption Commission Act 2011*).

that it has addressed the application of human rights considerations by recommending that reasonable limits are placed on the circumstances in which such powers can be exercised and by ensuring that procedural fairness and natural justice considerations are an inbuilt part of the work of an ACT ACIC.

The Committee wishes to thank all of those who have contributed to its inquiry, by making submissions and/or appearing before it to give evidence. The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is appreciative that it was able to draw on a broad range of expertise and experience in its deliberations. In its report, the Committee has based many of its recommendations, or variations thereof, on suggestions by inquiry participants.

RECOMMENDATIONS

RECOMMENDATION 1

9.37 The Committee recommends that the ACT Government establish a standing ACT independent integrity body to investigate corruption in public administration and strengthen public confidence in government integrity.

RECOMMENDATION 2

9.39 The Committee recommends that the ACT Government finalise the establishment of a standing ACT independent integrity body by the end of 2018.

RECOMMENDATION 3

9.41 The Committee recommends that any proposed bill for the establishment of a standing ACT independent integrity body be referred to an ACT Legislative Assembly committee for inquiry and report.

RECOMMENDATION 4

11.13 The Committee recommends that a standing ACT independent integrity body should have as its primary objective(s) to investigate, expose and prevent corruption and foster public confidence in the integrity of the ACT Government.

RECOMMENDATION 5

11.22 The Committee recommends that a standing ACT independent integrity body should have the following functions: (a) investigation, referral and reporting; (b) corruption prevention (including research and risk mitigation); and (c) public education.

RECOMMENDATION 6

11.26 The Committee recommends that the corruption prevention function of a standing ACT independent integrity body should include communicating and disseminating (as it concerns research, risk mitigation and prevention) lessons learned from investigation outcomes.

RECOMMENDATION 7

11.29 The Committee recommends that the public education function of a standing ACT independent integrity body should be focused on upholding and modelling high levels of probity and ethics together with communicating the outcomes of investigations, facilitating transparency, and awareness of corruption issues.

RECOMMENDATION 8

11.34 The Committee recommends that the focus of a standing ACT independent integrity body should be on corruption and integrity connected with public administration.

RECOMMENDATION 9

11.40 The Committee recommends that a standing ACT independent integrity body should be named as an Anti-Corruption and Integrity Commission (ACIC) to ensure consistency with theory and practice and to accurately reflect its objectives, functions and relationships with other integrity stakeholders.

RECOMMENDATION 10

12.21 The Committee recommends that the substantive jurisdiction of an ACT Anti-Corruption and Integrity Commission should cover all public officials. Public officials is to include all persons receiving a salary, wages or other payment from the ACT Government Service, its statutory authorities, agencies or boards. This would include parties delivering contracted work or services on behalf of government.

RECOMMENDATION 11

12.22 The Committee recommends that in investigating possible wrongdoing or impropriety on the part of a public official in exercising their official functions that the substantive jurisdiction of an ACT Anti-Corruption and Integrity Commission may extend to the conduct of third parties, i.e., where the third parties' conduct would give rise to (or could give rise to) wrongdoing.

RECOMMENDATION 12

12.30 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community.

RECOMMENDATION 13

12.31 The Committee recommends, as it concerns ACT Policing, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC), together with a Memorandum of Understanding with the Australian Commission for Law Enforcement Integrity (ACLEI), must:

- (a) provide for the ACLEI to refer corruption matters relating to ACT Policing to the ACT ACIC;

- (b) provide for the ACT ACIC to operate cooperatively with ACLEI and other agencies, including those in other jurisdictions for joint investigations and information sharing;
- (c) establish an appropriate framework for inter-agency coordination; and
- (d) establish an appropriate framework for information sharing to enable the exchange of relevant intelligence and documentation when an investigation is commenced.

RECOMMENDATION 14

12.37 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) have oversight over Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers.

RECOMMENDATION 15

12.38 The Committee recommends, as it concerns Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC) must:

- (a) ensure that judicial independence and parliamentary privilege is maintained;
- (b) have regard to the separation of powers;
- (c) with respect to parliamentary privilege, clearly define the boundaries between the powers of an ACT ACIC and parliamentary privilege;
- (d) include a legislated process to deal with items that might be subject to disputed claims of privilege;
- (e) make it clear that any code of conduct binding MLAs, MLA staff, and Judicial Officers augments and does not restrict the definition of corruption included in the Act; and
- (f) establish a process where conduct crosses over into other jurisdictions—that, an ACT ACIC shall first take the decision to proceed with an investigation.

RECOMMENDATION 16

12.42 The Committee recommends, as it concerns the ACT Legislative Assembly, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC) specify the requirement for a Memorandum of Understanding (MOU) between the statutory head of the ACIC and the Speaker of the ACT Legislative Assembly on the execution of a judicially approved search warrant on the premises of the Legislative Assembly.

RECOMMENDATION 17

12.55 The Committee recommends that the definition of ‘corrupt conduct’, as set out in Part 3 of the *NSW Independent Commission Against Corruption Act 1988*, should

form the definition of ‘corrupt conduct’ in the enabling legislation of an ACT Anti-Corruption and Integrity Commission.

RECOMMENDATION 18

12.56 The Committee recommends that an ACT Anti-Corruption and Integrity Commission’s (ACIC) scope of conduct be focused on investigating matters where they involve serious or systemic corruption. While the Committee believes that the focus should necessarily be on serious and systemic corruption, any legislation should not be drafted in a way that would unduly limit the scope of an ACT ACIC.

RECOMMENDATION 19

12.57 The Committee recommends that the terms ‘serious’ and ‘systemic’ should each be defined in an ACT Anti-Corruption and Integrity Commission’s enabling legislation—as follows:

- (a) ‘serious corruption’ should be defined as corrupt conduct that is likely to threaten public confidence in the integrity of government; and
- (b) ‘systemic corruption’ should be defined as it is in the Australian Commission for Law Enforcement Integrity (ACLEI) statute—that is, as a pattern of corrupt conduct.

RECOMMENDATION 20

12.60 The Committee recommends that the ACT Government take advice as to whether the concept of ‘corrupt conduct’ adopted in the enabling legislation of an ACT Anti-Corruption and Integrity Commission is reflected in the terms of offences under the *Criminal Code 2002*. If it is not reflected, the Committee recommends that the Code should be amended so that it defines in statute the new standard or offence of ‘corrupt conduct’.

RECOMMENDATION 21

12.69 The Committee recommends that an investigation threshold of ‘reasonable suspicion’ (as per the Victorian *Independent Broad-based Anti-corruption Commission Act 2011*) of the occurrence of corrupt conduct be required for an ACT Anti-Corruption and Integrity Commission to commence an investigation.

RECOMMENDATION 22

12.75 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to conduct preliminary investigations that do not include the use of coercive authority.

RECOMMENDATION 23

12.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) must be visible, accessible and a contact point for: (a) citizens and public servants to make complaints and report corruption concerns; (b) referrals from within government (ACT Public Service); (c) referrals from other integrity stakeholders/bodies; and (d) referrals from other designated stakeholders.

RECOMMENDATION 24

12.84 The Committee recommends that complaints/referrals as received by an ACT Anti-Corruption and Integrity Commission (ACIC) are to be triaged using set criteria—such as: dismiss/refer/investigate. The triage criteria as detailed in the Victorian *Independent Broad-based Anti-corruption Commission Act 2011* are a useful reference point.

RECOMMENDATION 25

12.86 The Committee recommends that confidentiality requirements are to apply to all complaints and referrals as received by an ACT Anti-Corruption and Integrity Commission (ACIC) until such time as the Commission decides to conduct public hearings or report.

RECOMMENDATION 26

12.91 The Committee recommends that mandatory reporting should apply within the ACT Public Service—such that Directors-General (and equivalents) have a duty to notify an ACT Anti-Corruption and Integrity Commission of any information or allegation that raises a corruption issue in his or her agency. Further, these requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.

RECOMMENDATION 27

12.92 The Committee recommends that where Directors-General (and equivalents) knowingly or wilfully fail to comply with an ACT Anti-Corruption and Integrity Commission's duty to notify it of any information or allegation that raises a corruption issue in their agency, penalties should apply.

RECOMMENDATION 28

12.94 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should be empowered to take steps to protect the safety of anyone providing assistance to it or anyone consequently at risk. Appropriate provisions should be put in place to ensure protection of complainants or persons

making reports, for example, protection from reprisals and victimisation. The Committee considers that these protections would be consistent with protections in other legislation.

RECOMMENDATION 29

13.10 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) as informed by its purpose, should have a role in fostering public confidence in an integrity context and bring an authoritative leadership, organising and coordinating focus to the ACT public sector and parliamentary integrity framework.

RECOMMENDATION 30

13.12 The Committee recommends, as it concerns relationships with other integrity stakeholders, that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation, at a minimum, should:

- (a) provide for the ACIC to operate cooperatively with other integrity agencies, including those in other jurisdictions—for joint investigations or information sharing with these jurisdictions;
- (b) provide an appropriate framework for inter-agency coordination;
- (c) detail information sharing provisions to enable the exchange of relevant intelligence and documentation when an investigation is commenced;
- (d) provide for appropriate referral mechanisms which allow the ACIC to refer matters to other bodies, that fall outside its jurisdiction and scope of conduct;
- (e) provide the ACIC, in referring matters to other integrity stakeholders, with power to give directions and guidance with regard to the conduct of the matter and to require the agency to provide a report as to the investigation undertaken and its results;
- (f) include, where the ACIC refers a complaint or report concerning an MLA to the Commissioner for Standards to specify that the Commissioner be obligated (as opposed to compelled) to provide a report as to the outcome of the referral. The ACIC will be able to report publicly that it has made such a referral and this will leave the onus on the ACT Legislative Assembly to explain what has happened to the referral; and
- (g) include, where the ACIC refers a complaint or report concerning a member of the Judiciary to the Judicial Council, to specify that the Judicial Council be obligated (as opposed to compelled) to provide a report as to the outcome of the referral. The ACIC will be able to report publicly that it has made such a referral and this will leave the onus on the Judicial Council to explain what has happened to the referral.

RECOMMENDATION 3 1

- 14.11** The Committee recommends that an ACT Anti-Corruption and Integrity Commission have own motion powers for the purposes of investigating, exposing and preventing corruption and fostering public confidence in the integrity of the ACT Government.

RECOMMENDATION 3 2

- 14.26** The Committee recommends that an ACT Anti-Corruption and Integrity Commission have powers to: (a) require attendance by witnesses and compel answers to questions; (b) apply for warrants to search properties and seize evidence; and (c) apply for warrants to engage in covert tactics—including: listening devices and optical surveillance.

RECOMMENDATION 3 3

- 14.27** The Committee recommends that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation must contain mechanisms to ensure procedural fairness and to guard against its investigative and coercive powers being abused. This should include safeguards to avoid any unwarranted violation of personal rights of a person under investigation; and placing reasonable limits on the circumstances in which such powers can be exercised. This should include:
- (a) requiring that when witnesses are summonsed that they be given notice of the subject matter that will be discussed (provided it does not unduly prejudice the investigation);
 - (b) ensuring that warrants that are issued for an ACIC investigation are issued by the Courts rather than the Commission itself;
 - (c) any action to engage in covert tactics should be subject to obtaining a warrant through a judicial officer;
 - (d) as it concerns engaging in a controlled operation—that detailed and prescriptive criteria should be included in any legislation which permits the ACIC to engage in these activities and that punitive measures should also be in place to protect against unauthorised controlled operations in connection with an ACIC's work;
 - (e) evidence gathered about unrelated third parties should form no part of an ACIC's investigation (unless it is relevant to the investigation);
 - (f) that evidence given by a suspect under compulsion cannot be used against that suspect in any subsequent prosecutions; and
 - (g) if proceedings are proceedings for an indictable offence, an ACIC must, to the extent it thinks it is necessary to do so, ensure that the accused's right to a fair trial is not prejudiced.

RECOMMENDATION 34

14.28 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's enabling legislation must provide that the protections afforded by legal professional privilege and privilege against self-incrimination respectively are waived in circumstances where the Commission uses its power to compel the production or giving of evidence.

RECOMMENDATION 35

14.29 The Committee recommends that an ACT Anti-Corruption and Integrity Commission is not bound by the rules of evidence and can inform itself on any matter in such a manner as it sees fit.

RECOMMENDATION 36

14.30 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should not have the power: (a) to engage in integrity testing; and (b) arm its officers.

RECOMMENDATION 37

14.33 The Committee recommends, to ensure consistency with the powers of the Australian Commission for Law Enforcement Integrity (ACLEI), where it concerns conduct of ACT Policing officers, that an ACT Anti-Corruption and Integrity Commission have the power to engage in integrity testing.

RECOMMENDATION 38

14.39 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to make findings of fact that corruption has occurred and that such a finding is not to be taken as a finding of guilt.

RECOMMENDATION 39

14.40 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's enabling legislation must explicitly restrict the Commission from reaching formal determinations of law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers.

RECOMMENDATION 40

14.49 The Committee recommends that an ACT Anti-Corruption and Integrity Commission institute an Exoneration Protocol that can be accessed in circumstances where an individual is subsequently exonerated or cleared of any personal corruption—after a finding of corruption. The Protocol amongst other things should include:

- (a) a mechanism for public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person's reputation has been attacked publicly; and
- (b) the development of guidelines to govern such a process.

RECOMMENDATION 4 1

14.58 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should not have powers to make disciplinary decisions nor manage a mediation program.

RECOMMENDATION 4 2

14.59 The Committee recommends that where an ACT Anti-Corruption and Integrity Commission refers a complaint or report to an integrity counterpart it should be informed (where applicable) of the outcome of any disciplinary proceedings.

RECOMMENDATION 4 3

14.62 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should have the power to take action for, and where applicable take action against any contempt of the Commission (subject to parliamentary privilege).

RECOMMENDATION 4 4

14.63 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should not have the power to take action against a person for an act or omission where it is established that there was a reasonable explanation for the act or omission concerned.

RECOMMENDATION 4 5

14.71 The Committee recommends than an ACT Anti-Corruption and Integrity Commission be empowered to refer suspected instances of criminality to appropriate authorities, subject to existing legal restrictions against reliance on derivative evidence by those authorities.

RECOMMENDATION 4 6

14.72 The Committee recommends that sufficient resources need to be provided to the ACT Office of the Director of Public Prosecutions to manage any increase in workload that may arise in connection with referrals from an ACT Anti-Corruption and Integrity Commission.

RECOMMENDATION 47

14.76 The Committee recommends that enabling legislation for an ACT Anti-Corruption and Integrity Commission include provisions that: (a) will regulate the manner in which evidence is gathered and shared with other agencies so as to improve the prospects of that material being used in subsequent prosecutions and to minimise any risk that such evidence will be misused; and (b) set out a mechanism for timely communication between the Commission and the ACT Director of Public Prosecutions to assist in pursuing matters of mutual interest.

RECOMMENDATION 48

14.82 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should have the power to publicly report the findings that result from any investigation, including findings of serious and systemic corruption and their relevant factual foundations. The power to report should include:

- (a) powers to report and bring to the attention of the Assembly and the public findings and recommendations in relation to specific investigations;
- (b) a statutory power of ‘follow-up’—the ability to report publicly on the Government’s compliance (or lack thereof) with past reports and recommendations;
- (c) power to make a special (confidential) report to the designated Assembly oversight committee—where the statutory head of the ACIC considers that the disclosure of the information in a report to the Assembly would, on balance be contrary to the public interest; and
- (d) power to decline to report a matter which, in the opinion of the statutory head of the ACIC, should remain confidential.

RECOMMENDATION 49

14.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) be provided with exceptions to public disclosure in the form of reporting where disclosure, based on a public interest test, would compromise an ongoing investigation, place an individual in danger, or prejudice an upcoming judicial proceeding.

RECOMMENDATION 50

14.96 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) have the power to deal with vexatious complainants. This power should take the form of the statutory head of the ACIC having discretion to not proceed where there are reasonable grounds to believe that a complaint is vexatious.

RECOMMENDATION 5 1

14.97 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to impose appropriate penalties on those complainants, who knowingly or wilfully make false or misleading claims or complaints.

RECOMMENDATION 5 2

14.109 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should not be limited as to the timeframes around which former actions can be assessed; but is of the opinion that the operational focus of an ACT ACIC should largely be prospective and focused on current matters.

RECOMMENDATION 5 3

15.4 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's enabling legislation refer to examinations (public and private) as opposed to hearings (public and private) to reinforce the investigatory proceeding that applies.

RECOMMENDATION 5 4

15.23 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should have the power to hold public examinations. The decision on whether to hold public or private examinations should be informed by a public interest test.

RECOMMENDATION 5 5

15.24 The Committee recommends that when determining whether a public or private examination should be held, the following should be considered by an ACT Anti-Corruption and Integrity Commission in making that decision:

- (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 examination); and
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

RECOMMENDATION 5 6

15.26 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission, as it concerns a decision to hold a public examination be subject to a statutory requirement to 'sign a statement explaining why the public interest outweighs the potential for prejudice or privacy infringements',

provide a copy to the person to be the subject of the examination, and give that person the opportunity to ‘make representations as to why the statement may be incorrect’.

RECOMMENDATION 57

15.28 The Committee recommends that an ACT Anti-Corruption and Integrity Commission be required to conduct its examinations, especially those open to the public, in accordance with Lord Justice Salmon’s principles of fair procedure for public inquiries.

RECOMMENDATION 58

16.27 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission be designated as an Officer of the Assembly.

RECOMMENDATION 59

16.28 The Committee recommends, as it concerns an ACT Anti-Corruption and Integrity Commission’s (ACIC) relationship with the ACT Legislative Assembly, that it be pursuant to the Officer of the Assembly framework and include the following requirements:

- (a) the ACIC to be oversighted by, and required to report to, an Assembly standing committee. The standing committee to be a committee established pursuant to Standing Order 215 (not Standing Order 16). The Committee to be chaired by a non-government member, its membership to be representative of the Assembly and the secretary to the Committee should not be a statutory office holder;
- (b) involvement by the Assembly (a combination of the Assembly as a whole and the relevant Assembly standing committee) in the appointment and dismissal of the statutory head of the ACIC; and
- (c) involvement by the Assembly (a combination of the Assembly as a whole and the relevant Assembly standing committee) in the approval of the budget for the ACIC.

RECOMMENDATION 60

16.41 The Committee recommends that the appointment of an Integrity Commissioner for an ACT Anti-Corruption and Integrity Commission should comply with the following requirements:

- (a) a single Commissioner model;
- (b) appointment as an independent statutory officer;
- (c) appointment for a fixed term between 5–7 years non-renewable;
- (d) appointment by the ACT Legislative Assembly—pursuant to the Officer of the Assembly framework;

- (e) to be qualified for appointment as Commissioner the person must be a former Judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years standing;
- (f) no age restriction should apply; and
- (g) the Commissioner must not be a former or current Member of the Legislative Assembly, or any other Australian Parliament.

RECOMMENDATION 6 1

16.42 The Committee recommends that the following additional requirements should be applied as it concerns the appointment of an Integrity Commissioner for an ACT Anti-Corruption and Integrity Commission:

- (a) the Commissioner to have a legislative duty to avoid actual or perceived conflicts of interest. A legislative direction may be appropriate for consequences to follow if the existence of a conflict of interest (real or perceived) is established;
- (b) that the appointee not have (or had) any political affiliations; and
- (c) appointments to the position should not be permitted from the ranks of existing ACT Government public servants or those who have been public servants in the ACT Public Service for a period of 10 years previously.

RECOMMENDATION 6 2

16.43 The Committee recommends that the enabling legislation for an ACT Anti-Corruption and Integrity Commission should provide for the appointment of an acting commissioner to act as Commissioner during any period for which there is no person appointed as commissioner or the Commissioner is absent from, or unable to discharge, official duties. A consultative process with the ACT Legislative Assembly pursuant to the Officer of the Assembly framework should be used with regard to proposals for acting arrangements.

RECOMMENDATION 6 3

16.45 The Committee recommends that the enabling legislation for an ACT Anti-Corruption and Integrity Commission should provide for the suspension and removal of the Commissioner. The process should comply with the following requirements:

- (a) suspension and removal of the Commissioner to be pursuant to the Officer of the Assembly framework;
- (b) be in accordance with specified criteria—including: for misbehaviour; for physical or mental incapacity, if the incapacity substantially affects the exercise of the Commissioner's functions; if the Commissioner becomes bankrupt or personally insolvent; or if the Commissioner has been guilty of corrupt conduct ; and

- (c) the procedures for either suspension or removal of the Commissioner should ensure procedural fairness.

RECOMMENDATION 64

16.48 The Committee recommends that funding arrangements for an ACT Anti-Corruption and Integrity Commission (ACIC) should be pursuant to the Officer of the Assembly framework

RECOMMENDATION 65

16.62 The Committee recommends that the accountability and oversight regime for an ACT Anti-Corruption and Integrity Commission (ACIC) must include:

- (a) oversight by a relevant Assembly standing committee—broad oversight role and broad mandate to ‘monitor and report’ on the performance and functions of an ACIC;
- (b) oversight by an inspector/inspectorate type mechanism—to receive and investigate complaints concerning any aspect of an ACIC’s operations or any conduct of its officers; and
- (c) oversight of the ACIC’s exceptional powers—in the form of monitoring, review and report.

RECOMMENDATION 66

16.63 The Committee recommends that a part-time Inspector be appointed to: (a) provide oversight as it concerns complaints relating to any aspect of an ACT Anti-Corruption and Integrity Commission’s (ACIC) operations or any conduct of its officers; and (b) to conduct a review of the operations (in the form of monitoring, review and report) of an ACT ACIC at a minimum every 12 months.

RECOMMENDATION 67

16.66 The Committee recommends that the eligibility criteria, and process for appointment, and dismissal, of a part-time Inspector for an ACT Anti-Corruption and Integrity Commission (ACIC) should mirror that which applies for the ACIC’s Integrity Commissioner.

RECOMMENDATION 68

16.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should be subject to annual reporting requirements as per the *Annual Report (Government Agencies) Act 2004*. In addition, the annual report should contain, amongst other things, detailed information as it concerns matters referred and investigated by the ACIC during the reporting period. The reporting

requirements as detailed in section 76 of the *Independent Commission Against Corruption Act 1988 (NSW)* are instructive.

RECOMMENDATION 69

16.89 The Committee recommends that the enabling legislation of an ACT Anti-Corruption and Integrity Commission must be reviewed every five years after commencement of the Act. The Report on the Review should be presented to the ACT Legislative Assembly within three months after the Review has started and be referred to the relevant Assembly oversight committee for inquiry and report.

RECOMMENDATION 70

17.10 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's specialised investigative capability services should be purchased from a state-based anti-corruption body; and that an arrangement is in place that provides for these services on an as-needed basis.

RECOMMENDATION 71

17.17 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission be permitted to engage persons on terms and conditions the statutory head sees fit. In any determination of the terms and conditions on which staff could be engaged, it would be appropriate for the statutory head to have regard to the general terms and conditions of employees of the ACT Public Service (ACTPS).

RECOMMENDATION 72

17.20 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation should include a provision recognising that the staff assisting the statutory head of the Commission are not subject to the direction of any person other than the statutory head, or a person authorised by the statutory head in relation to matters dealing with investigative functions and duties performed pursuant to the ACIC's enabling legislation.

RECOMMENDATION 73

17.24 The Committee recommends that appointments to senior management positions within an ACT Anti-Corruption and Integrity Commission should not be permitted from the ranks of existing ACT Public Service (ACTPS) employees or those who have been public servants in the ACTPS for a period of 10 years previously. Further, appointment terms for these positions should be for fixed terms (with the possibility of extension).

RECOMMENDATION 74

17.26 The Committee recommends that the following employment provisions and special conditions should apply to staff working for an ACT Anti-Corruption and Integrity Commission (ACIC):

- (a) staff to have a legislative duty to avoid actual or perceived conflicts of interest. A legislative direction may be appropriate for consequences to follow if the existence of a conflict of interest (real or perceived) is established;
- (b) staff not to have (or had) any political affiliations;
- (c) former AFP or ACT Policing police officers are not eligible for appointment to positions within an ACT ACIC;
- (d) staff to be subject to certain confidentiality requirements. Current or former staff members must not record, divulge or communicate any information acquired in the course of carrying out their duties, except in the performance of those duties; and
- (e) eligibility for employment to be subject to security clearance/assessments.

RECOMMENDATION 75

18.14 The Committee recommends that further work be undertaken to identify appropriate exemptions for an ACT Anti-Corruption and Integrity Commission from the operation of the *Privacy Act 1988*.

RECOMMENDATION 76

18.15 The Committee recommends that an ACT Anti-Corruption and Integrity Commission be required, in consultation with the Office of the Privacy Commissioner, to develop and publish information handling guidelines.

RECOMMENDATION 77

18.20 The Committee recommends that further work be undertaken to identify appropriate exemptions for an ACT Anti-Corruption and Integrity Commission (ACIC) from the operation of the *Freedom of Information Act 1989*.

RECOMMENDATION 78

18.26 The Committee recommends that the ACT Government appoint an independent person to conduct a statutory review of the *Public Interest Disclosure Act 2012* (the PID Act). The Review, amongst other things, should consider:

- (a) any potential conflict of interest (real or perceived) as it concerns decision makers and disclosure officers under the PID Act;

- (b) the findings of the Moss Review examining the operation of the Commonwealth *Public Interest Disclosure Act 2013* as it concerns the strengthening of that legislation to achieve the Act's integrity and accountability aims;
- (c) the matters raised in submission No. 3 (as detailed in paragraph 3.162) to the Inquiry as it concerns the PID Act;
- (d) application of the PID Act to any future ACT Anti-Corruption and Integrity Commission (ACIC)—in particular, its articulation with any protected disclosure provisions that may apply to any informants providing assistance to the ACIC or anyone consequently at risk; and
- (e) the suitability of an ACT ACIC for the purposes of receiving disclosures pursuant to the PID Act.

RECOMMENDATION 79

- 19.13** The Committee recommends that the ACT Government appoint an independent reviewer to examine appointment terms for statutory officer holders in the ACT and make recommendations to strengthen integrity as it concerns appointment of these office holders.

PART 1—CONTEXT TO THE INQUIRY

1 INTRODUCTION AND CONDUCT OF INQUIRY

INQUIRY REFERRAL AND TERMS OF REFERENCE

- 1.1 On Thursday 15 December 2016, the Legislative Assembly established the Select Committee on an Independent Integrity Commission (the Committee) to consider the feasibility of the establishment of an independent integrity commission in the Australian Capital Territory (ACT).⁴
- 1.2 Specifically, as part of its terms of reference (T of R)—the Committee was asked to consider the most effective and efficient model of an independent integrity commission for the ACT and to make recommendations on: (i) the appropriateness of adapting models operating in other similarly-sized jurisdictions; (ii) the personnel structure of the commission to ensure the appropriate carriage of workload; (iii) governance and funding that delivers independence; (iv) the powers available to a commission; (v) the educative functions of a commission; (vi) issues regarding retrospectivity, including human rights, and the timeframes around which former actions can be assessed; and (vii) the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT.⁵
- 1.3 As per its resolution of establishment, the Committee was to report by the end of August 2017.⁶ On 6 June 2017, at its meeting, the Assembly agreed to amend the Committee's reporting date to by the end of October 2017.⁷

⁴ ACT Legislative Assembly, *Debates*, 15 December 2016, pp. 253–254.

⁵ ACT Legislative Assembly, *Debates*, 15 December 2016, pp. 253–254.

⁶ ACT Legislative Assembly, *Debates*, 15 December 2016, pp. 253–254.

⁷ ACT Legislative Assembly, *Debates*, 6 June 2017, p. 1879.

CONDUCT OF THE INQUIRY

INVITED BRIEFINGS

- 1.4 As part of its inquiry, the Committee scheduled a series of private briefings from selected subject matter experts to provide background on aspects of the inquiry coverage.
- 1.5 The Committee thanks these subject matter experts for making time to meet with it. The invited briefings assisted the Committee in its understanding of the many issues it considered during the Inquiry.

FIELD VISITS

- 1.6 As part of its inquiry, the Committee held a number of interstate field visits to gather information as follows:
 - Victoria/Tasmania (two day) combined—Thursday 4 and Friday 5 May 2017; and
 - NSW (one day)—Monday 15 May 2017.
- 1.7 The Committee met with key people from the relevant independent integrity body and the relevant parliamentary oversight committee(s) in each jurisdiction. A summary of the Committee's meeting schedule(s) for these visits is at **Appendix A**.
- 1.8 The Committee also thanks those individuals and organisations for making time available to meet with it.

SUBMISSIONS

- 1.9 The Committee invited public submissions for its inquiry on 27 February 2017 via a media conference; advertising in the *Canberra Times*, placing a notice on the ACT Legislative Assembly website; and via social media communication channels. The Committee also directly invited key stakeholders, interest groups and organisations, with an interest in the Inquiry, to make a written submission.
- 1.10 From the outset of the Inquiry, as part of its call for written submissions, the Committee emphasised:

...that it has a broad public interest mandate and was not in a position to determine the rights and wrongs of individual cases. The Committee process is not a forum to resolve issues pertaining solely to individual cases or grievances but is a forum to explore the general matters of principle, policy or public administration relevant to the T of R. Individual cases would only be considered to the extent that they may assist the

Committee with the general matters of principle, policy or public administration relevant to the T of R⁸

- 1.11 The individuals and organisations who lodged written submissions are listed at **Appendix B**. Copies of these submissions can be downloaded from the Committee homepage.⁹ Further detail on submissions received is set out in chapter three.

DISCUSSION PAPER

- 1.12 The Committee released¹⁰ a discussion paper entitled, *Issues paper—Australian Public Sector Integrity Frameworks*, to assist individuals and organisations to prepare submissions to its inquiry.
- 1.13 Whilst noting the Committee did not have a particular view at the time about the features or powers that an integrity commission for the ACT might have, as an initial criteria, its discussion paper employed a list of possible powers and features for integrity commissions identified by Prenzler and Faulkner in their paper, 'Towards a Model Public Sector Integrity Commission' (2010) which, in their terms, would constitute "A Model Commission".¹¹
- 1.14 Prenzler and Faulkner propose that a "Model Commission" would have the capacity to:
- conduct own motion investigations;
 - require attendance and answers to questions;
 - hold public hearings;
 - apply for warrants to search properties and seize evidence;
 - engage in covert tactics—including listening devices, optical surveillance, undercover agents and targeted integrity tests;
 - directly investigate the most serious and intermediate matters;
 - make disciplinary decisions and manage a mediation program;
 - conduct research and risk reviews aimed at improving procedures and preventing misconduct;
 - engage in public sector ethics training;
 - prosecute complainants who are patently vexatious; and

⁸ Via call for submissions from Committee inquiry homepage; and direct invites—27 February 2017.

⁹ https://www.parliament.act.gov.au/in-committees/select_committees/an-Independent-Integrity-Commission

¹⁰ 27 March 2017.

¹¹ Prenzler, T. and Faulkner, N. (2010) 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69(3), pp. 251–262, and also available at: <http://www98.griffith.edu.au/dspace/handle/10072/36721>

- account for its work using a variety of performance measures, including stakeholder satisfaction, prosecution outcomes and case study reports.¹²

1.15 Prenzler and Faulkner are of the view that the powers and features they propose as underpinning a model commission are:

...core elements of evolving institutional arrangements internationally and in Australia. They can be seen in their most mature form in police integrity agencies – such as the Northern Ireland Police Ombudsman, established 2000, or the Independent Police Complaints Commission for England and Wales, established in 2004 (Prenzler, 2009:153-172). But they are also evident in agencies with a wider brief across the public sector, such as the landmark Hong Kong Independent Commission to Combat Corruption, established in 1974 (Scott, Carstairs and Roots, 1988).¹³

PUBLIC HEARINGS

1.16 The Committee held public hearings on Thursday 20 July and Monday 24 July 2017; and Friday 1 September and Thursday 7 September 2017.

1.17 A list of witnesses who appeared before the Committee is at **Appendix C**. Full transcripts of public hearings are available on the Legislative Assembly website at: <http://www.hansard.act.gov.au/hansard/2017/comms/default.htm> - independent

REPORT ADOPTION

1.18 The Committee met on 11, 12, 18, 19, 25, 27 and 30 October 2017 to consider the Chair's draft report and the report, as amended, was adopted by the Committee on 30 October 2017.

QUESTIONS

1.19 A number of witnesses undertook to provide further information, or took questions on notice at public hearings. The Committee acknowledges that taking questions on notice means that a considered and accurate answer can be provided.

1.20 The Committee thanks agency officers and other witnesses, for their assistance with the provision of responses.

¹² Prenzler, T. and Faulkner, N. (2010), 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69(3).

¹³ Prenzler, T. and Faulkner, N. (2010) 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69 (3), p. 262.

STRUCTURE OF THE COMMITTEE'S REPORT

- 1.21 The Committee's reports is divided into four parts, comprising 20 chapters, covering the following main topics:

Part 1—Context to the Inquiry

- Chapter 1—Introduction and conduct of the Inquiry
- Chapter 2—Inquiry context [subject matter and local context]

Part 2—Views from submitters

- Chapter 3—Views of submitters

Part 3—Views put forward in hearings

- Chapter 4—Views put forward in hearings—public sector integrity stakeholders
- Chapter 5—Views put forward in hearings—parliamentary integrity stakeholders
- Chapter 6—Views put forward in hearings—key interest groups and organisations
- Chapter 7—Views put forward in hearings—ACT Policing integrity framework
- Chapter 8—Views put forward in hearings—interested citizens

Part 4—Views of the Committee

Jurisdictional considerations

- Chapter 9—Jurisdictional integrity context

Design, form, functions and powers of a standing ACT independent integrity body

- Chapter 10—Guiding principles informing elements of design, form, functions and powers
- Chapter 11—Integrity body framework
- Chapter 12—Jurisdiction, definition and scope of conduct
- Chapter 13—Relationship with other integrity stakeholders
- Chapter 14—Powers
- Chapter 15—Power to hold public hearings
- Chapter 16—Accountability and independence
- Chapter 17—Staffing and resourcing
- Chapter 18—Application of other legislation
- Chapter 19—Other matters
- Chapter 20—Conclusion

ACKNOWLEDGEMENTS

- 1.22 The Committee thanks all those who contributed to the Inquiry by making submissions, providing additional information and/or appearing before it to give evidence.
- 1.23 The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. The Committee has based many of its recommendations, or variations thereof, on suggestions by inquiry participants.

2 INQUIRY CONTEXT

- 2.1 Specifically, as part of its Terms of Reference, the Committee has been asked to consider the most effective and efficient model of an independent integrity commission.
- 2.2 To assist with setting a context for the Inquiry, this chapter provides information as it concerns the purpose of anti-corruption/integrity bodies and the local context as it concerns the consideration of establishing such a body in the ACT.

PURPOSE OF ANTI-CORRUPTION/INTEGRITY BODIES

- 2.3 Globally the placement on the policy agenda, of the concept of standing anti-corruption commissions, designated stand-alone integrity bodies, or specialised anti-corruption institutions can be sourced initially to the emergent need to address the ‘global and multi-faceted challenge of fighting corruption’.¹⁴ This was reinforced by a number of international conventions¹⁵, amongst other things, mandating the establishment of anti-corruption bodies. For example, the UN Convention Against Corruption, considered to be the most universal in its approach requires parties, again amongst other things, to the Convention:

...to implement specialised bodies responsible for preventing corruption and for combating corruption through law enforcement.¹⁶

- 2.4 In addition to mandating anti-corruption bodies, these conventions recognise as to the functions of these bodies, that exposing and investigating corruption is only one part of the equation and that its prevention is equally important. Accordingly, these conventions recognise that preventing and combating corruption requires a range of multidisciplinary functions or anti-corruption functions. The OECD recommends that when decisions are being taken to establish or strengthen an anti-corruption body, decision makers need to take into consideration the full range of anti-corruption functions, including: policy development, research, monitoring and co-ordination; prevention of corruption in power structures; education and awareness raising; investigation and prosecution.¹⁷

¹⁴ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, p. 3.

¹⁵ UN Convention Against Corruption (which came into force in 2005); Council of Europe Criminal Law Convention on Corruption (which came into force in 2002); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (came into force in 1997).

¹⁶ UN Convention Against Corruption.

¹⁷ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, pp. 9–10.

- 2.5 Whilst prosecution activity is an essential anti-corruption function, with few exceptions, it does not reside within a specialised anti-corruption institution but with a separate body. The role of a specialised anti-corruption institution as it concerns prosecution is to investigate alleged corruption and, where adequate evidence is gathered, to present such evidence in a way to a Director of Public Prosecutions (or equivalent) for prosecution.
- 2.6 Further, these international conventions also recognise that essential elements are required to support the effectiveness of anti-corruption bodies—namely:
- ...these bodies should be independent from undue interference, specialised in corruption, and have sufficient resources and powers to meet their challenging tasks.¹⁸
- 2.7 The global conversation of the need to fight corruption was further supplemented by concerns related to integrity and trust in government.¹⁹
- 2.8 As to the emergence of such bodies in Australia, all Australian states now have designated independent integrity agencies/bodies each with their own enabling legislation. The establishment of these bodies can be organised into two tranches:
- Established after 1980
- NSW Independent Commission Against Corruption (ICAC)—established 1988
 - Queensland Crime and Corruption Commission (Qld CCC)—established 1989
 - Western Australia Corruption and Crime Commission (WA CCC)—established 2004
- Established from 2010
- Tasmanian Integrity Commission (IC)—established 2010
 - Victorian Independent Broadbased Anti-corruption Commission (IBAC)—established 2010
 - SA Independent Commission Against Corruption (ICAC)—established 2012
- 2.9 With regard to the Northern Territory—on 26 August 2015, the Legislative Assembly of the Northern Territory (NT) resolved to establish an Anti-Corruption Integrity and Misconduct Commission. On 14 December 2015, Mr Brian Martin AO QC was appointed to inquire and report to the Administrator of the NT on the establishment of an independent anti-corruption body. The Martin report was handed to the Administrator on 27 May 2016 and tabled in the NT Legislative Assembly on 27 June 2016 in accordance with the Inquiries Act.²⁰ On 25 October 2016, in a statement in the NT Legislative Assembly, the Attorney-General and Minister for Justice indicated that a:

¹⁸ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, p. 3.

¹⁹ Submission No. 30—Wettenhall and Aulich; Aulich, C., Wettenhall, R. and Evans, M. (2012) 'Understanding integrity in public administration: Guest Editors' Introduction', *Policy Studies*, Vol. 33, No. 1, January, p. 1.

²⁰ Refer: <https://acimcinquiry.nt.gov.au/> [accessed 16 March 2017].

...draft Bill to establish the ICAC will be prepared and available for public comment by the first half of 2017, with the aim to introduce a final Bill in the second half of 2017.²¹

2.10 On 24 August 2017 the Legislative Assembly referred the Independent Commissioner Against Corruption (ICAC) Bill to the Social Policy Scrutiny Committee for inquiry and report by 21 November 2017.

2.11 The overarching driver for the creation of the state-based standing anti-corruption commissions:

...in the 1980s and 1990s, followed the sweep of 'new administrative law' federal reforms of the 1970s and 1980s designed to strengthen and increase the accessibility of public accountability mechanisms. Since that date, each State has created a standing anti-corruption commission, and there has been ongoing debate about how these institutions should best be designed.²²

2.12 In considering the State-based anti-corruption bodies—the following points are important:

- with regard to jurisdiction—all have coverage over the public sector but not the private sector (though the extent of jurisdiction varies);
- all possess coercive powers similar to Royal Commissions;
- an overriding theme in the establishment of these bodies was the restoration and maintenance of trust in government and public administration; and
- all, with the exception of the South Australian (SA) ICAC, were established following revelations of corruption; a perception that corruption was going unchallenged; or identification of significant failings or gaps within existing integrity frameworks. The SA ICAC was established as a pre-emptive measure and safeguard.²³ The moves to create an anti-corruption body in the NT appear to be in response to pressure faced by the Government from media and the public around a possible breach of compliance provisions under the Electoral Act (Foundation 51 matter); questions about scrutiny of ministerial travel allowances; and the public release of an independent review into the appointment of judges and magistrates.²⁴

2.13 A further influence on the substantive placement of anti-corruption bodies (or equivalent) on the policy agenda, can be attributed to the development of the concept of a National Integrity

²¹ Legislative Assembly for the Northern Territory, Debates, 25 October 2016, p. 213.

https://parliament.nt.gov.au/__data/assets/pdf_file/0004/394087/DEBATES-DAY-4-25-OCTOBER-2016.pdf.

²² Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', *Conference paper prepared for National Integrity Conference*, March 2017, p. 1.

²³ Australian Senate. (2016) Senate Select Committee on the Establishment of a National Integrity Commission—Interim Report, May.

²⁴ ABC News online. (2015) 'NT Government bows to pressure to set up an anti-corruption body, but blames Labor for "legacy issues"', 14 August.

System.²⁵ Advocacy by the international NGO—Transparency International (TI) drawing on the report of Queensland Anti-corruption Commissioner Tony Fitzgerald advanced the:

...concept of a National Integrity System comprising eleven pillars which, in working together in constructive fashion, would go far in establishing a society free of corruptive influences...²⁶

- 2.14 The eleven pillars comprising a National Integrity System focused on a country's governance—in terms of internal corruption risks and their contribution to fighting corruption in society—include amongst other entities—anti-corruption agencies.²⁷
- 2.15 In conclusion, the emergence of the need for, and subsequent establishment of designated anti-corruption bodies—globally and nationally—emphasise that such bodies perform a distinctive role in an integrity system due to the nature of corruption itself and complexities associated with its exposure. The corruption frame is that concerned with the correlation between corruption and the quality of public administration and its effect on integrity and trust in government.
- 2.16 Accordingly, preventing and combating such corruption requires a range of multidisciplinary functions or anti-corruption functions—including: policy development, research, monitoring and co-ordination; prevention of corruption in power structures; education and awareness raising; investigation and prosecution. In considering the prosecution function, the OECD in its review of models of specialised anti-corruption institutions, observed that in practice, with few exceptions, the prosecution activity, whilst an essential anti-corruption function, does not reside within a designated anti-corruption body but with a separate body.²⁸

AN ANTI-CORRUPTION/INTEGRITY BODY FOR THE ACT?

- 2.17 This section sets out local context and relevant considerations as it concerns the establishment of an anti-corruption/integrity body in the ACT.
- 2.18 A decision to establish a designated independent integrity agency or body requires careful consideration.

²⁵ Pope, J. (2000) *Confronting Corruption: The Elements of a National Security System* (TI Source Book 2000), Transparency International, Berlin; Submission No. 30—Roger Wettenhall and Chris Aulich, pp. 1–2.

²⁶ Submission No. 30—Roger Wettenhall and Chris Aulich, p. 1.

²⁷ Pope, J. (2000) *Confronting Corruption: The Elements of a National Security System* (TI Source Book 2000), Transparency International, Berlin.

²⁸ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat.

- 2.19 A jurisdiction's institutional integrity capacity can take a number of forms and this is evidenced in the diversity of institutional arrangements that exist in Australian jurisdictions with regard to integrity frameworks.
- 2.20 Integrity framework design and choice is a fundamental question for jurisdictional decision making relating to the adequacy and capacity of integrity capacity to prevent and respond to corruption.
- 2.21 Further, the impetus for jurisdictional change can also be classified broadly into action following revelations of corruption; a perception that corruption was going unchallenged; identification of significant failings or gaps within the existing integrity framework; or as a pre-emptive measure and safeguard.
- 2.22 In considering the State-based integrity bodies, an overriding theme in the establishment of these bodies was the restoration and maintenance of trust in government and public administration. All, as noted previously, with the exception of the SA ICAC, were established following revelations of corruption; a perception that corruption was going unchallenged; or identification of significant failings or gaps within the existing integrity framework. The SA ICAC was established as a pre-emptive measure and safeguard.²⁹
- 2.23 The salient point for consideration is that choices about integrity frameworks are more complex than how issues may be portrayed in the media or the political imperatives at the time but instead that:
- ...through careful deliberation, it may be possible to identify new or different institutional options, rather than presuming that the answer lies simply in copying a particular institution from another jurisdiction.³⁰
- 2.24 These deliberations, according to Brown and Head (2004) should be guided by careful consideration of the following eight questions:
- public versus less public approaches;
 - internal versus external review;
 - reactive versus proactive inquiries;
 - agency-specific versus sector-wide review;
 - limited versus expansive jurisdictions;

²⁹ Australian Senate. (2016) Select Committee on the Establishment of a National Integrity Commission—Interim Report, May.

³⁰ Brown, A.J. and Head, B. (2004) 'Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems', Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September to 1 October 2004, p. 17.

- misconduct versus maladministration;
- investigation versus research and policy; and
- who guards the guards?.³¹

2.25 Brown and Head (2004) also emphasise that whilst institutional design and choice is fundamental to the functioning of an integrity system, it is only one part of the equation, in that:

...nations and governments can sometimes **appear** to have all the necessary institutions and processes in place to pursue integrity and control corruption, but their actual capacity to do so may [*be*] limited or non-existent. Further, while we may assume that the cornerstones of integrity systems might be particular institutions or laws, some key integrity capacities may reside elsewhere – such as in social structures, cultural values and education systems.³²

CALLS FOR THE ESTABLISHMENT OF AN INTEGRITY BODY IN THE ACT— AN HISTORICAL OVERVIEW

2.26 Calls for the establishment of an independent integrity body in the ACT, mark each decade since self-government—it was raised at the outset of self-government in 1989, again in 2001 (prior to an October election that year); and again in 2016. An overview of each of these events is set below.

1989

2.27 In 1989—specifically, 1 June, the seventh sitting day of the First Assembly, a member of the Residents Rally³³ moved the ‘early establishment of an independent advisory committee against corruption’ comprised of community and government members, with powers established by statute and responsible to the ACT Attorney-General. The Member argued that ‘there is sufficient evidence of partiality and insider trading within the administration to warrant the establishment of a commission against corruption’.³⁴

³¹ Brown, A.J. and Head, B. (2004) ‘Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia’s Integrity Systems’, Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September to 1 October 2004, p. 3.

³² Brown, A.J. and Head, B. (2004) ‘Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia’s Integrity Systems’, Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September to 1 October 2004, p. 2.

³³ Mr Bernard Collaery MLA.

³⁴ ACT Legislative Assembly, *Hansard*, 1 June 1989, pp. 329–339.

- 2.28 Further, in moving the establishment of the proposed committee, the member concerned identified some of its guiding principles and coverage, in that:

...this Assembly cannot establish a body such as that on a recriminatory basis; on the basis that we look to the past necessarily and try to hunt down or track down, as it were, people who we think have been in situations of that nature.

The Rally simply wishes to indicate to the people of the ACT that there is a sufficient pattern of activity and there is sufficient precedent elsewhere in Australia and in the developed regions of the Western world to justify a type of standing committee, the terms of reference, powers and membership of which are to be determined - hopefully on a bipartisan basis - by this Assembly.

The Rally's view has always been that we need a model corruption body, such as has been established in Hong Kong - undeniably successfully established - and is now under way in Sydney. I note reports in today's "Sydney Morning Herald" and today's "Canberra Times" indicating that there is some inquiry afoot in relation to activities of possibly a criminal or quasicriminal nature in relation to Waverley Council. That is the type of issue which keeps morale high in the public administration.

The Rally does not propose that the commission be a creature of this Assembly, that this Assembly turn itself into a Star Chamber of private investigation and crusader-like zeal on corruption.

...

In the Rally's view, in some situations it is clear that standards have not been set adequately at senior levels in the ACT Administration. The Rally believes that the model established in New South Wales is for a State with a large population and a very high industry and public sector infrastructure. The model for Canberra could be one with like powers and a like determination to see that wrongdoing is brought to book but not with that same structure, the same costs and the like.³⁵

- 2.29 The Assembly resolved, following amendments proposed by an opposition member³⁶ that 'the composition, terms of reference and powers of the advisory committee' be considered by the Standing Committee on Public Accounts.³⁷

- 2.30 The Public Accounts Committee's report on the matter was presented on 14 December 1989.³⁸ The report discussed existing checks and balances and the form of the proposed body

³⁵ Mr Bernard Collaery MLA, ACT Legislative Assembly, *Hansard*, 1 June 1989, p. 330.

³⁶ Mr Trevor Kaine MLA.

³⁷ ACT Legislative Assembly, *Hansard*, 1 June 1989, pp. 329–339.

³⁸ ACT Legislative Assembly, *Minutes of Proceedings*, No. 40, 14 December 1989, p. 163.

http://www.parliament.act.gov.au/_data/assets/pdf_file/0014/751001/89MoP040.pdf#1

(including the need for the body, and its functions and advisory role). The report also outlined key features of the proposed advisory committee—including the structure of the body, its membership, the definition of ‘corrupt conduct’, the range of ‘public officials’ to be covered, complaints and allegations, the protections to be offered in the proposed legislation, confidentiality, the duty to report, accountability, the resources to be provided to the proposed body and the future review of its operations. The Public Accounts Committee made 23 recommendations on the aforementioned matters.³⁹

2.31 The Government tabled its response in December 1990. In its response, the Government agreed to the vast majority of the Committee’s recommendations and indicated that there were only two significant differences between the Committee’s recommendations and the Government’s response.⁴⁰

2.32 On 27 November 1991, the member of the Residents Rally initially proposing the establishment of an independent advisory committee against corruption⁴¹ presented the Public Corruption Bill 1991 to the Legislative Assembly, however the Bill lapsed on polling day for the 1992 General Election (14 February 1992). The Bill was for:

An Act to establish a Committee to receive information relating to allegations of corruption of public officials and public authorities and to refer that information to investigative agencies.

2001

2.33 In 2001—the Standing Committee on Justice and Community Safety, in its consideration of the Commission for Integrity in Government Bill 1999 found that the arrangements proposed in the Bill for the establishment of a designated integrity body were ‘more complex than necessary and would possibly not be cost-effective’.⁴² However, the Committee identified the need for further work in the ACT to counter corruption and integrity in the behaviour of public officials. Accordingly, the Committee recommended that:

...the Government, in consultation with the Auditor-General, develop a model for a new function which provides for both (1) the investigation of complaints about

³⁹ ACT Legislative Assembly. (1989) Standing Committee on Public Accounts, *Report on an Independent Advisory Committee Against Corruption*, November.

http://www.parliament.act.gov.au/_data/assets/pdf_file/0005/379832/1PA_1_Independent_Advisory.pdf

⁴⁰ ACT Legislative Assembly. (1989) Ministerial Statement on Government Response to Public Accounts Committee Report on an Independent Committee Against Corruption, December.

⁴¹ Mr Bernard Collaery MLA.

⁴² ACT Legislative Assembly. (2001) Standing Committee on Justice and Community Safety, *Report No. 18—The Commission for Integrity in Government Bill 1999*, August, p. 14.

behaviour lacking integrity and (2) an educative and preventative role in relation to behaviour lacking integrity.⁴³

2016

- 2.34 In the lead up to the 2016 ACT General Election, concerns rose about questionable property and land deals—including land purchases and close relationships between developers and government⁴⁴ which underscored commitments from all major parties to act on integrity in government.
- 2.35 Throughout the election period, the major parties campaigned for improved integrity in government measures. The measures advanced varied—though in overarching terms, included the establishment of a designated integrity body or commissioner; proposals to strengthen distributed integrity measures; and to strengthen existing integrity framework bodies. A summary of the proposed measures is set out below.
- 2.36 The ACT Greens was the first of the current parties in the Assembly to announce a policy for the establishment of an ACT independent commission against corruption and a restriction on political donations to individuals (ACT residents) only with the reinstatement of a cap on donations to that of \$5,000 (half the limit that was wound back in 2015).⁴⁵ In connection with establishing an ICAC, the ACT Greens advised that the Commission would:
- ...be responsible for maintaining the standards of conduct, propriety and ethics in the ACT's public services, politicians and the judiciary;
- It will have the statutory power to conduct investigations in allegations of misconduct and corruption, including the power to call for and seize documents and enter premises, and hold public inquiries and compulsory examinations – including where criminality is suspected;⁴⁶
- 2.37 With regard to improved integrity measures in government, in its 2016 Election Policies, the Canberra Liberals promised, if elected, it would establish an Independent Commission Against Corruption (ICAC) and increase funds to the Auditor-General by \$3 million and introduce an independent public service commissioner.⁴⁷ The Canberra Liberals proposals formed part of a

⁴³ ACT Legislative Assembly. (2001) Standing Committee on Justice and Community Safety. (2001), *Report No. 18—The Commission for Integrity in Government Bill 1999*, August, p. 15.

⁴⁴ ACT Auditor-General. (2016) Auditor-General's Report No. 7 of 2016: *Certain Land Development Agency Acquisitions*.

⁴⁵ ACT Greens. (2016) 2016 Election Policies; ACT Greens. (2016) Election commitments and costings—GRN038/GRN038C.

⁴⁶ ACT Greens. (2016) Election policy: Establish an ACT ICAC Restoring confidence in our democracy, p. 1.

⁴⁷ Canberra Liberals. (2016) 2016 Election Policies, accessed 3 September 2017 at: <http://canberraliberals.org.au/policies/>; Canberra Liberals. (2016) Election commitments and costings—LIB008/LIB008C; LIB016/LIB016C; LIB044/LIB044C.

broader integrity package. In connection with the establishment of an ICAC, the Canberra Liberals advised that the Commission would:

...improve the standard of conduct, propriety, and ethics in ACT public authorities; investigate wrong doing; and enhance public confidence that misconduct by public officers will be appropriately dealt with.

The Commission would comprise about 10 full time equivalent staff including a Chief Commissioner, Chief Executive Officer, investigation officers, and a General Counsel position. The final structure would depend on a further analysis of organisations in other jurisdictions.⁴⁸

- 2.38 ACT Labor indicated that it would: (i) establish an ACT Integrity Commissioner to investigate allegations of misconduct; (ii) ban political donations from property developers (noting it had already ceased accepting developer donations); and (iii) strengthen reporting as it concerns donations—requiring all donations to be reported within seven days of receipt.⁴⁹ In connection with an ACT Integrity Commissioner, ACT Labor advised that it:

...will appoint an ACT Integrity Commissioner, assisted by a team of specialised investigators, who will investigate, conduct hearings, and have the power to recommend criminal prosecution, for serious breaches of integrity across the public sector.

An independent review into the Commission's operations and resourcing will be conducted five years after establishment, to ensure it is meeting its objectives.⁵⁰

- 2.39 The outcome of the 2016 General Election⁵¹ resulted in Labor forming government with the support of the ACT Greens. A formal Parliamentary Agreement, outlining shared policy priorities was negotiated and formalised.⁵²

- 2.40 The Parliamentary Agreement for the 9th ACT Legislative Assembly, as it concerns integrity measures, states:

10. Strengthening government, parliamentary and electoral integrity

Canberrans are entitled to have confidence that their government is working in their best interests at all times. ACT Labor and the ACT Greens agree to implement a

⁴⁸ Canberra Liberals (2016) Election policy: Establish an Independent Commission Against Corruption (ICAC) in the ACT, 19 September.

⁴⁹ ACT Labor. (2016) 2016 Election Policies; ACT Labor. (2016) Election commitments and costings—LAB044/LAB044C.

⁵⁰ ACT Labor Media Release: 'ACT Labor to make govt more transparent and ACT elections more democratic', 24 September 2016.

⁵¹ 15 October 2016.

⁵² 30 October 2016.

package of reforms that will build on measures previously implemented to improve probity, integrity and accountability in decision-making in the Territory:

1. Establish an Independent Integrity Commission, broadly structured on those operating in similarly sized jurisdictions, following a Parliamentary Committee inquiry into the most effective and efficient model for the ACT;
2. Effective immediately, neither party will accept donations from property developers, and the Government will bring to the Assembly a legislative ban on all such donations based on bans operating in other jurisdictions;
3. Establish a Select Committee to review the operation of the 2016 ACT election and Electoral Act, and make recommendations on lowering the voting age, improving donation rules and reporting timeframes, and encouraging more people to enrol, vote and participate more widely in political activity;
4. Through the Assembly process, expand the scope of the lobbyist register to capture in-house government relations staff, industry associations, and project management liaison officers and companies, and conduct a review of its effectiveness after one year; and
5. Strengthen the Commissioner for Standards' role by streamlining the referrals process for complaints against MLAs.⁵³

- 2.41 On Thursday 15 December 2016, the Legislative Assembly established the Select Committee on an Independent Integrity Commission to consider the feasibility of the establishment of an independent integrity commission in the Australian Capital Territory (ACT).⁵⁴

DOES THE ACT NEED A DESIGNATED OR STAND-ALONE INTEGRITY BODY?

- 2.42 In considering this question—the following matters are relevant:

- the jurisdictional attributes and characteristics specific to the ACT;
- perceived levels of trust in government and public administration; and
- the current ACT public sector (including ACT Policing) and parliamentary integrity framework—are there any gaps and vulnerabilities in integrity and oversight?.

- 2.43 Matters pertaining to jurisdictional attributes and characteristics together with levels of trust in government are discussed below. Discussion concerning the current ACT public sector (including ACT Policing) and parliamentary integrity framework and whether there are any gaps and vulnerabilities in integrity and oversight is set out in chapter nine.

⁵³ Parliamentary Agreement for the 9th ACT Legislative Assembly. (2016), 30 October, p. 7.

⁵⁴ ACT Legislative Assembly, *Debates*, 15 December 2016, pp. 253–254.

JURISDICTIONAL ATTRIBUTES AND CHARACTERISTICS SPECIFIC TO THE ACT

- 2.44 Some of the jurisdictional attributes and characteristics specific to the ACT and which are pertinent in any discussion concerning the establishment of a designated integrity body include:

THE ACT IS A SMALL JURISDICTION

- 2.45 In small jurisdictions people invariably wear multiple hats and there can be an interconnectedness of relationships in large part due to proximity and minimal degrees of separation. The outcome is greater potential for conflicts of interest (real and perceived) and a 'revolving door dilemma'.

CITY-STATE MODEL OF GOVERNANCE—LAYER OF REPRESENTATION AND ACCOUNTABILITY MISSING

- 2.46 In the case of the ACT, governing in the Territory is unique as it has what is referred to as a city-state model, or two tiers of government, where two sets of responsibilities—state and council—are inextricably linked. Halligan and Wettenhall (2002) have commented on the significance of this arrangement in terms of democracy for the ACT:

The ACT city-state model fuses two sets of responsibilities which are elsewhere in Australia divided between a state or territory government tier and a local government tier. Thus a broader range of functions is vested in the ACT government than in any other Australian sub-national government.

...

In comparative terms, therefore, members of the ACT Legislative Assembly carry a heavy load and much responsibility, and this must inevitably impact on the way they represent their electors.

...

The presence of a tier of local government councils in other Australian jurisdictions means that citizens in those jurisdictions have recourse to another group of elected representatives when they want to involve governmental processes...⁵⁵

- 2.47 The fusing of two sets of responsibilities, as they relate to government, also suggest that accountability measures in such jurisdictions take on more significance, simply on the basis of the wider coverage of responsibilities coupled with a reduced layer of representation and governance.

⁵⁵ Submission by Professors Halligan and Wettenhall to the ACT Legislative Assembly Standing Committee on Legal Affairs (5th Assembly) Inquiry into the appropriateness of the size of the ACT Legislative Assembly, 12 April 2002.

ACT ECONOMY HAS A RELATIVELY NARROW REVENUE BASE

- 2.48 Whilst efforts have been made to prioritise the diversification of the ACT economy to minimise its reliance on land development as a major source of revenue, the economy remains strongly related to the property, construction and land development industries.
- 2.49 The literature shows that property and land development processes can provide potential for corruption or may pose a corruption risk.⁵⁶

INCUMBENT GOVERNMENT—SERVING A 5TH TERM

- 2.50 Incumbency over successive terms coupled with the interconnectedness of relationships and potential for conflicts of interest indicative of small jurisdictions can create a mix of elements that may undermine public confidence in government decision-making and processes.

UNIQUE ARRANGEMENT FOR PROVISION OF POLICE SERVICES IN THE ACT

- 2.51 The Framework for the delivery of policing services to the Territory is unique in Australia as all other jurisdictions have their own police services. This framework derives historically from the AFP's provision of policing services in the ACT prior to self-government in 1988.⁵⁷
- 2.52 Effectively, the funding and delivery of policing services in the ACT mean that the arrangements to prevent and respond to corruption in the Commonwealth sphere apply to ACT Policing, that is, ACLEI covers AFP employees including ACT Policing and this oversight is supplemented by the AFP's internal investigations unit known as AFP Professional Standards.
- 2.53 In practical terms, notwithstanding that an oversight arrangement for ACT Policing exists in the Commonwealth sphere, it raises questions as to whether an ACT body should have oversight over policing officers funded to deliver services to the ACT taxpayer and community.

PERCEIVED LEVELS OF TRUST IN GOVERNMENT AND PUBLIC ADMINISTRATION

- 2.54 When delivering The Reith Lectures in 2002—A Question of Trust, philosopher, Onora O'Neill, amongst other things, examined the nature of trust and its role in society. Importantly she emphasised the linkage between levels of trust and legitimacy of a government, in that

⁵⁶NSW ICAC. (2017) Corruption risks in NSW Development Approval processes: position paper, September; Murray, C. and Frijters, P. (2017) *Game of mates—How favours bleed the Nation*, e-copy only; Murray, C. and Frijters, P. (2015) 'Clean Money in a Dirty System: Relationship Networks and Land Rezoning in Queensland', *Discussion paper series—IZA DP No. 9028*, April; Dodson, J., Coiacetto, E. and Ellway, C. (2006) 'Corruption in the Australian Land Development Process: Identifying a research agenda', *Proceedings of the 2nd Bi-Annual National Conference on The State of Australian Cities*.

⁵⁷ ACT Auditor-General's Report No. 3 of 2016: *ACT Policing Arrangement*, May 2016.

‘without trust we cannot stand’. In introducing her first lecture, O’Neill highlighted the importance of the social contract—between government and the people:

Confucius told his disciple Tsze-kung that three things are needed for government: weapons, food and trust. If a ruler can't hold on to all three, he should give up the weapons first and the food next. Trust should be guarded to the end: "without trust we cannot stand". Confucius' thought still convinces. Weapons did not help the Taliban when their foot soldiers lost trust and deserted. Food shortages need not topple governments when they and their rationing systems are trusted, as we know from WWII. It isn't only rulers and governments who prize and need trust. Each of us and every profession and every institution needs trust. We need it because we have to be able to rely on others acting as they say that they will, and because we need others to accept that we will act as we say we will. The sociologist Niklas Luhman was right that 'A complete absence of trust would prevent [one] even getting up in the morning.'⁵⁸

- 2.55 As noted previously, in the lead up to the 2016 ACT General Election, concerns were voiced in the community about questionable property and land deals—including land purchases and close relationships between developers and government. Others saw establishment of an independent integrity commission as an important preventative measure and safeguard. This view was coupled with current work being undertaken in other jurisdictions⁵⁹ to strengthen and safeguard integrity frameworks. In response to these views and concerns in the community⁶⁰, all major parties made commitments to act on integrity in government. Detail on the measures proposed by each major party has been outlined previously.
- 2.56 Public opinion and the sentiments expressed in many submissions to the Inquiry indicate strong support for the principle of a designated ACT independent integrity type body. There is also support for the correlation between the presence of such a body and improved accountability and trust in government.

⁵⁸ BBC—Radio 4—Reith Lectures. (2002) A Question of Trust, Lecture One, Onora O’Neill.

⁵⁹ Northern Territory and Commonwealth jurisdictions.

⁶⁰ ACT Auditor-General. (2016) Auditor-General’s Report No. 7 of 2016: *Certain Land Development Agency Acquisitions*.

PART 2—VIEWS FROM SUBMITTERS

3 VIEWS OF SUBMITTERS

INTRODUCTION

- 3.1 This chapter considers views on the inquiry terms of reference—as expressed in written submissions provided to the Committee.
- 3.2 The Committee received 33 submissions and four supplementary submissions to its inquiry. This was accompanied by three submissions and 18 supplementary submissions which were received in-confidence. In total the Committee received 36 submissions and 22 supplementary submissions to this inquiry.
- 3.3 As to the submission analytics—submissions were received from a range of key integrity stakeholder groups—public sector, parliamentary and policing; key interest groups and organisations, professional associations, policy and research institutes, community councils and associations, state-based anti-corruption bodies, union groups, political parties, academics, integrity experts and interested individuals. A summary of submissions⁶¹ received across these stakeholder groups is detailed in Table 3.1.

Table 3.1—Summary of submissions received across stakeholder groups

Stakeholder group(s)	Number of submissions received
Public sector integrity	4 (1 supplementary)
Parliamentary integrity	3 (1 supplementary)
Police integrity	2 (1 supplementary)
Policy and research institutes	3
Professional associations	2
Community councils and associations	2 (1 supplementary)
Union groups	2
Academics	3
Political parties	2
State-based anti-corruption bodies	2

⁶¹ Submissions authorised for publication.

NGOs	1
Integrity experts	2
Interested individuals	5

3.4 The views expressed in the submissions are categorised across the following themes:

- whether the establishment of an independent integrity body is needed in the ACT;
- considerations regarding design, form and functions, of an independent integrity body;
- ensuring the effectiveness of an independent integrity body in the ACT;
- appointment of commissioner(s);
- funding arrangements;
- jurisdiction of an independent integrity body in the ACT;
- should jurisdiction be extended to include ACT Policing?;
- scope of conduct and definition of corruption and misconduct;
- relationships of an independent integrity body in the ACT with other integrity stakeholders;
- powers of an independent integrity body in the ACT;
- power to hold hearings;
- civil liberty concerns around the use of investigative and coercive powers;
- corruption prevention and public education functions
- citizen participation in the work of an independent integrity body in the ACT;
- retrospectivity;
- oversight and governance of an independent integrity body in the ACT;
- complaints, complainants (including vexatious complainants) and protections;
- application of other legislation to an independent integrity body in the ACT; and
- distributed integrity measures.

3.5 The Committee notes that this is not an exhaustive list.

COMMON THEMES

3.6 An analysis of the submissions across each of the aforementioned themes is set out following.

WHETHER THE ESTABLISHMENT OF AN INDEPENDENT

INTEGRITY BODY IS NEEDED IN THE ACT

3.7 There were no submissions that were of the view that the establishment of an independent integrity body in the ACT should not be contemplated. As to those submissions that specifically made comment as to its desirability, views expressed ranged from unequivocal support to a more cautious approach, in that either there was no evidence of corruption or the ACT had not been a victim to a significant scandal warranting the establishment of such a body as had been the case in other jurisdictions. These submitters were of the view that the establishment of such a body should be considered as a preventative or risk mitigating measure.⁶²

3.8 In its submission, the Griffith Narrabundah Community Association commented that:

The GNCA believes that there is an overwhelming case for the establishment of an ACT Independent Integrity Commission.⁶³

The GNCA believes that the establishment of an AIIC would present a singular opportunity to change and improve the civic life in Canberra. We should seize the moment and get on with it.⁶⁴

3.9 The submission to the inquiry by Ms Fatseas advised the Committee:

This is an important initiative. ...

The impetus for the establishment of an integrity commission has come from widespread community disquiet about a range of decisions in recent years, and concerns about the integrity of some of these decisions.

To address these concerns, it is essential that any Integrity Commission "has teeth" and is established in a timely way. I would not like to see a similar scenario as in the early 1990s, when the Public Corruption Bill 1991 was presented at such a late stage in the term of the Assembly that it lapsed due to the 1992 ACT elections.⁶⁵

3.10 In its submission, the ACT Bar Association commented:

As a matter of principle the Bar strongly favours the creation of an independent anti-corruption body for the ACT which approximates the models adopted in NSW and Victoria.⁶⁶

⁶² Submission No. 22—UnionsACT; Submission No. 4—ACT Assembly Ethics and Integrity Adviser.

⁶³ Submission No. 28—Griffith Narrabundah Community Association, p. 3.

⁶⁴ Submission No. 28—Griffith Narrabundah Community Association, p.18.

⁶⁵ Submission No. 18—Marea Fatseas, p. 1.

⁶⁶ Submission No. 12—ACT Bar Association, p. 2.

3.11 The Law Society of the ACT expressed the view in its submission that the:

The Society supports in principle the establishment of an Independent Integrity Commission (IIC) in the ACT. In doing so, the Society acknowledges the long-standing and ongoing debate within the ACT regarding the establishment of an anti-corruption body, and the fact that all other Australian States and Territories have now established, or are in the process of establishing, anticorruption bodies within their jurisdictions. The underlying rationale of such bodies, namely open and accountable public administration and the maintenance of public confidence in the integrity of public administration and officials, is a valuable objective and is supported by the Society.⁶⁷

3.12 The submission to the inquiry by Dr Sheehy, expressed the view that whilst the ACT had suffered no major corruption scandal, it suggested that either this situation may be attributed to 'good, clean practice' or it may be as a consequence of the absence of a designated integrity body. Importantly, it emphasised that 'the absence of evidence is not the same as evidence of absence'.⁶⁸

3.13 UnionsACT advised the Committee that whilst supporting 'in principle the establishment of an Integrity Commission, with a focus on identifying and exposing serious corruption amongst elected officials, senior public servants and political party officials'—it noted that the establishment of such a body in other jurisdictions has occurred in response to a specific event or finding. UnionsACT was of the view there was 'no evidence of serious or widespread misconduct by elected officials or public servants in the ACT'. Further, in the absence of such evidence it believes that 'ACT public servants, elected officials and political party officials are entitled to the presumption that they are acting properly, lawfully and in the public interest'.⁶⁹

3.14 Consequently, UnionsACT advised that it considered the establishment of an Integrity Commission as an important preventative measure.⁷⁰

3.15 Those submissions, in the main, not expressing a view either way were drawn from integrity stakeholder groups, though there were other contributors.⁷¹ These stakeholders, in the main, made comment on considerations, in the event that such a body is established.

3.16 The Clerk of the ACT Legislative Assembly advised:

⁶⁷ Submission No. 15—Law Society of the ACT, p. 1.

⁶⁸ Submission No. 13—Benedict Sheehy (PhD), p. 2

⁶⁹ Submission No. 22—UnionsACT, pp. 1–2.

⁷⁰ Submission No. 22—UnionsACT, p. 2.

⁷¹ Submission No. 26—ACT Auditor-General; Submission No. 19—ACT Public Sector Standards Commissioner; Submission No. 29—ACT Ombudsman; Submission No. 6—Guy Boland; Submission No. 7—Jon Stanhope; Submission No. 16—Rhyl Hurley.

I do not express a view one way or the other as to the desirability of an independent integrity commission but I do note that a high level of public trust in public institutions, particularly parliamentary institutions, is essential to the legitimacy and ongoing viability of any democratic polity. ...

While there is no evidence available to suggest that widespread or systemic corruption exists in the ACT, this, of itself, is not an argument against the development and maintenance of effective anticorruption and integrity arrangements.⁷²

3.17 In the event that an independent integrity body in the ACT was established, ACT Policing was of the view that coverage of ACT Policing by an ACT based integrity body would 'create duplication and a requirement for de-confliction with other integrity bodies'—on this basis ACT Policing proposes that the current framework as it applies 'to ACT Policing and the broader AFP is adequate'.⁷³

3.18 Further, some contributors⁷⁴ noted that given the terms of reference—specifically inquiring into the establishment of such a body—it suggested that it was assumed that such a body was needed for the ACT.

3.19 The submission by Mr Dempster commented:

This committee's Terms of Reference do not specifically ask if an independent integrity commission is needed in the Australian Capital Territory. One can assume that the mere establishment of this ACT select committee is predicated on a self-evident need.⁷⁵

CONSIDERATIONS REGARDING DESIGN, FORM AND FUNCTIONS OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.20 In considering matters related to design, form and functions of an independent integrity body in the ACT—three matters are important: (i) cautioning that the solution may not lie in adopting a model from another jurisdiction; (ii) having an awareness of the gaps and vulnerabilities in the current ACT public sector integrity framework; and (iii) understanding jurisdictional attributes and characteristics specific to the ACT and which are pertinent in any discussion concerning the establishment of a designated integrity body.

⁷² Submission No. 3—Clerk, ACT Legislative Assembly, p. 1.

⁷³ Submission No. 25—ACT Policing, p. 8.

⁷⁴ Submission No. 31—Accountability Round Table; Submission No. 2—Quentin Dempster.

⁷⁵ Submission No. 2—Quentin Dempster, p. 4.

3.21 In considering institutional design and choices, given the ACT was now only one of two jurisdictions without such a body, a number of submissions suggested it was in a unique position, as part of its design process, to learn from the arrangements that have been in place for the state-based anti-corruption bodies.⁷⁶

3.22 Some submissions agreed that adopting a model *per se* from another jurisdiction may not result in the best design for the ACT's unique context.⁷⁷

3.23 The submission to the inquiry by Dr Sheehy suggested that in considering the establishment of an integrity body—there was good reason to look at models elsewhere, in that both failures and successes of other models provide lessons that may be relevant to the ACT. It cautioned against importing aspects of models ‘without due attention to context’. It emphasised that extracting:

...appropriate parts of models and lessons of both success and failure will require discerning among those models and lessons to identify which aspects are attributable to specific agency or body design and those which are more attributable to the institutional context. Accordingly, when designing a body such as the ACT is proposing, special attention needs to be given to the specific context in which that body is expected to operate. It needs not only to effectively imitate and adapt other models, but as noted in the Issues Paper to go beyond in order to ensure that the proposed body works well with existing bodies and practices that are working and disrupt those which are less than optimal...⁷⁸

3.24 In its submission, the ACT Ombudsman encouraged:

...the Committee to explore the relationships between existing integrity bodies in the ACT and the proposed commission. If established, an independent integrity commission should work with and complement existing oversight mechanisms. I agree with the Committee that adopting a model from another jurisdiction may not result in the best design for the ACT's unique context.⁷⁹

⁷⁶ Submission No. 31—Accountability Round Table; Submission No. 12—ACT Bar Association; Submission No. 9—The Australia Institute; Submission No. 1—IBAC Victoria; Submission No. 17—QLD CCC; Submission No. 24—Canberra Liberals.

⁷⁷ Submission No. 29—ACT Ombudsman; Submission No. 12—ACT Bar Association; Submission No. 13—Benedict Sheehy (PhD).

⁷⁸ Submission No. 13—Benedict Sheehy (PhD), p. 2.

⁷⁹ Submission No. 29—ACT Ombudsman, p. 1.

3.25 As it concerns defining gaps and vulnerabilities in integrity and oversight the ACT Ombudsman suggested that consideration be given to ‘conducting an in-depth analysis’ of the existing ACT integrity system ‘to identify opportunities for corruption and effective counter responses’.⁸⁰

3.26 Further as to identification of the gaps and vulnerabilities in the current ACT public sector integrity framework, the Canberra Liberals were of the view:

Whilst the Ombudsman, Auditor-General and Police collectively have powers to investigate malpractice, malfeasance and wrong-doing, there are still numerous occurrences of possible misconduct that may not initially appear to warrant Police resources yet are also not investigated by the Auditor-General or Ombudsman. As such, the Canberra Liberals believe that there is a need for a body to investigate specific possible integrity breaches.⁸¹

3.27 A submission to the inquiry felt that the Canberra community should have more opportunity to consider the establishment of an independent integrity body than that which the current inquiry provided.⁸²

3.28 In its submission the Canberra Alliance for Participatory Democracy (CAPaD) whilst advising that it felt an Independent Integrity Commission was needed, and in a timeframe before the 2020 ACT General Election, it was of the view that ‘the community should have far more opportunity to deliberate on the purpose, form, functions and funding of the body than’ the current inquiry provides. It submitted that further community participation as it concerns the ‘inquiry and design process’ was ‘likely to produce a more efficient and effective final model’.⁸³

3.29 As to the importance of understanding jurisdictional attributes and characteristics specific to the ACT and which are pertinent to any discussion concerning the establishment, and subsequent design, of a designated integrity body, a number of submissions focused on this detail.

3.30 The submission by Dr Sheehy argues the case for proper design with reference to the inquiry terms of reference. Firstly, in addressing the core issue as to does the ACT need an Integrity Commission, the submission notes that the establishment of such a body would be a critical stage ‘in the maturation of the ACT and its governance institutions’. It suggested that:

Neither the size nor the age of the ACT preclude the need for an integrity body. Indeed, in some ways the ACT’s special history, governance peculiarities and size call for greater attention to the potential problem. As a newer, smaller territory, with close

⁸⁰ Submission No. 29—ACT Ombudsman, p. 1; 5.

⁸¹ Submission No. 24—Canberra Liberals, p. 1.

⁸² Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), p. 2.

⁸³ Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), pp. 1–2.

networks is a context in which relationships are fresher, more integrated and as such more prone to use in ways that do not support the public interest. .. a commission to ensure integrity is the norm remains of significant importance.⁸⁴

- 3.31 The submission went onto consider that the ACT has a number of unique governance arrangements, including the city-state model which need to be considered when designing integrity measures:

...in terms of its governance, the ACT has peculiarities which further recommend attention to this important function. The Territory operates as both local and quasi-state government and with a unicameral legislative body, the ACT government has greater powers with less or perceived less *[sic]* accountability. These powers lead to a reasonable proposal of ensuring the corollary of a special accountability body.⁸⁵

- 3.32 In its submission, the Griffith Narrabundah Community Association commented that:

...as is clear from the discussion about the need for an integrity commission in the ACT, many observers feel that small size may be a factor in encouraging corruption and misbehaviour in the smaller jurisdictions. If this is, in fact the case, the optimal size of an integrity agency for the ACT may not be a simple reflection of the different population sizes of the ACT and the larger states such as NSW.⁸⁶

- 3.33 The ACT Bar Association in its submission emphasised that:

The size of our jurisdiction should not in the first instance dictate the model for such a body.⁸⁷

- 3.34 As to gaps and vulnerabilities in the current ACT integrity framework, a number of submissions noted that the jurisdiction of a designated integrity body should consider its relationships with other integrity bodies, avoid duplication and maintain the separation of powers.⁸⁸

- 3.35 As noted in a paper prepared by a former NSW Auditor-General, and as attached to the Inner South Canberra Community Council's submission, it was noted that:

⁸⁴ Submission No. 13—Benedict Sheehy (PhD), pp. 1–2.

⁸⁵ Submission No. 13—Benedict Sheehy (PhD), p. 2.

⁸⁶ Submission No. 28—Griffith Narrabundah Community Association, p. 4.

⁸⁷ Submission No. 12—ACT Bar Association, p. 2.

⁸⁸ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 33—ACT Legislative Assembly Commissioner for Standards; Submission No. 13—Benedict Sheehy (PhD); Submission No. 16—Rhyl Hurley; Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD).

...the act establishing an ACT anticorruption body must make it clear that any code of conduct binding members of the Legislative Assembly augments and does not restrict the definition of corruption included in the Act.⁸⁹

ENSURING THE EFFECTIVENESS OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.36 Several submissions highlighted the importance of ensuring that such a body would be effective and not a “toothless tiger”. Critical elements raised by contributors in this regard, aside from appropriate powers, were independence as it concerns appointment of the statutory office holder to head the organisation and safeguards in relation to funding arrangements. There was a general view that the more involved parliament was in the appointment process of the statutory head of the body and with its funding arrangements the greater the level of assured independence.

3.37 In examining the available evidence from the performance of anti-corruption type bodies around Australia, to inform the most effective design of an integrity commission in the ACT, in its submission the Australia Institute’s research found that:

...the broad jurisdiction of an integrity commission, and its ability to hold regular public hearings will be critical to its success in exposing and investigating systemic corrupt conduct.⁹⁰

3.38 The structure of the body as it concerned staffing and resources was also cited as an important element underpinning the effectiveness of the Body. The ACT Bar Association was of the view that the Body needed ‘sufficient staff to undertake something more than a secretariat function’.⁹¹

3.39 As it concerns funding, in its submission the ACT Bar Association was of the view that:

A funding arrangement must be established that gives that body the capacity to discharge its functions as an independent body without having to go cap in hand to the government for each investigation that it undertakes. Resources must be sufficient to give the body the critical mass to provide reports on systemic issues rather than simply being a passive complaint processing body.

⁸⁹ Submission No. 21—Inner South Canberra Community Council, Attachment, p. 6.

⁹⁰ Submission No. 9—Australia Institute, p. 1.

⁹¹ Submission No. 12—ACT Bar Association, p. 3.

The flow on resource implications for other bodies (including the DPP) must also be given consideration. Any cases referred to the DPP are likely to be complex and the DPP must be resourced to deal effectively with such prosecutions.⁹²

3.40 The ACT Ombudsman emphasised that:

In order to protect the independence of an integrity commission and the public perception of that independence, the work of that commission should not be hampered by a lack of resources. It must be in a position to respond to issues of possible corruption effectively and within a reasonable timeframe.

Decisions about whether or not to investigate should not be made on the basis of funding availability. It may be pertinent to provide budget flexibility (as proposed by Mr Brian Martin AO QC in his Report on the establishment of an Anti-Corruption, Integrity and Misconduct Commission for the Northern Territory⁹³) given the workload of a new integrity body is impossible to predict with any confidence, especially in the years post establishment. It may also be appropriate to afford the head of the proposed integrity commission the discretion to expend resources to pursue a particular investigation above and beyond annual budgetary allocation, where it is in the public interest to do so.⁹⁴

3.41 Equally important, some contributors were of the view that such a body should be affordable.⁹⁵

3.42 The Assembly Ethics and Integrity Adviser was of the view that such a body needed to be 'reasonably affordable'⁹⁶ The submission by Ms Hurley advised that:

ACT is a relatively small jurisdiction. It is vital to achieve excellent cost-benefit outcomes from integrity processes and systems. Costs must be contained.⁹⁷

3.43 The submission to the inquiry by Dr Sheehy was of the view that together with appropriate powers, no body of this kind is successful without appropriate resourcing. Whilst noting that the ACT was a small jurisdiction with limited resources:

It will be necessary in the design process to think creatively about how additional resources can be obtained and existing resources leveraged to ensure adequate

⁹² Submission No. 12—ACT Bar Association, p. 2.

⁹³ Martin, B. (2016) Anti-Corruption, Integrity and Misconduct Commission Inquiry Final Report—May 2016. Available at: <https://acimcinq ui ry. nt.gov.au/?a=292252>

⁹⁴ Submission No. 29—ACT Ombudsman, p. 8.

⁹⁵ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, p. 1; Submission No. 16—Rhyl Hurley, p. 4.

⁹⁶ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, p. 1.

⁹⁷ Submission No. 16—Rhyl Hurley, p. 4.

resources without unnecessarily burdening the budget. As noted in other contexts, denial of adequate resources is mechanism for political control of agencies and can seriously undermine the efficacy of agencies including integrity bodies (Sheehy and Feaver 2016). It can also fundamentally erode the perceived legitimacy and thereby improperly politicise those bodies. Yet limited resources can also spur the development of an appropriately focused body which balance integrity assurance with the effective and efficient execution of government business (Anechiarico and Jacobs 1996).⁹⁸

APPOINTMENT OF COMMISSIONER(S)

- 3.44 As to views on whether a three commissioner (as is now the case in NSW) or a single commissioner model was preferred, the bulk of submissions did not express a view either way.
- 3.45 Those contributors expressing a view included the ACT Bar Association which was ‘not attracted to the idea recently adopted in NSW of having multiple Commissioners. The structure is cumbersome and unnecessary’⁹⁹ and the Science Party, which was of the view that an ACT integrity body should have three commissioners¹⁰⁰.
- 3.46 The general view of contributors was that the Commissioner should be appointed for a fixed non-renewable term, have legal qualifications and the appointment process should involve the Parliament. Some contributors submitted additional considerations, including that appointments to the statutory head and senior management positions should not be permitted from existing ACT public servants or those who have been public servants in the ACT for a period of 10 years previously.
- 3.47 The submission to the inquiry by Ms Fatseas advised the Committee that:
- The Integrity Commissioner should be a former judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years standing¹⁰¹. The position should be advertised and the appointment agreed to by consensus of the Legislative Assembly or, if there is no consensus, at least 20 of the 25 MLAs (80%). The Commissioner should report to the Assembly as a whole. The Assembly should also decide on the Integrity Commission's budget.¹⁰²

⁹⁸ Submission No. 13—Benedict Sheehy (PhD), p. 5.

⁹⁹ Submission No. 12—ACT Bar Association, p. 3.

¹⁰⁰ Submission No. 23—Science Party, p. 1.

¹⁰¹ This is consistent with a recommendation made by Brian Martin AO QC, *Anti-Corruption, Integrity and Misconduct Inquiry- Final Report*, May 2016, with respect to establishment of an integrity commission in the Northern Territory.

¹⁰² Submission No. 18—Marea Fatseas, p. 2.

3.48 In its submission, the ACT Bar Association was of the view:

Appointments to the Commissioner position or to senior management positions should not be permitted from the ranks of existing ACT public servants or who have been public servants in the ACT for a period of 10 years previously. It is noted in that context that the Tasmanian Government has recently announced the appointment of a former senior Tasmanian public servant as the CEO of its integrity Commission. As a matter of principle such an approach is undesirable.

It is the Bar's view that the Commissioners should have legal qualifications.¹⁰³

3.49 Some contributors suggested that the arrangements for the appointment of a Campaign Advertising Reviewer, pursuant to the *Government Agencies (Campaign Advertising) Act 2009*, may serve as a useful guide for determining a process, involving the Assembly, for appointing the statutory head of an ACT integrity body.¹⁰⁴ These features include: designated experience or expertise on one or more specific areas; the reviewer must not be a public servant; the responsible Minister must not appoint a person as reviewer unless the Legislative Assembly has approved the appointment, by resolution passed by a majority of at least 2/3 of the members; appointed for not longer than 3 years (with scope for reappointment if eligible—refer *Legislation Act 2001*, s 208 and dict, pt 1, def appoint); conditions of appointment of the Reviewer are the conditions agreed between the responsible Minister and the Reviewer, subject to any determination under the *Remuneration Tribunal Act 1995*; and the *Legislation Act 2001*, division 19.3.3 (Appointments—Assembly consultation) does not apply to the appointment of a reviewer.¹⁰⁵

3.50 A contributor noted the potential for conflict should the statutory head of an ACT integrity body be appointed on a part-time basis. The submission by Mr Boland advised the Committee:

The Committee should consider whether part-time commissioners may undermine the independence of the commission where those part-time commissioners are also engaged in other professional fields or tempted to 'tailor' their work to secure permanent appointments.

Actual as well as perceived independence is important.¹⁰⁶

¹⁰³ Submission No. 12—ACT Bar Association, p. 3.

¹⁰⁴ Submission No. 3—Clerk, ACT Legislative Assembly p. 40; Submission No. 19—ACT Public Sector Standards Commissioner, pp. 31–32.

¹⁰⁵ Section 12—Appointment of Reviewer, *Government Agencies (Campaign Advertising) Act 2009*.

¹⁰⁶ Submission No. 6—Guy Boland, p. 1.

FUNDING ARRANGEMENTS

- 3.51 Several contributors were of the view that the Assembly should have a major role in determining the budget for an independent integrity body.
- 3.52 In its submission the Griffith Narrabundah Community Association submitted that a designated integrity body in the ACT should have:

...a budget that is determined by the Assembly separately from the Government's budget.¹⁰⁷

...

It would be undesirable if the AIIC's budget allocation were to be buried in the budget for Justice and Community Services, or within the myriad activities of the Chief Minister's Directorate. Consequently the GNCA recommends that the AIIC budget be required to be a separate item, and be debated separately from all other budget matters.¹⁰⁸

JURISDICTION OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

- 3.53 Many submissions were of the view that any proposed integrity body should have broad responsibilities as it concerns government activities and public officials. Its focus should be public sector officials and its coverage should extend to the conduct of third parties, i.e., private individuals where such conduct affects public administration.
- 3.54 Public officials were defined as all public office holders receiving salary, wages or expenses from the ACT Government service—but may also include said officials who could be in a position of influence or power.
- 3.55 A contributor to the Inquiry, commenting on actions taken in respect of the private sector, was of the view that a designated integrity body should:
- have jurisdiction in respect of all "public office holders":
 - 8.4.1. whether in the Assembly, the judiciary or the public service broadly defined;
 - 8.4.2. whether full- or part-time;
 - 8.4.3. whether appointed under statute, employed or engaged under contract;

¹⁰⁷ Submission No. 28—Griffith Narrabundah Community Association, p. 1.

¹⁰⁸ Submission No. 28—Griffith Narrabundah Community Association, p. 6.

8.4.4. [w]hether remunerated or honorary; or

8.4.5. to the extent that they may exercise powers conferred under a statutory licence, but would not otherwise have jurisdiction in respect of actions taken in the private sector;¹⁰⁹

3.56 In its submission, the Law Society of the ACT advised the Committee that:

It is appropriate that the jurisdiction of the IIC include ACT public sector agencies, public officials, and members of the Legislative Assembly. In addition, careful consideration should be given to extending the reach of the IIC to entities who are contracted to undertake government work. The Society notes that as AFP officers, ACT Police are subject to the AFP's Professional Standards unit and judicial officers are subject to the recently formed Judicial Council. The Society notes that protocols between the IIC and other relevant regulatory/investigative bodies (such as the Judicial Council and other agencies with an oversight role including the ACT Auditor-General) would need to be developed and agreed in order to regulate interaction between the bodies and to avoid duplication of effort.¹¹⁰

3.57 As to its jurisdiction concerning the Assembly, the general views of contributors was that a designated integrity body should have jurisdiction where the standing regulatory capacities of the Assembly are vulnerable and it should have regard to the separation of powers and parliamentary privilege. In the context of proposed arrangements, coverage of MLAs and modifications to the Commissioner for Standards role, the Clerk of the Assembly advised the Committee that:

...the jurisdiction of an independent integrity commission as it concerns MLAs should be clearly delineated and narrow. A commission should not be given the function to investigate or to form judgements in relation to matters which properly fall within the domain of the Assembly to look after its own affairs—i.e. in relation to possible contempts, breaches of the standing orders or Assembly resolutions (including the code of conduct and declaration of members' interests requirements). These matters should continue to be dealt with, for the most part, by the existing arrangements based on relevant parliamentary procedure, statute and constitutional provisions. In particular, I submit that the establishment of an independent integrity commission should not have the effect of displacing the Assembly Commissioner of Standards—these arrangements should continue, albeit with some modifications.¹¹¹

¹⁰⁹ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, p. 2.

¹¹⁰ Submission No. 15—Law Society of the ACT, pp. 1–2.

¹¹¹ Submission No. 3—Clerk, ACT Legislative Assembly, p. 30.

...the Commissioner of Standards [*be*] at the centre of all complaints or allegations made about the conduct of MLAs and at the same time enable an independent integrity commission to investigate serious criminal conduct relating to the performance of a member's duties as an elected representative.¹¹²

- 3.58 The Clerk's submission went on to suggest, as it concerns MLA staff, that the Committee should:

...consider the jurisdiction of the Commissioner of Standards, the Assembly itself, and any putative integrity commission to investigate the conduct of members' staff, including staff employed by ministers, employed under the *Legislative Assembly (Members' Staff) Act 1989*.¹¹³

SHOULD JURISDICTION BE EXTENDED TO INCLUDE ACT POLICING?

- 3.59 Whilst some submissions acknowledged that ACT Policing was already subject to an oversight arrangement in the Commonwealth sphere, questions about whether an ACT designated body should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community are valid.

- 3.60 In the event that an independent integrity body in the ACT was established, ACT Policing was of the view that coverage of ACT Policing by such a body would 'create duplication and a requirement for de-confliction with other integrity bodies'—on this basis ACT Policing proposed that the current oversight framework as it applied to ACT Policing and the broader AFP was adequate.¹¹⁴

- 3.61 In its supplementary submission to the Inquiry, ACT Policing agreed:

...wholeheartedly that the community the ACTP serves is justifiably entitled to be assured about the high integrity and professional conduct of its police.¹¹⁵

- 3.62 As to why the ACT would not have oversight of its own police force, the Chief Police Officer went on to state that the ACT community 'is entitled to be regularly assured of the integrity of its police service' and that a:

¹¹² Submission No. 3—Clerk, ACT Legislative Assembly, pp. 30–35.

¹¹³ Submission No. 3—Clerk, ACT Legislative Assembly, p. 39.

¹¹⁴ Submission No. 25—ACT Policing, p. 8.

¹¹⁵ Submission No. 25a—ACT Policing, p. 2.

...number of avenues already exist for this assurance to be provided both to the Minister and in the public domain as previously outlined. The MPES [*Minister for Police and Emergency Services*] currently has access to ACT Policing corruption information from ACLEI [*Australian Commission for Law Enforcement Integrity*]. Additional complaint data about ACT Policing is available via Professional Standards Quarterly Reporting and the Annual report.

ACTP [*ACT Policing*] is willing to provide additional information upon request, subject to the requested information complying with the confidentiality provisions under Part V of the AFP [*Australian Federal Police*] Act, as well as secrecy provisions within the LEIC [*Law Enforcement and Integrity Commission*] Act.

Importantly ACTP would in good faith, consider all further discussion with the Minister and the Committee, as to how increased assurance and greater transparency could be maintained.¹¹⁶

- 3.63 In the context of whether there may be barriers in delineating the AFP from ACT Policing for the purposes of an investigation by a proposed ACT Integrity body, in its supplementary submission, ACT Policing advised:

It is recommended the Committee seek further advice from the ACT Government Solicitor regarding this question, in particular the effect of s27 of the Australian Capital Territory {Self-Government} Act 1988 and the ability of the Territory to pass laws effecting Commonwealth agencies and officers in the manner proposed.

It would be difficult to delineate between the functions of ACT Policing and broader AFP, for the purpose of an ACT IIC, without the support of a Commonwealth policy. It is ACTP's understanding that under the current legislation there would be no means of compulsorily acquiring information from the AFP, in compelling AFP employees to appear before an ACT IIC.

Furthermore, this may result in a range of regimes dealing with misconduct by ACT Policing, namely the AFP Act, LEIC Act and any additional ACT legislation created for the ACT IIC. This may create inconsistencies throughout investigative functions and final outcomes.¹¹⁷

- 3.64 The CPSU's views as to whether ACT Policing should be included in the jurisdiction of an ACT integrity body were:

¹¹⁶ Submission No. 25a—ACT Policing, p. 6.

¹¹⁷ Submission No. 25a—ACT Policing, p. 6.

As ACT Police are covered by ACLEI, we believe it is unnecessary for them to be covered by the Integrity Commission. The CPSU notes that in NSW, police are not covered by ICAC but by the Law Enforcement Conduct Commission.¹¹⁸

3.65 The submission to the inquiry by Ms Hurley noted that:

It appears that ACT policing integrity matters are already dealt with separately. So long as the ACT government and peoples have some satisfactory feed-in to that system, it should remain separate.¹¹⁹

3.66 As to whether ACT Policing should be subject to the jurisdiction of an ACT designated integrity body, the Narrabundah Griffith Community Association advised the Committee that:

The GNCA believes that it would be desirable for the AIIC to have the scope to investigate the AFP, at least to the extent that their activities involve the provision of policing services to the ACT. However, we also recognise that the ACT does not have its own police force but purchases policing functions from the Commonwealth via the Australian Federal Police (AFP). The AFP has its own internal investigation unit. Even if the Commonwealth were agreeable to an arrangement whereby a Territory based organisation such as an Integrity Commission could investigate a federal body (such as the AFP, or even the Division which deals with ACT policing), setting appropriate arrangements in place to allow this would require (probably lengthy) negotiations between the Commonwealth and Territory Governments.

This process might unreasonably delay or defer the establishment of the AIIC. Consequently the GNCA believes that at this stage it would be preferable to establish the AIIC as soon as possible and to omit the ACT policing side of the AFP from the scope of any AIIC's area of responsibility at the beginning. After establishing the AIIC the Territory Government can subsequently engage with the Commonwealth Government on the appropriate mechanisms to allow the ACT policing side of the AFP to also be subject to the AIIC in due course. The GNCA recommends that the ACT adopt this approach.¹²⁰

3.67 In connection with police complaints, the submission to the inquiry by Mr Stanhope was of the view that there were 'grounds for a detailed review of the efficacy of the existing police complaints process' in the ACT and suggested that 'consideration be given to enhancing the current police complaints processes'.¹²¹

¹¹⁸ CPSU—Response to QToN at public hearing of 1 September 2017, p. 3.

¹¹⁹ Submission No. 16—Rhyl Hurley, p. 4.

¹²⁰ Submission No. 28—Griffith Narrabundah Community Association, pp. 14–15.

¹²¹ Submission No. 7—Jon Stanhope, p. 1.

- 3.68 As to how the current process could be enhanced the submission went on to suggest that ‘there would be merit in consideration being given to adopting in the ACT the United Kingdom practice whereby a police force self-refers to an independent police complaints tribunal any decision or action by the police force or an individual officer which has resulted in a problematic or controversial outcome or which potentially brings the police into disrepute’.¹²²

SCOPE OF CONDUCT AND DEFINITION OF CORRUPTION AND MISCONDUCT

- 3.69 In general, as it concerns scope of conduct, contributors making comment, were of the view that the investigative jurisdiction of a new integrity body should be limited to serious and/or systemic corruption. The scope of conduct was important in reinforcing a distinction between the work of a designated integrity body and the jurisdiction of other bodies in the integrity system. Further, the threshold to commence an investigation—for example, ‘reasonably satisfied’ versus ‘reasonable suspicion’—was also emphasised.

- 3.70 The ACT Bar Association submitted that:

The statutory thresholds that apply to the beginning of investigations should not operate to place unreasonable limitations on the range of issues that can be investigated. As the LCA noted, the Victorian experience was that the Independent Broad-based Anti-Corruption Commission was unduly constrained by the high legal threshold that was imposed before it could begin an investigation. The body created in the ACT should have the power to investigate corrupt conduct and to bring the state of mind required to justify an investigation in line with formulations adopted elsewhere in the criminal law for the exercising of coercive powers; that is, an investigation can commence when there is a "reasonable suspicion" of corrupt conduct.

As to what constitutes "corrupt conduct" the Committee is referred to the discussion of this issue in the report of the *Independent Panel-Review of the Jurisdiction of the Independent Commission Against Corruption (July 2015)(NSW)*. The Bar is of the view that the definition of "corrupt conduct" must place a focus on conduct that impairs or could impair public confidence in public administration. The particulars of what that might include could be added without limiting the generality of the conduct that is otherwise captured.¹²³

- 3.71 The submission to the inquiry by Ms Fatseas advised the Committee that:

¹²² Submission No. 7—Jon Stanhope, p. 1.

¹²³ Submission No. 12—ACT Bar Association, pp. 2–3.

The Integrity Commission should be empowered to investigate corruption, defined by Transparency International, as "the abuse of entrusted power for private gain", that involves politicians, their staff, public servants, police, judges, and others appointed to ACT statutory authorities, agencies or boards. There also needs to be capacity for the Integrity Commission to make findings against private interests that take part in corrupt transactions.¹²⁴

3.72 The Law Society of the ACT expressed the view that:

...it is appropriate that the jurisdiction of the IIC not be confined to criminal offences, but extend to a broader range of undesirable conduct, including matters where there exists a reasonable suspicion of corruption, conflicts of interest and/or undue influence.¹²⁵

3.73 Further, in its submission, the ACT Bar Association advised the Committee that there was 'considerable utility in ensuring that the concepts of corrupt conduct adopted in a foundational Act should be reflected in the terms of offences under the *Criminal Code 2002* (ACT)'.¹²⁶

3.74 The Australia Institute submitted that:

As demonstrated by NSW ICAC, a broad definition of corrupt conduct in the jurisdiction of an ACT Integrity Commission is critical to ensuring success in investigating and exposing systemic corruption. NSW ICAC has the broadest definition of corrupt conduct of any state commission, allowing it to *[investigate]* a wider range of conduct. NSW ICAC's definition of corrupt conduct has a wider list of conduct that could be considered to be corrupt, including key activities such as official misconduct, election bribery and obtaining financial benefit by vice engaged in by others. It also has a lower threshold for what pertains to corrupt conduct - which includes conduct that would result in a disciplinary action under any law.¹²⁷

3.75 The ACT Legislative Assembly and Ethics Adviser expressed the view that:

Consideration should be given to whether or not the legislation establishing the Commission should provide for a new civil sanction under which the Commission could, after the conduct of its investigation in private, publicly release a finding of "corruption". In undertaking this consideration, it would be necessary to contemplate whether "Corruption" could be defined so as to avoid that definition covering conduct

¹²⁴ Submission No. 18—Marea Fatseas, p. 2.

¹²⁵ Submission No. 15—Law Society of the ACT, p. 2.

¹²⁶ Submission No. 12—ACT Bar Association, p. 4.

¹²⁷ Submission No. 9—The Australia Institute, p. 4.

that could constitute an existing criminal offence - where such conduct has been found, the preferable course is that the matter be dealt with by way of criminal prosecution with all the systemic and personal safeguards that attach to that process.¹²⁸

- 3.76 In the event that an ACT integrity body was established and its legislative framework 'is to include a definition of corrupt conduct which gives the commission jurisdiction to investigate conduct that is so defined,'¹²⁹ the Clerk of the Assembly submitted that:

...the definition, so far as it applies to MLAs, should be limited to conduct which satisfies both the following tests: (i) the alleged conduct, if proven, gives rise to a possible criminal offence; and (ii) the conduct relates to the performance of the MLA's duties as a Member of the Legislative Assembly.¹³⁰

- 3.77 IBAC Victoria noted in its submission that legislative changes as passed by the Victorian Parliament in May 2016, pursuant to the *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* introduced changes (which took effect from 1 July 2016) included: (i) the ability to investigate allegations of 'misconduct in public office'; and (ii) 'a broader definition of corruption and lower threshold to investigate corrupt conduct'.¹³¹

RELATIONSHIPS WITH OTHER INTEGRITY STAKEHOLDERS

- 3.78 Several contributors noted that the relationships an independent integrity body has with other integrity stakeholders are important and represent valuable inter-institutional cooperation and information-sharing toward common public goals. At a minimum enabling legislation for a designated integrity body should formalise these relationships and provide for: (i) referral mechanisms; (ii) provision for exchange of information; (iii) inter-agency arrangements; and (iv) relationship management procedures. The importance of avoiding duplication with the jurisdiction of existing integrity bodies was also emphasised.

- 3.79 In its submission the Law Society of the ACT noted:

...that protocols between the IIC and other relevant regulatory/investigative bodies (such as the Judicial Council and other agencies with an oversight role including the

¹²⁸ Submission No. 4a—ACT Legislative Assembly Ethics and Integrity Adviser, p. 2.

¹²⁹ Submission No. 3—Clerk, ACT Legislative Assembly, p. 35.

¹³⁰ Submission No. 3—Clerk, ACT Legislative Assembly, pp. 35–36.

¹³¹ Submission No. 1—IBAC Victoria, Attachment—p. 2.

ACT Auditor-General) would need to be developed and agreed in order to regulate interaction between the bodies and to avoid duplication of effort.¹³²

3.80 In the submission by Ms Fatseas to the inquiry it was noted:

Any duplication between the new integrity commission and other existing organisations and integrity mechanisms in the ACT should be identified and action taken to reduce such duplication and ensure an integrated integrity framework.¹³³

3.81 The Assembly Ethics and Integrity Adviser was of the view that:

The Commission's role would thus be to supplement and enhance the effectiveness of existing ACT institutions and mechanisms, rather than to replace them. The Commission would not have a power of direction over other institutions, but it would be able to make recommendations to them or, in a worst case, report to the Assembly on perceived shortcomings in the performance of their integrity role.¹³⁴

POWERS OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.82 The general tenor of the views of submitters was that a designated integrity body should have wide ranging and significant powers to be effective but equally important was that such powers should be proportionate and tempered by appropriate controls.

3.83 The views of submitters as it concerns the power to hold hearings are set out in the following section.

3.84 In considering the suite of other powers, the general view was that they were necessary and supported, with the exception of the power to make disciplinary decisions and provide mediation. A number of contributors were of the view that such power risked shifting the body into a legal proceeding as opposed to an investigative proceeding.

3.85 The exception to support for own motion powers was expressed by UnionsACT which was 'wary of a Commission with broad powers to initiate its own investigations'.¹³⁵ Further, the exception to support for power to 'make findings only' was also expressed by UnionsACT. In its submission UnionsACT noted that:

The experience in NSW and other jurisdictions is that the ability for a Commission to make public findings can have serious adverse consequences for individuals. This can

¹³² Submission No. 15—Law Society of the ACT, p. 2.

¹³³ Submission No. 18—Marea Fatseas, p. 2.

¹³⁴ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, p. 3.

¹³⁵ Submission No. 22—UnionsACT, p. 4.

amount to a penalty, even if a court later finds that the individual committed no wrong-doing. UnionsACT therefore does not support an ACT Integrity Commission to have powers to make public findings.¹³⁶

3.86 Several contributors noted the inevitable tension that exists between civil liberties/personal rights and an integrity body's use of investigative and coercive powers. This is discussed further in a following section. Whilst noting general support for investigative and coercive powers—this support was qualified by an emphasis of the importance of placing reasonable limits on the circumstances in which such powers can be exercised. Examples included:

- requiring (subject to exceptions) that when witnesses are summonsed that they be given notice of the subject matter of the questions they will be asked;
- ensuring that warrants (an important protection against arbitrary invasion of one's home or work) that are issued for a Commission investigation are issued by Courts rather than the Commission itself;
- any action to engage in covert tactics should be subject to obtaining a warrant through a judicial officer;
- as it concerns engaging in a controlled operation—that detailed and prescriptive criteria should be included in any legislation which permits the commission to engage in a controlled operation and that punitive measures should also be in place to protect against unauthorised controlled operations in connection with an integrity body's work; and
- evidence gathered about unrelated third parties should form no part of an integrity body's investigation.

3.87 Aspects of investigative coercive powers not supported were—

- where an integrity body's officer may engage in entrapment—reservations were expressed about a commission body being in a position where its officers may engage in entrapment (refer J D Heydon, 'The Problems of Entrapment' (1973) 32 *Cambridge Law Journal*, pp. 268; 270–272)¹³⁷; and
- an integrity body not have the power to arm its officers¹³⁸.

3.88 In its submission, as it concerns limits to coercive powers, UnionsACT was of the view that:

The integrity commission should principally be an investigatory body. If the commission were granted coercive powers, they should be limited to an investigatory function, e.g., powers that allows it to:

- Seek information;

¹³⁶ Submission No. 22—UnionsACT, p. 4.

¹³⁷ Submission No. 6—Guy Boland, p. 6.

¹³⁸ Submission No. 28—Griffith Narrabundah Community Association, p. 1.

- Require the provision of documents.¹³⁹

3.89 In its submission, the ACT Bar Association advised:

The powers given to the Commission must be sufficient to enable it to test the information that it is provided and to allow dismissal of complaints or decisions to be made as to referrals to other bodies (for example, the Ombudsman or the AFP) at an early stage.¹⁴⁰

3.90 The ACT Ombudsman was of the view that:

An integrity commission should have significant powers to address corruption at all levels, including covert and coercive powers if appropriate. However, it is important to note that the administration of such powers is expensive in terms of infrastructure, specialised personnel with sufficient skill sets and appropriate oversight.¹⁴¹

3.91 As it concerns powers and resourcing of a designated integrity body, the submission by Dr Sheehy noted that consideration of powers of such a body was needed and the ‘international literature indicates’ that a wide range of options are available ‘when considering how law may address integrity issues (Ackerman 2011)’.¹⁴² The submission emphasised that a critical issue will be:

...identifying appropriate powers and ensuring that those are tightly connected to scope and statutory objectives. Loosely connected to a broad or vague scope, powers can lead the body into fruitless and even counterproductive work. By setting the scope wisely and clearly, the required powers will be more easily identified and balanced by accountability obligations. By clearly connecting power with accountability, some of the more egregious errors of government bodies, including integrity bodies, may well be avoided (Sheehy and Feaver 2016).¹⁴³

3.92 As to the powers that should be available to an integrity commission, the submission to the inquiry by Mr Boland was of the view that the variety of powers of a ‘Model Commission’ as referred to in the Committee’s issues paper ‘are significant powers, and safeguards should protect against their misuse or abuse’.¹⁴⁴ The submission advised the Committee that:

The necessity and appropriateness of these particular powers should not be assumed, and the extent of any restrictions or impositions on personal and property rights

¹³⁹ Submission No. 22—UnionsACT, p. 4.

¹⁴⁰ Submission No. 12—ACT Bar Association, p. 3.

¹⁴¹ Submission No. 29—ACT Ombudsman, p. 8.

¹⁴² Submission No. 13—Benedict Sheehy (PhD), p. 5.

¹⁴³ Submission No. 13—Benedict Sheehy (PhD), p. 5.

¹⁴⁴ Submission No. 6—Guy Boland, p. 1.

through their exercise should be reasonable, justified and proportionate. To prevent these powers being misused and from an accountability perspective, express criteria should be set out in any legislation enacted.¹⁴⁵

3.93 The submission added further that the:

...Committee should carefully consider safeguards to otherwise very extensive powers, and should rely on empirical evidence, where available, to establish the 'effectiveness' of any of the powers sought. Many of these powers are already covered in other pieces of legislation and granted to the police. Why the commission should separately receive them is not obvious.¹⁴⁶

3.94 The submission went on to suggest that:

- warrants should only be issued to a member of the commission body by a Supreme Court judge. Noting that this would be consistent with practice in other jurisdictions, and it would enhance public confidence;
- as it concerns engaging in a controlled operation—that detailed and prescriptive criteria should be included in any legislation which permits the commission to engage in a controlled operation. The submission added that one safeguard would be to require the officer of the commission who it is proposed should engage in the controlled operation to apply under the *Crimes (Controlled Operations) Act 2008* (ACT) and for that officer to be treated as a law enforcement officer under that Act. Punitive measures should also be in place to protect against unauthorised controlled operations in connection with the commission's work;
- evidence gathered about unrelated third parties should form no part of the commission's investigation; and
- reservations were expressed about a commission body being in a position where its officers may engage in entrapment (refer J D Heydon, 'The Problems of Entrapment' (1973) 32 *Cambridge Law Journal*, pp. 268; 270–272).¹⁴⁷

3.95 In its submission, as it concerns own motion powers, UnionsACT submitted that it:

...wary of a Commission with broad powers to initiate its own investigations. Should it be granted such powers, this decision should be subject to review and oversight.¹⁴⁸

3.96 As to a designated independent integrity body having the power to make disciplinary decisions and provide mediation, a submitter commented:

¹⁴⁵ Submission No. 6—Guy Boland, p. 1.

¹⁴⁶ Submission No. 6—Guy Boland, p. 2.

¹⁴⁷ Submission No. 6—Guy Boland, pp. 2–3.

¹⁴⁸ Submission No. 22—UnionsACT, p. 4.

Clearly, an ICAC must be able to find that a person has acted corruptly or is corrupt. This element would go further by allowing the body to suspend or impose a penalty or dismiss a person who has been found to have acted corruptly. Alternatively, the body can mediate such penalties with the agency responsible for the person found to have acted corruptly. It is more common that an anti-corruption body allows another authority, such as the courts or an employer to determine the appropriate penalty or response when a person is found to be corrupt. Providing this power might be efficient in that the anti-corruption body deals with the whole matter. But the lack of division of power - as between judge, jury and executioner - might be questionable;¹⁴⁹

POWER TO HOLD HEARINGS

- 3.97 The power to hold public hearings is a contentious matter and the views of contributors to the inquiry can be organised on a continuum ranging from mandating the power to hold public hearings to mandating the holding of private hearings with a range of options in between.
- 3.98 In the main, the controversy that surrounds the holding of public hearings is related to legitimate expectations about an integrity body's use of its discretion. In making a case for the power to hold public hearings it must therefore be tempered by measures that are designed to keep a check on such discretion.
- 3.99 Some contributors supporting the power to hold public hearings were of the view that it was a key accountability mechanism and, in many ways, the holding of public hearings represents the public face of an integrity body.
- 3.100 In making the case for mandating the holding of public hearings, the submission by Mr Harris noted the reluctance by some legislators to allow anti-corruption bodies to undertake public hearings, preferring instead to limit their use to a minimum. It suggested that the arguments put forward to support minimal use, such as hearings being equivalent to a kangaroo court or tainting reputations unfairly was unfounded—for the following reasons:
- public hearings such as those conducted by the NSW ICAC nearly always follow private investigations that have provided the ICAC with adequate evidence to suggest the existence of corruption. Further, in the case of the NSW ICAC a correlation between public hearings and corruption findings was noted, in that over the last ten years, there have been an annual average of 7.2 investigation reports involving findings of corruption with public hearings averaging 8.1 per annum;
 - it is not in the interests of anti-corruption bodies to conduct public hearings that do not result in corruption findings;

¹⁴⁹ Submission No. 21—Inner South Canberra Community Council, Attachment, p. 3.

- again using the ICAC as a model, notes there have only been a couple of cases where ICAC findings of corruption have been overturned by NSW courts and that these appeals can be seen to have succeeded on technical grounds;
- in Australian jurisdictions, serious indictable offences must first be considered by public committal hearings before a magistrate. Those who argue that there should be no public hearings by anti-corruption bodies need to consider this precedent. Further, if arguments against public hearings prevail, it suggests there should be no open court hearings;
- mandated private processes offend the principle that justice must be accorded by public processes. Private hearings give the public no confidence that justice has been accorded properly, professionally, impartially and diligently; and
- acknowledges that whilst it is true that more public attention is given to public hearings involving prominent people such as Ministers of the Crown, parliamentarians and legislators and senior, appointed public officials, public hearings about these officers are in the minority, and the close media attention given to such hearings is entirely understandable—on the basis that it is those public officers who can do most damage to the social contract.¹⁵⁰

3.101 Some contributors were of the view that hearings should be held in private and that concerns with regard to accountability would be balanced where an integrity body has the power to publicly report the findings that result from any hearing in an investigation report. The main arguments for private hearings were to avoid unnecessarily tainting reputations or the possibility of undeserved reputational damage.

3.102 The Assembly Ethics and Integrity Adviser advised the Committee that whilst perceiving ‘no objection to public hearings where their purpose’ was linked to: promoting recognition, both publicly and amongst holders of public office, of the need for integrity in ACT public administration; periodic review and reporting to the Assembly on the effectiveness of existing ACT institutions and mechanisms insofar as they impact on integrity in ACT public administration; and the development and publication of recommended best practice standards for integrity in ACT public administration—he remained:¹⁵¹

...to be convinced that public hearings are necessary to ensure the effectiveness of Commission investigation of complaints or allegations.

...Such hearings, involving exercise of the Commission's coercive powers, risk unwarranted damage to the reputation and livelihood of potentially innocent persons who are the subject of such complaint or allegation, or who may be subjected to attack by those defending those accused. Moreover, members of the public who may have

¹⁵⁰ Submission No. 8—Tony Harris, pp. 2–3.

¹⁵¹ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, pp. 2–4.

relevant knowledge may be more often discouraged from disclosing that information in a highly public forum than they may be encouraged to come forward with it.¹⁵²

3.103 In its submission the CPSU advised the Committee that it:

...does not support public hearings except in extraordinary circumstances. Private hearings should be the default mode of hearing. The CPSU consulted with members who work in ACLEI who have direct experience with ensuring the integrity of public sector staff. There was a general consensus that private hearings work better than public hearings:

- The standard of proof for ICAC in NSW is "on the balance of probability" and findings cannot be made about guilt, a far lower bar than in criminal cases.
- Public hearings can impact on the ability to prosecute corruption afterwards because of the media attention they get;
- Public hearings have an impact on reputation, considering the vast majority of people ACLEI bring in to talk to are just witnesses.¹⁵³

3.104 In a supplementary contribution, the CPSU elaborated as to its definition of 'extraordinary circumstances':

A public interest test should be devised to determine the extraordinary circumstances in the public interest that warrant public hearings. The test must ensure it will not affect the personal safety or reputation of an individual. Victoria's IBAC does a public interest test which it determines.¹⁵⁴

3.105 Some contributors submitted that the default should be private hearings with public hearings in exceptional circumstances, such as where the public interest outweighed the holding of a private hearing.

3.106 In its submission, the Law Society of the ACT advised the Committee:

As a general rule, matters considered by the IIC should be managed privately, but the IIC should have the power to conduct public hearings in specified circumstances. The Society notes that a number of jurisdictions prescribe a public interest test to provide guidance as to when it is appropriate to hold public (as opposed to private) hearings. It is important that the IIC have sufficient flexibility to proactively balance the public interest in disclosing and exposing corrupt behaviour with the potential

¹⁵² Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, pp. 3–4.

¹⁵³ Submission No. 11—CPSU (PSU Group), pp. 2–3.

¹⁵⁴ CPSU—Responses to QToN, Public hearing of 1 September 2017, p. 1.

disproportionate damage to reputation (including the public's trust in government bodies).¹⁵⁵

3.107 The ACT Bar Association noted in its submission that:

Some jurisdictions have no public hearings. Others do. It is recognised that the holding of public hearings can "trash" reputations easily. The holding of public inquiries has in some instances proved controversial and have, in some instances, become somewhat theatrical in nature. The Bar favours an approach that assumes that the hearing will take in private but allows public hearings to be conducted based on a public interest - private right discretion. A public hearing can be conducted when ultimately it is in the public interest to do so. For example, where systemic issues arise, the balance may weigh in favour of public hearings. The content of what the "public interest" is must in our view be given specific content while in the end leaving the resolution of the matter in the hands of the Commissioner. Generally this is the approach in most jurisdictions. For example, in smaller jurisdictions see section 139 of the *Corruption, Crime and Misconduct Act 2013 (WA)* (assumes that a hearing will not be in public unless the benefits of public exposure and awareness outweigh the potential for prejudice or privacy infringements). Similar provision is made in Queensland: section 177 of the *Crime and Corruption Act 2011 (Qld)*.¹⁵⁶

3.108 Other contributors were of the view that the power to hold public hearings should be available but that this should be informed by a public interest test. There were different views as to whether such a test should be prescriptive or of a broad nature leaving discretion for the statutory head to make the decision.

3.109 Amongst other considerations, a public interest test is a mechanism that strengthens procedural fairness considerations as a means of balancing expectations about an integrity body's use of its discretion.

3.110 In summary, in considering views of submitters it is acknowledged that a balance must be drawn between the legitimate objectives of public hearings (transparency and accountability of the conduct of the body, public confidence in its operations, the discovery of further evidence, the education of the public, the general deterrent effect) and the possibility of undeserved reputational damage in some cases. The power to hold public hearings informed by a public interest test can strengthen procedural fairness considerations to balance expectations about an integrity body's use of its discretion.

¹⁵⁵ Submission No. 15—Law Society of the ACT, p. 2.

¹⁵⁶ Submission No. 12—ACT Bar Association, pp. 3–4.

CIVIL LIBERTY CONCERNS AROUND THE USE OF INVESTIGATIVE AND COERCIVE POWERS

3.111 Several contributors¹⁵⁷ noted the inevitable tension that exists between civil liberties/personal rights and an integrity body's use of investigative and coercive powers. As safeguard towards avoiding any unwarranted violation of personal rights, the general tenor from contributors was that enabling legislation for a designated integrity body in the ACT must contain mechanisms to minimise the effect on the rights of a person under investigation and ensure procedural fairness. The principal mechanism is to restrict the limitation of rights to the investigative process and to deny an anti-corruption body a disciplinary role.

3.112 The designation of the ACT as a human rights jurisdiction was emphasised suggesting that any such mechanisms to minimise the effect on the rights of a person under investigation should be a high priority.

3.113 The submission to the inquiry by the Accountability Round Table (ART) detailed this concern, and the various parameters that it encompasses, together with its relationship to the effectiveness of an integrity body:

The ART accepts that the enormous powers granted to a body such as ICAC raise serious questions for the legislature, and that basic civil liberties are seriously at risk, such as the right not to be required to incriminate oneself, and the potential effect on those publicly named in open hearings.¹⁵⁸

...The ART accepts that an anti-corruption commission is given wide powers and that there is a risk that such powers will be misused. The interests of the community, and those who are subject to investigation, demand that the risk be minimised, but without detracting from the efficacy of the powers themselves.¹⁵⁹

3.114 The submission went on to propose that suitable risk mitigation measures might include:

- careful selection of an integrity body's staff and the Commissioner(s);
- provision in enabling legislation of an Inspectorate which supervises the activities of the integrity body, and a committee of Parliament to examine its conduct; and
- provision of other protections in enabling legislation—for example: (a) that evidence given by a suspect under compulsion cannot be used against that suspect in further proceedings;

¹⁵⁷ Submission No. 6—Guy Boland; Submission No. 31—Accountability Round Table; Submission No. 12—ACT Bar Association; Submission No. 15—Law Society of the ACT.

¹⁵⁸ Submission No. 31—Accountability Round Table, p. 6.

¹⁵⁹ Submission No. 31—Accountability Round Table, p. 7.

and (b) the involvement of a Public Interest Monitor to give some protection against abuse of an integrity body's ability to overhear and tape telephone calls.¹⁶⁰

3.115 As to the granting of exceptional powers, the submission concluded by emphasising that:

Ultimately the question is whether the community is serious about addressing the risk of corruption. It is necessary to remember that corruption is usually hidden, secret, insidious and difficult to discover, identify and eradicate. In contrast, criminal activity, which is supervised by the courts and the police force, is generally obvious and unmistakable - e.g. perjury, murder, theft, assault and rape. The ART has submitted to the Victorian Parliament that the existing safeguards against risk of the abuse of the powers given to IBAC are adequate and enable the people of Victoria and their government and Parliament to entrust IBAC's Commissioner with the full powers required to exercise the discretion to commence and conduct an investigation appropriately.¹⁶¹

3.116 As to the importance of minimising the effect on the rights of the person under investigation, in its submission to the inquiry, the Canberra Liberals advised the Committee that:

...in performing this duty, the entity must afford natural justice to all persons of interest and ensure that it does not create a perception of guilt by the sheer fact that an investigation is underway.¹⁶²

CORRUPTION PREVENTION AND PUBLIC EDUCATION FUNCTIONS

3.117 Several submissions expressed the view that in addition to an investigative function, a designated integrity type body should also have prevention and public education functions.¹⁶³

3.118 The submission to the inquiry by Ms Hurley, as it concerns educative functions of a commission, advised the Committee that:

In my experience, most investigations result in sub-prosecutorial outcomes, making education, prevention, discipline and advisory functions vital. These may involve dealing with systems and/or individuals.

¹⁶⁰ Submission No. 31—Accountability Round Table, p. 7.

¹⁶¹ Submission No. 31—Accountability Round Table, p. 7.

¹⁶² Submission No. 24—Canberra Liberals, p. 2.

¹⁶³ Submission No. 1—IBAC Victoria; Submission No. 17—QLD CCC; Submission No. 14—Australian Commission for Law Enforcement Integrity; Submission 19—ACT Public Sector Standards Commissioner; Submission No. 16—Rhyl Hurley; Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD); Submission No. 15—Law Society of the ACT.

Educative functions are essential to the prevention and remedying functions of the commission. They would respond to trends seen in complaints, results of investigations and observation of public concern about public sector agencies and parliamentarians.

A role in policy development and legislative change is also important to prevention as are risk reviews.¹⁶⁴

3.119 The submission went on to suggest that as to resourcing a research function that ‘major research functions should be contracted to e.g. a university as necessary as opposed to having an internal research section’.¹⁶⁵

3.120 The ACT Public Sector Standards Commissioner, as it concerned ethics and integrity prevention, education and capacity building suggested that a role for a proposed integrity commission could be to:

...foster high standards of behaviour of public officials, aligned with community expectations, with a view to lifting the public trust in our institutions, and trust in the people within the institutions.¹⁶⁶

3.121 In its submission to the inquiry, the Canberra Alliance for Participatory Democracy (CAPaD), felt that of equal importance to other aspects and functions of a Commission’s work was that:

...the Commission should play a role in educating and building the commitment of the wider community, and encouraging participation in the work of all the accountability and transparency mechanisms and bodies in the ACT.¹⁶⁷

CITIZEN PARTICIPATION IN THE WORK OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.122 Some submissions to the inquiry were of the view that an independent integrity body in the ACT should be a contact point for citizens and public servants to make complaints and report corruption concerns. An integrity body that is accessible and open to all citizens to make complaints is considered to be a key form of citizen participation.¹⁶⁸

¹⁶⁴ Submission No. 16—Rhyl Hurley, p. 3.

¹⁶⁵ Submission No. 16—Rhyl Hurley, p. 3.

¹⁶⁶ Submission No. 19—ACT Public Sector Standards Commissioner, p. 54.

¹⁶⁷ Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), p. 3.

¹⁶⁸ Submission No. 23—Science Party; Submission No. 4—Assembly Ethics and Integrity Adviser; Submission No. 16—Rhyl Hurley.

3.123 However, two submissions¹⁶⁹ to the inquiry were of the view that the Committee should consider more direct ways for making citizens active stakeholders in the work of any proposed independent integrity body in the ACT.

3.124 Firstly, the submission to the inquiry by Dr Dowlen focused on the value of incorporating randomly selected citizens in integrity systems and procedures.¹⁷⁰ The submission went on to explore this concept in the context of the establishment of an independent integrity commission in the ACT. In support of its main proposition—the incorporation of randomly selected citizens in integrity architecture—the submission discussed: (i) potential problems of creating an integrity body made up of appointed personnel—who guards the guards?; (ii) the ‘political logic’ of including a citizen component ‘in the defence of the integrity of political systems in general’—in that, the political system belongs to citizens; (iii) the potential value of using random selection for citizen participants to protect integrity—in that, random recruitment from the citizen body for upholding political integrity is informed by its use in ancient Athenian democracy as a means of limiting the power of appointment; (iv) how the proposed arrangement may contribute to the ‘problems of maintaining political integrity’; (v) scheme designs suitable for the ACT—if it was felt that there should be some level of citizen engagement in the integrity system. The submission provided three examples for consideration (the use of a citizens’ jury to endorse or reject the commission’s findings; a permanent citizen group to oversee an integrity body’s work; and Citizens’ Parliamentary Groups); and (vi) practical issues that would need to be addressed if a scheme of this nature was to be considered—including: the pools from which randomly-selected citizens might be drawn; and that a regulatory type of body would be needed to provide the administrative support for a chosen model of citizen engagement.¹⁷¹

3.125 Secondly, the submission by the Canberra Alliance for Participatory Democracy (CAPaD) drew on Dr Dowlen’s model of incorporating randomly selected citizens in integrity systems and procedures as it concerned some of the inquiry terms of reference.

3.126 CAPaD was of the view that a suitable personnel structure of such a body was needed to ensure the appropriate carriage of workload, governance and funding mechanisms to deliver independence. CAPaD submitted that independence of governance would be heightened by including ‘randomly selected citizens’.¹⁷²

3.127 The submission went on to state that as it concerns the relationship between any commission and existing accountability and transparency mechanisms and bodies in the ACT, whilst an

¹⁶⁹ Submission No. 10—Dr Oliver Dowlen; and Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD).

¹⁷⁰ Submission No. 10—Dr Oliver Dowlen, p. 3.

¹⁷¹ Submission No. 10—Dr Oliver Dowlen.

¹⁷² Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), p. 2.

integrity commission has a role ‘to find and call out corruption’ operating within conventional frameworks, it should also create and support ‘participation by ordinary citizens’.¹⁷³ Further, the role civil society plays in the effectiveness of such a body was emphasised and that its participation needs to be adequately resourced.¹⁷⁴

RETROSPECTIVITY

3.128 Submitters making comment were of the view that in general, no limit on timeframes around which former actions can be assessed was supported. This was on the basis that submitters felt that such a body must be able to look into matters that happened before it commenced operation if it is to enjoy public confidence. Notwithstanding, it was noted that as much as possible, the jurisdiction of the new body should be prospective and oriented towards the future. Its retrospective focus should be limited to only the most severe and clearly indicated cases.

3.129 As it concerns retrospectivity—guiding principles for decisions about undertaking investigations into historical matters should consider the likelihood of any probative evidence being available to ‘reasonably support the commission’s findings or deter future wrong doing’.¹⁷⁵ It is noted that offences must have existed at the time for them to be relevant.

3.130 The submission by Mr Boland was of the view that:

The Commission should not undertake investigations into historical matters where it is unlikely that any probative evidence will be available to reasonably support the Commission’s findings or deter future wrong doing.¹⁷⁶

OVERSIGHT AND GOVERNANCE OF AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.131 Several contributors noted that the oversight model for an independent integrity body should occupy a position that necessitates a relationship involving the Parliament as opposed to the Executive Government. The importance of the relationship with the Parliament was emphasised as a requirement to ensure independence and accountability. This important consideration was emphasised in the submission by Professors Wettenhall and Aulich:

¹⁷³ Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), p. 3.

¹⁷⁴ Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD), p. 3.

¹⁷⁵ Submission No. 6—Guy Boland, p. 3.

¹⁷⁶ Submission No. 6—Guy Boland, p. 3.

The notion that some integrity bodies are 'watchdogs' and that they need protecting from the executive arm of governments gained clear expression in the early Australian discussions and subsequently in more recent cases that have emerged in both Federal and State jurisdictions (see Evans 1990; Aulich 2012; Aulich & Wettenhall 2017). The independence of all integrity agencies from governments is supremely important: how that independence can be secured is a major issue in modern public administration. This is part of the accountability equation that applies to them. But there is another part: they are themselves part of the public domain, are funded from the public treasury, and have to be accountable themselves. How this equation is to be worked out is another major issue in public administration, and we have to recognise that parliament is the central institution involved.¹⁷⁷

3.132 The principal form of oversight suggested by contributors was in the form of a parliamentary oversight committee.¹⁷⁸ Different views were expressed as to whether this oversight role should fall to an existing committee or whether it should fall to a new committee created for this purpose.

3.133 The submission to the inquiry by Wettenhall and Aulich highlighted important considerations concerning the effectiveness of committee oversight, advising that:

Virtually without exception, the serious literature on these bodies proposes that there should be supervision by and accountability to a multi-party committee of the parliament capable of making, and therefore expected to make, judgments on a non-partisan basis, independently of particular parties and interests. In some cases the literature has proposed separate such committees for each agency, e.g. with a public accounts committee being deemed appropriate for the auditor-general's office or an elections committee appropriate for the electoral office. But committees of this sort are likely to have a broader range of functions, and be unable to focus only on the integrity issues involved.

So the stronger arrangement comes with proposals for a single 'officers of parliament committee' as in the New Zealand model (Beattie 2006), a committee able without distractions to focus on matters such as working out appropriate budgets for all the agencies, recommending appointments to senior positions within the agency, and receiving and considering regular reports on agency affairs. Where necessary, this responsibility will also include undertaking relationships with the executive government, but it will be understood that the committee speaks for the legislature as

¹⁷⁷ Submission No. 30—Roger Wettenhall and Chris Aulich, p. 2.

¹⁷⁸ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 30—Roger Wettenhall and Chris Aulich; Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser; Submission No. 21—Inner South Canberra Community Council—Attachment; Submission No. 15—Law Society of the ACT.

a whole and not for a particular party. By definition it will not include ministers, and particularly it will not be chaired by a minister.¹⁷⁹

3.134 The Clerk of the Assembly was of the view submitted ‘[r]ather than establishing a dedicated committee for such a purpose...that such a role could be performed by either the Standing Committee on Justice and Community Safety or the Standing Committee on Administration and Procedure’.¹⁸⁰

3.135 The ACT Bar Association was of the view that the ‘body created must be given a proper statutory basis that spells out its coercive powers and will give it independence (subject to supervision by a Committee of the Assembly established for that purpose)’.¹⁸¹

3.136 It was suggested by some submitters that a parliamentary oversight committee model could be strengthened by designating an integrity body as an officer of the Parliament.¹⁸²

3.137 Some contributors¹⁸³ also noted that oversight arrangements should extend to include an inspectorate/inspector type mechanism for overseeing an integrity body’s use of its special powers. The necessity for further oversight mechanisms, in addition to an Assembly committee, was emphasised by the ACT Ombudsman:

All anti-corruption bodies in Australia are subject to parliamentary oversight, although it is important to ensure that the jurisdiction and role of a standing committee is clearly articulated. For example, a standing committee should not be able to review a particular decision or investigation of an integrity commission nor should it be able to interfere with its day-to-day operation. To do so could compromise its independence, or the perception thereof.¹⁸⁴

3.138 As to the importance of a mechanism to review the exercise of its powers, in its submission the ACT Bar Association commented:

Having an independent inspectorate to review the exercise of the Commissioner’s powers may be too burdensome and expensive in the ACT. The South Australian approach of having the Attorney-General appoint someone...to conduct a review of the

¹⁷⁹ Submission No. 30—Roger Wettenhall and Chris Aulich, p. 4.

¹⁸⁰ Submission No. 3—Clerk, ACT Legislative Assembly, p. 40.

¹⁸¹ Submission No. 12—ACT Bar Association, p. 2.

¹⁸² Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 30—Roger Wettenhall and Chris Aulich; Submission No. 21—Inner South Canberra Community Council, Attachment.

¹⁸³ Submission No. 12—ACT Bar association; Submission No. 22—UnionsACT; Submission No. 29—ACT Ombudsman.

¹⁸⁴ Submission No. 29—ACT Ombudsman, p. 7.

activities of the Commissioner might...provide a middle ground (with the review taking place perhaps every two years).¹⁸⁵

3.139 In its submission, the ACT Ombudsman commented:

While parliamentary oversight of the proposed integrity commission is key, so too is the establishment of specialised oversight where this is warranted by the nature of powers conferred upon that body.¹⁸⁶

3.140 With regard to oversight, the submission by Dr Sheehy noted the challenges of choosing between oversight mechanisms, where a single mechanism may be preferred given the ACT's small size and related limited resources. The submission went on to note that 'including an independent oversight organ might be both unnecessary and too costly'. However, it also noted that 'the alternative of following a model local practice (Prenzler and Faulkner 2010) of a Cross-Party Parliamentary Oversight Committee might fail to provide the depth of oversight required'.¹⁸⁷

COMPLAINTS, COMPLAINANTS (INCLUDING VEXATIOUS COMPLAINANTS) AND PROTECTIONS

3.141 In general, the views of contributors as to whether the work of a designated integrity body should only be on the basis of referrals or whether it should also be empowered to receive complaints from citizens, supported that such a body be visible, accessible and a contact point for all citizens to make complaints/and report corruption concerns.

3.142 Further, submitters were of the view that this should be supplemented with referrals from: within government (ACTPS); other integrity stakeholders/bodies and vice a versa; and that there be mandatory reporting—such as staff at an executive level having a duty to notify. It was also suggested that any requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.

3.143 Contrary to the general view of contributors, in its submission UnionsACT submitted that:

...it is of the view that the principle means by which a commission can initiate an investigation should be by referral. The referral could be from the range of existing bodies and commissions within the ACT,¹⁸⁸

¹⁸⁵ Submission No. 12—ACT Bar Association, p. 2.

¹⁸⁶ Submission No. 29—ACT Ombudsman, p. 7.

¹⁸⁷ Submission No. 13—Benedict Sheehy (PhD), p. 4.

¹⁸⁸ Submission No. 22—UnionsACT.

3.144 Those contributors to the inquiry expressing a view on the matter of managing vexatious complainants were of the view that integrity bodies need to be able to deal with these types of complainants.¹⁸⁹ There was a general view that this should be dealt with by providing an integrity body with the power to not proceed where there are reasonable grounds to believe that a complaint is vexatious, as opposed to having a power to prosecute vexatious complainants.¹⁹⁰

3.145 In its submission, as it concerns managing vexatious complainants, UnionsACT submitted that it was:

...concerned that the Commission not spend time or resources considering minor or vexatious complaints. This could include members of the public making unfounded, frivolous or unmeritorious allegations about public servants when the individual opposes a legitimate government decision or action.

Sensational reporting in the media about government actions, especially in a small jurisdiction, heighten this risk.¹⁹¹

3.146 The submission went on to advise that it supported 'the establishment of penalties for providing false or knowingly misleading claims or complaints'.¹⁹²

3.147 As noted in a paper prepared by a former NSW Auditor-General and which formed an attachment to the Inner South Canberra Community Council's submission, regarding the power to prosecute vexatious complainants, the Committee was advised that:

This power seems excessive if it is understood that an anti-corruption body can ignore vexatious complainants. Other mechanisms - such as an employer's response to a vexatious complainant - ought to be sufficient;¹⁹³

3.148 A contributor to the inquiry emphasised the importance of including provisions to protect persons providing information (or anyone consequently at risk) to an independent integrity body.¹⁹⁴ The submission by Mr Dempster emphasised that 'protocols to protect the commission's informants would be crucial to success'.¹⁹⁵

¹⁸⁹ Submission No. 18—Marea Fatseas; Submission No. 21—Inner South Canberra Community Council—Attachment; Submission No. 22—UnionsACT; Submission No. 28—Griffith Narrabundah Community Association; Submission No. 16—Rhyl Hurley.

¹⁹⁰ Submission No. 21—Inner South Canberra Community Council—Attachment; Submission No. 18—Marea Fatseas.

¹⁹¹ Submission No. 22—UnionsACT, p. 5.

¹⁹² Submission No. 22—UnionsACT, p. 5.

¹⁹³ Submission No. 21—Inner South Canberra Community Council—Attachment, p. 3.

¹⁹⁴ Submission No. 2—Quentin Dempster.

¹⁹⁵ Submission No. 2—Quentin Dempster, p. 5.

3.149 In supplementary information, the CPSU was of the view as it concerns protections of a commission's informants that the ACT Public Interest Disclosure Act should:

...form the starting point of protections for whistle blowers.

All information should be treated confidentially and complaints made to the Integrity Commission should be protected from defamation proceedings.

Furthermore, there should be legislative protections for whistle blowers to ensure it is a criminal offence to threaten or use, cause, inflict or procure violence, punishment, damage; loss or disadvantage to anyone who has given the Integrity Commission information or assisted it in other ways or to dismiss or disadvantage anyone in their employment because they have assisted the Integrity Commission.¹⁹⁶

APPLICATION OF OTHER LEGISLATION TO AN INDEPENDENT INTEGRITY BODY IN THE ACT

3.150 Human rights considerations are of particular importance given the ACT is a human rights jurisdiction. Whilst not specifically identified in the context of human rights considerations, a number of contributors to the inquiry noted the importance of ensuring that individuals subject to investigation are afforded procedural fairness and natural justice.

3.151 In its submission, as it concerns the protection of human rights, the ACT Bar Association emphasised that:

In a jurisdiction where the Human Rights Act (2004)(ACT) has application restraint needs to be applied in respect of how fundamental rights (such as the privilege against self incrimination) are to be modified. Careful consideration needs to be paid to a number of issues.¹⁹⁷

3.152 The submission went on to state that the issues requiring careful consideration as it concern human rights included matters related to the: (i) holding of public hearings; and (ii) safeguarding of traditional protections, on the basis that the 'coercive powers that are available to some anti-corruption bodies are sometimes very widely drawn. They can involve the capacity for such bodies to override rights such as the privilege against self-incrimination and the right to a fair hearing when, for example, disclosure is made in advance of what the evidence is'.¹⁹⁸

¹⁹⁶ CPSU—Responses to QToN, Public hearing of 1 September 2017, p. 3.

¹⁹⁷ Submission No. 12—ACT Bar Association, p. 3.

¹⁹⁸ Submission No. 12—ACT Bar Association, pp. 3–4.

3.153 The application of other legislation including the *Privacy Act 1988*¹⁹⁹ and *Public Interest Disclosure Act 2012*²⁰⁰ were also noted by some contributors.

DISTRIBUTED INTEGRITY MEASURES

3.154 Some contributors made comment, either as the focus of their submission or in-part, concerning distributed integrity measures. This included the introduction of additional measures and/or the strengthening of existing measures.

SUBMISSION BY MR LEON ARUNDELL

3.155 Using a planning policy context, the submission to the inquiry by Mr Arundell set out case study examples to support three recommendations to strengthen distributed integrity measures—namely that the ACT Government should:

- provide legal training for government officials on how to identify and comply with their legal obligations, including those under the ACT Public Service Code of Conduct and under Section 9 of the Public Sector Management Act;
- strengthen the ACT Public Service Code of Conduct, including provision for independent assessments of allegations of breaches of the code of conduct; and
- reduce the complexity of legislation, so that it can be properly understood and efficiently implemented by the people responsible for implementing it.²⁰¹

3.156 The submission to the inquiry by the Griffith Narrabundah Community Association recommended, amongst other things, that the work of an ACT Independent Integrity Commission would be:

...assisted by the further examination of the following measures to discourage corruption and misconduct:

- a. steps to enhance the transparency of government;
- b. effective Codes of Conduct for politicians and other office holders;
- c. measures to better protect whistle-blowers and those who report suspected corrupt behaviour;
- d. changes to prevent defamation laws being used to deter reporting of corruption, or as a vehicle for illicit payment of inducements; and

¹⁹⁹ Submission No. 14—ACLEI; Submission No. 17—Qld CCC.

²⁰⁰ Submission No. 2—Quentin Dempster; Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 28—Griffith Narrabundah Community Association.

²⁰¹ Submission No. 5—Leon Arundell.

e. other changes to reduce the scope for unaccountable decision making by bureaucrats.²⁰²

SUBMISSION BY MR JON STANHOPE

3.157 In the context of complaint processes within the Alexander Maconochie Centre (AMC) and Bimberi, the submission to the inquiry by Mr Stanhope noted ‘the difficulties presented by and implications of the code of silence which operates within prison systems such that prisoners will not inform on other prisoners’.²⁰³ The submission noted that this was an issue touched on by Mr Phillip Moss in his review into the care of Steven Freeman while incarcerated in the AMC.

3.158 The submission was of the view that this should be revisited by the Select Committee in the context of the powers which an independent integrity commission would need in order to be able to address this issue where it may arise.

3.159 A related issue advanced, in the context of complaints, was ‘the need to develop a system whereby inmates in correctional institutions can lodge complaints against correctional staff who engage in criminal or other inappropriate behaviour without fear of retribution’.²⁰⁴

3.160 In the context of accountability for deaths in custody or other government institutions, the submission was of the view that there would be benefit in considering a mechanism for ensuring appropriate accountability when there is serious harm/or the death of a person in detention or in an institution managed by the ACT Government. In this regard, the submission suggested that consideration be given to the ACT adopting the legislative regime created in the United Kingdom (UK) under the *Corporate Manslaughter and Corporate Homicide Act 2007*. This regime ‘provides that companies and government bodies face prosecution if they are found to have caused a person’s death due to their corporate health and safety failings’.²⁰⁵

3.161 Should such a law mirroring the UK Act be introduced in the ACT, it was submitted that its administration could be vested in an independent integrity commission.²⁰⁶

SUBMISSION BY CLERK—ACT LEGISLATIVE ASSEMBLY

3.162 As it concerns the operation of the *Public Interest Disclosure Act 2012*, in its submission to the inquiry, the Clerk of the Assembly submitted that:

²⁰² Submission No. 28—Griffith Narrabundah Community Association, p. 1.

²⁰³ Submission No. 5—Jon Stanhope, p. 1.

²⁰⁴ Submission No. 5—Jon Stanhope, pp. 1–2.

²⁰⁵ Submission No. 5—Jon Stanhope, pp. 1–2.

²⁰⁶ Submission No. 5—Jon Stanhope, p. 2.

- provisions which make the clerk responsible for investigating MLAs or staff employed under the *Legislative Assembly (Members' staff) Act 1989* should be removed;
- consideration be given to removing the conduct of MLAs from the definition of disclosable conduct (i.e. disapplying the application of the PID Act to MLAs);
- consideration be given to removing the provisions which give the Commissioner for Public Sector Standards an oversight role in relation to MLAs and their staff; and
- consideration be given to the appropriateness of provisions in sections 35 and 37 relating to contempt.²⁰⁷

3.163 In the context of arrangements for lobbyists, the submission went on to suggest that should a designated integrity body be established 'appropriate demarcations that might apply in relation to the regulation of lobbyists should be considered'.²⁰⁸

COMMITTEE COMMENT

3.164 In relation to the submissions to the inquiry, the Committee notes the views put forward in the written submissions. The Committee explored these views further at its public hearings where it heard from:

- current public sector integrity stakeholders;
- current parliamentary integrity stakeholders;
- ACT Policing integrity stakeholders;
- key interest groups and organisations; and
- interested citizens.

3.165 The views put forward at the hearings are summarised in chapters four, five, six, seven and eight respectively.

²⁰⁷ Submission No. 3—Clerk, ACT Legislative Assembly, pp. 35–37.

²⁰⁸ Submission No. 3—Clerk, ACT Legislative Assembly, pp. 37–38.

PART 3—VIEWS PUT FORWARD IN HEARINGS

4 VIEWS PUT FORWARD IN HEARINGS—PUBLIC SECTOR INTEGRITY STAKEHOLDERS

- 4.1 Considered in this section are views put forward in public hearings by public sector integrity stakeholders.
- 4.2 The following current public sector integrity stakeholders appeared in public hearings:
- the Auditor-General of the ACT;
 - the ACT Ombudsman; and
 - the Public Sector Standards Commissioner.
- 4.3 The views put forward by these stakeholders are considered below.

ROLE OF THE AUDIT OFFICE IN THE CURRENT PUBLIC SECTOR INTEGRITY FRAMEWORK

- 4.4 The Auditor-General of the ACT appeared, together with the Principal, Professional Services, of the ACT Audit Office, in hearings of 20 July 2017.
- 4.5 In her opening statement, the Auditor-General told the Committee about the role of the Auditor-General, and ‘in so doing show ... the relationship ... between audits and the identification of fraud risks’, and its implications.²⁰⁹
- 4.6 She told the Committee that the role of the Auditor-General was ‘threefold’:
- ...to ‘provide an independent view to the Assembly and the community on accountability, efficiency and effectiveness of the ACT public sector’;
 - ...to ‘foster accountability in the public administration of the territory’; and
 - ...to ‘promote efficiency and effectiveness of public services and programs provided by or for the territory’.²¹⁰

²⁰⁹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹⁰ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

- 4.7 This was done ‘primarily’ through the conduct of performance audits and financial audits.²¹¹
- 4.8 The Auditor-General also told the Committee that she was also ‘a disclosure officer’ under the *Public Interest Disclosure Act*, and that was ‘also an important avenue for information’.²¹²
- 4.9 She told the Committee that in addition to receiving Public Interest Disclosures (PIDS) under that Act, she also received ‘representations’. While these could take ‘many forms’, they could include ‘requests for a performance audit on a particular issue, recognising that a significant issue may exist but the PID criteria may not be met’. ‘Sometimes’, she told the Committee, a PID or a representation ‘may be considered and background work undertaken’ which indicated ‘it would be in the public interest for the matters of concern to be the subject of a performance audit’.²¹³
- 4.10 With regard to this, she noted that all performance audits were tabled in the Legislative Assembly for the ACT, and that ‘all of these audits’ were ‘inquired into’ by the Assembly’s Standing Committee on Public Accounts, and that this also formed part of current ‘integrity processes’.²¹⁴
- 4.11 With regard to fraud, the Auditor-General told the Committee that while ‘neither performance nor financial audits [were] focused on identifying fraud’, they were ‘incredibly important’ in ‘identifying inadequacies in governance and administrative arrangements, systems and/or processes that present risks with respect to an agency’s exposure to fraud or corruption’, or reduced ‘the potential for the agency to readily detect fraud or corruption if it were to occur’.²¹⁵
- 4.12 While the discovery of fraud was not the primary focus of performance or financial audits, there could be occasions in which fraud was brought to light through these processes, in which the Audit-Office ‘would refer the matter to the appropriate authority for further action’. However, she noted, ‘the primary responsibility for the prevention and detection of fraud rests with those charged with governance of an agency’.²¹⁶
- 4.13 In relation to financial audits, specifically, the Audit Office was ‘responsible for obtaining reasonable assurance that the financial statements taken as a whole are free from material

²¹¹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹² Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹³ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹⁴ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹⁵ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

misstatement, whether caused by fraud or error', but it was not responsible 'for making a legal determination on whether fraud has actually occurred'.²¹⁷

4.14 In addition, as part of the Office's audit work, the auditing standards required it to make inquiries 'of those charged with governance and the audit committees regarding their knowledge of any actual, suspected or alleged fraud', and this was done 'annually' in the course of conducting financial audits.²¹⁸

4.15 'In practice', she told the Committee, this meant that the head of the agency was 'interviewed annually' as part of the financial audit process, in the course of which the Audit Office would ask questions such as:

"What is the process for allegations of fraud being reported to you?" "Has training been provided to staff on risks and fraud matters? If not, how are the staff made aware of their responsibilities in regard to fraud?" "Do you have knowledge of any actual, alleged or suspected fraud?" and "What is your assessment of the risk that the financial statements of your agency may be materially misstated as a result of fraud and why?"²¹⁹

4.16 She told the Committee that answers to these questions were analysed and if there were 'issues, the director of financial audits and I are made aware, and then we take appropriate action'.²²⁰ In addition, if an 'auditor out in the field identifies fraud, or has information that indicates fraud may exist, they must, under the standards, communicate it on a timely basis to management', and in practice that usually meant 'telling me or the director, and we would contact the head of the agency'.²²¹

4.17 If the Audit Office conducted an audit under the *Corporations Act*, it was 'obliged to notify the Australian Securities and Investments Commission', and this had been done in 2015, although this was not, in this case, 'related to fraud'.²²²

4.18 The Auditor-General told the Committee that the Audit Office provided reports to agencies 'following completion of the financial audits', to 'advise management and relevant ministers of any issues around systems that may allow fraud to occur more readily', and which was then reported the Audit Offices' 'financial audits, financial results and audit findings'. It was then

²¹⁷ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 2.

²¹⁸ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, pp. 2–3.

²¹⁹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 3.

²²⁰ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 3.

²²¹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 3.

²²² Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 3.

‘up to management’ to respond to any indications of vulnerability to fraud contained therein.²²³

- 4.19 However, she told the Committee, the Audit Office did not ‘examine every transaction’ of an agency. It was ‘the responsibility of the agency to ensure that all transactions are checked and correctly recorded’. If the Audit Office ‘looked at every transaction’, it would ‘never complete a financial audit’.²²⁴ Hence, financial audits ‘should not be relied on to assume that fraud has not occurred’. Rather the Audit Office, in conducting audits, reviewed ‘major systems and examines the transactions around those’, and it was this focus on ‘systems’, rather than particular instances of fraud, that she regarded as a significant contribution by her office to the ‘integrity framework’. It was possible that ‘actual fraud might be detected through a performance audit’, but this had not occurred ‘so far’.²²⁵
- 4.20 In light of these propositions, the Auditor-General told the Committee that the ‘the role of the Auditor-General with respect to identifying fraud risk, through undertaking either financial or performance audit’ was likely to support the work of any future anti-corruption commission in the ACT, and that as a result she would welcome the creation of ‘a strong mechanism’ which facilitated ‘communication between my office, all the integrity bodies and any future commission’.²²⁶

ROLE OF THE OMBUDSMAN IN THE CURRENT PUBLIC SECTOR INTEGRITY FRAMEWORK

- 4.21 The ACT Ombudsman appeared before the Committee in hearings of 20 July 2017.
- 4.22 In his opening statement, the Ombudsman told the Committee, amongst other things, that the ACT Ombudsman was ‘a core integrity agency in the ACT’, which sought to uphold the ‘key concepts’ of ‘assurance, integrity, influence for better practice, and improvement’.²²⁷

²²³ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 3.

²²⁴ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, pp. 3–4.

²²⁵ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 4.

²²⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 5.

²²⁷ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

- 4.23 He told the Committee that providing ‘assurance on integrity’ was ‘an important part of my role and that of my office’. ²²⁸ As Ombudsman, he held ‘a range of responsibilities’, ²²⁹ including responsibility for:
- ‘complaint handling and investigation of ACT directorates’
 - ‘dealing with complaints about requests made to directorates under the FOI Act’; and
 - ‘disclosures under and complaints about’ the *Public Interest Disclosure Act*. ²³⁰
- 4.24 He told the Committee that his office had recently ‘commenced a new function under the reportable conduct scheme’, which took effect on 1 July 2017, which was ‘an employment-based child protection scheme’ and would, in 2018, ‘oversight the new freedom of information regime’. As a result the Ombudsman had ‘experienced a broadening of jurisdiction both at the commonwealth level but also in the ACT’ and, ‘indeed, elsewhere in recent times’. ²³¹
- 4.25 His office monitored ‘police use of covert powers through inspections conducted under: the *Crimes (Controlled Operations) Act 2008*; the *Crimes (Assumed Identities) Act 2009* and the *Crimes (Surveillance Devices) Act 2010*. Its inspectorate responsibilities in relation to ACT Policing also included ‘monitoring police management of the ACT child sex offender register’ under the *Crimes (Child Sex Offenders) Act 2005*. ²³²
- 4.26 The Ombudsman went on to tell the Committee about things that were outside of his jurisdiction. This did not include oversight over the ‘the actions of ACT government ministers or MLAs, the decisions of courts and tribunals, nor issues associated with employment, disability services or services for older people’. In addition, with ‘exception of our role in terms of administering the reportable conduct scheme, which relates to certain employers’, matters regarding ‘services for children and young people’ were also beyond the Ombudsman’s jurisdiction in the ACT. ²³³
- 4.27 He told the Committee that if a new entity were to be created, ‘the question of how it is held accountable’ was ‘a really important consideration’, consideration of which featured ‘in all of the jurisdictions’ which sought to implement an anti-corruption commission. Further, from ‘the point of view of effectiveness of any new arrangement’, ‘referrals between agencies work must be considered’: ‘you have to be really clear about what part of a problem is mine versus

²²⁸ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²²⁹ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²³⁰ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²³¹ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²³² Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²³³ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 6.

what part is back to the agency, over to the police or off to some other entity', and how 'it all works', in this regard, was 'an incredibly important part of an effective system'.²³⁴

ROLE OF THE PUBLIC SECTOR STANDARDS COMMISSIONER

- 4.28 The Public Sector Standards Commissioner did not make an opening statement, or describe the role of her position in the public sector integrity framework when she appeared in hearings of 20 July 2017. She advised the Committee that she had set out this material in her submission to the inquiry.²³⁵

VIEWS ON GAPS AND VULNERABILITIES IN THE CURRENT PUBLIC SECTOR INTEGRITY FRAMEWORK

- 4.29 In her opening statement, the Auditor-General proposed that 'a risk analysis of ACT government activities from a fraud perspective' be conducted, which would 'identify risks that are prevalent in all jurisdictions'. It would also highlight 'points of difference in the ACT', such as 'unique' characteristics of the ACT with respect to 'land transactions and landholdings'.²³⁶
- 4.30 In his opening statement, the Ombudsman noted that in his submission he had proposed that 'work be done to assess the corruption risk in the ACT', in similar terms to that suggested by the Auditor-General.²³⁷ A 'key' proposal of the submission was to identify current 'gaps in integrity and oversight', in view of the current 'suite of oversight bodies' in the ACT, with a focus on thinking about 'what ... gaps ... need to be filled in respect of effectiveness of and value for money considerations of a future commission'.²³⁸

INTER-INSTITUTIONAL COOPERATION AND INFORMATION-

²³⁴ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 6.

²³⁵ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 6.

²³⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 4.

²³⁷ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 5.

²³⁸ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 6.

SHARING

- 4.31 In hearings of 20 July 2017, the Committee asked questions regarding relationships between integrity agencies, including referrals, communication and collaboration between agencies.²³⁹
- 4.32 In responding to these questions, the Ombudsman told the Committee that the ‘simple way to describe where the Ombudsman’s office begins’ was to note that it was ‘driven by complaints’. While there were ‘a variety of other activities’, the ‘core jurisdiction’ of an ombudsman was to ‘deal with complaints from members of the public or others pertaining to some aspect of government administration that falls within our jurisdiction’.²⁴⁰
- 4.33 Sometimes these complaints were ‘matters that we simply refer back to the relevant agency’, and, he told the Committee ‘we can liaise with the relevant agency’ to ensure that ‘that person gets the service they ought get and resolve a matter in a quite direct way with the relevant agency and the individual concerned’.²⁴¹
- 4.34 However, at other times ‘complaints identify more systemic issues or other sorts of issues’. Where a complaint entailed ‘some sort of serious allegation of wrongdoing or some sort of serious issue around corruption or fraud or the like’, his office may ‘undertake some investigation of the matter to get some sense of it’, but ‘might then refer it to the police’.²⁴²
- 4.35 In the ACT, his office may ‘engage with the Public Sector Standards Commissioner’ or other statutory offices, depending ‘on the nature of the matter’.²⁴³
- 4.36 Later in hearings of 20 July 2017, the Committee asked questions regarding the advisability of adopting arrangements similar to the Tasmanian Integrity Commission, which employed a board rather than a single commissioner. If such an approach were adopted in the ACT, the Committee suggested, public sector integrity stakeholders would be represented on the Commission’s board, and this would create a formal mechanism for collaboration.²⁴⁴
- 4.37 In responding, the Auditor-General stated that at present the Audit Office, because it did not have ‘something that is quite concrete’, it was necessary to be ‘incredibly mindful of privacy’ and ‘incredibly mindful of not breaching anything’. A clearer framework, such as that under

²³⁹ *Transcript of Evidence*, 20 July 2017, p. 6.

²⁴⁰ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, pp. 6–7.

²⁴¹ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁴² Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁴³ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁴⁴ *Transcript of Evidence*, 20 July 2017, p. 13.

consideration, could provide conditions for greater sharing between public sector integrity stakeholders than was possible at present.²⁴⁵

4.38 She also told the Committee that if such a model were to put in place in the ACT, it would be important to ensure that the new arrangements were consistent with current powers of ACT public sector integrity stakeholders. In particular, she was not sure whether the Tasmanian Auditor-General had the power to interview under oath or affirmation, as was the case for her office. In the ACT, she was limited in how that information could be used, and people interviewed were not protected from self-incrimination, and provision for this would need to be made to ensure information-sharing under a 'board' model was correctly aligned with local conditions in this respect.²⁴⁶

4.39 At this point the Committee put a further question as to whether the ACT Human Rights Commissioner should be included on the board of an anti-corruption in the ACT, is a board model were adopted.²⁴⁷

4.40 In responding, the Ombudsman re-stated his position, put forward in hearings and in his submission to the inquiry, that the design of an anti-corruption commission should begin with a risk analysis, 'an assessment of what are the areas of activity that ACT parliamentarians are concerned about that render the creation of a new body necessary':

When one is clear about what those areas of risk and activity and sources of potential fraud, corruption et cetera and wrongdoing might be, then one can turn one's mind to which of the existing entities might be brought together and if a commission or a council of commissioners of some sort were to be created. I think it turns on that question of whom it is that you bring into the mix.²⁴⁸

COMPLAINTS-HANDLING

4.41 At this point in hearings, the Public Sector Standards Commissioner stated that complaints-handling was a 'really important part' of the public sector integrity framework, and that 'one of the crucial matters' to be decided in planning for an anti-corruption commission in the ACT was 'how complaints are dealt with'.²⁴⁹

²⁴⁵ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 13.

²⁴⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 14.

²⁴⁷ *Transcript of Evidence*, 20 July 2017, p. 14.

²⁴⁸ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 14.

²⁴⁹ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 7.

- 4.42 She told the Committee that the Ombudsman, the Auditor-General and herself had ‘identified that how those mechanisms work between existing agencies’ was ‘really important’. Also, while ‘we want to ensure that complainants have every right to have everything examined as much as possible’, it was important to anticipate ‘complaint shopping’. However, she said because of the ‘small nature of the ACT’, there was ‘a very good informal working relationship between the Ombudsman, the Auditor-General and me’ in terms of ‘the appropriate place for those complaints to be taken up, both in a PID context and complaints in general’. This was important because ‘you would not want to have three bodies undertaking the same investigation concurrently’.²⁵⁰
- 4.43 She told the Committee that:
- ‘triaging’ of complaints was important;
 - that it was ‘absolutely right and proper’, if a complaint had been investigated and subsequently ‘other issues’ emerged, that it was re-examined; and that
 - timing, ‘the substance of the matter’ and ‘what investigations have been done previously and by whom’ were also important.²⁵¹
- 4.44 She also told the Committee that there were further important questions with regard to decisions not to investigate complaints, including the management of complaints which were ‘very time consuming’.²⁵²
- 4.45 At this point in hearings the Ombudsman told the Committee about his office’s practice in relation to decisions not to investigate complaints. He told the Committee that there were ‘circumstances in which we decide not to investigate a complaint’. Not every complaint was ‘investigated in a deep sense’, and if a complainant approached his office without approaching the relevant government agency, his office would suggest this as an initial course of action, at which point his office would consider that it did not ‘need to go any further’. However, there were also ‘quite serious matters’ which would make it necessary for his office to adopt another approach.²⁵³
- 4.46 However, in relation to this, the Public Sector Standards Commissioner noted that while the Ombudsman’s work was ‘about investigating complaints’, there were open questions as to whether ‘a fraud or corruption entity’ would receive and consider complaints. Her understanding of the practice of the ACLEI (the Australian Commission for Law Enforcement

²⁵⁰ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁵¹ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁵² Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 7.

²⁵³ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 8.

Integrity) was that it would ‘look for corruption matters as they are found’ but that it would not, as such, investigate complaints.²⁵⁴

4.47 She went on to say that, for an integrity body, many things would be raised as ‘fraud and corruption’ matters; that it was necessary ‘to be able to make a quick but thorough assessment’ about the extent to such a body was obliged to pursue such matters; and that in light of this the ‘whole triaging and referral process’ became ‘really important’.²⁵⁵

4.48 At this point in proceedings, the Auditor-General provided her perspective on complaints-handling. She told the Committee that:

By the time someone comes to me, they are usually at the end of the line. They have tried the Ombudsman; they might have tried the Assembly members; they have tried the commissioner. Then they will say to our office, “Under no circumstances are you to tell anyone who I am. I am claiming confidentiality privilege.”²⁵⁶

4.49 In responding to this, she told the Committee, her office was ‘very practical’:

We say, “Have you been here and been there?” We cannot even mention the name to our colleagues. We will not be able to discuss cases. But what I tend to do, particularly with Bronwen [*the Public Sector Standards Commissioner*], when there is a cluster of things happening, is to say to her, “Are we sure this is not systemic? Is this something that my office should be looking at?”²⁵⁷

4.50 In connection with such scenarios, she told the Committee, communication was important, her office also had ‘to be mindful’ that maintaining privacy remained ‘a key obligation’ of the Audit Office to the community,²⁵⁸ and noted that in the ACT, as a ‘small jurisdiction’, this was ‘not easy’.²⁵⁹

4.51 At this point, the Auditor-General spoke about the importance of defining the focus of a future anti-corruption commission. In relation to this, she told the Committee that:

The thing I would counsel strongly is that this is a great opportunity to have something focused on corruption: the really pointy end of this whole spectrum. I would strongly counsel that, yes, every complaint is important, but if you spend a lot of time in this

²⁵⁴ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁵⁵ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁵⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁵⁷ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁵⁸ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁵⁹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 8.

commission focusing on every complaint, you may actually not be targeting what you were set up to do.²⁶⁰

4.52 She told the Committee that complaints often did not ‘highlight fraud issues’: these issues were ‘usually quite embedded in an organisation’. Alternatively, ‘the person or people committing them was incredibly astute in how to use the system’. She hoped that a new commission would ‘be looking at the high risk areas’, making strategic decisions about which complaints it would investigate, as distinct from having its investigative practices determined by complaints alone.²⁶¹

4.53 In further discussion with the Committee, the Auditor-General agreed that anti-corruption commissions in other Australian jurisdictions were complaints-driven, but emphasised the importance of such bodies having clear definitions for the specific kind of complaint they would deal with in greater detail. She suggested that to the extent that such a commission was able to target and select the complaints it would investigate, it operated not just as ‘another complaints body’, but as a body created to ‘deal with specific issues’ in the public sector domain, and in this way could deliver the greatest benefit.²⁶²

AN ANTI-CORRUPTION COMMISSION AS A CLEARING-HOUSE FOR COMPLAINTS

4.54 Later in hearings of 20 July 2017, the Committee asked a question regarding the operation of the Victorian Independent Broad-based Anti-corruption Commission (IBAC). In particular, it suggested that the IBAC acted as a clearing-house for complaints, referring them to other agencies, and asked whether this would be a useful approach to complaints-handling for a future anti-corruption commission in the ACT. The Committee also asked if it would be preferable to have a more tightly-constrained collaboration and referral process in relation to Public Interest Disclosures alone.²⁶³

4.55 In response, the Auditor-General and the Ombudsman each gave an account of their involvement in current processing for handling PIDs (Public Interest Disclosures) under the *Public Interest Disclosure Act 2012* (ACT). The Public Sector Standards Commissioner also made comment on her role in this process.²⁶⁴

4.56 As to views with regard to whether a future anti-corruption commission in the ACT could act as a clearing-house for complaints and disclosures or whether formal collaboration and referral

²⁶⁰ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 8.

²⁶¹ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 9.

²⁶² Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 9.

²⁶³ *Transcript of Evidence*, 20 July 2017, pp. 14–15.

²⁶⁴ *Transcript of Evidence*, 20 July 2017, pp. 15–16

between public sector integrity stakeholders in relation to PID Act disclosures was preferred, the Auditor-General indicated that she thought ‘you could make both work’.²⁶⁵ The Ombudsman commented:

Again, one has to work through the questions of thresholds as well as the questions of referrals and repositories. Until all those things are sorted out, I am not sure whether the model you describe is the right one or not.²⁶⁶

DEFINITIONS OF FRAUD AND CORRUPTION

- 4.57 In hearings of 20 July 2017 the Committee asked questions regarding definitions of fraud and corruption. Each of the three key public sector integrity statutory officers answered this question in the context of their particular role and remit in public sector integrity.

PUBLIC SECTOR STANDARDS COMMISSIONER

- 4.58 In responding to the question, the Public Sector Standards Commissioner told the Committee that ‘in terms of corruption, really what we are looking at is the ability to influence, and often the seniority of the officer’.²⁶⁷ Similarly, for corruption, she told the Committee, ‘for most of our matters you really have to look at the level of the person and the ability that they have to be able to pervert the workplace: their degree of influence’.²⁶⁸
- 4.59 She told the Committee that her office did ‘a lot of work around the initial assessment’ of matters, and noting that the concept of a ‘preliminary assessment was put in place’ in the ‘last round of the enterprise agreement’. She told the Committee that this was most direct and ‘effective’ way to ‘deal with issues quickly and at the workplace level’. Anything that perverted— ‘wilfully’ perverted—‘the way that you operate in the workplace’ was ‘immediately referred to the police’, and this could ‘range from misusing a sick certificate from a doctor’, or ‘stealing by people who deal with money’.²⁶⁹
- 4.60 Any such matters issues were referred to police, however most matters considered by her office were at the ‘lower level’ of seriousness, however the ‘vast majority’ of the matters dealt

²⁶⁵ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 15.

²⁶⁶ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 15.

²⁶⁷ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 10.

²⁶⁸ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, pp. 10–11.

²⁶⁹ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 10.

with by her office in fact concerned ‘misconduct investigations’, ‘workplace grievances’, and ‘workplace issues’. ²⁷⁰

AUDITOR-GENERAL

- 4.61 The Auditor-General also responded to the question. In so doing, she told the Committee that the work of her office was ‘quite broad’, and knew Section 9 of the *Public Sector Management Act* ‘well’, but also operated under auditing standards that were ‘very clear’.
- 4.62 The Principal, Professional Services, of the Audit Office provided further detail on the auditing standards which governed the work of the Office.
- 4.63 He told the Committee that the applicable standard was Auditing Standard ASA 240, which set out ‘the auditor’s responsibility relating to fraud in an audit of a financial report’. The standard defined fraud as ‘a material misstatement in a financial report’, and set out ‘two types of intentional misstatements’: fraudulent financial reporting and misappropriation of assets. ²⁷¹
- 4.64 The Principal told the Committee that the standard set out ‘a number of examples of the types of discrepancies in accounting reports’. Examples included:
- ‘transactions that are not reported in a complete or timely manner, or are improperly recorded as to the amount, accounting period, specification and entity’;
 - ‘unsupported or unauthorised balances or transactions and any last-minute adjustments that significantly affect financial results’;
 - ‘evidence of employees’ access to systems and records inconsistent with that necessary to perform their authorised duties’;
 - ‘conflicting or missing evidence’, where ‘there are not documents to support what is reported in the financial statements’, including ‘unavailability of information’ such as ‘significant unexplained items on reconciliations’; and
 - ‘any entries and adjustments made to account balances in the statements, missing inventory or physical assets of significant magnitude’. ²⁷²
- 4.65 Having considered procedure in relation to financial audits, the Auditor-General went on to speak about fraud and corruption in relation to performance audits. She told the Committee that while conducting performance audits, the Audit Office interviewed ‘people on occasion under oath or affirmation’ and if, in the course of that process the audit discovered ‘a clear case of fraud’ the Office would report the matter to the police. ²⁷³

²⁷⁰ Ms Bronwen Overton-Clarke, *Transcript of Evidence*, 20 July 2017, p. 10.

²⁷¹ Mr Ajay Sharma, *Transcript of Evidence*, 20 July 2017, p. 11.

²⁷² Mr Ajay Sharma, *Transcript of Evidence*, 20 July 2017, p. 11.

²⁷³ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 11.

- 4.66 In one case, she told the Committee, where the Office had investigated manipulation of data at the Canberra Hospital, the Office referred the matter to the Head of Agency and also to the Public Sector Standards Commissioner for ‘appropriate action to be taken’ under Section 9 of the *Public Sector Management Act*.²⁷⁴
- 4.67 In another instance, the Audit Office had conducted a performance audit on single dwelling development assessments, considering in particular the work of certifiers, in which case the Audit Office ‘made some very strong recommendations about auditing’ and ‘what the agency needed to do’.²⁷⁵
- 4.68 She also noted that because audits were tabled in the Assembly and then became ‘the material of the Assembly’, the relevant Assembly committee—or the agency in question—could ‘actually interrogate even further’ after the work of the Audit Office was completed. However, she told the Committee, it was not always ‘black and white as to where the audit stops and where you would actually suggest further interrogation’, and the Audit Office was seeking to do further work on this question.²⁷⁶
- 4.69 Later in hearings the Auditor-General stated that she thought it important to acknowledge that fraud could ‘occur where there are solid systems’. In organisations where systems were not ‘effectively managed’, fraud was more likely to occur. Conversely, tighter constraints increased the likelihood that fraud would be detected.²⁷⁷

THE OMBUDSMAN

- 4.70 In his comments about definitions, the Ombudsman noted definitions in relation to public interest disclosures, stating that this was ‘one of the areas’ where ‘certain legislative thresholds’²⁷⁸ had been determined, and quoted from Section 8 of the *Public Interest Disclosure Act 2012 (ACT)*:²⁷⁹

...disclosable conduct means any of the following:

(a) conduct of a person that could, if proved—

(i) be a criminal offence against a law in force in the ACT; or

(ii) give reasonable grounds for disciplinary action against the person;

²⁷⁴ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 11.

²⁷⁵ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 12.

²⁷⁶ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 12.

²⁷⁷ Dr Maxine Cooper, *Transcript of Evidence*, 20 July 2017, p. 13.

²⁷⁸ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 12.

²⁷⁹ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 12.

(b) action of a public sector entity or public official for a public sector entity that is any of the following:

- (i) maladministration that adversely affects a person's interests in a substantial and specific way;
- (ii) a substantial misuse of public funds;
- (iii) a substantial and specific danger to public health or safety;
- (iv) a substantial and specific danger to the environment.²⁸⁰

4.71 Regarding this, he went on to say that he emphasised 'the word "substantial" because:

...obviously the drafters of this piece of legislation were contemplating that you have to have a threshold here somewhere or you might end up being flooded with minor, trivial matters that then create a massive sort of bureaucratic and administrative burden for little gain and you cannot find the wood for the trees.²⁸¹

THE ROLE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

4.72 The Director of Public Prosecutions (DPP) appeared before the Committee in hearings of 20 July 2017.²⁸²

4.73 In his opening statement, the DPP noted in particular two issues of concern, regarding demarcations between an anti-corruption commission and his office, including problems raised in connection with the admissibility of evidence obtained under compulsion in subsequent proceedings in courts.²⁸³

4.74 In considering demarcations between his office and an anti-corruption commission, the DPP told the Committee that:

Clearly, one of the issues that the committee is looking at from the terms of reference is how this body will operate in terms of this being a very small jurisdiction, and hopefully not needing a large standing army, so to speak; in other words, crafting an

²⁸⁰ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 12, quoting the *Public Interest Disclosure Act 2012* (ACT), Section 8, viewed 18 September 2017 and available at: <http://www.legislation.act.gov.au/a/2012-43/current/pdf/2012-43.pdf>.

²⁸¹ Mr Michael Manthorpe, *Transcript of Evidence*, 20 July 2017, p. 12, quoting the *Public Interest Disclosure Act 2012* (ACT), Section 8.

²⁸² *Transcript of Evidence*, 20 July 2017, p. 36 ff.

²⁸³ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 36.

organisation which is able to expand when it needs to and then contract when it needs to.²⁸⁴

4.75 He told the Committee that:

...the functions that my office performs are prosecutorial and not investigative, and the functions that this proposed body would perform would be investigatory. If, as is the case in many other jurisdictions in Australia, this body has powers of compulsion then that does raise issues about the way in which there is communication of information between this body and my office if there were any prosecutions in prospect.²⁸⁵

4.76 This was of particular concern, he told the Committee, because generally in other Australian jurisdictions anti-corruption bodies had ‘powers of compulsion’, and there were ‘great restrictions on the use that can be made of material’. The High Court of Australia had ‘made a number of rulings in this area in the past few years’, although it was ‘not entirely clear the extent to which some of the prognostications of the High Court affect the functioning of prosecutions after a compulsory hearing’.²⁸⁶

4.77 ‘Nevertheless’, he told the Committee the rule was ‘unfair to use compulsorily acquired material against a person in any subsequent prosecution’. Where such inquiries gave rise to ‘any matters for prosecution’, there had to be ‘effectively a reinvestigation of the matter, or at least a putting together of a brief containing material other than compulsorily acquired material’.²⁸⁷

4.78 As a result, he told the Committee, questions of ‘who knows what from the compulsory inquiry’ had ‘caused lots of problems. The consequence of this for the DPP was that any such knowledge arising from the work of an anti-corruption commission ‘should not leak into my office’. While he would not see problems with staff being sourced from his office, ‘or indeed other government lawyers’ within the ACT, ‘there would need to be very careful Chinese walls put in place in respect of any of my staff who had participated in any way in any investigation by this proposed body’.²⁸⁸

FINDINGS OF MISCONDUCT AND CORRUPTION VERSUS

²⁸⁴ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 36.

²⁸⁵ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 36.

²⁸⁶ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 36.

²⁸⁷ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 36.

²⁸⁸ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 37.

PROSECUTIONS

4.79 The Committee and the DPP also considered the status of findings of misconduct or corruption by anti-corruption commissions, noting that this varied between different Australian jurisdictions.²⁸⁹

4.80 Regarding this, the DPP told the Committee that:

Yes. The function of finding misconduct or corruption is a completely different function from the prosecution function. The committee may think, looking at other models, that there is some benefit in having the ability of a body to identify behaviour as corrupt, but that does not carry with it any significance.²⁹⁰

4.81 He told the Committee that such a finding ‘of itself carries no significance for a prosecutor’:

A prosecutor would have to find an offence that had been committed, and then would have to find admissible evidence to substantiate that offence, and that admissible evidence would need to be other than compulsorily acquired evidence that came out of an inquiry.²⁹¹

4.82 It was important, in the view of the DPP, that an anti-corruption commission would not have prosecutorial powers, and that the ‘function of prosecution’ was ‘retained in my office’. This would ‘particularly be the case if the body had the power to make findings of corruption or misconduct’, because there was ‘potential for confusion in the public mind as to what the significance of such a finding would be if that body also had prosecutorial powers’. His office should retain prosecutorial powers, which were ‘exercised in accordance with the prosecution policy of the territory and the general law’; which were ‘well known’; and which had been ‘elaborated on now by the High Court in cases like X7 and so on in terms of what use may be made of compulsorily acquired material’.²⁹²

PUBLIC OR PRIVATE HEARINGS

4.83 In hearings of 20 July 2017 the Committee asked the DPP questions regarding the advisability of an anti-corruption commission holding public or private hearings in the course of its investigations.²⁹³

²⁸⁹ *Transcript of Evidence*, 20 July 2017, p. 37.

²⁹⁰ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 37.

²⁹¹ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 37.

²⁹² Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 37.

²⁹³ *Transcript of Evidence*, 20 July 2017, pp. 37–38.

- 4.84 In responding to the question, regarding public versus private hearings, the DPP told the Committee that he did not ‘see any direct consequence for any subsequent prosecution’:

Clearly, prosecutors operate in an environment where the general principle is open justice. Generally, prosecutors are of the view that, unless there are very good reasons that matters take place in closed court, they should take place in open court. That is a principle that is probably more extensive than just criminal prosecutions. It runs through our legal system. A lot of it is to do with the exposure that comes from a public hearing and the ability of other members of the community to react, sometimes, to information that comes out in a public hearing. Private hearings tend to mean that that sort of information is not necessarily exposed in the same way.²⁹⁴

- 4.85 In practice, he told the Committee, his understanding was that most bodies of this kind employed ‘a mixture of public and private hearings’.²⁹⁵ The ‘discretion of any such body would be required to engage in private hearings when there was good reason to do that’, but the ‘general principle of law’ was that ‘what is sometimes called the disinfecting sunlight of public hearings’ should be the ‘general rule’.²⁹⁶

- 4.86 Later in hearings of 20 July 2017, the Committee asked further questions as to whether the implications of hearings being held in public or private. In particular, the Committee asked whether the process of an anti-corruption commission would attract public confidence in the event that findings of corruption or misconduct were made, but no prosecutions were pursued subsequent to those findings being made.²⁹⁷

- 4.87 In responding to the question, the DPP told the Committee that there were ‘two different functions being performed’:²⁹⁸

Members of the committee will readily appreciate the difference between those two functions but members of the community may have great difficulty understanding the difference. So if there is a finding of misconduct and, for example, no subsequent prosecution because a prosecutor makes a decision that there is insufficient evidence on the prosecution test to proceed, that may seem to be inconsistent, but in fact it is not inconsistent.²⁹⁹

²⁹⁴ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 38.

²⁹⁵ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 38.

²⁹⁶ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 38.

²⁹⁷ *Transcript of Evidence*, 20 July 2017, p. 39.

²⁹⁸ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

²⁹⁹ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

4.88 In his view, this was ‘really is a matter for public education’:³⁰⁰

The role of the integrity commission would be to identify what they found to be, for example, misconduct or corruption, but that does not imply that it is a criminal offence, or that there is evidence available to the criminal standard of prosecuting that person.³⁰¹

4.89 ‘Clearly’, he told the Committee, ‘there would be a necessity for the public to be very engaged with that distinction’ if the public were to have confidence in the anti-corruption commission’s process.³⁰²

INADMISSIBLE KNOWLEDGE AND SUBSEQUENT PROCEEDINGS

4.90 In hearings of 20 July 2017 the Committee asked the DPP further questions regarding inadmissible knowledge arising from anti-corruption commission proceedings and its significance in subsequent proceedings in courts.³⁰³

4.91 In responding, the DPP told the Committee that this was ‘a problem that arises even under the current regime’. It was ‘not uncommon’, for example, ‘for a person who has previously been convicted of a particular offence to be then charged with another offence and brought to trial’. In such cases, there was ‘information out in the public arena’ regarding the accused, but a jury would be ‘be instructed very clearly not to have regard to that information’, and this ‘kind of scenario’ was ‘actually quite common in the criminal law’.³⁰⁴

4.92 Similar challenges arose in connection with media reporting and the advent of social media. However, the DPP told the Committee, there were ‘standard directions’ that juries were to ‘have no regard to’ such information, and standard directions that ‘they are to try the case on the evidence presented within the four corners of the case’.³⁰⁵

4.93 In his experience and ‘the experience of most of those who are familiar with the function of the jury system’, juries were ‘very good at following directions of judges and trying cases on the evidence before them, and not having regard to inadmissible material that they may be aware of from other sources’. His view was that ‘as a principle’, there was not ‘much difference between the two scenarios’: that is, between information arising from the findings

³⁰⁰ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

³⁰¹ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

³⁰² Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

³⁰³ *Transcript of Evidence*, 20 July 2017, p. 38.

³⁰⁴ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 38.

³⁰⁵ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 38.

of an anti-corruption commission and information arising from media or social media coverage of matters before the Court.³⁰⁶

³⁰⁶ Mr Jon White SC, *Transcript of Evidence*, 20 July 2017, p. 39.

5 VIEWS PUT FORWARD IN HEARINGS— PARLIAMENTARY INTEGRITY STAKEHOLDERS

- 5.1 Current parliamentary integrity stakeholders, including the Clerk of the Legislative Assembly for the ACT, and the ACT Legislative Assembly Ethics and Integrity Adviser, appeared before the Committee in hearings of 20 July 2017.³⁰⁷

GAPS AND VULNERABILITIES IN THE CURRENT PARLIAMENTARY INTEGRITY FRAMEWORK

- 5.2 When he appeared in hearings of 20 July 2017, the Committee asked the Clerk of the Assembly to elaborate on comments he had made in his submission regarding gaps in the current parliamentary accountability framework. In particular, it asked about comments the Clerk had made about gaps in accountability mechanisms for staff of Members of the Assembly.³⁰⁸

- 5.3 In responding, the Clerk told the Committee that he had raised this question in his submission because in his view members' staff fell into a 'sort of special category':

Even though they have a code of conduct, it is not quite clear to me whether, if there is an issue about the conduct of a member's staff, how that might be handled under current arrangements.³⁰⁹

- 5.4 The Clerk noted that there was a public interest disclosure procedure, to which Members' staff could be subject, 'if there were some malfeasance or anything in relation to a member's staff'.³¹⁰ However in such instances the relevant officer for receiving public interest disclosures was the Clerk of the Assembly. This placed the Clerk 'in the funny position of having to investigate public interest disclosures against members' staff or members themselves', and he did not think that the Clerk was 'well placed at all to conduct those investigations'.³¹¹

³⁰⁷ *Transcript of Evidence*, 20 July 2017, p. 19 ff.

³⁰⁸ *Transcript of Evidence*, 20 July 2017, p. 19.

³⁰⁹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 19.

³¹⁰ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, pp. 19–20.

³¹¹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 20.

- 5.5 He told the Committee that he regarded the question of accountability for Members' staff as 'one of the hardest issues to resolve' because they 'should not escape any scrutiny whatsoever, but there were 'problems with how they are to be treated ... given their special status with members'.³¹²
- 5.6 At this point the Committee asked whether there was any 'explicit barrier' to Members' staff being included within the remit of an anti-corruption commission.³¹³
- 5.7 In response, the Clerk told the Committee that there was a difficulty only 'to the extent of their handling of documents that attract parliamentary privilege':
- If they are preparing speeches for members and things like that, and the nature of the complaint relates to that activity, there is a privilege issue there, but if it is more about criminal or corrupt behaviour, I do not particularly see any issues.³¹⁴

CLERK'S ROLE IN RECEIVING PIDS IN THE CONTEXT OF THE LEGISLATIVE ASSEMBLY

- 5.8 Later in hearings of 20 July 2017, the Committee asked further questions of the Clerk of the Assembly regarding his role in receiving and investigating PIDs.³¹⁵
- 5.9 In responding, the Clerk told the Committee that if 'the Assembly were to adopt an integrity commission ... that role could be undertaken by an integrity commission'. From his perspective, he would 'prefer to be out of the role investigating possible PIDs' because he did not think that the role of Clerk of the Assembly was 'ideally suited' to that function.³¹⁶
- 5.10 The Director, Office of the Clerk, also responded to the question. He told the Committee that although PIDs were provided for by an Act of the Assembly, the Legislative Assembly's Commissioner for Standards was identified as the receiving person for PIDs in the context of the Legislative Assembly under a resolution of the Assembly, and this was done to give this process 'a proper parliamentary basis outside of the reach of the courts', to maintain a separation of powers.³¹⁷

³¹² Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 20.

³¹³ *Transcript of Evidence*, 20 July 2017, p. 20.

³¹⁴ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 20.

³¹⁵ *Transcript of Evidence*, 20 July 2017, p. 33.

³¹⁶ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 33.

³¹⁷ Mr David Skinner, *Transcript of Evidence*, 20 July 2017, p. 33.

- 5.11 However, he told the Committee, there was ‘pretty specific advice around what would happen if you were to refer a PID to the commissioner’.³¹⁸

The effect of that is likely to be that many of the protections that are associated with that act would disappear. If somebody is making a public interest disclosure with the expectation that there would be a number of protections available to them, which is a large part of the purpose of that act, and it was then referred off to this commissioner who exists only as a matter of resolution, that could create some problems, obvious problems, for the person making the disclosure, because they perhaps came forth on the basis that they would be protected, and those protections would go.³¹⁹

- 5.12 He told the Committee that if there were an arrangement ‘codified in statute’...‘where there was ... an integrity commission that was able to receive those, some of those problems would go away’, but this would not entirely resolve the question of whether ‘the Commissioner for Standards, established by resolution, would be the appropriate person’ to conduct investigations into PIDs. He told the Committee that there were also further questions regarding the interaction of the *Public Interest Disclosure Act* with the legislative framework for a future ACT anti-corruption commission.³²⁰

ROLE OF THE LEGISLATIVE ASSEMBLY ETHICS AND INTEGRITY ADVISER

- 5.13 The Committee also asked the Legislative Assembly Ethics and Integrity Adviser whether he had been approached regarding the conduct of Members’ staff, or whether approaches had been solely with regard to the conduct of Members.³²¹

- 5.14 In responding, he told the Committee that:

On occasions I have been asked for advice on issues that involve relationships between members and their staff or members and the staff of another member, but it has been advice to the member.³²²

- 5.15 His view was that ‘no holder of any public office, which would include a staff member, should be exempt from scrutiny’, and that if an anti-corruption commission were created it should ‘have equal remit for all holders of public office, including members’.³²³

³¹⁸ Mr David Skinner, *Transcript of Evidence*, 20 July 2017, p. 33.

³¹⁹ Mr David Skinner, *Transcript of Evidence*, 20 July 2017, p. 33.

³²⁰ Mr David Skinner, *Transcript of Evidence*, 20 July 2017, p. 33.

³²¹ *Transcript of Evidence*, 20 July 2017, p. 20.

³²² Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 20.

³²³ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 20.

PARLIAMENTARY PRIVILEGE

- 5.16 The Ethics and Integrity Adviser went on to consider parliamentary privilege in this context. He told the Committee that he had experience in this area, because he have been ‘appointed twice by the Senate to determine whether documents seized under police warrants were subject to parliamentary privilege’. In these cases, he told the Committee:

...the Federal Court had held that if documents were subject to privilege they were beyond the scope of a warrant. But the court said it is for the parliament to determine what is subject to parliamentary privilege.³²⁴

- 5.17 In light of this, he told the Committee, he saw no reason ‘why this body, if it is created, should have any limitation other than in relation to parliamentary privilege’, and that this was ‘a matter for the parliament’.³²⁵

- 5.18 Later in hearings of 20 July 2017, the Committee asked further questions as to how future ACT or federal anti-corruption commissions would deal with parliamentary privilege.³²⁶

- 5.19 In responding, the Ethics and Integrity Adviser told the Committee that he thought that parliamentary privilege, ‘at the end of the day’, was ‘supreme’:³²⁷

If you have a matter which the integrity commission cannot investigate because it involves privilege then the Assembly has got to resolve it, and the Assembly stands or falls with the electorate by how they resolve it.³²⁸

- 5.20 He went on to say that:

In the cases that I was involved in, there had been warrants issued, documents seized from MPs’ offices, claims for privilege, and there was a process whereby I was appointed to ascertain whether the documents were or were not subject to privilege. If they were subject to privilege, outside the warrant, the police could not have them. If they were not subject to privilege, they could go to the police and they could do what they wanted with them. At the end of the day, you need to have the supremacy of the parliament but we have got an accountability mechanism every four years.³²⁹

³²⁴ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 20.

³²⁵ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 20.

³²⁶ *Transcript of Evidence*, 20 July 2017, p. 24.

³²⁷ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 24.

³²⁸ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 24.

³²⁹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 24.

- 5.21 At this point in proceedings, the Clerk of the Assembly provided an example from the ACT in which there had been ‘a public interest disclosure about the conduct of a staff member’, related to ‘the illegal use of emails’. In this case, the ‘matter was immediately referred to the AFP’, which executed ‘a search warrant on a member’s office in this building’ in the presence of the Clerk, of which the Member ‘was notified the night before’.³³⁰
- 5.22 He told the Committee that in the course of the execution of the search warrant, ‘documents were seized’, which were then placed in the Chamber Lounge in the Assembly building, for which the locks were changed. The Member ‘claimed privilege over all the documents’, and the Assembly ‘appointed a person to examine those documents’, to ‘ascertain which of those documents parliamentary privilege applied to and which of the documents could be given to the police for the purposes of their investigation’.³³¹
- 5.23 The Clerk told the Committee that in this instance, he was, as Deputy Clerk, the person appointed to assess the documents. Most of them ‘were covered by parliamentary privilege’, but some were handed over to the Australian Federal Police. The Federal Police ‘put a case’ to the Director of Public Prosecutions (DPP), however the DPP found ‘that there was insufficient evidence to mount a case’.³³²
- 5.24 At that stage, he told the Committee, ‘having finished all the criminal elements and the AFP investigation’, the Assembly ‘established a privileges committee to investigate the matter’, which made findings and reported to the Assembly, and ‘subsequently the staff member did resign as a result’.³³³
- 5.25 He went on to say that if ACT or federal anti-corruption commissions were created, it would be necessary for there to be ‘a memorandum of understanding between the police and the corruption body and the Assembly’, and noted that the Assembly already had a memorandum of understanding with ‘the police’.³³⁴
- 5.26 The Clerk noted that the Parliament of New South Wales had a memorandum of understanding with the NSW Independent Commission Against Corruption (ICAC). He also noted that in NSW there had ‘already been six inquiries concerning the execution of search warrants on members by ICAC in New South Wales’; that this was ‘a very contentious issue between what powers the ICAC has and where parliamentary privilege intercedes’; and that

³³⁰ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

³³¹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

³³² Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

³³³ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

³³⁴ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

this was why he had ‘urged’ in his submission that, ‘whatever powers are given to such a commission, the issue of parliamentary privilege needs to be very carefully considered’.³³⁵

- 5.27 Later in hearings of 20 July 2017 the Committee asked the Clerk questions regarding anonymity and integrity processes, noting differences in approach across Australian jurisdictions in this regard. In particular, the Committee asked a question as to how confidentiality was managed in the instance he used, earlier, as an example of integrity processes at work in the parliamentary sphere.³³⁶

- 5.28 In responding to the question, the Clerk told the Committee that:

In that particular case, a public interest disclosure led to it. So up until the time it was resolved it was anonymous. The only people that knew about it were the police, the Clerk, the Deputy Clerk, the Speaker and, of course, the member concerned, although the member whose emails were the subject of the dispute was also aware. It remained anonymous until the police investigation ceased, and then a matter of privilege was raised. That was when the veil, I suppose, was lifted.³³⁷

- 5.29 He told the Committee that there was ‘scope for anonymity’, but ‘in our current process ... if someone makes a complaint against a member the matter currently goes to the Speaker’. He noted that, at the time of hearings, there was a proposal before the Assembly that complaints ‘go straight to the Standards Commissioner’.³³⁸

- 5.30 He told the Committee that the ‘four complaints we have had so far’ had ‘all emanated from an election campaign or debates in the chamber. The intent in dealing with the complaints had been to ‘be anonymous as much as possible’, but ‘the nature of the election campaign and the nature of debates in the chamber meant it was fairly obvious that a complaint had been lodged’.³³⁹

- 5.31 The Clerk went on to say that the previous Speaker of the Assembly had adopted a policy ‘that once she had referred a complaint to the Commissioner for Standards she would announce then that a complaint had been lodged’. He acknowledged that anonymity and confidentiality was a significant issue ‘particularly in a small town’, and noted that there was criticism of the ICAC process in NSW to the effect that ‘even if the allegation is not proved, it does not matter’.³⁴⁰

³³⁵ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 25.

³³⁶ *Transcript of Evidence*, 20 July 2017, p. 27.

³³⁷ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 27.

³³⁸ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 27.

³³⁹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 28.

³⁴⁰ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 28.

All members in the New South Wales Parliament who were named as part of the ICAC investigation eventually ended up losing their seats, either by way of resignation or just not getting re-elected.³⁴¹

REFUSAL TO COOPERATE

5.32 At a later point in hearings of 20 July 2017 the Committee asked further questions about the operation of present arrangements to support parliamentary integrity.³⁴² In responding, the Ethics and Integrity Adviser told the Committee that he had ‘a biased view’, but he considered that the current system in the Assembly worked well.³⁴³

5.33 However, he told the Committee, the current approach relied on ‘the goodwill of members’. Complaints raised by Members about breaches of the Assembly Code of Conduct, were ‘referred to the commissioner, and the commissioner will investigate, he will consider and report’.³⁴⁴

5.34 While, in his view, present arrangements worked, and worked well, it was less clear, in the absence of coercive powers, what would happen if ‘a member refused to cooperate with the commissioner’, so that ‘the commissioner could not perform his intended role’. This was an unmanaged risk under present arrangements.³⁴⁵

5.35 The Ethics and Integrity Adviser told the Committee that at present, in such a scenario, the ‘refusal to cooperate would be a breach of the code of conduct’, but ‘we do not have a mechanism to enforce it’. An anti-corruption commission ‘body should be able to step in and say’:

“We received the complaint about a member, we sent it to the Speaker, who sent it to the commissioner. The member did not cooperate. The commissioner has been unable to satisfactorily resolve. We will bring the complaint in house. We will exercise our coercive powers.”³⁴⁶

5.36 Later in hearings of 20 July 2017, the Clerk of the Assembly also made comment on scenarios in which Members of the Assembly refused to cooperate with integrity procedures. He told the Committee that there was ‘a further step’ in between ‘when the Commissioner for

³⁴¹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 28.

³⁴² *Transcript of Evidence*, 20 July 2017, p. 21.

³⁴³ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 22.

³⁴⁴ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 22.

³⁴⁵ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 22.

³⁴⁶ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 22.

Standards does an investigation into a member, and if a member refuses to cooperate'. A refusal to cooperate would be, 'in itself is a breach of the code of conduct because the code of conduct says you should'.³⁴⁷

- 5.37 While he agreed that a future anti-corruption commission might 'step in and use its coercive powers' in such a scenario, in his view there was 'a further step in the middle' which could be employed. He told the Committee that the Legislative Assembly's Commissioner for Standards reported to the Standing Committee on Administration and Procedure, and this committee, 'like any other committee', could 'call for persons, papers and documents'.³⁴⁸
- 5.38 He told the Committee that if the commissioner informed the committee 'that a member or someone else was not cooperating with the commissioner', the committee could 'call the member'. There had been occasions where the commissioner had 'interviewed people' and 'up to this point' they had cooperated. If that cooperation were 'not forthcoming to the committee', which would surprise him, there was 'that recourse to an integrity body'. However, in his view, there were 'a few steps to take' under parliamentary procedure before a matter would get to that point.³⁴⁹
- 5.39 At this point, the Committee asked whether a Member of the Assembly who was unwilling to comply with directions under the Assembly's Code of Conduct could be penalised by being suspending from the Assembly, and Clerk confirmed that this was indeed the case.³⁵⁰

PERSONS UNDER CONTRACT TO GOVERNMENT

- 5.40 In hearings of 20 July 2017 the Committee asked the Ethics and Integrity Adviser to elaborate on remarks he had made in his submission to the inquiry regarding scrutiny over persons under contract to government, noting that outsourcing by government raised questions on 'where boundaries should fall' for accountability mechanisms.³⁵¹

- 5.41 In responding, the Ethics and Integrity Advisor told the Committee that:

There are some people who are engaged under a contract of employment as opposed to being holders of a public office, and they should be within remit, and then you have people who are employed under a contract for service, where there is a legal

³⁴⁷ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 22.

³⁴⁸ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 23.

³⁴⁹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 23.

³⁵⁰ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 23.

³⁵¹ *Transcript of Evidence*, 20 July 2017, p. 20.

distinction. But to the extent that they are providing a public service, notwithstanding that it is not as an employee, I do not see why they should be outside remit.³⁵²

ETHICS AND INTEGRITY ADVISOR'S MODEL FOR AN ANTI-CORRUPTION COMMISSION

- 5.42 In hearings of 20 July 2017, the Ethics and Integrity Advisor outlined his proposal, as set out in his submission, for an ACT anti-corruption commission. In this model the commission 'would not be a primary investigator of allegations'. Rather, it would 'pass allegations on to the existing body best empowered to deal with them'. In the case of persons under contract to government, this 'might well be the contracting agency that has let the contract for these particular services'.³⁵³
- 5.43 He envisaged that an anti-corruption commission would be 'a last resort body', so that 'if there were no contractual remedy, or the contracting agency did not do anything about it, this body might be able to buy in'. The ACT already had 'a large matrix of agencies with responsibilities for integrity in public office', and he did not 'perceive that it is broken'. The function of an anti-corruption commission would be to 'make it better'.³⁵⁴
- 5.44 At this point the Committee asked whether such a commission would still be obliged to conduct preliminary investigations in order to ascertain whether matters warranted further attention.³⁵⁵
- 5.45 In response, the Ethics and Integrity Adviser told the Committee that in the model he proposed the commission:
- ...would receive a complaint, ascertain what it relates to and ascertain who was the agency best suited to deal with it, pass it on, and then monitor progress with the handling of the complaint, so that if it does not get sufficient priority, if it turns out to be beyond the jurisdiction of the agency to which it has been referred or there is no legal capacity to deal with it, it might come back into the new agency.³⁵⁶

³⁵² Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, pp. 20–21.

³⁵³ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 21.

³⁵⁴ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 21.

³⁵⁵ *Transcript of Evidence*, 20 July 2017, p. 21.

³⁵⁶ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 21.

5.46 He told the Committee that in his view a commission would not necessarily have to conduct investigations ‘to get to that point of referral’.³⁵⁷

5.47 Later in hearings of 20 July 2017 the Committee asked the Ethics and Integrity Advisor to elaborate on the description of his model for an anti-corruption commission.³⁵⁸

5.48 In responding to the question, he told the Committee:

What I anticipate, because we have got a system that largely works at the moment, is that if a complaint is received—and I see this body as being a clearing house for complaints, and members of the public at the moment I think could reasonably say they have great difficulty in working out whom to complain to about various things—a useful role for this body would be just to stand in the marketplace and say, “If you have got a complaint about public administration, give it to us.” It will then pass it on to the agency that has power to deal with it.³⁵⁹

5.49 He went on to say:

If there is not an agency, then maybe there should be. It might be a systemic question. If there is not an agency, there might still be an issue that this body might investigate. But if they find that there is an agency with power to deal with the complaint, pass it on and then monitor that agency to make sure they do deal with it. If it does not rate on their priorities, if they ignore it, if they refuse to deal with it, then this body might step in. In that sense, it is a last resort.³⁶⁰

5.50 The other important role he envisaged for an anti-corruption commission was dealing with cases where a complaint was made against an agency and that agency was not in a position to investigate. This included complaints against an integrity body.³⁶¹

5.51 In relation to this, the Ethics and Integrity Adviser provided an example concerning the Australian Federal Police, which had an internal standards unit operating under the scrutiny of the Australian Commission for Law Enforcement Integrity (ACLEI). However, in more serious cases the ACLEI would ‘conduct an investigation and deal with it, rather than the police internally’.³⁶²

³⁵⁷ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 21.

³⁵⁸ *Transcript of Evidence*, 20 July 2017, p. 25.

³⁵⁹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, pp. 25–26.

³⁶⁰ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 26.

³⁶¹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 26.

³⁶² Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 26.

- 5.52 For instances where there is a complaint against the ACLEI itself, he told the Committee, the relevant Act established ‘a process whereby the minister can appoint a special investigator who is outside ACLEI to investigate the allegation against ACLEI’, in connection with which he himself had been appointed as special investigator ‘a couple of times’.³⁶³
- 5.53 In the model he proposed, he told the Committee, a similar process would take place if, for example, there was a complaint against the Audit Office. He told the Committee that it would not be fitting for the Auditor-General to investigate because ‘she would be conflicted in dealing with that’, and that such a case ‘might be one that this body deals with rather than referring to her or the Ombudsman’s office or whatever’.³⁶⁴
- 5.54 When asked whether an anti-corruption commission should be answerable to a parliamentary committee, the Ethics and Integrity Adviser agreed that this should be the case, and that such a committee should be responsible for ‘oversight’ of the commission.³⁶⁵
- 5.55 When asked as to whether he envisaged the role of an anti-corruption commission as being to addressing gaps in the present integrity framework, the Ethics and Integrity Adviser agreed that he saw the role of an anti-corruption commission as ‘enhancing what is there and filling some gaps’:³⁶⁶
- It could well be that you start seeing complaints about something or other on which there is no guidance to the public service, there is no offence, there is no code of conduct, it is a new issue. So this body might take the lead in developing a systemic response. That is another filling of a gap.³⁶⁷

WHETHER AN ANTI-CORRUPTION COMMISSION SHOULD CONDUCT PUBLIC INVESTIGATIONS

- 5.56 Later in hearings of 20 July 2017, the Ethics and Integrity Adviser made comment on the importance of anonymity and confidentiality for those under investigation, and the advisability of an anti-corruption commission conducting public investigations.³⁶⁸

³⁶³ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 26.

³⁶⁴ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 26.

³⁶⁵ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 27.

³⁶⁶ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 27.

³⁶⁷ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 27.

³⁶⁸ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 28.

5.57 He told the Committee that:

I am strongly of the view that if we have an integrity commission it should not conduct public hearings. It could conduct public inquiries into systemic issues but not public investigations into allegations of corruption. They should be behind closed doors. If they find the person innocent, then their position has been protected. If they find the person has, in their view, committed an offence, off to the DPP. If the DPP then undertakes his process and goes to court, that is where it sees the light of day. But we can too readily trash people's good reputations without cause.³⁶⁹

5.58 At this point, the Committee asked whether there was a risk that public hearings, if conducted by an anti-corruption commission, may prejudice a later court hearing which considered the same evidence.³⁷⁰

5.59 In responding, the Ethics and Integrity Adviser told the Committee:

Well, they possibly can. There is a very public matter at the moment where people are expressing very grave doubts about whether the accused can get a fair trial because of what has been in the public domain prior.³⁷¹

5.60 However, he thought the 'more usual issue' was:

...not causing damage to people without cause, and the arguments that I hear put for public hearings I do not think hold water. One of them is that having a public investigation will induce potential witnesses to come forward who would not otherwise. I very much doubt that. I think it is more likely to deter people from coming forward because they do not want to be grilled up hill and down dale in a public forum.³⁷²

5.61 This was, he said, 'a very vexed question', regarding which there were 'legitimately held different views on either side'. He thought the 'safer course' was not to have public investigations, although it was 'completely different', and valid, for an anti-corruption commission to hold public inquiries into 'systemic issues'.³⁷³

5.62 The Committee also asked whether differences between the process of an anti-corruption commission and conventional courts of law—regarding the right to silence, being compelled to

³⁶⁹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 28.

³⁷⁰ *Transcript of Evidence*, 20 July 2017, p. 28.

³⁷¹ *Transcript of Evidence*, 20 July 2017, p. 28.

³⁷² *Transcript of Evidence*, 20 July 2017, p. 28.

³⁷³ *Transcript of Evidence*, 20 July 2017, p. 28.

answer in public, and general procedural fairness—formed part of the concerns expressed by the Ethics and Integrity Adviser about public hearings by an anti-corruption commission.³⁷⁴

5.63 In responding to the question, the Ethics and Integrity Adviser agreed, saying that in such a situation, a body with coercive powers ‘may uncover matter that is inadmissible in court proceedings’, and could, as a result, ‘come to the conclusion that it has found a breach that cannot be penalised’. However, this may lead the commission ‘to give some consideration as to whether there needs to be systemic change’.³⁷⁵

5.64 In posing a further question, the Committee noted that in some other jurisdictions integrity bodies had the ability to make findings of corruption or misconduct, but these did not necessarily lead to a criminal prosecution because the evidence brought to light was not admissible in court, and directors of public prosecutions could decide a prosecution could not be sustained. However the Committee asked whether there was a public interest in that finding being made public, even if it did not result in criminal charges.³⁷⁶

5.65 In responding to the question, the Ethics and Integrity Adviser told the Committee that:

There may not be a criminal charge; there may be a civil outcome. You may have someone dismissed from service, something like that. But it may also be that a finding by this body is adverse, but that is just an opinion.³⁷⁷

5.66 He went on to say that:

If it does not measure up as sanctionable under the existing law, why should that prevail? [If it] raises a systemic question ... maybe we need to do something about the existing law. But if you have essentially just an opinion that has no civil or criminal sanction, why should that opinion prevail?³⁷⁸

5.67 He told the Committee that:

You may well go into a process of having an inquiry as to the need for systemic change where it has got to be a no names, no pack drill type of situation, to protect the person involved. But that is just a matter of discretion, I think.³⁷⁹

³⁷⁴ *Transcript of Evidence*, 20 July 2017, pp. 28–29.

³⁷⁵ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 29.

³⁷⁶ *Transcript of Evidence*, 20 July 2017, p. 29.

³⁷⁷ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 29.

³⁷⁸ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 29.

³⁷⁹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 29.

5.68 At this point, the Committee asked whether there was a positive role for public investigations by anti-corruption commissions in supporting or restoring public confidence in government systems.³⁸⁰

5.69 In responding, the Ethics and Integrity Adviser told the Committee that this pointed to 'the systemic route':

So you have had an investigative process that has found something that you say is a matter of concern to the public, but there is no existing sanction. That raises the question: why do we not have a sanction?³⁸¹

5.70 He told the Committee that this was 'where this body could have a role in identifying those issues', 'seeking to develop, possibly quite publicly develop, a sanction to deal with that situation', after the process of investigation.³⁸²

5.71 The Ethics and Integrity Adviser went on to say that:

...in a lot of these types of things that you talk about, the issues arise through, or become publicly known through, Auditor-General's reports, through Ombudsman's reports, things like that. It may be those reports that engender the public concern. Once the public concern is manifest, that is when the question is asked: "These problems are being found and we do not have a solution. What solution should we have?" That is where I would see this body coming in.³⁸³

5.72 When asked whether this may result in matters not being resolved, in the sense that there was no public statement about the matter and persons involved, the Ethics and Integrity Adviser agreed, but stated that the emphasis in the approach he advocated was on 'avoiding future repetition'.³⁸⁴

5.73 At this point the Committee asked a further question about how to maintain confidentiality in integrity processes where investigations were not public. In particular, it asked what measures could be used to ensure that complainants did not publish allegations before a commission published its findings.³⁸⁵

5.74 In responding, the Ethics and Integrity Adviser told the Committee that although he was 'not deeply familiar with it', he understood that a number of anti-corruption bodies in Australian

³⁸⁰ *Transcript of Evidence*, 20 July 2017, p. 30.

³⁸¹ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 30.

³⁸² Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 30.

³⁸³ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 30.

³⁸⁴ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 31.

³⁸⁵ *Transcript of Evidence*, 20 July 2017, p. 31.

jurisdictions had powers to ‘to issue orders to people who are complainants or witnesses to not publicly disclose anything’; that breaching such orders would constitute a contempt; and that this ‘might be an appropriate power’ for an ACT anti-corruption commission.³⁸⁶

WHETHER AN ACT ANTI-CORRUPTION COMMISSIONER SHOULD BE AN OFFICER OF PARLIAMENT

- 5.75 In hearings of 20 July 2017 the Committee considered whether a future ACT anti-corruption commissioner should be an Officer of Parliament. In particular, it asked the Clerk of the Assembly whether he saw any impediment to such an arrangement.³⁸⁷
- 5.76 In responding to the question, the Clerk told the Committee he did not.³⁸⁸
- 5.77 The Committee then considered views on parliamentary oversight of an anti-corruption commission which the Clerk had put forward in his submission to the inquiry. The Committee noted the Clerk’s submission that the appropriate means to parliamentary oversight were either the Assembly’s Standing Committee on Justice and Community Safety or its Standing Committee on Administration and Procedure.³⁸⁹
- 5.78 In hearings, his view was that such functions could be performed by existing committees of the Assembly, and that the ‘advantage’ of oversight by the Standing Committee on Administration and Procedure was that it was in a position to consider ‘matters of parliamentary privilege and things of that nature that come up from time to time’ and ‘whether the integrity body, if it is established, is transgressing on parliamentary privilege issues’.³⁹⁰
- 5.79 In relation to this proposal, the Clerk noted again that there had been ‘six inquiries in New South Wales as to whether the ICAC has overstepped the mark in terms of parliamentary privilege’. In light of this, the Standing Committee on Administration and Procedure ‘might be better suited to sort of keep an eye on things’, although he was ‘agnostic’—not having ‘a strong view either way’—and it was in his view a matter for the Assembly to decide.³⁹¹

³⁸⁶ Mr Stephen Skehill, *Transcript of Evidence*, 20 July 2017, p. 31.

³⁸⁷ *Transcript of Evidence*, 20 July 2017, p. 31.

³⁸⁸ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 32.

³⁸⁹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 32.

³⁹⁰ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 32.

³⁹¹ Mr Tom Duncan, *Transcript of Evidence*, 20 July 2017, p. 32.

6 VIEWS PUT FORWARD IN HEARINGS—KEY INTEREST GROUPS AND ORGANISATIONS

6.1 The following key interest groups and organisations appeared before the Committee in the course of its inquiry:

- the Inner South Canberra Community Council (ISCCC);
- the Community and Public Sector Union (CPSU);
- the ACT Bar Association; and
- the Accountability Round Table.

6.2 Views put by these groups and organisations in hearings are considered below.

6.3 The views put forward by Ms Marea Fatseas in hearings, as an interested citizen, are also considered below. The views of other interested citizens appearing before the Committee are set out in chapter eight. Ms Fatseas appeared with the ISCCC but not on its behalf.

INNER SOUTH CANBERRA COMMUNITY COUNCIL AND MS MAREA FATSEAS

6.4 The Inner South Canberra Community Council (ISCCC) appeared before the Committee in public hearings of 24 July 2017.

6.5 Ms Marea Fatseas, Chair of the ISCCC, and Mr John Edquist, Deputy Chair, ISCCC, appeared before the Committee. Mr Edquist represented the ISCCC due to the fact that Ms Fatseas had made a submission to the inquiry as a private person, nevertheless Ms Fatseas and Mr Edquist appeared together when they spoke to the Committee.³⁹²

GAPS AND VULNERABILITIES IN THE CURRENT PUBLIC SECTOR INTEGRITY FRAMEWORK

6.6 In her opening statement, Ms Fatseas told the Committee why, in her view, an anti-corruption commission was necessary in the ACT. She told the Committee that:

³⁹² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 55.

Through my involvement over the last seven years or so in community organisations I have been exposed to issues where there appeared to be inexplicable decisions and poor transparency, which made it difficult for the community to find out why those decisions were made. Through subsequent research by me and others, and through reading media investigations, I came to the view that there were potential integrity issues, especially in the domain of planning.³⁹³

6.7 She told the Committee that perhaps the risk was ‘higher in the area of planning in the ACT’ due to the ACT Government ‘undertaking both state level and municipal functions’. She told the Committee that ‘particular cases’ had concerned her in this regard.

6.8 However, in relation to these instances, she told the Committee, there was ‘still uncertainty about what happened’, and she was concerned that this could lead to ‘a lack of confidence that we are being governed for the benefit of the community and the common good rather than for the benefit of special interests’.³⁹⁴

6.9 She told the Committee that establishing an ‘independent integrity commission’ could help to:
...address and allay community concerns about these and other cases and help to prevent future integrity issues through improved awareness, vigilance and education with respect to maintaining high standards of integrity.³⁹⁵

6.10 She also told the Committee that ‘in general’ she supported the ‘features and powers of a model integrity commission as proposed by Prenzler and Faulkner’, with some qualifications expressed in her submission. In particular, she thought it important that:

...the integrity commission establishes a strong community engagement strategy from the outset. This will ensure that the integrity commission has a good understanding of, first of all, the integrity concerns of the community and, secondly, possible strategies involving the community that could help to prevent or reduce the likelihood of integrity issues arising in future.³⁹⁶

6.11 Mr Edquist also made an opening statement. He told the Committee, among other things, that ‘the feeling in the ISCCC is that the ACT needs an independent integrity commission and that such a commission should be established as soon as possible’.³⁹⁷

³⁹³ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 54.

³⁹⁴ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, pp. 54–55.

³⁹⁵ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 55.

³⁹⁶ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 55.

³⁹⁷ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

- 6.12 'The preferred model', in the view of the ISCCC, was that of the New South Wales ICAC, 'simply because it seems to be the most successful model in Australia':

If we are going to go to the trouble of establishing a commission, it should be modelled on that. It should have a broad definition of corruption which deals with not only criminal activities but official misconduct and a lack of impartial behaviour when dealing with issues.³⁹⁸

- 6.13 He told the Committee that it was the view of the ISCCC that such a body 'should also have a power to hold public hearings':

We consider that essential. Clearly the integrity commissions which do not have public hearings are complete failures and a waste of public money. Why would you bother? They are an indulgence.³⁹⁹

- 6.14 'In addition', he told the Committee, the commission should have:

...the power to initiate its own inquiries, to compel witnesses to attend and answer questions, to apply for warrants to search for and seize evidence, and to engage in covert investigations.⁴⁰⁰

- 6.15 He noted that the Committee's discussion paper referred to 'covert tactics', but he thought that 'a bit evasive or confusing'. He thought 'undercover operations' was a better description, 'including wiretapping, bugging people, following them and such like', and that if 'you do not have those your integrity commission will be much less effective at the very least'.⁴⁰¹

- 6.16 In his view, the 'debate really revolves around the point about whether the integrity commission should have responsibility for the AFP, or at least that section of the AFP which polices the ACT'. The position of the Griffith Narrabundah Community Association on this question was that:

it would be better to set up the integrity commission now, even if you had to exclude the AFP, so that it could start its work and then you could leave till later the negotiation of an agreement between the territory government and the commonwealth or the Federal Police about covering the AFP. But you should not let that hold up the establishment of an ICAC now.⁴⁰²

³⁹⁸ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

³⁹⁹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

⁴⁰⁰ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

⁴⁰¹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

⁴⁰² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

- 6.17 He went on to say that there were ‘those who say it is essential to cover the Federal Police’, and those ‘on the other side are saying not that you should not cover the Federal Police’, but that this should not ‘stop the establishment of an independent integrity commission’.⁴⁰³

DEFINITIONS OF CORRUPTION

- 6.18 In hearings of 24 July 2017 the Committee asked questions regarding definitions of ‘corruption’.⁴⁰⁴
- 6.19 In responding to the question, Ms Fatseas told the Committee that in her submission she had used a definition developed by Transparency International, which was ‘the abuse of entrusted power for private gain’.⁴⁰⁵
- 6.20 She also noted examples that she had provided in her submission in connection with the ACT, where there was ‘still a lot of uncertainty, a lack of transparency, about what actually happened’. It was possible that in these examples ‘it was all perfectly above board’, but that ‘sometimes the appearance of corruption can be as bad as the actual corruption itself’.⁴⁰⁶
- 6.21 One example, she told the Committee, concerned the particular property transactions and development by the ACT Brumbies, which ‘we ... saw in the paper’⁴⁰⁷:
- Then we did not hear anything for a long while.⁴⁰⁸
- 6.22 She made mention of a number of matters in connection with the property transaction and development, including: (i) the early departure of the Club’s CEO⁴⁰⁹; and (ii) the application of powers by the ACT Government to waive the associated Lease Variation Charge, ‘which was a matter of several million dollars’⁴¹⁰.
- 6.23 At this point Mr Edquist also made comment, saying that there was community concern about this matter:

Particularly as it then turns out that, some years afterwards, the club does not have the \$11 million and no-one can say where it went.⁴¹¹

⁴⁰³ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 56.

⁴⁰⁴ *Transcript of Evidence*, 24 July 2017, p. 56.

⁴⁰⁵ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴⁰⁶ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴⁰⁷ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴⁰⁸ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴⁰⁹ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴¹⁰ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 57.

⁴¹¹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 57.

6.24 Later in hearings of 24 July 2017, Mr Edquist made further comment regarding definitions of ‘corruption’. He told the Committee definitions of corruption should cover ‘not only things which are already crimes but also maladministration’.⁴¹²

6.25 He told the Committee that in his view:

...Tony Harris defined that very well when he talked about maladministration or misconduct, including malfeasance, which is an act that is unjustified or harmful; misfeasance, which is an abuse of power; non-feasance, which is an improper failure to act when an official or a politician should have acted; oppression, extortion and imposition. As in New South Wales, he believes that a failure to use your powers impartially would also be corruption.⁴¹³

6.26 He told the Committee that there were expectations of bureaucracy that it should be ‘to be absolutely neutral and treat all similar cases in the same way’. This was ‘difficult’, but that was ‘why we have these cumbersome bureaucratic rules’: to ‘to try to make sure that people do behave in that way’.⁴¹⁴

6.27 In this situation, he told the Committee, the agency was concerned with providing assurance that “This building will not harm the inhabitants. It will not harm the neighbours”. In an ideal situation, he told the Committee, ‘there would be very little judgement in granting or refusing a building approval’, ‘[you] would simply tick the boxes’:⁴¹⁵

If you say, “Tick the boxes” in respect of ACTPLA, they would have a fit. They would say, “Oh, that is terrible!” But to my mind, as a bureaucrat, that is ideal.⁴¹⁶

6.28 In this context, he told the Committee, it was important to ‘avoid subjective judgements where we say, “Oh, that is okay; that is not okay”, and if judgements are made, ‘they should be recorded’:⁴¹⁷

Who is making the decision? What is the decision they make? Under what power are they making it and why did they make it? It should be, “I decided under section such and such of the act that this is right because blah, blah, blah.”⁴¹⁸

⁴¹² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, pp. 58–59.

⁴¹³ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴¹⁴ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴¹⁵ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴¹⁶ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴¹⁷ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴¹⁸ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 59.

MODELS FOR AN ANTI-CORRUPTION COMMISSION

- 6.29 In hearings of 24 July 2017 the Committee asked questions regarding the purpose of an anti-corruption commission as envisaged by Ms Fatseas and Mr Edquist. In particular it asked whether the primary purpose of such a commission would be to inform the community or to investigate corruption and misconduct.⁴¹⁹
- 6.30 In responding to questions, Ms Fatseas agreed that it was her view that an anti-corruption commission would provide ‘an opportunity to clear up matters’, and agreed that such a commission should deal with matters that did not reach a threshold to be considered ‘criminal’ in nature, but were problematic because they had ‘created an environment’ in which ‘trust has been lost in government’.⁴²⁰
- 6.31 The Committee asked for Ms Fatseas’ view on the consequences of a finding from a commission of conduct that was not criminal, but was corrupt or giving the impression of corruption.⁴²¹
- 6.32 In responding to the question, Ms Fatseas told the Committee that this was ‘covered in the Prenzler and Faulkner requirements’:
- Where it is serious and intermediate, you could directly investigate it. The integrity commission could investigate it and make findings. Then, if it was something that was perhaps not as serious, they talk about making disciplinary decisions and managing a mediation program.⁴²²
- 6.33 In her view, she told the Committee, criminal activity should be referred to a law enforcement agency, and non-criminal conduct should be addressed ‘through a transparent process between the integrity commission and a relevant public authority’, but there could be a ‘different approach’ to ‘something that was considered to have made a major impact on public confidence’.⁴²³
- 6.34 At a later point in hearings of 24 July 2017, the Committee asked Ms Fatseas further questions regarding the model she proposed for an ACT anti-corruption commission.⁴²⁴

⁴¹⁹ *Transcript of Evidence*, 24 July 2017, p. 58.

⁴²⁰ *Transcript of Evidence*, 24 July 2017, p. 58.

⁴²¹ *Transcript of Evidence*, 24 July 2017, p. 58.

⁴²² Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 58.

⁴²³ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 58.

⁴²⁴ *Transcript of Evidence*, 24 July 2017, p. 59.

- 6.35 In responding, she told the Committee that one important element were powers to conduct own-motion inquiries, as had been set out by Prenzler and Faulkner. A further element were powers to ‘require attendance’, ‘answers to questions’ and to hold public hearings.⁴²⁵
- 6.36 In relation to powers to hold public hearings, she noted that allegations could be made in the present hearings. She tended ‘not to be afraid of having public hearings’. People should ‘be given natural justice, of course’, so that they could ‘respond to any allegations made against them’, but ‘really if you do not have transparency and you do not have public hearings, it is going to be very difficult’, ‘not only to address some of the concerns’ but also because it would reduce the capacity to raise community awareness as a result of exposure to proceedings of the commission.⁴²⁶
- 6.37 In relation to this last point, she told the Committee that:
- We are all on this journey together, in a way. We all have to keep ourselves to high standards and it is good for us to learn from each other, through these examples, what we expect should be standards both for public officials and also people in the community such as us who hold positions heading up community groups. I think it is an important thing. That is why I have mentioned here the importance of community engagement right from the beginning, because it is really about getting everybody to become more aware of what it is that we are trying to achieve in having better governance—whether that governance is by politicians, by public servants—and as a community how we can ensure that we have better governance.⁴²⁷
- 6.38 When the Committee asked Mr Edquist for comment on this matter, he told the Committee that he thought that is was ‘essential’ that an anti-corruption commission hold public hearings:
- I suppose it is part of the theatre of civic life. Most countries have public trials for a very good reason. Justice must not only be done, but people want to see it being done. I do not think that a wide range of human societies over thousands of years can be entirely wrong about this. Why would we want to have secret trial? I mean, secret trials are what you have in dictatorships and so on. People should have the right to be cross-examined in public and the right to reply in public. It is not just one way.⁴²⁸
- 6.39 When asked whether he was concerned that protections, such as rules of evidence and principals of natural justice, did not apply in ICAC settings, Mr Edquist told the Committee that this was compensated for by the fact that ‘what they say and evidence which appears in the ICAC is not necessarily admissible at a criminal trial’. In a criminal trial, the accused has ‘all the

⁴²⁵ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 59.

⁴²⁶ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, pp. 59–60.

⁴²⁷ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 60.

⁴²⁸ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 60.

rights and all the protections of the laws of evidence', but in ICAC proceedings 'the only punishment that they suffer from a public hearing, if they have engaged in activity which can be interpreted as corrupt, is the loss of public reputation', and this was 'okay'. This might be viewed as 'harsh', but it was 'not nearly as harsh as Eddie Obeid and Ian Macdonald are suffering now, when they are in jail and are going to be there for some years'.⁴²⁹

- 6.40 Asked whether such an approach was, in his view, justified, Mr Edquist told the Committee that there was 'a balance in these things', and that in his view the public felt that the NSW ICAC process was 'a much better process than what you have in South Australia or Victoria, for instance':⁴³⁰

In Victoria they are paying about as much as New South Wales is paying for the ICAC. What are they getting out of it? They get two cases of people fiddling procurement at government schools in the western suburbs. I would be very upset if I were a Victorian taxpayer. When you have speakers of the parliament from both parties rorting the system hand over fist and the IBAC says you cannot touch them, that is a joke.⁴³¹

- 6.41 When asked whether providing covert powers to an anti-corruption commission would affect those of other investigatory bodies, Mr Edquist told the Committee that this was not necessarily the case, and that in New South Wales 'I do not think the police have had their powers changed or reduced by the ICAC'.⁴³²

- 6.42 'Similarly', he told the Committee, in the ACT the Ombudsman and the Auditor-General did 'different things', in that they investigated 'how public administration has worked, whether money has been spent the right way and whether methods are the most efficient and things like that'. This was 'an essential function', and he thought the ACT 'very lucky' in having the present Auditor-General, who was 'excellent', kept 'everyone on their toes, and that was 'the way it should be'.⁴³³

- 6.43 Likewise, the 'sorts of issues which are dealt with by the Ombudsman are not the sorts of things that an ICAC-type body would be looking at'. These were all 'separate jurisdictions' which were 'tools to improve public administration'.⁴³⁴

⁴²⁹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

⁴³⁰ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

⁴³¹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

⁴³² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

⁴³³ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

⁴³⁴ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 61.

- 6.44 In a further question, the Committee noted that the Auditor-General had told the Committee that it was not part of her role to find and investigate corruption, but rather to identify ‘system risks’ which could increase the likelihood of fraud and corruption.⁴³⁵
- 6.45 In responding to the question, Ms Fatseas quoted another submission, by Professor Benedict Sheehy, to the effect that in defining the focus of an ACT anti-corruption commission the best approach was to ‘look at the specific risks posed by the ACT’s unique governance’. She noted that submission had advised the Committee that the ACT planning regime was ‘subject to less scrutiny than in other jurisdictions that have both local and state scrutiny’.⁴³⁶
- 6.46 She told the Committee that this point was consistent with the examples she had provided earlier in hearings, in that they were ‘all in the planning area’.⁴³⁷ In relation to this, she told the Committee that:
- Perhaps that area has a particular need in the ACT, more than in other jurisdictions, for those very reasons—that we do not have city councils to look at planning applications, with perhaps some state government oversight. We have both of those functions collapsed into one organisational agency. So there is perhaps more risk associated with that. Perhaps that partly answers your question, Ms Cody. We can look at the things in the ACT jurisdiction that are unique and therefore perhaps pose more risks.⁴³⁸
- 6.47 In response to further questions over the independence of the ACT Planning and Land Authority (ACTPLA), Mr Edquist stated that in his view:
- The people who head up ACTPLA, or the Environment, Planning and Sustainable Development Directorate, are now just ordinary public servants who have worked in other parts of the public service before and will work in other ones again.⁴³⁹
- 6.48 He told the Committee that this was not to say that there was ‘anything wrong with them’: in fact he knew and liked many of them. Planning staff were ‘just standard bureaucrats’, and there was ‘no longer a separate career path for planners’.⁴⁴⁰

⁴³⁵ *Transcript of Evidence*, 24 July 2017, pp. 61–62.

⁴³⁶ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴³⁷ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴³⁸ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴³⁹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴⁴⁰ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 62.

- 6.49 Of more concern, he told the Committee, was that the agency responsible for planning for not self-funded, and should be: that is, the agency 'should have the power to set its own fees when people lodge plans so that it does not need to get funded by the government'.⁴⁴¹
- 6.50 Under current conditions, however, funding had been 'reduced and reduced', to the point where with 'the best will in the world, they find it very difficult to conduct the planning functions that they should'.⁴⁴² It was not that there was 'much corruption, if any at all', in the agency responsible for planning, it was 'just that they have been put in a difficult, almost impossible, situation'.⁴⁴³
- 6.51 At this point, Ms Fatseas provided a further example in this domain, referring to a failure to deliver a land management plan for Manuka Oval and asked how it was the ACT had got to a point where there was 'a requirement under legislation' for such a document to be provided to the Assembly, but the Assembly itself had not received nor had the 'opportunity' to consider it.⁴⁴⁴
- 6.52 She went on to say:
- We are volunteers in the community. We know about this requirement. But it looks like the Assembly has not been given the opportunity to look at that land management plan for Manuka Oval, yet there is this massive public expenditure being proposed. I just do not understand how we can get to this point.⁴⁴⁵

IMPLEMENTATION OF AN ANTI-CORRUPTION COMMISSION

- 6.53 The Committee asked questions regarding timelines envisaged by the witnesses for the implementation of an ACT anti-corruption commission, and whether it would be desirable to create such a commission within the present term of government.⁴⁴⁶
- 6.54 In responding to the question, Ms Fatseas told the Committee:
- Definitely, I would not like to see what happened the last time an integrity commission was proposed, where it took years; it was only put forward just before an election, and then nobody heard about it for years afterwards. I think something should happen

⁴⁴¹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴⁴² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 62.

⁴⁴³ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, pp. 62–63.

⁴⁴⁴ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 63.

⁴⁴⁵ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 63.

⁴⁴⁶ *Transcript of Evidence*, 24 July 2017, p. 63.

within the next year so that we have time for it to be established and to be working. We have already got some examples of what should be looked at and cleared up.⁴⁴⁷

6.55 She told the Committee that when such matters were ‘not dealt with’, this became ‘corrosive’, leading to ‘a lack of confidence in the community that our taxpayers’ money, the rates that we pay, is being used to the best effect’. In her view, it was necessary to put something in place ‘within the next year, if possible’, in order to ‘address some of those burning issues that are still of concern to the community’.⁴⁴⁸

6.56 Mr Edquist made similar comment. He told the Committee that:

The sooner you can establish an independent integrity commission the better. That is going to take some time, though, and particularly recruiting a suitable head. You need someone who is vigorous and determined to make their mark and so on. Probably, and possibly regrettably, you need someone from out of town who is only here for three years or so, because if they are doing their job properly they are going to make enemies, and you need someone who is not going to be upset by that.⁴⁴⁹

6.57 In his view the ‘issues which I think most call out to be looked at by some kind of integrity commission’ were ‘some of the purchasing decisions by the Land Development Agency’, in relation to which:

Either the Land Development Agency had the most weird bureaucratic processes, and perhaps someone should have their pay docked for allowing that to go on, or there was much worse going on.⁴⁵⁰

TEMPORAL SCOPE

6.58 The Committee also asked about the temporal scope of a future anti-corruption commission: that is, the extent to which it could investigate matters which had transpired before the creation of the commission.⁴⁵¹

6.59 In responding to the question, Mr Edquist told the Committee that it would have to have sufficient scope to do this because to ‘have it so that it dealt only with matters that occurred

⁴⁴⁷ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 63.

⁴⁴⁸ Ms Marea Fatseas, *Transcript of Evidence*, 24 July 2017, p. 63.

⁴⁴⁹ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 64.

⁴⁵⁰ Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 64.

⁴⁵¹ *Transcript of Evidence*, 24 July 2017, p. 64.

after it was established would be silly': if there had been 'improper activities, particularly illegal activities, they should still be investigated'.⁴⁵²

COMMUNITY AND PUBLIC SECTOR UNION (CPSU)

- 6.60 Representatives of the Community and Public Sector Union (CPSU) before the Committee in hearings of 1 September 2017. The ACT Regional Secretary of the CPSU appeared before the Committee, together with a Union organiser.⁴⁵³

VIEWS ON THE DESIGN, FUNCTIONS AND POWERS OF AN ACT ANTI-CORRUPTION COMMISSION

- 6.61 In her opening statement to the Committee the Regional Secretary told the Committee of the views of the CPSU on an ACT anti-corruption commission.⁴⁵⁴
- 6.62 She told the Committee that the CPSU was 'broadly supportive of an integrity commission', but had 'some important views' on 'issues to be addressed in its establishment'.⁴⁵⁵
- 6.63 'First and foremost', she told the Committee, the CPSU considered that such a commission needed to be 'adequately funded and staffed', and that it was 'essential' that staff were 'well trained' and that the commission was 'resourced adequately'.⁴⁵⁶
- 6.64 An example of the importance of adequate provision was the Australian Commission for Law Enforcement Integrity (ACLEI) which, she told the Committee, was 'very stretched in terms of staffing and funding'. The scope of the ACLEI had been 'broadened out' to cover such agencies as the Department of Immigration and Border Protection and the Australian Border Force, and this had resulted in the ACLEI being 'really, really stretched in terms of resources', which 'really undermines the important work that they are trying to do'.⁴⁵⁷
- 6.65 In light of this, she told the Committee, the CPSU took the view that an anti-corruption commission 'should have a base level of funding' and 'should not be relying on the government of the day'. In this regard, she noted that the NSW ICAC, due to funding cuts, was seeking to reduce its workload, and that this undermined 'the important work that they are

⁴⁵² Mr John Edquist, *Transcript of Evidence*, 24 July 2017, p. 64.

⁴⁵³ *Transcript of Evidence*, 1 September 2017, p. 66 ff.

⁴⁵⁴ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 66.

⁴⁵⁵ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 66.

⁴⁵⁶ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 66.

⁴⁵⁷ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, pp. 66–67.

designed to do'. As a result, the CPSU believed that funding needed 'to be established separately'.⁴⁵⁸

6.66 Turning to other elements of design for an anti-corruption commission, she told the Committee that:

- there 'should be oversight and procedural fairness in relation to own-motion study investigations and requiring attendance';
- there 'should be a separation between the assessment of allegations and an investigation;
- there 'should be an independent office to oversee the integrity commission and conduct audits for reporting purposes'; and that
- it 'is crucial in our view that there is independent oversight of matters that are referred on for own-motion studies', such as would be provided by 'an all-party Legislative Assembly committee established to ensure external scrutiny'.⁴⁵⁹

6.67 In relation to hearings, she told the Committee, the CPSU:

- believed that hearings 'should be private and that procedural fairness should be paramount';
- supported 'requirements for attendance at hearings';
- did not not support public hearings, to 'ensure that witnesses' reputations remain intact' and to 'prevent media attention and scrutiny which could make it more difficult for prosecutions down the line'; and
- believed that 'all persons should be informed of the nature of the allegation or complaint prior to a hearing', to 'to ensure procedural fairness and natural justice'.⁴⁶⁰

6.68 She told the Committee that if an anti-corruption commission were to 'initiate covert tactics such as integrity testing' then there should 'be strict oversight and due process'. In relation to integrity testing, the CPSU was concerned regarding:

- the 'selection and oversight of integrity testing authorities';
- the 'time frame to conduct an integrity test after authorisation';
- the 'use of information and how that is required in the integrity test and how it is protected'; and
- 'the potential for entrapment of employees'.⁴⁶¹

6.69 The Regional Secretary told the Committee that the CPSU did not support 'excessive coercive powers'; believed that such a commission 'should be subject to the appropriate legal processes

⁴⁵⁸ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁵⁹ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁶⁰ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁶¹ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

required when investigating corruption'; and that protections 'must be in place to ensure that the rights of individuals are upheld through an investigative process'.⁴⁶²

6.70 She told the Committee that the CPSU believed that:

- 'the ACT integrity commission should refer cases for prosecution rather than make public determinations';
- there 'should be penalties built into any integrity commission that deter people from making vexatious claims against individuals'; and that
- fines should be available to an ACT anti-corruption commission as penalties.⁴⁶³

6.71 The Regional Secretary told the Committee that the CPSU believed that the scope of an ACT anti-corruption commission should not be limited to 'ACTPS departments, agencies, parliamentarians and their staff'. Rather it should be 'broadened out to labour hire companies', and wherever there were 'outsourcing or privatisation' arrangements, in which case it 'should extend to those employees'.⁴⁶⁴

6.72 She also told the Committee that the CPSU did not believe that 'the commission should duplicate other integrity processes', whether they were 'code of conduct processes or misconduct processes that apply under enterprise agreements'. A commission 'should be really for serious misconduct and corrupt activity rather than lower level code of conduct matters'.⁴⁶⁵

PUBLIC HEARINGS

6.73 In hearings of 1 September 2017, the Committee asked questions as to whether an anti-corruption commission should conduct public or private hearings. It noted that the position set out in the CPSU's submission was that hearings should only be held in public under 'extraordinary circumstances', and asked what the CPSU considered to be extraordinary circumstances.⁴⁶⁶

6.74 In responding, the Regional Secretary took the question on notice, but told the Committee that:

From our perspective, for the most part it really should be a private hearing because you do not want to put people through an incredibly stressful situation, particularly if

⁴⁶² Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁶³ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁶⁴ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 67.

⁴⁶⁵ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁶⁶ *Transcript of Evidence*, 1 September 2017, p. 68.

they have got no case to answer or if they are a witness. We would not want them to be dragged into something in the public domain that might impact on their standing in the future or might impact on your ability to prosecute down the line.⁴⁶⁷

6.75 The Union Organiser also responded to the question. She told the Committee that it would in her view be considerations of public interest that would determine whether there were extraordinary circumstances that warranted a public hearing.⁴⁶⁸

6.76 The Committee noted that there had been ‘considerable’ debate among witnesses on this point; that ‘strong arguments’ had been ‘put both ways’; and how public confidence in an anti-corruption commission would be maintained if proceedings were held ‘behind closed doors’.⁴⁶⁹

6.77 In responding, the Regional Secretary told the Committee that she was concerned about instances in which ‘there might not be a case to answer’ but the reputation of persons under consideration ‘might be tarnished down the line’. In her view it was important to maintain ‘the confidence of ... people that may not genuinely have a case to answer’.⁴⁷⁰

6.78 There were also concerns that an anti-corruption commission process should not ‘set up a situation where it might impact on a case down the line’.⁴⁷¹

ACT BAR ASSOCIATION

6.79 Representatives of the ACT Bar Association appeared before the Committee in hearings of 1 September 2017.⁴⁷²

DESIGN, FUNCTIONS AND POWERS

6.80 In his opening statement, the President of the ACT Bar Association told the Committee that:

Our view is that the body that is established, if it is to be established, must be allowed to function robustly, without getting bogged down in a hierarchy of bodies who may

⁴⁶⁷ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁶⁸ Ms Amy Knox, *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁶⁹ *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁷⁰ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁷¹ Ms Brooke Muscat-Bentley, *Transcript of Evidence*, 1 September 2017, p. 68.

⁴⁷² *Transcript of Evidence*, 1 September 2017, p. 83 ff.

act as gatekeepers before the ICAC's investigatory power is exercised or can be exercised.⁴⁷³

- 6.81 He told the Committee that to 'that extent', the Bar Association was not 'attracted to submissions that have been made that suggest that other bodies act as gatekeepers for investigations into potentially corrupt conduct'. It view was that 'a scheme that operates differentially as between members of the Assembly and other public officials may cause a loss of faith' in a future anti-corruption commission. A 'filtering process' such as had been suggested in other submissions had 'the potential to undermine the process of investigation that may take place'.⁴⁷⁴
- 6.82 Regarding funding, the President told the Committee that the view of the Bar Association was that a future anti-corruption commission 'must be funded in a way that gives it a degree of autonomy to pursue investigations in its own way'.⁴⁷⁵
- 6.83 Regarding appropriate leadership of such a commission, he told the Committee that the Bar Association favoured 'a single commissioner rather than a collection of commissioners' who was 'appropriately qualified, preferably with legal qualifications and preferably with a background in either criminal investigation or criminal adjudication'. Ideally, 'that person would come from the Canberra community'.⁴⁷⁶
- 6.84 It was important, the President told the Committee, that the powers of such a body 'be clearly defined'. The Bar Association proposed that Members framing future legislation for an ACT anti-corruption commission 'use the New South Wales legislation as a starting point', because it 'has been in existence for a long time, and there is an established body of jurisprudence in relation to the operation' of the relevant Act.⁴⁷⁷
- 6.85 In connection with this, he stated that because 'anybody who is brought to the courts or before the ICAC body' was likely 'to be resourced', legal challenges against actions brought by the ICAC were likely to be more frequent than for conventional criminal investigations or prosecutions. There was, therefore, 'some advantage in relying upon the jurisprudence that has developed in relation to the New South Wales model'.⁴⁷⁸
- 6.86 The President noted the operation of the *Human Rights Act 2004* in the ACT. In light of this, he told the Committee, the Bar Association urged that 'the powers that are given to the ICAC
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⁴⁷³ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 83.

⁴⁷⁴ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 83.

⁴⁷⁵ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 83.

⁴⁷⁶ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 83.

⁴⁷⁷ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 83.

⁴⁷⁸ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, pp. 83–84.

body to be appropriately restrained', having regard to the principles of the *Human Rights Act*. As a result, warrants should be granted by courts rather than at the motion of the anti-corruption commission alone.⁴⁷⁹

6.87 He told the Committee that the Bar Association favoured 'a private hearing model', except where 'public interest considerations which are specifically defined suggest that the hearings should be in public'.⁴⁸⁰

6.88 In addition, the Bar Association urged:

...a model that closely aligns the ICAC investigation to the possibility of criminal offences and to the prosecution of criminal offences so that, whether it is a concept of corruption or corrupt behaviour similar to sections 7 and 9 of the New South Wales act.⁴⁸¹

6.89 In connection with this, he told the Committee, if that were to be 'the threshold and ultimately the basis of a finding of ICAC', the ACT *Criminal Code* should be amended 'to ensure that the offences line up with the ultimate finding that ICAC can make', and that 'the processes of ICAC make it possible, or more probable, that criminal prosecutions will take place'.⁴⁸²

6.90 If compulsory powers were to be made available to an ACT anti-corruption commission, he told the Committee, the Bar Association favoured:

...a legislative model that directs the attention of ICAC to the desirability of its processes ensuring that if the finding is eventually to be of corrupt conduct, its processes will eventually allow a criminal prosecution to be brought.⁴⁸³

PUBLIC INTEREST TEST

6.91 In hearings of 1 September 2017 the Committee asked the Bar Association to provide further views on a public interest test upon which an anti-corruption commission would decide whether to hold hearings in public or private.⁴⁸⁴

6.92 In responding to the question, the President told the Committee that it was 'important that it goes beyond a statutory discretion that says simply that it is a choice between public interest versus a person's reputation'. The model should 'identify, beyond the generic, what the public

⁴⁷⁹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸⁰ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸¹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸² Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸³ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸⁴ *Transcript of Evidence*, 1 September 2017, p. 84.

interest is'. 'Public interest' could be 'educative'; it could be 'the interest that the public has in knowing where allegedly corrupt behaviour has arisen'.⁴⁸⁵

6.93 There were further considerations, however, as to:

...whether or not, for example, the particulars of the behaviour that the person is about to be tested on have been disclosed to them before the hearing takes place; the degree to which preparation has been possible; and the likelihood of future court proceedings arising from the behaviour that is being examined.⁴⁸⁶

6.94 The President went on to say that:

It strikes me from a distance that the ICAC proceedings in New South Wales are good theatre, but if, given the body of material that ICAC, to the stage of examination, has gathered, it is likely that a criminal prosecution is going to arise, as with the Obeid matter, for example, I am not sure what the benefit to the public is in relation to the process of cross-examination that then happens in a public domain. If it is decided—if the commission has formed a view—that prosecution is likely, I am not sure what it does to the interests of justice, in particular, for that sort of theatre to happen before the person goes to the criminal court.⁴⁸⁷

INVESTIGATORY FUNCTIONS AND CAPACITY

6.95 In hearings of 1 September 2017 the Committee asked questions regarding investigatory functions and capacity for an ACT anti-corruption commission. The Committee noted that the Bar Association's submission to the inquiry had referred to the possibility that investigative functions could be provided by the Australian Federal Police (AFP), and asked whether such an arrangement could raise concerns about conflict of interest if it were to be put in place.⁴⁸⁸

6.96 In responding, the President of the Bar Association told the Committee that:

Having been a prosecutor for a long time, it strikes me that the AFP, for various reasons, has not been a completely convincing operator in this particular space, either locally or nationally.⁴⁸⁹

6.97 He told the Committee that he did not 'want to speculate in public on why that might be so', but that he was 'not sure if the public would perceive the AFP to be operating in clear space, as

⁴⁸⁵ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸⁶ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 84.

⁴⁸⁷ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁸⁸ *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁸⁹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 85.

it were, in relation to the suggestion that they investigate potentially corrupt conduct of politicians'.⁴⁹⁰

6.98 However, he told the Committee, if decision-making functions were taken away from the AFP and they were 'exercising a co-opted role where discretion is vested in somebody else', the public 'might have a greater degree of confidence' in the AFP's capacity to operate in an investigatory capacity.⁴⁹¹

6.99 The Committee considered another alternative: of obtaining investigative services from other jurisdictions.⁴⁹²

6.100 In responding, the President told the Committee that there were 'some advantages' to this approach in that integrity bodies in other jurisdictions had an 'expertise' which would 'be missing in the early days' of an ACT anti-corruption commission.⁴⁹³

6.101 He also noted that expense would be 'another consideration', possibly not 'the most important consideration', but 'one of the considerations'.⁴⁹⁴

DEMARCATIONS BETWEEN ACT INTEGRITY BODIES

6.102 In hearings of 1 September 2017 the Committee considered demarcations between the work of ACT integrity bodies, including a possible future anti-corruption commission.⁴⁹⁵

6.103 In responding, the President noted that if an ACT anti-corruption commission were established, it would be one of 'a number of bodies' with a role in 'the improvement of the standard of public administration'. He told the Committee that in light of this it was important 'to establish an appropriate hierarchy' between these bodies in which if a matter is raised and it 'comes directly to a number of bodies and a reference is made, a decision has to be made as to who is going to take it over'.⁴⁹⁶

⁴⁹⁰ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁹¹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁹² *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁹³ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 85.

⁴⁹⁴ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 86.

⁴⁹⁵ *Transcript of Evidence*, 1 September 2017, p. 86.

⁴⁹⁶ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 86.

6.104 However, he told the Committee, the Bar Association did not favour a hierarchy which had anti-corruption commission ‘dealing with the leftovers’. Rather, investigations of a matter ‘at the threshold level’ was ‘likely to be all about defining how serious it is’.⁴⁹⁷

6.105 In particular, he told the Committee, he was concerned about the ‘forensic significance’ of ‘how the initial complaint is dealt with’:

If there is a matter that is potentially serious which goes, by necessity—by legislative arrangement or understanding—to everybody, the capacity for an investigation to be contaminated is reasonably high.⁴⁹⁸

6.106 When asked by the Committee whether an anti-corruption commission should be the ‘clearing-house’ for such matters, the President agreed, and stated that view of the Bar Association was that if there was ‘to be a hierarchy’, ‘and there probably should’, the anti-corruption commission ‘should be on top of it’.⁴⁹⁹

WHETHER A COMMISSIONER SHOULD BE APPOINTED FROM THE LOCAL COMMUNITY

6.107 In hearings of 1 September 2017, the Committee asked the President to comment on whether the commissioner of an ACT anti-corruption commission should be appointed from in- or outside of the ACT.⁵⁰⁰

6.108 In responding, the President told the Committee that:

Philosophically—and I suppose it goes to appointments generally—the person who fills that role is standing in judgement in relation to members of the Canberra community. Also there is an issue about the knowledge that goes with involvement in a community as well.⁵⁰¹

6.109 He acknowledged that there were potential problems with ‘baggage’ if a person was appointed from within the ACT community, but:

...ultimately you are making adverse findings in relation to somebody from your community. It is not a personal thing; it is a philosophical thing. If we are an independent polity, we need to govern ourselves. That is my general view. You are the representation of that philosophy and I just see that, if you do not follow that through

⁴⁹⁷ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 86.

⁴⁹⁸ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 87.

⁴⁹⁹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 87.

⁵⁰⁰ *Transcript of Evidence*, 1 September 2017, p. 87.

⁵⁰¹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 87.

in a fairly logical and cohesive way, you undermine the cohesion of the polity. We would become a subset of New South Wales or Victoria.⁵⁰²

6.110 Later in hearings, the Committee asked further questions as to whether the head of an ACT anti-corruption commission should be appointed from in- or out-side of the ACT, noting views put to the Committee that Canberra was 'a small town' and 'lot of people who have these sorts of qualifications know the other sorts of people that would be called before such an inquiry'.⁵⁰³

6.111 In responding, the President acknowledged that this was 'the contrary view'. In considering the question, he told the Committee that this was not only influenced by the origin of the person chosen for the position, but their background:

...if you look at the Tasmanian experience, it just strikes me that what they have done in recent times is unfortunate in a way, in relation to the type of person they have appointed, rather than a person coming from the community. I think that person's background is Tasmanian, but I think the distinction that has to be made is about the public service nature of the person that is appointed. If they have recently been a senior bureaucrat in the ACT, I do not think the community is going to look at that person and think they are going to be of independent mind. And perhaps that is an argument against appointing locally. I do not know.⁵⁰⁴

FUNDING FOR AN ACT ANTI-CORRUPTION COMMISSION

6.112 In hearings of 1 September 2017 the Committee asked questions regarding the connection between an anti-corruption commission being 'robust' and funding models.⁵⁰⁵

6.113 In responding, the President told the Committee that a desirable model 'would inevitably involve a concept of statutory independence', and that the 'financial aspect' was important.⁵⁰⁶

6.114 He told the Committee that oversight was also important, and that there should 'be a capacity to act rather than just to justify actions taken'. What had happened in New South Wales in the appointment of further commissioners looked 'to be politically inspired and an attempt to provide an internal brake on the way that the ICAC operates'. If an anti-corruption

⁵⁰² Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 87.

⁵⁰³ *Transcript of Evidence*, 1 September 2017, p. 88.

⁵⁰⁴ *Transcript of Evidence*, 1 September 2017, p. 88.

⁵⁰⁵ *Transcript of Evidence*, 1 September 2017, p. 88.

⁵⁰⁶ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 88.

commission were to get ‘bogged down’ in this way then that would be ‘unfortunate’: such a body needed to ‘well resourced’ and to be given ‘clear powers to do its job’.⁵⁰⁷

POWERS TO COMPEL WITNESSES

6.115 In hearings of 1 September 2017 the Committee asked questions regard a future commission’s power to compel witnesses and the consequences of this for the admissibility of evidence in any later court proceedings.⁵⁰⁸

6.116 In responding to the question, the President told the Committee that the Bar Association would favour a model that required the commission ‘to have regard to any future criminal prosecution that is going to possibly arise’. If the commission considered that ‘a prosecution may arise from its investigation’, then this ‘should inform, to the level that is appropriate, the methodology that it adopts’.⁵⁰⁹

If there is a choice between a cautioned interview and a compelled statement, you would go down a cautioned interview path because that would be admissible at trial.⁵¹⁰

6.117 He suggested that there should be legislative arrangements under which the commission would be ‘compelled to consider the downstream consequences of the methodology that it adopts, in light of the possibility of criminal conduct’, upon the basis of which ‘judgements could be made’. If, in any particular instance, the commission were to choose to proceed using compelled statements, that would be open to the commission, but that would ‘inevitably derogate from the possibility of a successful criminal prosecution’.⁵¹¹

6.118 When asked about the influence of evidence heard in a public hearing on any subsequent court proceeding, the President responded. He told the Committee that there would be two key decisions in any particular instance, one regarding ‘the capacity of the witness to be compelled to give the answer’, and the other whether the commission would adopt a private or a public process. Where proceedings were held in public, however, the:

...publicity associated with a hearing would, at the very least, slow down the process of criminal trial because the courts would be anxious for the dust to have settled at some level before a criminal trial is brought on.⁵¹²

⁵⁰⁷ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, pp. 88–89.

⁵⁰⁸ *Transcript of Evidence*, 1 September 2017, p. 89.

⁵⁰⁹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 89.

⁵¹⁰ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 89.

⁵¹¹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 89.

⁵¹² Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 89.

6.119 In response to further questions, the President told the Committee that he did not wish to suggest by his comments that one of these approaches would be ‘to the absolute exclusion of the other’, but told the Committee that if the model were to include ‘accountability to be established by criminal prosecution’, it would be advisable to ensure that the commission ‘was directed to make sure that that is given some priority in the way it goes about its business’:⁵¹³

It might gather inadmissible material, but that inadmissible material might be very useful in another context. But if the choice is between a prosecution and gathering what is useful and important in another context—it depends on the model that the Assembly ultimately adopts—if you want to give priority to criminal court outcomes then you have got to direct the investigators to make sure that they are giving that priority in the way they gather their evidence.⁵¹⁴

6.120 In response to further questions about the advisability of public versus private proceedings of a future anti-corruption commission, and the potential role of public proceedings in supporting public confidence,⁵¹⁵ the President told the Committee that it was ‘a balancing exercise’, however:

It strikes me, though, that if there is, in the view of the commissioner, a *prima facie* case in relation to criminal conduct, the public interest in relation to the public agitation of that issue can be as equally addressed in a criminal trial as it is in an ICAC hearing. Eddie Obeid stood his trial and that was a matter of public record.⁵¹⁶

6.121 When asked about this issue in connection with matters that would not proceed to a criminal trial, the President told the Committee that this depended on ‘what the witness is going to be facing before they come to the hearing’. He told the Committee that as ‘a cross-examiner’ it was ‘great sport to show them a document that they have not seen’ where this was ‘done in the context of a court of law’, it was done was under ‘legal and ethical’ restraint. He was not saying that this ‘should not occur’ in commission proceedings, but only that it was ‘a balancing act’ between the perceived benefits of a commission making a finding, on one hand, or matters being considered in a criminal court.⁵¹⁷

CHANGES TO THE *CRIMINAL CODE*

6.122 In hearings of 1 September 2017 the Committee asked questions regarding a proposal that if an anti-corruption commission were created in the ACT, the *Criminal Code 2002* (ACT) should

⁵¹³ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 89.

⁵¹⁴ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, pp. 89–90.

⁵¹⁵ *Transcript of Evidence*, 1 September 2017, p. 91.

⁵¹⁶ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 91.

⁵¹⁷ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 91.

be amended so that it defined, in statute, an offence of ‘misconduct in public office’, as had been done in Victoria.⁵¹⁸

6.123 In response, the President told the Committee that:

Ultimately, with the threshold issue as to what ICAC is going to be concerned to investigate, whether it is called “corrupt conduct” or “misconduct in public office”, whatever it is going to be, it is important that the criminal law reflect that as an offence. Whatever you hit upon as the threshold test, it needs to be reflected in the criminal law ...⁵¹⁹

6.124 When asked whether he thought it may or may not be adequately reflected in current ACT legislation, the President told the Committee that the answer to this question depended ‘on what you come up with as your test, and that it ‘may be; it may not be’, depending on ‘what your threshold test is’.⁵²⁰

6.125 This was important, he told the Committee, because:

If there is going to be a referral at the end of it to the DPP, you do not want the investigation to have been conducted on a different basis to that which they can prosecute.⁵²¹

ACCOUNTABILITY ROUND TABLE

6.126 The Chair of the Accountability Round Table—Anti-Corruption Working Group—the Hon. Stephen Charles QC AO appeared before the Committee in hearings of 7 September 2017.⁵²²

6.127 When asked to describe the Accountability Round Table (ART), the Chair of the ART Anti-Corruption Working Group told the Committee that:

It is a group of mainly retired professional, academic and learned people of a completely non-partisan variety. Barry Jones, for example, is one of our members. We have a variety of people. Tim Smith, David Harper and I were Supreme Court judges.

⁵¹⁸ *Transcript of Evidence*, 1 September 2017, p. 92.

⁵¹⁹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 92.

⁵²⁰ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 92.

⁵²¹ Mr Ken Archer, *Transcript of Evidence*, 1 September 2017, p. 92.

⁵²² *Transcript of Evidence*, 7 September 2017, p. 149.

Alan Goldberg, who recently died, was a Federal Court judge. It is completely non-partisan.⁵²³

6.128 He told the Committee that the ART was:

...interested in transparency and accountability in government, and matters such as an anti-corruption commission are very much involved in that. We are looking at political donations, how they might be better disciplined. The attempt to obtain access to parliamentarians which is not available to the public is another one of our very serious concerns.⁵²⁴

DEFINITIONS OF CORRUPTION

6.129 In hearings of 7 September 2017 the Committee asked questions regarding definitions of corruption, noting that there appeared to be some difficulties with definitions in Victoria where they had resulted in high thresholds for investigations, and asking as to what was the most suitable definition.⁵²⁵

6.130 In responding, the Chair of the of the ART Anti-Corruption Working Group told the Committee that:

The New South Wales definition is the widest. It covers practically anything. Anywhere that the commissioner thinks there may be corruption, in effect, he or she is allowed to investigate.⁵²⁶

6.131 In the Victorian case, he told the Committee, the ‘absolute reverse’ applied:

It was a bitter complaint of ours at the time the act was set up that the definition did not even include misconduct in public office. In effect it tied the definition to the question of an indictable offence. There were some statutory offences made—conspiracy and bribery of public officials—but what we found was that the definition of corruption was so narrow that you could not even investigate misconduct in public office.⁵²⁷

6.132 As a result, he told the Committee:

The first commissioner, Stephen O’Bryan, told his investigators that before they could start they had to be able to identify the indictable offence that was involved. Also, the

⁵²³ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 149.

⁵²⁴ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 149.

⁵²⁵ *Transcript of Evidence*, 7 September 2017, pp. 149–150.

⁵²⁶ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵²⁷ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

first form of the act in 2011, when it was set up, said that the commissioner had, in effect, to be able to articulate the facts giving rise to that indictable offence, and that it was serious corruption, before they could even start an investigation using the powers in the act.⁵²⁸

6.133 He told the Committee that this had been ‘improved slightly by the Andrews government, because they have at least added misconduct in public office to the definition’, but ‘apart from cases of that kind’, ‘they still have to find an indictable offence’. Although the threshold had been ‘reduced slightly’, there were still ‘quite unacceptable barriers in place before the Victorian IBAC can commence an investigation’.⁵²⁹

6.134 A key problem, he told the Committee, was that people ‘suspected of corruption were usually well heeled’, and that as ‘soon as they found that there was an investigation underway, they moved in, seeking Supreme Court injunctions to stop the investigation proceeding’. The result was that ‘the investigator has to lay all the cards on the table, showing what they have’, and this created an ‘opportunity for obfuscating, hiding and destroying evidence’ that was ‘enormous’. In addition, ‘the delay that follows is critical’.⁵³⁰

6.135 This, he told the Committee, was why it was ‘desirable to go to the wider end’, as found in the definitions provided to the NSW ICAC, and this was ‘one of the reasons why that has been so successful’. The failings of the ICAC were due to ‘completely different reasons’.⁵³¹

6.136 In response to further questions regarding definitions, the Chair of the ART Anti-Corruption Working Group told the Committee that the relevant Act in Queensland was ‘often held up as being the one with the best all-round performance’, but that the ‘width’ of the NSW ICAC legislation was ‘desirable as a starting point’.⁵³²

ACCOUNTABILITY FOR POLICE

6.137 In hearings of 7 September 2017 the Committee asked questions regarding appropriate arrangements to provide accountability for police.⁵³³

6.138 In responding to the question, the Chair of the ART Anti-Corruption Working Group told the Committee that NSW had ‘a separate body looking after police integrity’:

⁵²⁸ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵²⁹ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵³⁰ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵³¹ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵³² Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁵³³ *Transcript of Evidence*, 7 September 2017, p. 151.

They always took the view that it was desirable to have some sort of office of police integrity, and former Justice James Wood took the view that it was desirable to separate that body from the ICAC.⁵³⁴

6.139 When asked as to why Justice Wood took that view, the Chair of the ART Anti-Corruption Working Group told the Committee it was because ‘he thought that the police were very clever and if you have them in the same body the police will get into that and stop you having effective investigation of corruption’.⁵³⁵

6.140 He noted that in Victoria the IBAC did have jurisdiction over police complaints, and that the Andrews’ government was ‘pursuing IBAC to take on a great deal more of a load in investigating the police’, and told the Committee that this was ‘fine so long as there is adequate finance and so long as there is a large enough workforce’.⁵³⁶

6.141 He told the Committee that if the IBAC in Victoria was ‘required to investigate, say, all of these police chases leading to deaths in Mildura and have separate teams going out for that’, then it would need to ‘double’ its present workforce and ‘have an increase of about \$30 million in their annual budget’. He told the Committee that there was concern within the IBAC that ‘legislation goes through requiring them to do this’, it would ‘dramatically curtail their ability to conduct the civil investigations’.⁵³⁷

PUBLIC OR PRIVATE PROCEEDINGS

6.142 In hearings of 7 September 2017 the Committee asked questions regarding the advisability of any future ACT anti-corruption commission holding its hearings publicly or in private.⁵³⁸

6.143 In responding, the Chair of the ART Anti-Corruption Working Group told the Committee that the NSW ICAC, when he ‘spoke to the people there’ in 2011, ‘they had a rule of thumb to have at least one public hearing per month’, ‘regardless of the demands of the individual case’. He thought this had been put in place by ICAC Commission David Ipp who, he said, had ‘had the view that you had to keep this body out in front of the public, to keep people’s minds fixed on corruption and the need to raise it’.⁵³⁹

⁵³⁴ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 151.

⁵³⁵ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 151.

⁵³⁶ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 151.

⁵³⁷ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, pp. 151–152.

⁵³⁸ *Transcript of Evidence*, 7 September 2017, p. 152.

⁵³⁹ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

6.144 This practice had, in the view of the Chair of the ART Anti-Corruption Working Group, led to ‘disasters, absolute disasters, with people’s reputations trashed’.⁵⁴⁰

6.145 In Victoria, the approach was different. Under Section 107 of the relevant Act, he told the Committee:

...an examination is not to be open to the public—it is barred—unless IBAC considers on reasonable grounds a number of things: that it is in the public interest; that it can be held without causing unreasonable damage to a person’s reputation; and, thirdly, that there are exceptional circumstances.⁵⁴¹

6.146 This, he told the Committee, was something that the IBAC ‘complains about’: the ‘exceptional circumstances’:

It is very difficult to assess beforehand what a court is going to think are exceptional circumstances and whether they will simply accept the assertion by the commissioner that these circumstances are exceptional.⁵⁴²

6.147 However, he told the Committee, ‘all of these bodies’ took the view, as far as he was aware that it was ‘important to have an ability to hold occasional public hearings and to use that ability’. He noted that in ‘a bit over 3½ years’ there had ‘only been five public hearings by IBAC’. However, in his view the IBAC had been ‘extremely effective’, and he cited the example of Operation Ord, which brought to light fraud in the Victorian Education Department.⁵⁴³

6.148 In practice, he told the Committee the IBAC had ‘a set of well-established rules about what is going to happen when they have these public hearings’, and as a result there was ‘very little public complaint in Victoria about the holding of public hearings’, and ‘the only real question’ was whether requirements for ‘exceptional circumstances’ for public hearings should remain in statute.⁵⁴⁴

EVIDENCE GIVEN BY A SUSPECT UNDER COMPULSION CANNOT BE USED IN LATER COURT PROCEEDINGS

6.149 In hearings of 7 September 2017 the Committee noted provisions in supporting legislation for the Victorian IBAC to make evidence given by a suspect under compulsion not able to be used

⁵⁴⁰ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

⁵⁴¹ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

⁵⁴² Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

⁵⁴³ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

⁵⁴⁴ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 153.

in later court proceedings, and asked whether the Chair of the ART Anti-Corruption Working Group was in favour of such provisions.⁵⁴⁵

6.150 In responding, the Chair of the ART Anti-Corruption Working Group told the Committee that:

What usually happens is that, when you have a ring of people that are involved, you have done your preliminary inquiries and you know who are the constituents, A, B, C, D and E, and you take the view that the one that you really want to prosecute is A, you will then get evidence from B, C, D and E which will enable you to prosecute A. You may then, as well, get A in public or in-camera hearings and cross-examine, but you cannot use that evidence.⁵⁴⁶

6.151 He told the Committee that in his view this was ‘very important’, and was ‘the only way of going about it’.⁵⁴⁷

6.152 At this point the Committee asked whether the Chair of the ART Anti-Corruption Working Group was in favour of powers such as those held by the NSW ICAC, that is to make findings that a person has engaged in corrupt conduct rather than resorting to proceedings under criminal law.⁵⁴⁸

6.153 In responding, the Chair of the ART Anti-Corruption Working Group told the Committee that he was ‘very concerned’ about ‘at least a couple of findings that have happened in the ICAC’ in which, he said, ‘people have been found guilty of corruption, have lost their positions and have been prevented from getting public service situations’.⁵⁴⁹

6.154 In the case of Kear, he told the Committee, the accused was ‘charged with offences where the onus of proof was on him to establish his innocence’. Although he ‘succeeded before the magistrate’, he still had not ‘had the finding against him removed’, and the Chair of the ART Anti-Corruption Working Group thought this ‘an abomination’. In light of this, he told the Committee, ‘an exoneration protocol’ should be put in place to deal with this kind of scenario.⁵⁵⁰

⁵⁴⁵ *Transcript of Evidence*, 7 September 2017, p. 155.

⁵⁴⁶ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 155.

⁵⁴⁷ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 155.

⁵⁴⁸ *Transcript of Evidence*, 7 September 2017, p. 155.

⁵⁴⁹ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 155.

⁵⁵⁰ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 155.

7 VIEWS PUT FORWARD IN HEARINGS—ACT POLICING INTEGRITY FRAMEWORK

- 7.1 The Committee considered integrity frameworks for ACT Policing. In connection with this, ACT Policing and the Australian Commission for Law Enforcement Integrity (ACLEI) appeared before the Committee in hearings.⁵⁵¹

ACT POLICING

- 7.2 The Chief Police Officer (CPO), ACT Policing, and the National Manager—Reform, Culture and Standards, Australian Federal Police (AFP), appeared before the Committee in hearings of 7 September 2017.⁵⁵²

- 7.3 In her opening statement, the CPO told the Committee that:

Whilst I am not an expert in the range of ACT oversight mechanisms that exist, I can assure the committee that ACT Policing members, as members of the AFP and thereby commonwealth officers, are the subject of long-established, robust integrity frameworks and internal and external oversight mechanisms to detect, disrupt and deter corruption. These include AFP professional standards, the Commonwealth Ombudsman and the Australian Commission for Law Enforcement Integrity.⁵⁵³

- 7.4 She told the Committee that the AFP integrity framework had been ‘recognised as the benchmark for Australian government agencies’, and that ‘AFP professional standards provide ongoing advice and support to other agencies to strengthen their integrity frameworks’.⁵⁵⁴

- 7.5 In addition, the AFP’s integrity framework was subject to ‘continuous reviews’ by ACLEI and the Commonwealth Ombudsman, and other measures.⁵⁵⁵

- 7.6 She told the Committee that the ACT Government had the ‘reassurance’ of regulation 18 of the Law Enforcement Integrity Commissioner Regulations 2017, which established:

⁵⁵¹ *Transcript of Evidence*, 7 September 2017, pp. 116 ff. and 134 ff.

⁵⁵² *Transcript of Evidence*, 7 September 2017, p. 116.

⁵⁵³ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

⁵⁵⁴ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

⁵⁵⁵ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

...a mechanism for the relevant ACT government minister, in this instance the Minister for Police and Emergency Services, to be informed about ACLEI's activities when investigating serious corruption and systemic corruption as defined by the [*Law Enforcement Integrity Commissioner Act 2006 (Cth)*].⁵⁵⁶

- 7.7 She told the Committee that ACT Policing detailed 'misconduct and corruption allegations and finalised investigations' in its annual report and in 'regular reporting to the Minister for Police and Emergency Services'.⁵⁵⁷
- 7.8 She also told the Committee that ACT Policing was 'also a tool which is currently used to investigate broader corruption' in the ACT.⁵⁵⁸ In this capacity, she told the Committee, the 'majority of ACT Policing's work in this field' was 'referral-based', but 'proactive investigations' were conducted 'where appropriate'.⁵⁵⁹

VIEWS ON THE DESIGN OF A FUTURE ACT ANTI-CORRUPTION COMMISSION

- 7.9 In her opening statement, the CPO told the Committee that it was the view of ACT Policing that 'rather than create duplication and a requirement for deconfliction with other integrity bodies, the current framework as it applies to ACT Policing and the broader AFP would remain'. She told the Committee that this position was 'supported by the testimony of the ACT Ombudsman and the submission of ACLEI', and that both of these bodies had 'expressed their confidence in the current ACT Policing oversight integrity arrangements'.⁵⁶⁰
- 7.10 She told the Committee that should an ACT anti-corruption commission be established, ACT Policing 'would support the commission having appropriate powers, governance and capability' to deliver 'a range of outcomes from education to the prosecution of serious corruption and systemic corruption', and that such a commission 'would need to be appropriately funded to deliver a scalable and flexible capability', at 'significant cost to the ACT government'.⁵⁶¹
- 7.11 She told the Committee that in such a scenario:

⁵⁵⁶ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

⁵⁵⁷ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

⁵⁵⁸ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 117.

⁵⁵⁹ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 118.

⁵⁶⁰ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶¹ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

The delivery or supplementation of investigative services by ACT Policing and/or the broader AFP would not only be an efficient and effective means to establish and maintain a scalable and flexible investigative capability, it would also be consistent with the AFP's current working relationship with ACLEI at the commonwealth level.⁵⁶²

- 7.12 'An additional benefit', she told the Committee, 'of drawing on these resources' would be that 'those police would remain under the scrutiny of the existing internal and external integrity frameworks' while 'conducting integrity investigations on behalf of an ACT independent integrity commission'.⁵⁶³

DUPLICATION

- 7.13 In hearings, the Committee noted concerns expressed by the CPO regarding duplication of oversight over officers of ACT Policing, and asked as to why she considered that such a duplication would occur when, if an ACT anti-corruption commission were created, the jurisdiction of the ACLEI over ACT Policing would be removed.⁵⁶⁴
- 7.14 In responding, the CPO told the Committee that this would be 'quite a complicated process' in that 'if you look at how ACT Policing delivers its service, we have the benefit of being able to leverage off the broader AFP often and regularly', and as a result 'actually delineating those members who you would say were full-time ACTP members' was 'not always straightforward'.⁵⁶⁵
- 7.15 The CPO told the Committee that the ACT Government provided 'funding for a whole range of support services for the ACT police'. When, for example, it required support on weekends, 'whether it be negotiators or tactical response', these were 'actually commonwealth members under outcome 1 of AFP delivering a service to ACT Policing'.⁵⁶⁶ As a result, she told the Committee, 'it would be like a bowl of spaghetti that you would be trying to unravel in terms of that oversight requirement'.⁵⁶⁷
- 7.16 At this point, the National Manager—Reform, Culture and Standards, Australian Federal Police, also made comment. He told the Committee that:

Thinking about it in terms of the entire AFP workforce, we would have people who move through ACT Policing, get great career opportunities and experience here, then

⁵⁶² Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶³ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶⁴ *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶⁵ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶⁶ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 119.

⁵⁶⁷ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, pp. 119–120.

move on to do other things, and vice versa. Not only for the individuals but for us, in trying to stay on top of any sense of systemic corruption or issues, having all that information together is pretty important. I guess that there would be challenges in terms of the individual moving in and out of the jurisdiction.⁵⁶⁸

7.17 In response to further questions, the CPO told the Committee that:

The internal process is, of course, for the purposes of administration, payroll et cetera. They then go on the ACT books. However, as I indicated, some of the services delivered to ACT are provided by the AFP nationally.⁵⁶⁹

7.18 When asked if officers performing day-to-day duties were ‘signed over’, in an administrative sense, to ACT Policing, the CPO told the Committee that this was indeed the case. She also told the Committee that ‘on occasion ... we have members to develop their capability currently working in AFP headquarters doing national work, and vice versa’.⁵⁷⁰

7.19 Following on from this discussion, the Committee asked a series of questions about how many corruption matters had been investigated in the context of ACT Policing over recent years, and the arrangements, currently in place, through which ACT Policing dealt with such matters.⁵⁷¹

7.20 Later in hearings, the Committee put the view that it was a community expectation that the ACT would have oversight over its own police force—that is, ACT Policing—and asked why that arrangement should not apply.⁵⁷²

7.21 In responding, the CPO told the Committee that there were ‘a couple of reasons why not’:

One is that I would argue that the oversight that currently exists is working well. That has been supported by other independent parties, including ACLEI and the commonwealth Ombudsman. It is a well-tested and robust framework. And, as I indicated, the current arrangements have been seen as being best practice and are being benchmarked across other agencies. I guess the point is, in simple terms: if it is not broken, don’t fix it.⁵⁷³

⁵⁶⁸ Assistant Commissioner Ray Johnson, *Transcript of Evidence*, 7 September 2017, p. 120.

⁵⁶⁹ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 120.

⁵⁷⁰ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 120.

⁵⁷¹ *Transcript of Evidence*, 7 September 2017, pp. 123, 124–127, 129–130.

⁵⁷² *Transcript of Evidence*, 7 September 2017, p. 132.

⁵⁷³ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 132.

7.22 Secondly, she told the Committee ‘mechanisms do exist for the ACT government to have oversight’. As to whether that was ‘being adequately capitalised on’ or could be ‘enhanced or improved’, was a question for the Committee to consider.⁵⁷⁴

7.23 She went on to say:

I am just saying that I think there is a range of strategies that could be employed to address the concerns that you have raised, one of which would be to have an independent commission. But I also think that you could explore enhancing the current arrangements and reporting arrangements that exist.⁵⁷⁵

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

7.24 The Australian Commission for Law Enforcement Integrity (ACLEI) appeared before the Committee in hearings of 7 September 2017.⁵⁷⁶

7.25 The Integrity Commissioner—Mr Michael Griffin AM, Executive Director, and General Counsel of the ACLEI appeared before the Committee.

REPORTING MECHANISMS

7.26 In hearings of 7 September 2017 the Committee asked the ACLEI to describe its process and in particular its practice as regards reporting.⁵⁷⁷

7.27 In responding, the Integrity Commissioner told the Committee that:

...what might exercise the mind of the committee, as it does for the public when they look at an agency like mine, is probably the issue that is best considered in the terms of Justice Finn’s famous Blackburn lecture where he talked about public trust for public officials. The issue is: what is going on there? What is happening behind those closed doors?⁵⁷⁸

7.28 He told the Committee that:

⁵⁷⁴ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 132.

⁵⁷⁵ Assistant Commissioner Justine Saunders, *Transcript of Evidence*, 7 September 2017, p. 132.

⁵⁷⁶ *Transcript of Evidence*, 7 September 2017, p. 134.

⁵⁷⁷ *Transcript of Evidence*, 7 September 2017, p. 134.

⁵⁷⁸ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, pp. 134–135.

The way we seek to achieve that end, that is, the confidence of the public, is through a variety of reporting mechanisms. The first and probably the most powerful is if we have an investigation, we find corruption, we detect it, we investigate it, we expose it. It may or may not involve criminal offending. If it involves criminal offending, a brief will be prepared and provided to the relevant authority, which is usually the Director of Public Prosecutions. That is where the rule of law exposes what has happened in the public proceedings in a courtroom. So the eventual end is exposed properly in a court of law if it is a criminal matter.⁵⁷⁹

- 7.29 Alternatively, if it were an administrative matter, it was a different process, 'as it is in all government departments, be they state, federal or local government, in fact, where there are code of conduct issues'. He told the Committee that a matter 'may not be criminal' but nevertheless 'raises an integrity issue'.⁵⁸⁰
- 7.30 After considering briefly distinctions between 'corruption', 'corrupt conduct', and 'integrity', he told the Committee that where matters are considered to be an 'administrative issue', the ACLEI would 'send it back to the AFP' because 'under my legislation I must give priority to serious and systemic corruption'.⁵⁸¹
- 7.31 He told the Committee that if it was a matter 'of lesser severity', he 'might refer it back to the AFP to deal with', and then the AFP would 'go through the standard process that all government departments do, be it federal, state or local government code of conduct'. He told the Committee that this was 'usually reviewable in the courts' and was 'reported' if it was considered either by the federal Administrative Appeals Tribunal, the Fair Work Commission or the courts if an appeal were launched alleging an error of law.⁵⁸²
- 7.32 However, in response to further questions, the Integrity Commissioner told the Committee that matters referred back to the AFP, because considered 'administrative', the ACLEI did not report them since matters 'we are not expending our resourcing on ... we will not report on'.⁵⁸³
- 7.33 However, he agreed that such matters would be reported by the AFP under its annual reporting obligations.⁵⁸⁴

⁵⁷⁹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 135.

⁵⁸⁰ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 135.

⁵⁸¹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 135.

⁵⁸² Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

⁵⁸³ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

⁵⁸⁴ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

7.34 At this point, the Integrity Commissioner noted contrasting approaches that had been adopted in two other jurisdictions. He told the Committee that in NSW:

...after the Tink review, it was decided to take all the minor offending, the lower level police allegations that used to be dealt with by the New South Wales Ombudsman, and put that into the new commission called the Law Enforcement Conduct Commission.⁵⁸⁵

7.35 However, he told the Committee:

Exactly the opposite happened in WA in 2015, where what used to be dealt with by their anti-corruption commission, that was the lower level stuff, was moved to the Public Sector Commission.⁵⁸⁶

7.36 These were, he told the Committee ‘completely opposing philosophies’ about what to do with ‘administrative offending’ rather than ‘criminal offending’: that is, ‘misconduct’ rather than ‘corruption’.⁵⁸⁷

7.37 Following on from this discussion, the Committee asked the Integrity Commissioner what happened in instances where matters—considered criminal—were referred to the Director of Public Prosecutions (DPP) but the DPP chose not to proceed.⁵⁸⁸

7.38 In response, the Integrity Commissioner told the Committee the matter ‘comes back to us’:

As well as providing the evidence to the appropriate authorities to prosecute if I consider that there is a threshold case, I will then usually await the outcome of the court proceedings so that I do not run the risk of muddying the waters for the court or for the people who are appearing before the court.⁵⁸⁹

7.39 ‘Once that is completed’, he told the Committee, he would ‘then proceed with my statutory obligation to provide reports to the minister’. He would complete that ‘because I am not making findings there of criminal conduct, but of whether or not there has been corrupt conduct’.⁵⁹⁰

⁵⁸⁵ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

⁵⁸⁶ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

⁵⁸⁷ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 136.

⁵⁸⁸ *Transcript of Evidence*, 7 September 2017, p. 137.

⁵⁸⁹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 137.

⁵⁹⁰ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 137.

- 7.40 When asked whether such reports were provided to federal or ACT ministers when matters arose in connection with ACT Policing, the Integrity Commissioner told the Committee that in those instances both minister would receive reports.⁵⁹¹

PUBLIC OR PRIVATE PROCEEDINGS

- 7.41 The Committee asked the ACLEI about its practice on investigating matters in public or private proceedings.⁵⁹²

- 7.42 In responding, the General Counsel told the Committee that the ACLEI was ten years old, and in that time it had never held a public inquiry or a public hearing.⁵⁹³

- 7.43 When asked why this was the case, the Integrity Commissioner told the Committee that this was ‘almost entirely a function of what we investigate and those criteria that I mentioned to you’.⁵⁹⁴ The first criterion was:

...whether or not the hearing is likely to involve confidential information. As you would appreciate, that covers a whole range of things. It could be contractual information, commercial-in-confidence. It could be psychology-in-confidence—a person or their family may have psychological issues. It may be medical-in-confidence. It may be legal-in-confidence. So I have to look at that and give consideration to that.⁵⁹⁵

- 7.44 A second criterion was ‘whether or not there may be allegations of criminal offending’:

Is this going to be potentially of a criminal nature? How would my public inquiry affect the rule of law that I adverted to before—that is, the primacy of the courts? Am I going to muddy the waters for the courts? Am I going to prejudice the defence of somebody who has been charged with an offence? Am I going to expose a whistleblower in those circumstances? So I have regard to all of that material.⁵⁹⁶

- 7.45 A third criterion was ‘the unfair prejudice to a person’s reputation’:

The way the legislation is framed, if you think of those words, it is actually quite interesting. It does not say “unfairness to a person” or “prejudice to a person’s reputation”; it is “unfair prejudice to a person’s reputation” We could probably spend

⁵⁹¹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 137.

⁵⁹² *Transcript of Evidence*, 7 September 2017, p. 140.

⁵⁹³ Ms Penny McKay, *Transcript of Evidence*, 7 September 2017, p. 140.

⁵⁹⁴ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 140.

⁵⁹⁵ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

⁵⁹⁶ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

all day talking about what just those words mean, but I have to give consideration to that in light of the other things.⁵⁹⁷

7.46 However, he told the Committee, ‘the paramount consideration for me, because of what we are looking at, is that the type of corruption’. By definition, he told the Committee, in a law enforcement environment this was ‘deeply concealed’, ‘what we refer to as a “deep dive”’. This required ‘extensive investigation and intelligence analysis by quite sophisticated methods that we have available to us’.⁵⁹⁸

7.47 As a result, he told the Committee:

We do not want to be blowing the trumpet that the cavalry is coming by holding public hearings, just as police and other investigative agencies do not conduct their investigations in public until such time as the criminality or the corruption is almost ready to be identified. We do not want to run the risk of prejudicing the investigation. To date, that is the reason why I, two other commissioners and one acting commissioner have not held a public hearing. It is the nature of the material.⁵⁹⁹

7.48 A final consideration, the Integrity Commissioner told the Committee, was ‘whether or not it is in the public interest that the hearing take place in public’. He told the Committee that he had always to ‘cognisant of the saying that sunlight is the best form of antiseptic’, and he ‘completely’ understood and agreed with that.⁶⁰⁰

7.49 Discussion later in hearings also considered this matter. In the context of this discussion, the Integrity Commissioner told the Committee that how to deal with the challenge of ‘reassuring the public’ was ‘an interesting matter’. Proceedings in court were the ‘the traditional and best way to do that because of the protections available to people who are wound up in that process’. However, agencies as the ACLEI should also ‘increase the amount of information provided to the public’, as the ACLEI was attempting to do through its website.⁶⁰¹

⁵⁹⁷ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

⁵⁹⁸ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

⁵⁹⁹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

⁶⁰⁰ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 141.

⁶⁰¹ Mr Michael Griffin AM, *Transcript of Evidence*, 7 September 2017, p. 147.

8 VIEWS PUT FORWARD IN HEARINGS— INTERESTED CITIZENS

8.1 The following interested citizens appeared before the Committee in the course of its inquiry:

- Mr Jack Waterford;
- Mr Quentin Dempster;
- Mr Tony Harris;
- Ms Rhyl Hurley; and
- Ms Marea Fatseas.

8.2 Views put by these individuals in hearings (with the exception of Ms Fatseas) are considered below. As noted previously, the views put forward by Ms Fatseas are set out in chapter six.

MR JACK WATERFORD

8.3 Mr Jack Waterford appeared before the Committee in hearings of 24 July 2017.⁶⁰²

ROLE AND VALUE OF ANTI-CORRUPTION COMMISSIONS

8.4 In his opening statement, Mr Waterford, among other things, told the Committee that there were ‘certain fundamental ways in which corruption and maladministration in government differ from ordinary crime as we know it’. Most crime was committed ‘by the underclass’, and most was ‘impulsive, opportunistic’ and committed ‘without giving any particular thought to ... implications’, and as a result deterrence was of limited use in preventing it.⁶⁰³

8.5 In contrast, he told the Committee, ‘corrupt behaviour by politicians or officials or by the people who procure or benefit from it is rather more likely to be calculated crime’. The people who conducted it were, ‘generally speaking, people of the middle class’, people who ‘consider the consequences of their behaviour and in particular consider whether they are going to get caught and what the consequences might be’.⁶⁰⁴

8.6 These consequences, which were ‘not going to be changed by the legislature’, were:

⁶⁰² *Transcript of Evidence*, 24 July 2017, p. 41 ff.

⁶⁰³ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 42.

⁶⁰⁴ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 42.

...disgrace, being removed from your job and public life, and never being able to conduct it again. You will probably have to leave town, but even then, thanks to the internet or something, your disgrace will accompany you forever.⁶⁰⁵

8.7 He went on to say that:

The question is: are you going to get caught doing it? It is my experience that people think about that very carefully. I often urge public servants to think, when they are considering what they are going to do, “Just imagine to yourself how you are going to explain that to the estimates committee when you are being asked about it.” That involves a calculus: is the estimates committee likely to get into it? Sometimes there are places where there are heavy levels of scrutiny and the chance of getting caught is high. There are places where, frankly, the level is very low.⁶⁰⁶

8.8 In light of this, he told the Committee, ‘the presence of active anti-corruption bodies, the mere existence of them, is a substantial deterrent’ to corrupt conduct, and he was ‘in favour of such a thing even if it were not necessarily to be absolutely inundated with cases’: the ‘mere fact that it was there and was looking for things to do’ would make ‘some people a little alarmed’ and provide a deterrent.⁶⁰⁷

GAPS AND VULNERABILITIES IN THE CURRENT INTEGRITY FRAMEWORK

8.9 Mr Waterford told the Committee that he did not think the ACT ‘a particularly corrupt place’ in the sense that it had ‘a particularly poor calibre of public servant or politician or police officer or other type of official’. He thought that in the ACT there were ‘the normal propensities of people who attempt it and the normal propensities of people who are going to succumb to such temptation’.⁶⁰⁸

8.10 However, ‘in certain respects the ACT provides more temptations than some other jurisdictions of equivalent size’, due to the fact that private industry in this town is particularly focused in a few areas which depend particularly on concessions, licensing and grants *[from]* government’:⁶⁰⁹

There are so many parts of what passes as industry in Canberra or in other parts of Australia that turn on dealings with government. That is why in this town, partly also because we are a national capital, we have such a heavy lobbying industry and why

⁶⁰⁵ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 42.

⁶⁰⁶ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 42.

⁶⁰⁷ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, pp. 42–43.

⁶⁰⁸ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶⁰⁹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

information is such an important currency. In that sort of environment I think it particularly important that we have very strong and powerful things.⁶¹⁰

- 8.11 In light of this, he told the Committee, he favoured an ACT anti-corruption commission which had ‘a very broad remit’, which should ‘cover maladministration as much as outright corruption’,⁶¹¹ because there were:

...things that happen in any community, including in this town, which do not amount to taking or soliciting of bribes or anything like that but which amount to the wasteful use of public resources and very poor stewardship.⁶¹²

- 8.12 Mr Waterford went on to provide an example:

I was in a suburb relatively recently and noticed that finally, after what must be seven or eight years, some work on a long boarded-up service station is about to begin. In truth, that service station should have been forfeited to the government about seven years ago—if it closed eight years ago—because the land laws of the ACT are set against land banking and are set against land speculation. If you have got property in the ACT you should be occupying it, you should be building on it. If you do not want it you should be forfeiting it.⁶¹³

- 8.13 A similar principle, he told the Committee, should apply to Civic, which was ‘increasingly shut up by whole streets, in effect, almost boarded up without any business going on because of the existence of the Canberra mall’.⁶¹⁴

- 8.14 Regarding this, he told the Committee:

The ACT government, like the commonwealth government on its behalf beforehand, the old Department of Territories, has long failed to enforce lease purpose clauses. Whether that is right or wrong—and there are some people who think that if you do you frighten off private business or something like that; I think that is a nonsense—the impact is that there is a massive loss of revenue to the ACT. It also, as I say, encourages secondary land speculation.⁶¹⁵

- 8.15 This, Mr Waterford told the Committee, was an example of ‘what you might call maladministration’. He knew of ‘no evidence whatever that indicates anybody has taken a

⁶¹⁰ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶¹¹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶¹² Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶¹³ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶¹⁴ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

⁶¹⁵ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 43.

bribe or anything like that', but it was 'costing the citizens of the ACT', including insofar as it 'reduced capacity to enjoy Civic as it ought to be'.⁶¹⁶

- 8.16 Other matters he considered of concern included gambling and liquor in the ACT, and 'people who are associates of government'. In this regard, he noted that 'the ACT is the jurisdiction which most generously subsidises politicians from the public purse', providing '\$8.50 a vote', but had 'the least effective laws involving political donations in Australia'. A *quid pro quo* should apply so that 'that if we are going to give public money', there should be 'transparency, openness and full disclosure of all office bearers, including at the sub-branch level of politicians'.⁶¹⁷

- 8.17 In this regard, he told the Committee:

When you talk about associated agencies or bodies and whatnot, you also think of people whose corporate memberships of political parties—including, if you are in the Liberal Party, the Cormack Foundation in Victoria; or if you are in the Labor Party, you might think of things like the Labor clubs and the trade union movements, which give very generous donations to the Labor Party—mean that their party political and government-oriented activities should be subject to scrutiny.⁶¹⁸

- 8.18 Noting examples in NSW, Mr Waterford put the view that persons of influence who were involved in lobbying government, and who had close associations with government, 'should be part of the purview' of an ACT anti-corruption commission.⁶¹⁹
- 8.19 In this sense, he told the Committee, there was 'a special need' in the ACT due to the presence of 'bodies which seem to have many hats, often simultaneously worn and it is never quite clear which is which'.⁶²⁰
- 8.20 He told the Committee that it was problematic that it was 'not always apparent which role is being played when there are land transfers, when deals are being made', and that the public was becoming 'increasingly cynical about appearances of insider trading and so on'.⁶²¹

⁶¹⁶ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 44.

⁶¹⁷ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 44.

⁶¹⁸ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 44.

⁶¹⁹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 44.

⁶²⁰ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 45.

⁶²¹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 45.

OVERSIGHT OF AN ACT ANTI-CORRUPTION COMMISSION OVER ACT POLICING

- 8.21 In hearings of 24 July 2017, Mr Waterford told the Committee that he believed that it was ‘absolutely critical’ that the police force of the ACT be subject to the scrutiny of an ACT anti-corruption commission.⁶²²
- 8.22 He told the Committee that ‘that the existing AFP integrity controls’, whether it was ‘ACLEI or various other things’, were ‘weak and unsatisfactory and not befitting the ACT’. Although the ACT paid ‘Rolls-Royce prices’ for policing services from the Australian Federal Police it received ‘a very ordinary return for it’ as the ‘calibre of the police force’ was not high, and the calibre of its work was ‘very poor’:⁶²³
- ...the police force has never been proactive in searching out crime in the ACT. They love the publicity associated with matters such as terrorism and work against drugs because there is nobody to gainsay what they claim ...⁶²⁴
- 8.23 Mr Waterford told the Committee that he was concerned that ACT Policing were ‘not very good at solving our local murders’ or ‘local burglaries’. In his view, ‘its systems, starting with its ACLEI’, were ‘hopeless and inept and just simply do not get it’. He could ‘think of a number of eyebrow-raising matters involving ACT Police that could be, should be, affecting the ACT’ and which ‘could be, should be, the subject of external inquiry’.⁶²⁵

CURRENT ACT INTEGRITY FRAMEWORK

- 8.24 Mr Waterford made comment on the current ACT integrity framework at various points in hearings of 24 July 2017.
- 8.25 He told the Committee that the activity of the ACT Ombudsman had ‘become very low profile’, and that had, as a result of ‘mistakes of government, particularly at the federal level, has become compromised by being given additional watchdog functions’.⁶²⁶
- 8.26 He also said, however, that the ACT was ‘very blessed in that it has got an activist Auditor-General’ which, he said, could ‘make politicians’ lives unhappy’, but was ‘almost the only operating check and balance’, ‘apart from a reasonably active media’ that operated in the ACT.⁶²⁷

⁶²² Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 45.

⁶²³ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 45.

⁶²⁴ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 45.

⁶²⁵ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 46.

⁶²⁶ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 46.

⁶²⁷ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 46.

8.27 At a later point in hearings, Mr Waterford told the Committee that:

In relation to perceptions of corruption even when general government policy is being followed, I think an endemic problem in the ACT—and I am not being partisan about this—is that the things that would guarantee that the public was reasonably satisfied that things were occurring, which is to say by way of an at-a-distance, impartial public tender, rather than an announcement out of the blue that somebody had been selected to do this, would dispel a lot of those perception problems.⁶²⁸

8.28 Mr Waterford told the Committee that the ACT Auditor-General had ‘had some very critical things to say about the way this has happened in practice’, but that her ‘focus so far has been on a very narrow range of transactions’.⁶²⁹

8.29 In his own comment, he told the Committee, he had referred to an ‘appearance of cronies and mates’ in the operation of government in the ACT, by which he meant that ‘these are not processes of tender or open competition’, but gave ‘the impression of being arranged over lunch’. Although, he said, this was ‘not necessarily with money changing hands’, it was ‘very untidy looking’ in terms of public sector integrity.⁶³⁰

PARLIAMENTARY OVERSIGHT OF AN ACT ANTI-CORRUPTION COMMISSION

8.30 In hearings of 24 July 2017 the Committee asked questions regarding parliamentary oversight of a future ACT anti-corruption commission.⁶³¹

8.31 In responding, Mr Waterford told the Committee that:

There should be parliamentary oversight, obviously, and I think that the parliamentary oversight should also be assisted, although in a separate sort of process, by something of the order of an inspector or whatnot. I would not necessarily recommend the New South Wales types of chaps, because I think that more than a bit of jealousy and other things have percolated through the brawls that are occurring in New South Wales about the roles of inspectors of ICAC. But I think that an ICAC needs its own scrutiny, its own auditing, and a certain amount of critical at-a-distance sort of continual review, and that includes parliamentary review.⁶³²

8.32 However, he told the Committee, it should not be ‘too intimate’:

⁶²⁸ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 52.

⁶²⁹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 52.

⁶³⁰ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 52.

⁶³¹ *Transcript of Evidence*, 24 July 2017, p. 47.

⁶³² Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 47.

One of the great problems of the ACT is over-intimacy by everybody. Even good and honest people, including politicians, are continually meeting people who have been involved in transactions before. The political class knows virtually everybody, and we are constantly tripping over each other at functions and so forth, and it leads not just to ambiguity and whatnot but often also to bad impressions, I might say generally, of corruption as well.⁶³³

8.33 He told the Committee that:

...just as it is said that the appearance of bias is as bad as the fact of bias, sometimes the appearance of corruption is as bad as the fact of it. This is a particular reason why politicians, people at the high executive levels of government, should eschew too much direct involvement in decision-making matters such as money.⁶³⁴

8.34 In this regard, he told the Committee, the ‘Faulkner style of reforms that occurred during the Rudd government period’, in which ‘government basically withdrew from all but a very limited number of government appointments and patronage, or from approval of tenders and whatnot’, were ‘much to be welcomed’.⁶³⁵

MODELS FOR A FUTURE ACT ANTI-CORRUPTION COMMISSION

8.35 In response to questions from the Committee about striking a balance between supporting public confidence and protecting the reputations of persons under consideration by an ACT anti-corruption commission, Mr Waterford outlined a preferred model for the activity of such a commission.⁶³⁶

8.36 He told the Committee that such a commission operated:

...first of all as an organisational body which says, “What are we going to do? What are we going to focus on?” They look, if you like, for smoke and begin investigations. They have various powers—coercive, intrusive et cetera—and they exercise them.⁶³⁷

8.37 It was ‘when they get to a prima facie stage, when there is some smoke behind this fire’, that questions over whether hearings would be conducted, and whether they would be conducted in public, would arise.⁶³⁸

⁶³³ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 47.

⁶³⁴ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 47.

⁶³⁵ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 47.

⁶³⁶ *Transcript of Evidence*, 24 July 2017, p. 51 ff.

⁶³⁷ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

⁶³⁸ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

8.38 He told the Committee, with regard to this question, that there were ‘many people’ who expressed concern about allegations made in public hearings, who would ‘point to various ruined reputations’, such as Eddie Obeid or Ian Macdonald in NSW.⁶³⁹ However, he told the Committee:

The fact is that in relation to those sorts of inquiries, they were under investigation for 18 months beforehand. They had been extensively bugged, monitored, surveilled et cetera. They were the subject not of a spray of unbriefed allegations or whatever but of a carefully focused inquiry.⁶⁴⁰

8.39 This, he told the Committee was ‘the model for a proper ICAC or IC sort of body’.⁶⁴¹

8.40 Regarding reputational damage, he told the Committee:

I struggle to think in Australia of reputations traduced in the sense that everybody purports to fear. It is fairly obvious to me that the sorts of people who express most concern about it—and they include politicians, I might say—are the sorts of people who would have most to fear, because they are involved in the exercise of power and do not greatly welcome scrutiny of their decision-making process.⁶⁴²

8.41 At a later point in hearings, in response to questions, Mr Waterford told the Committee that:

A wide and embracing thing based on the New South Wales legislative model is the ideal, but I think that an IC sort of body should be a little bit grand about this and decide what they are going to investigate and what they are going to pass on to other bodies. It should not depend on reference from below so much as on a broad jurisdiction from above.⁶⁴³

MR QUENTIN DEMPSTER

8.42 Mr Quentin Dempster appeared before the Committee in hearings of 1 September 2017.⁶⁴⁴

⁶³⁹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

⁶⁴⁰ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

⁶⁴¹ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

⁶⁴² Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 51.

⁶⁴³ Mr Jack Waterford, *Transcript of Evidence*, 24 July 2017, p. 52.

⁶⁴⁴ *Transcript of Evidence*, 1 September 2017, p. 94 ff.

OPENING STATEMENT

- 8.43 In his opening statement, Mr Dempster told the Committee about sources of risk for integrity. In this regard, he told the Committee:

The risk from internal cultures which can become conducive to corruption is greater where decision-makers procure products, services or material, act as the consent authority for property development which can enrich proponents, and administer and award small, medium and large contracts. That is where the risk is.⁶⁴⁵

- 8.44 He told the Committee that:

In politics, the risk of compromise of integrity comes from political donations with unseen strings attached. I refer to slush funding by vested interests—industry or individuals—to, in effect, buy policy concessions—liquor, gaming, poker machine policy, for example—and the vested interest influence peddling which can come with that. That can even be applied through vested interest influence peddling down to political party preselection, branch stacking; all the games that adversarial political parties play.⁶⁴⁶

- 8.45 He told the Committee that ‘Westminster-style parliaments sometimes redeem themselves, as far as public interest exposure of questionable conduct is concerned, through questions on notice’; noted that ‘under parliamentary privilege, members, through their informants and constituents, can raise things’; and that parliamentary Committees could ‘look at problems, call witnesses and gather evidence’.⁶⁴⁷

- 8.46 However, he told the Committee, the ‘trouble with corruption is that it is conducted in secret with sometimes sophisticated countermeasures to avoid detection deployed by the corrupt’.⁶⁴⁸

- 8.47 Mr Dempster also spoke about the role and scope of anti-corruption commission. Referencing a view, put forward elsewhere, that ‘any investigative body set up with coercive powers ... should only be engaged in the pursuit of systemic corruption’, he told the Committee that this was not, in his view, correct.⁶⁴⁹

⁶⁴⁵ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 94.

⁶⁴⁶ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 94.

⁶⁴⁷ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 94.

⁶⁴⁸ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 95.

⁶⁴⁹ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 95.

- 8.48 Rather, quoting former NSW ICAC commissioner David Ipp QC that every ‘evidentiary thread had to be pulled’,⁶⁵⁰ Mr Dempster stated that:

Operation Jasper, the ICAC’s biggest investigation into ministerial misconduct, started with an anonymous phone call. “You should look at corruption in coal licences in the Bylong Valley,” the anonymous caller said. “A cabinet minister is involved.”

Investigators discovered a secret deal in which an exploration licence had been created by ministerial direction, not by the department’s mining specialists, with beneficiaries to gain a windfall potentially of \$600 million. So you do not know where the evidence will lead, if you have substantive evidence coming from an informant.⁶⁵¹

- 8.49 A further area he highlighted in his opening statement was that ‘any anti-corruption body’s obligation’ was to ‘to protect its informants’: ‘those courageous people who can put their lives, livelihoods and future employability on the line to help all of us expose corruption’. He told the Committee that witness protection was ‘problematic’. While there were ‘protocols for witness protection’, it was not desirable to have informants ‘live their lives under witness protection’, because it was, in his view, ‘appalling’.⁶⁵²

DEFINITIONS OF ‘CORRUPTION’

- 8.50 In commenting on the appropriateness and robustness of the definition of corrupt conduct in the NSW ICAC Act, Mr Dempster told the Committee:

I noticed that the definition survived the ICAC inquiry set up by Mike Baird, with Gleeson, a former Chief Justice, and McClintock. They left the definitions as they stood, because you are looking at more than criminality. But it is a pretty good list. I think it has stood the test of time since 1988 and I think those definitions have been adopted by other jurisdictions.⁶⁵³

WITNESS PROTECTION

- 8.51 In hearings of 1 September 2017, the Committee asked further questions regarding witness protection in the context of anti-corruption commission inquiries.⁶⁵⁴

⁶⁵⁰ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 95.

⁶⁵¹ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 95.

⁶⁵² Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 95.

⁶⁵³ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 102.

⁶⁵⁴ *Transcript of Evidence*, 1 September 2017, p. 95.

- 8.52 In responding to the question, Mr Dempster provided an example of where, in the Wollongong *Dirty, Sexy Money* NSW ICAC investigation, ‘the informant was fully protected’:⁶⁵⁵

The secrecy of the operation was quite clearly established. But somebody inside that council made quite good observations about what was really going on, informed the ICAC and said, “You should look here.” They started an operation, got a reference and, after they saw that the evidence was substantive, they went to do a raid and used their coercive powers appropriately. But no-one ever knew who the informant was. I thought that was a very good outcome because that person could get on with their lives.⁶⁵⁶

PRIVATE OR PUBLIC HEARINGS

- 8.53 In hearings of 1 September 2017 the Committee asked questions as to the whether an ACT anti-corruption commission should conduct public or private hearings.⁶⁵⁷

- 8.54 In responding to the question, Mr Dempster provided an example. He told the Committee that:

In breaking the viciousness of police corruption and the code of silence in Queensland and New South Wales, when they wired undercover police officers who had rolled over—that concept of rolling over—they made the rollovers earn their indemnity. They had to go in and give evidence.⁶⁵⁸

- 8.55 This, he told the Committee, had been, ‘problematic for those individuals, even though they have redeemed themselves, as it were’.⁶⁵⁹ However, he told the Committee ‘the accuracy of the information’ was ‘the most important thing’, and noted that there were ‘other ways to get information’ which could be employed by a ‘good investigation’.⁶⁶⁰

- 8.56 The Committee also considered this question at a later point in hearings, where Mr Dempster told the Committee that:

It is the experience of all these investigators, from Fitzgerald through to the Wood royal commission, that the public hearing—when they determine operationally—sometimes you do not have to have one; you have enough admissible evidence to make findings already and the accountabilities will flow with that without you having to

⁶⁵⁵ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 96.

⁶⁵⁶ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 96.

⁶⁵⁷ *Transcript of Evidence*, 1 September 2017, p. 96.

⁶⁵⁸ *Transcript of Evidence*, 1 September 2017, p. 96.

⁶⁵⁹ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 96.

⁶⁶⁰ *Transcript of Evidence*, 1 September 2017, p. 96.

call in a lawyer or go through the process of a public hearing. But the advantage is in people coming out of the woodwork, the public coming out of the woodwork, when they can see that the anti-corruption body is fair dinkum about exposing it.⁶⁶¹

- 8.57 Mr Dempster told the Committee that he had been impressed by statements by Geoffrey Watson, counsel assisting the NSW ICAC under David Ipp:

Just imagine for one moment that the work of the Royal Commission into Institutional Child Abuse had been conducted privately, not publicly: no-one would have trusted the processes, and the fine work done by that Royal Commission would have been lost to us—it would have been a pointless exercise. Worse—it would have perpetuated the secrecy which has surrounded those terrible activities.⁶⁶²

- 8.58 Mr Dempster also noted the comments of David Ipp, former commissioner of the NSW ICAC, on the importance of public proceedings in restoring public confidence and encouraging greater attention to good practice on the part of public officials.⁶⁶³

ARTICULATION WITH OTHER INTEGRITY BODIES

- 8.59 In hearings of 1 September 2017 the Committee noted the other integrity bodies currently in operation in the ACT, and asked Mr Dempster for his view on the best way for an ACT anti-corruption commission to fit into this structure.⁶⁶⁴
- 8.60 In answering the question, Mr Dempster noted that in connection with proposals for a federal anti-corruption commission, similar considerations had been canvassed: in that context the presence of the Australian Federal Police, the Public Service Commission and other bodies.⁶⁶⁵
- 8.61 Advocates for standing commissions, he told the Committee, held that such bodies did not have coercive investigative powers, and quoted a recent paper to the effect that:

Although the AFP has strong investigative powers it can only use them to investigate corruption when it is a Commonwealth crime. This means that many forms of

⁶⁶¹ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 100.

⁶⁶² Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 100, quoting Geoffrey Watson SC, (2017) 'The Darkest Corners: The case for a federal integrity commission', Conference keynote: Accountability and the Law 2017, pp. 14–15, viewed 26 September 2017, available at: <http://www.tai.org.au/sites/default/files/Watson%20-%20The%20darkest%20corners.pdf>

⁶⁶³ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 100, quoting David Ipp AO QC, (2017) 'Accountability and the Law: Anti-corruption Agencies in Australia', Conference Opening—Accountability and the Law 2017, p. 9, viewed 26 September 2017, available at <http://www.tai.org.au/sites/default/files/ipp%20-%20Accountability%20and%20the%20Law.pdf>

⁶⁶⁴ *Transcript of Evidence*, 1 September 2017, p. 99.

⁶⁶⁵ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 99.

misconduct covered by state based anti-corruption commissions are not investigated by the AFP as they are not crimes.⁶⁶⁶

8.62 And that:

This means that it cannot investigate any behaviour that affects the impartial and honest conduct of public office, which the state anti-corruption commissions define as corrupt conduct ...⁶⁶⁷

8.63 Mr Dempster went on to say that this constituted a gap in 'powers to uncover what happens in secret', and that this gap consisted of the absence of coercive powers from those available to existing investigating bodies.⁶⁶⁸

FINDINGS OF CORRUPT CONDUCT

8.64 In hearings of 1 September 2017 the Committee asked questions as to whether it was desirable for anti-corruption commissions to have the power to make findings of corrupt conduct.⁶⁶⁹

8.65 In responding, Mr Dempster told the Committee:

If you really want prosecutions to be a benchmark, looking at Queensland, New South Wales and others, if you have not got that, I think you should have that, because if you have to make a decision on whether you recommend public hearings or not, that would be important as an attachment.⁶⁷⁰

8.66 He told the Committee that there had been a:

...view that came out of New South Wales from the most unpleasant Jasper and Spicer investigations, which went right into Macquarie Street, right up into the political parties, into the federal Liberal Party and the federal Labor Party. It was awfully embarrassing and everybody ducked for cover. There was this view that if you make people run a gauntlet of media cameras to go into the hearing room, that is reputational damage already. Some people were saying it was a show trial even though

⁶⁶⁶ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 99, quoting Hannah Aulby, (2017) 'The case for a federal corruption watchdog: ICAC needed to fill the gaps in our integrity system', Australia Institute discussion paper, p. 9, viewed 26 September 2017, available at: <http://www.tai.org.au/sites/default/files/P380%20Case%20for%20a%20federal%20ICAC.pdf>.

⁶⁶⁷ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 99, quoting Hannah Aulby, (2017) 'The case for a federal corruption watchdog: ICAC needed to fill the gaps in our integrity system', p. 9.

⁶⁶⁸ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 100.

⁶⁶⁹ *Transcript of Evidence*, 1 September 2017, p. 101.

⁶⁷⁰ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 101.

all the ICAC's procedural fairness was subject to judicial review in the Supreme Court and even up into the High Court, which is appropriate if you are worried about abuse of power.⁶⁷¹

- 8.67 Mr Dempster told the Committee that he had interviewed Tony Fitzgerald QC, the commissioner for the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, known as the 'Fitzgerald inquiry'. Mr Dempster told the Committee that:

In my interview questions of him, Fitzgerald was dealing with this point. In his inquiry into National Party corruption and police corruption in Queensland, he did not make any declarative findings that "Joh Bjelke-Petersen is corrupt. I find him to be corrupt under the terms and definitions of the act." They did find that he took bags of cash from developers and that the police commissioner took bags of cash from the bagman and various conduits. All that corruption was exposed. Then they went and appointed a special prosecutor, which went through the fair process of criminal proceedings some years after that.⁶⁷²

- 8.68 He went on to say that:

Fitzgerald came to the view that you do not need to make declarative findings that "I find you to be not a credible witness," to make adverse remarks, or to say, "You are corrupt under the definition." That is because, even if no prosecution results from that or prosecutions do result and the person is acquitted, that person, with a Google-able world, now has to live with that finding for the rest of their life. He said that because it is the rule of law, and justice would indicate that that is a grave detriment to a person, why have it? I thought that made sense for all of the parliamentarians struggling with what was right about reputational risk as well as the need to expose corruption.⁶⁷³

⁶⁷¹ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 101.

⁶⁷² Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 102.

⁶⁷³ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 102.

WHETHER ACT POLICING SHOULD BE SUBJECT TO AN ACT ANTI-CORRUPTION COMMISSION

8.69 In hearings of 1 September 2017, the Committee asked questions as to whether ACT Policing should be subject to the jurisdiction of an ACT anti-corruption commission.⁶⁷⁴

8.70 In responding, Mr Dempster told the Committee:

I think you should have external oversight. We have learnt that. With external oversight, the more eyes you have, everybody watching, for all the right reasons, the better so that we do not have malignant cultures and abuse of power does not occur—anything that the parliament can do to have external oversight. We have learnt a hell of a lot about external oversight of police forces around the world since the police culture was so vicious in the 50s, 60s, 70s, 80s and started to be cleaned up in the 1990s. The police got on with the discharge of their honourable duties. I am sure there is still some police corruption and I am sure there is still some abuse of power. We all make misjudgements and what have you. But the accountability with external oversight would be a very wise thing.⁶⁷⁵

MR TONY HARRIS

8.71 Mr Tony Harris, former NSW Auditor-General, appeared before the Committee in hearings of 1 September 2017.⁶⁷⁶

DEFINITIONS OF 'CORRUPTION'

8.72 In his opening statement, Mr Harris told the Committee that it was in his view important to provide a useful definition of 'corruption', and that it was not 'only illegality that is the subject of corrupt finding'.⁶⁷⁷

8.73 In the Metherill affair in NSW, he told the Committee, he had not been able to 'ascertain whether there was an illegality'. There appeared to be 'an abuse of power by the Premier in order to enrich his political advantages', but:

⁶⁷⁴ *Transcript of Evidence*, 1 September 2017, p. 103.

⁶⁷⁵ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 103.

⁶⁷⁶ *Transcript of Evidence*, 1 September 2017, p. 107 ff.

⁶⁷⁷ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 107.

...there was no subsequent criminality chased against him, and he was found, of course, not to be corrupt by the appeals court on a technicality, the technicality being that there was no code of conduct at the time against which he could be measured.⁶⁷⁸

- 8.74 Without that finding from the Court of Appeals—that no crime had been committed—Mr Harris told the Committee, the Premier of the time ‘would have been found to have been corrupt’.⁶⁷⁹
- 8.75 In light of this, Mr Harris told the Committee that corruption was ‘not only an illegality’, and that sometimes ‘a finding of corruption’ was ‘actually important to finalise the matter when there is no illegality’.⁶⁸⁰
- 8.76 Later in hearings the Committee questions regarding definitions of corruption.⁶⁸¹
- 8.77 In responding, Mr Harris told the Committee that ‘the three or four pages of corrupt activities listed in the ICAC will give you a good start’, and seemed ‘to have survived the times’.⁶⁸²
- 8.78 He told the Committee that in the Commonwealth he had ‘subject to three, I think, issues of corruption of ministers from time to time’. One of them ‘concerned a request’ by a minister ‘that I waive criminal charges’. He told the Committee that he ‘would like to see that as corruption’, due to ‘the power imbalance between me and a minister, who can persuade the Prime Minister to fire me at any time’, and due to ‘the seriousness of the event’.⁶⁸³
- 8.79 ‘The same minister’, he told the Committee, asked him ‘to make a public service decision in favour of a person who happened to be the mistress of his ministerial friend’, and he would like that to be considered to be corruption as well, ‘because, again, you come under great pressure’.⁶⁸⁴

PUBLIC HEARINGS

- 8.80 In hearings of 1 September 2017 the Committee asked questions as to the advisability of an anti-corruption commission holding public hearings.⁶⁸⁵

⁶⁷⁸ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 107.

⁶⁷⁹ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 107.

⁶⁸⁰ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 107.

⁶⁸¹ *Transcript of Evidence*, 1 September 2017, p. 110.

⁶⁸² Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 110.

⁶⁸³ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 110.

⁶⁸⁴ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 110.

⁶⁸⁵ *Transcript of Evidence*, 1 September 2017, p. 108.

8.81 In responding, Mr Harris told the Committee that he thought it ‘terribly important to have public hearings to tell the public that this is a working mechanism and it is effective’, and that if ‘you do not have public hearings the kind of trust that you wish to elicit from the public in governmental processes will be missing, because they will just believe that everything is hidden is everything not done’.⁶⁸⁶

8.82 Regarding the potential for reputational damage as a result of appearing in a public hearing, Mr Harris told the Committee that he thought there was no greater risk in this regard than if a person had appeared in court as the subject of proceedings.⁶⁸⁷

8.83 ‘In any event’, he told the Committee, the ICAC did not ‘have public hearings out of the blue: they ‘occur after a lot of work is done’; were ‘not frivolous’; and ‘are too expensive to be frivolous’.⁶⁸⁸

8.84 At a later point in hearings, the Committee asked questions regarding the basis for Mr Harris’ views on the efficacy of public hearings by anti-corruption commissions.⁶⁸⁹

8.85 In responding, Mr Harris told the Committee:

There is one person in the past 20 years who has successfully appealed against a corruption finding in New South Wales, and that was under a rather cute view of the law administered by the appeals court. Their findings have not been able to be offset in the law in the main. So they are not frivolous when they come to that kind of finding. Secondly, there are people who appear before it and you might say their reputations are ruined, but I do not think they are. I mean, I do not think that the Premier who resigned because he had forgotten a bottle of Grange resigned because he was in front of the ICAC as a material witness; he resigned because, as he said, “It is impossible to forget that I received a bottle of Grange,” and, having got the evidence that he did receive a bottle of Grange, he had to resign. So people who appear before it are not necessarily tarnished. Their reputation is not necessarily tarnished. I think the public can see that what they did is what matters, not the fact that they were there as a witness.⁶⁹⁰

8.86 He also told the Committee that:

They found Joe Tripodi, who unfortunately was the chairman of my public accounts committee, to be corrupt. I thought, “Thank goodness it has emerged,” because you

⁶⁸⁶ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 108.

⁶⁸⁷ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 108.

⁶⁸⁸ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 108.

⁶⁸⁹ *Transcript of Evidence*, 1 September 2017, p. 109.

⁶⁹⁰ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 109.

could see it well before the event. The public hearing helps the public understand what is going on. It helps the public know that the government, broadly defined, is at work, and it gives them some comfort that something is being done about corruption.⁶⁹¹

- 8.87 Further, with regard to decisions to hold public hearings, Mr Harris agreed that these were taken after ‘extensive work and investigation’, and told the Committee that although to some it seemed that the question of whether to hold public or private hearings was ‘very black and white’, those in favour of public hearings made ‘the observation that it comes after a fair bit of preliminary work’, and was ‘well past that prima facie moment rather than just any old case suddenly becoming a public hearing’.⁶⁹²

RESPONSIBILITIES OF PUBLIC OFFICERS

- 8.88 In hearings of 1 September 2017 Mr Harris made comment on what he regarded as the responsibility of public officers to report corruption.⁶⁹³

- 8.89 He told the Committee that in NSW directors-general ‘have an obligation in New South Wales to advise the ICAC of any suspected corruption’, and that:

Actually every public officer has that obligation. I would try to load that up to give some protection to public officers. Tony Lauer, when he was commissioner of police, once said to me, rather ironically, I thought, “Any policeman who sees corruption and does nothing about it is corrupt.” I thought that was a very welcome admission. I think that we should say the same about public officers. If there is any corruption they see and do not report, they are corrupt.⁶⁹⁴

- 8.90 He told the Committee that:

Why did all this material about Obeid and coal mines occur? It occurred partly because the public service was captured by the government under contracts where they could be fired without notice and without reason at any time. A number of them learned it from the press. They were heads of department one moment and the press rang them up and said, “What do you feel about being fired?” They said, “Am I fired?” “Yes, you are.” That capture of the public service, and putting the public service in slavery to the political process, was a very important reason why this was not discovered earlier. There are people who knew precisely what was happening, who had senior positions in the government, and they did nothing. They ought to have been burdened with the

⁶⁹¹ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, pp. 109–110.

⁶⁹² Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 110.

⁶⁹³ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 109.

⁶⁹⁴ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 109.

responsibility that if they did nothing then they themselves had some consequences of that.⁶⁹⁵

INTERFACE WITH GOVERNMENT

8.91 In hearings of 1 September 2017 the Committee asked questions as to whether an anti-corruption commission should have powers to investigate not only public officials, politician and political staffers, but also persons and entities which provide good and services under contract to government.⁶⁹⁶

8.92 In responding, Mr Harris told the Committee:

Yes. If you look at the wealthiest people in Australia, they have got their wealth from dealing with government; whether it is the Rineharts or whoever they are, they have got licences. What is the saying? “A licence to print money.” People like dealing with the government because the government has all of this wealth attached to it, not only in terms of revenue but in terms of powers that it can exercise in a person’s favour.⁶⁹⁷

8.93 He told the Committee that in light of this it was important ‘to try to capture those people’.⁶⁹⁸ There were precedents for this in powers given to other bodies:

The commonwealth Auditor-General is now allowed to chase the money. The commonwealth Auditor-General’s powers are not restricted only to what the department spends; they can follow the cheque, for example, into charities, to see what the charity is doing. They can follow the cheque into business, to see that the business, whether it is building a frigate or not, is not wasting commonwealth money or seeing that it is not using it corruptly.⁶⁹⁹

8.94 In light of this, Mr Harris asked why, ‘if we have given that power to the Auditor-General to chase money’, should not the same power be given ‘to the commissioner to chase corruption?’⁷⁰⁰

⁶⁹⁵ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 109.

⁶⁹⁶ *Transcript of Evidence*, 1 September 2017, p. 112.

⁶⁹⁷ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 112.

⁶⁹⁸ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 112.

⁶⁹⁹ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 113.

⁷⁰⁰ Mr Tony Harris, *Transcript of Evidence*, 1 September 2017, p. 113.

MS RHYL HURLEY

8.95 Ms Rhyl Hurley appeared before the Committee in hearings of 1 September 2017.⁷⁰¹

MODEL FOR AN ANTI-CORRUPTION COMMISSION

8.96 In her opening statement, Ms Hurley told the Committee that an ACT anti-corruption should 'have wide powers over a wide jurisdiction of those receiving ACT government moneys', to 'investigate complaints of misconduct and corruption' and to 'pursue publicly accountable outcomes'.⁷⁰²

8.97 Such a commission, she told the Committee, 'should have education, prevention, discipline and advisory functions'. While the judiciary and police 'should be outside the jurisdiction' their roles and capabilities were 'essential to the work of the integrity commission'.⁷⁰³

8.98 Because the ACT was 'a relatively small jurisdiction' which already had 'an established integrity system', she was concerned about 'cost, duplication, lines of responsibility and meaningful results which meet public expectations and which give public explanations'. In light of this, getting 'the relationships right' was 'really crucial'. There must be 'clear accountability to the parliament and to the people', including 'through an annual report with quantitative analysis of complaints, outcomes and actions'.⁷⁰⁴

8.99 Ms Hurley told the Committee that in her view:

- the AFP 'should be co-opted for investigation but not be a part of the administrative structure';
- post-investigation outcomes 'should include making disciplinary decisions and managing a remediation program';
- criminal activity 'should be referred to a law enforcement agency; and
- non-criminal misconduct [should be] addressed through a transparent process between the commission and the relevant agency or individual'.⁷⁰⁵

8.100 In addition, she told the Committee:

- independent and 'realistic' levels of funding should be 'assured';

⁷⁰¹ *Transcript of Evidence*, 1 September 2017, p. 77 ff.

⁷⁰² Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 77.

⁷⁰³ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 77.

⁷⁰⁴ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 77.

⁷⁰⁵ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 78.

- an anti-corruption commission should have a primary relationship ‘with parliament rather than with the government’;
- it was worthwhile considering a role for the ACT Supreme Court as an ‘external reviewer’; and
- that oversight of an anti-corruption commission could be provided by way of an ‘officers of parliament committee’ in the Legislative Assembly.⁷⁰⁶

PUBLIC HEARINGS

8.101 In hearings of 1 September 2017 the Committee asked questions as to whether public hearings were a useful in connection with operations of anti-corruption commissions.⁷⁰⁷

8.102 In responding, Ms Hurley told the Committee that:

public hearings are valuable from the point of view that, first of all, they give some rigour to the regime so that the public can see exactly what is happening; and there are always rules and caveats around public hearings that make them as protective as possible of people’s reputations.⁷⁰⁸

8.103 In addition, she told the Committee:

If somebody is called to a public hearing, they are usually a person who is in the public eye, so they have a responsibility to the public to answer questions or to justify whatever they have been doing.⁷⁰⁹

⁷⁰⁶ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 78.

⁷⁰⁷ *Transcript of Evidence*, 1 September 2017, p. 80.

⁷⁰⁸ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 80.

⁷⁰⁹ Ms Rhyl Hurley, *Transcript of Evidence*, 1 September 2017, p. 80.

PART 4—VIEWS OF THE COMMITTEE

9 JURISDICTIONAL INTEGRITY CONTEXT

- 9.1 This chapter surveys the current ACT integrity landscape, and vulnerabilities and gaps in the existing ACT public sector and parliamentary integrity framework.

THE CURRENT ACT PUBLIC SECTOR AND PARLIAMENTARY INTEGRITY FRAMEWORK

- 9.2 The current ACT public sector and parliamentary integrity framework was summarised in the Committee’s discussion paper released in March 2017. This framework included detail on what are referred to in the literature as integrity agencies that comprise the institutional pillars in what is defined as a National Integrity System. These agencies whilst belonging to the category of non-departmental public bodies (NDPB), established by enabling legislation to be at arm’s length from government, stand further apart from government than most NDPBs⁷¹⁰ by virtue of their role and functions in the integrity space and their relationship with the Parliament. Aside from the parliamentary integrity stakeholders, the other bodies profiled in the discussion paper are those considered to be the quintessential watchdog bodies and for this reason play a central role in the encouragement, establishment, protection and maintenance of an integrity system—together with designated anti-corruption bodies.⁷¹¹
- 9.3 ‘Integrity’ is a system of specific agencies and distributed integrity measures such as policies, practices, codes, laws and regulation that collectively build and maintain integrity, transparency and accountability in the public sector.⁷¹²
- 9.4 It is noted that the ACT Public Sector Standards Commissioner’s submission outlined, in her view, the current integrity-related ‘oversight’ bodies and their roles in ACT. The Commissioner

⁷¹⁰ As Thynne has highlighted—NDPBs where the organisation is given a managerial or executive function ‘as an executive agent of government’, it must be closely attuned to the powers and responsibilities of government itself. However, if it has a quasi-judicial role, such as, an administrative tribunal, it needs to be associated closely with the exercise of judicial power by the courts. And if, like an ombudsman or audit office, it has a checking role on government itself, ‘it will need to be structured and equipped to relate well to the legislature...at some distance from the government’ [Thynne, I. (2006) ‘Statutory bodies: how distinctive and in what way?’, *Public Organization Review*, Vo. 6 (3), p. 173.]

⁷¹¹ Submission No. 30—Roger Wettenhall and Chris Aulich.

⁷¹² Pope, J. (2000) *Confronting Corruption: The Elements of a National Security System* (TI Source Book 2000), Transparency International, Berlin; Submission No. 30—Roger Wettenhall and Chris Aulich, p. 2.

was of the view that it was important to have a clear understanding of the existing integrity mechanisms and that any newly proposed structure would need to take account of these roles.⁷¹³

- 9.5 The ACT Ombudsman advanced that it was important to define the gaps and vulnerabilities in integrity and oversight in the existing ACT integrity system to identify opportunities for corruption and effective counter response.⁷¹⁴

- 9.6 As to the current ACT parliamentary integrity framework, the Clerk was of the view that:

...the jurisdiction of an independent integrity commission as it concerns MLAs should be clearly delineated and narrow. A commission should not be given the function to investigate or to form judgements in relation to matters which properly fall within the domain of the Assembly to look after its own affairs—i.e. in relation to possible contempts, breaches of the standing orders or Assembly resolutions (including the code of conduct and declaration of members' interests requirements).

These matters should continue to be dealt with, for the most part, by the existing arrangements based on relevant parliamentary procedure, statute and constitutional provisions. The establishment of an independent integrity commission should not have the effect of displacing the Assembly Commissioner of Standards arrangements but with some modifications.⁷¹⁵

- 9.7 Further, as it concerns the staff of MLAs, the Clerk submitted that consideration should be given to the:

...jurisdiction of the Commissioner of Standards, the Assembly itself, and any putative integrity commission to investigate the conduct of members' staff, including staff employed by ministers, employed under the *Legislative Assembly (Members' Staff) Act 1989*.⁷¹⁶

- 9.8 It is acknowledged that the jurisdiction of any anti-corruption body must respect the separation of powers as it concerns Parliament and the Judiciary. Judicial independence and parliamentary privilege should always be maintained. An anti-corruption body's jurisdiction would be expected to cover those areas where the standing regulatory capacities of either Parliament or the Judiciary are vulnerable, limited or lacking.

⁷¹³ Submission No. 19—ACT Public Sector Standards Commissioner.

⁷¹⁴ Submission No. 29—ACT Ombudsman, p. 5.

⁷¹⁵ Submission No. 3—Clerk, ACT Legislative Assembly, pp. 30–35.

⁷¹⁶ Submission No. 3—Clerk, ACT Legislative Assembly, p. 39.

- 9.9 As to the current ACT Public sector integrity framework as it applies to policing integrity—ACT Policing was of the view that:

The AFP has significant and robust internal and external integrity mechanisms—which reduce the need for ACT Policing to also be subject to ACT Independent Integrity Commission oversight.

...coverage of ACT Policing by an ACT based integrity body would create duplication and a requirement for de-confliction with other integrity bodies—on this basis ACT Policing proposes that the current framework as it applies to ACT Policing and the broader AFP is adequate.⁷¹⁷

- 9.10 In its supplementary submission, ACT Policing reaffirmed this position, and indicated to ‘the extent that the ACT Government seeks greater understanding of AFP [*Australian Federal Police*] complaints management, integrity trends and issues, ACT Policing would consider, in collaboration with the ACT Government, the provision of what further information can be provided to achieve continued assurance for the Canberra community about their policing service’.⁷¹⁸
- 9.11 In contrast, a contributor was of the view that there were grounds for a detailed review of the efficacy of the existing police complaints process in the ACT and suggested that consideration be given to enhancing the current police complaints processes.⁷¹⁹

VULNERABILITIES AND GAPS IN THE EXISTING ACT INTEGRITY FRAMEWORK

- 9.12 As noted previously, in considering the question of whether the ACT needs a designated or stand-alone integrity body the matters of: (i) jurisdictional attributes and characteristics specific to the ACT; (ii) perceived levels of trust in government and public administration; and (iii) the current ACT public sector and parliamentary integrity framework—are all relevant.
- 9.13 Discussion concerning the matters of: (i) jurisdictional attributes and characteristics specific to the ACT; and (ii) perceived levels of trust in government and public administration are considered in chapter two.

⁷¹⁷ Submission No. 25—ACT Policing, p. 8.

⁷¹⁸ Submission No. 25a—ACT Policing supplementary submission, p. 4.

⁷¹⁹ Submission No. 7—Jon Stanhope, p. 1.

- 9.14 In assessing whether there are vulnerabilities and gaps in the existing ACT public sector and parliamentary integrity framework—the following observations are made in relation to key integrity agencies.

AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

- 9.15 Whilst the Australian Commission for Law Enforcement Integrity (which has coverage of the AFP and by extension ACT Policing) is functionally equivalent to state-based anti-corruption type bodies, its jurisdiction is Commonwealth law enforcement agencies.

ACT PUBLIC SECTOR STANDARDS COMMISSIONER

- 9.16 The ACT Public Sector Standards Commissioner is responsible for: promoting integrity in the ACT Public Service (ACTPS) and investigating misconduct. The Commissioner investigates misconduct by inquiring into whether the ACTPS Code of Conduct has been breached. In doing so the Commissioner's powers are limited to those of a Director-General (or equivalent), in that they are unable to: require people to give evidence or produce documents; enter or search premises; and to hold public hearings. Further, the ACTPS Code of Conduct only applies to ACTPS employees and its jurisdiction would cease where an employee subject to investigation is no longer an ACTPS employee.

ACT OMBUDSMAN

- 9.17 The ACT Ombudsman's primary focus is on resolution of complaints brought to it by individuals. Whilst the Ombudsman has significant investigatory powers and can conduct own motion investigations through which it may uncover systemic issues, its investigative focus is limited to matters arising from administration, meaning that it cannot investigate corrupt conduct that would be defined, for example, as behaviour impacting on the impartial function of public office. As to jurisdiction, the Ombudsman cannot investigate MLAs, the Judiciary or actions where parliamentary privilege applies. Further, it conducts investigations in private.
- 9.18 According to Hoole and Appleby (2017), these characteristics are both 'a source of institutional strength and weakness'. Whilst the privacy that surrounds the Ombudsman's work can assist with facilitating the resolution of complaints in a constructive manner, at the same time it may limit public awareness of the extent to which this work contributes to public integrity.⁷²⁰

⁷²⁰ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017.

- 9.19 Further, as Hoole and Appleby (2017) have noted ‘an emphasis on privacy and “soft power” may diminish the Ombudsman’s capacity to deter the worst instances of corruption’.⁷²¹ As to reports by the Ombudsman after an investigation, in the first instance reports are provided to the relevant agency and the responsible minister of the agency concerned.⁷²² It would seem, as it concerns independence, the Ombudsman is therefore required ‘to consult a Minister before including findings that are critical of government in a public report’.⁷²³

ACT AUDITOR-GENERAL

- 9.20 The ACT Auditor-General, is an independent Officer of the Assembly and has a financial and performance auditing role. Performance audits examining aspects of the efficiency, effectiveness and economy of government performance can be similar in scope to systemic inquiries undertaken by the Ombudsman. The Auditor-General would have the broadest jurisdiction of ACT Government agencies and entities and this coverage is supplemented by the Auditor-General’s ability to examine issues on a cross-portfolio, inter-institutional and inter-jurisdictional basis.⁷²⁴
- 9.21 The financial auditing function (a crucial feature of any government accountability framework) together with the performance audit function (and related powers) provides the Auditor-General with a robust and flexible capacity to serve as an integrity-promoting institution. This coverage is coupled with institutionalised protections for independence and transparency as per its public reports. The Auditor-General has follow the money powers, meaning it can look at third parties (non-public sector entities) at the request of a Minister or the Public Accounts Committee⁷²⁵ or on its own initiative if satisfied that specific criteria have been met.⁷²⁶
- 9.22 The Auditor-General’s role does not include the investigation of complaints *per se* and the extent to which they may have exposure to integrity and corruption issues arise in the main as incidental (not as a primary role) to their ‘broader mandate relating to the scrutiny of public sector performance and financial management’.⁷²⁷

⁷²¹ Hoole, G. and Appleby, G. (2017) ‘Integrity of Purpose: Designing a Federal Anti-Corruption Commission’, Conference paper prepared for *National Integrity Conference*, March 2017.

⁷²² Refer sections 18 and 19—*Ombudsman Act 1989*.

⁷²³ Hoole, G. and Appleby, G. (2017) ‘Integrity of Purpose: Designing a Federal Anti-Corruption Commission’, Conference paper prepared for *National Integrity Conference*, March 2017.

⁷²⁴ Sections 10 and 11, *Auditor-General Act 1996*.

⁷²⁵ Section 13C, *Auditor-General Act 1996*.

⁷²⁶ Section 13D, *Auditor-General Act 1996*.

⁷²⁷ Hoole, G. and Appleby, G. (2017) ‘Integrity of Purpose: Designing a Federal Anti-Corruption Commission’, Conference paper prepared for *National Integrity Conference*, March 2017.

ACT PARLIAMENTARY INTEGRITY FRAMEWORK

- 9.23 The ACT Legislative Assembly has in place the core components of a parliamentary standards and ethics framework. This includes: a code of conduct that covers all members of the Assembly; an independent Assembly ethics adviser to advise MLAs, when asked to do so by that Member, on ethical issues concerning the exercise of their role as a Member (including the use of entitlements and potential conflicts of interest); and a Commissioner for Standards to investigate complaints (from either the public, other MLAs or members of the ACTPS) concerning alleged breaches of the Members' code of conduct or the rules relating to the registration or declaration of interests.
- 9.24 Whilst the ACT Legislative Assembly has in place the core components of a parliamentary standards and ethics framework, with an open complaint process and an investigation function, its jurisdiction is limited to MLAs and its scope of conduct falls within the standing capacity of the Assembly to regulate its affairs.
- 9.25 As it concerns the conduct of members' staff (including ministerial staff) employed under the *Legislative Assembly (Members' Staff) Act 1989*, there appears to be a regulatory gap.

ACT JUDICIARY—JUDICIAL COUNCIL AND JUDICIAL COMMISSION

- 9.26 The *Judicial Commissions Act 1994* provides an integrity framework for judicial officers⁷²⁸. The ACT Judicial Council receives, examines and refers complaints regarding the behaviour or physical or mental capacity of judicial officers. If the Council is satisfied on reasonable grounds that a complaint is wholly or partially substantiated, the Executive must appoint a Commission to examine the complaint. Whilst the judicial framework has in place the core components of a judicial standards framework—with an open complaint process, where a complaint is upheld, an investigation process with significant powers⁷²⁹; and a default to hold private hearings unless the 'Council decides on reasonable grounds that it is in the public interest for the hearing to be held in public'⁷³⁰—its jurisdiction is limited to judicial officers (as defined in the Act) and its scope of conduct falls within the standing capacity of the Judiciary to regulate its affairs.

⁷²⁸ Defined in the *Judicial Commissions Act 1994* as Judges, Associate Judges, Magistrates and Presidential Member of ACAT.

⁷²⁹ The Council is not bound by rules of evidence, but may inform itself of any matter it considers appropriate and do whatever it considers necessary or expedient for the fair and expeditious conduct of the complaint examination. The Presiding Member of a Commission may issue a search warrant, if there are reasonable grounds, to enter and search a premises and seize things of the relevant kind. The Council or Commission may also request a judicial officer undergo a medical examination.

⁷³⁰ Section 35E, *Judicial Commissions Act 1994*.

- 9.27 Further, the application of the *Judicial Commissions Act 1994*, as it concerns complaints, may be limited where the person complained about is no longer a judicial officer. The Act specifies that the Council, after a preliminary examination, may dismiss a complaint if satisfied on reasonable grounds of any of a number of grounds, including that ‘the person complained about is no longer a judicial officer’.⁷³¹

COMMITTEE COMMENT

- 9.28 In considering the aforementioned key integrity agencies/frameworks—the Committee makes the following observations:
- no integrity agency has as its core function or objective the role of investigating and exposing corrupt conduct;
 - no integrity agency has as its core function or objective the role of investigating and exposing corrupt conduct as would be defined by an anti-corruption body and accompanied with the full suite of investigative and coercive powers⁷³² that are associated with such bodies;
 - the majority of the integrity agencies cannot investigate MLAs, ministers, ministerial or members’ staff or the Judiciary. Further, the AFP’s coverage would be limited to matters of a criminal nature;
 - the current integrity framework provides a limited capacity to investigate ACT Government agencies through the convening of hearings—whether in public or in private—outside a law enforcement context. Neither the Ombudsman nor the Auditor-General can convene public hearings. Parliamentary committees can follow-up the work of the Ombudsman and the Auditor-General via inquiries which may involve public hearings; and
 - there appears to be some possible limitations related to coherence from a public perspective. This can make it increasingly difficult for complainants to navigate and determine which agency is best suited to report a concern or complaint. This can create confusion for complainants and impacts on awareness of the extent to which the work of the current bodies contribute to public integrity and public confidence in government.
- 9.29 The Committee notes the possible implications of of an integrity framework that may lack coherence is as follows:

A pitfall in diffusing integrity and anti-corruption functions across multiple institutions is that it may deny individuals, including citizens and public service employees, a prominent and accessible point of contact for reporting concerns. It may also fail to broker public confidence in and awareness of integrity activities that do not benefit from the profile and publicity of a single, well-known institution. The interrelationship

⁷³¹ Section 35E, *Judicial Commissions Act 1994*.

⁷³² Such as powers to compel witnesses and evidence, hold public and private hearings, enter and search premises, and use surveillance devices and phone intercepts.

of the institutions..., including the legal and functional scope of their jurisdiction, is confusing, requiring attention to multiple cross-referenced statutes and interpretive provisions. It is not obvious that a citizen or public servant wishing to report a serious corruption concern would know where best to start.⁷³³

- 9.30 In light of this, the Committee considers that there are gaps and vulnerabilities as it concerns mechanisms to investigate and expose 'serious' and 'systemic' corruption in public administration.
- 9.31 The Committee formed the view that a key strength of the integrity agencies, such as the Auditor-General, Ombudsman and ACLEI, for example, was the independence of these organisations.
- 9.32 The Committee notes that these gaps and vulnerabilities are accentuated by the poor public understanding of the role of some key stakeholders in the current integrity framework. This can make it increasingly difficult for complainants to navigate and determine which agency is best suited to report a concern or complaint.
- 9.33 The Committee also notes that without an appropriate agency with adequate powers and comprehensive coverage of the whole public sector, corruption can remain hidden.⁷³⁴ Further, the Committee notes it has been suggested that corruption is much more likely to be exposed and dealt with in jurisdictions with anti-corruption commissions.⁷³⁵
- 9.34 As to how the vulnerabilities and gaps identified in the ACT integrity framework should be addressed, the Committee considered the following options:
- strengthening existing integrity agencies/bodies;
 - establishing an integrity body to fill the gap but as a key player in the integrity framework;
 - strengthening distributed integrity measures; or
 - a combination of all of these options.
- 9.35 The Committee believes that the option of strengthening existing integrity agencies/bodies to address the gaps and vulnerabilities, for example, with additional powers and functions, would not achieve the desired result. This is because designated integrity bodies are focused on investigating corrupt conduct, a form of behaviour that is inherently difficult to uncover or expose. Specialised agencies with this mandate are given exceptional powers to assist with

⁷³³ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017.

⁷³⁴ Victorian Public Sector Standards Commissioner. (2010) *Review of Victoria's Integrity and Anti-corruption System*, Melbourne: States Services Authority.

⁷³⁵ Wood, J. (1996) *Royal Commission into the New South Wales Police Service: Interim Report*, Sydney: Government of the State of NSW, p. 6.

such a role and which must be accompanied by a range of mechanisms to minimise the impact these powers can have on the rights of individuals under investigation. In the Committee's view such a role should rest with a body created for such a purpose. Further, the Committee is of the view that supplementing existing bodies with additional powers and tasks could also endanger the coherence of the mandated purpose of these bodies and the role they play in the integrity framework.

9.36 The Committee therefore makes the following recommendations:

Recommendation 1

9.37 The Committee recommends that the ACT Government establish a standing ACT independent integrity body to investigate corruption in public administration and strengthen public confidence in government integrity.

9.38 The Committee believes that it would be optimal to have legislation finalised for a standing ACT independent integrity body by the end of 2018. In the Committee's view this would permit a newly established body with an opportunity to commence and complete its consideration of any matters it may decide warrant investigation during this Assembly term.

Recommendation 2

9.39 The Committee recommends that the ACT Government finalise the establishment of a standing ACT independent integrity body by the end of 2018.

9.40 The Committee acknowledges the desire by contributors to the inquiry that an ACT independent integrity body be established and operational during the 9th Assembly term but equally important is that sufficient opportunity is provided for consideration regarding the final design, form, functions and powers of such a body. The Committee believes that after presentation, the Bill for the establishment of an ACT ACIC should be referred to an Assembly committee for inquiry and report.

Recommendation 3

9.41 The Committee recommends that any proposed bill for the establishment of a standing ACT independent integrity body be referred to an ACT Legislative Assembly committee for inquiry and report.

10 GUIDING PRINCIPLES INFORMING ELEMENTS OF DESIGN, FORM, FUNCTIONS AND POWERS

- 10.1 This chapter sets out the guiding principles informing the elements of design, form, functions and powers of a standing ACT independent integrity body.
- 10.2 These guiding principles follow-on from the:
- analysis of the ACT’s current integrity framework as it concerns gaps and vulnerabilities set out in the preceding chapter;
 - consideration of jurisdictional attributes and characteristics specific to the ACT (chapter 2); and
 - perceived levels of trust in government and public administration (chapter 2).

GUIDING PRINCIPLES

- 10.3 The guiding principles informing the elements of design, form, functions and powers of a standing ACT independent integrity body include:

ADDRESSING CORRUPTION REQUIRES CONSTANT VIGILANCE

- 10.4 Corruption cannot be eradicated⁷³⁶ but a risk based approach to managing its deterrence, disruption, detection and diversion is the best form of mitigation. The concept of a “zero tolerance” approach whilst giving the impression of taking a tough stand in reality its achievement is ‘unattainable...unless the activity is not performed’. Further, a “zero tolerance” creates unrealistic expectations in the community and across other key stakeholders.⁷³⁷

A STANDING INTEGRITY BODY EXISTS TO SERVE THE PUBLIC

- 10.5 A standing integrity body exists to serve the public—it needs to acquit its purpose to the ACT community and broker public confidence in and awareness of its integrity activities.⁷³⁸

⁷³⁶ Jarratt, M. (2015) ‘Corruption cannot be eradicated but government agencies can manage their risks’, *Public Sector Informant*, 2 February.

⁷³⁷ Jarratt, M. (2015) ‘Corruption cannot be eradicated but government agencies can manage their risks’, *Public Sector Informant*, 2 February.

⁷³⁸ Hoole, G. and Appleby, G. (2017) ‘Integrity of Purpose: Designing a Federal Anti-Corruption Commission’, Conference paper prepared for *National Integrity Conference*, March 2017.

This includes having visibility, being accessible and being a contact point for citizens and public servants to make complaints/and report corruption concerns.

A STANDING INTEGRITY BODY HAS A ROLE IN NURTURING PUBLIC CONFIDENCE

- 10.6 A standing integrity body has a role in nurturing public confidence in an integrity context and bringing an authoritative leadership, organising and coordinating focus to the ACT public sector and parliamentary integrity framework.

INTEGRITY IS A SYSTEM OF MEASURES AND AGENCIES THAT WORK TOGETHER

- 10.7 Integrity is a system of measures and agencies that work together—drawing on the work of Transparency International, Professors Wettenhall and Aulich note:

We follow the work of TI and others in referring to the term 'integrity' as a *system* of specific agencies, policies, practices, codes, laws and regulation that collectively build and maintain integrity, transparency and accountability in the public sector.⁷³⁹

- 10.8 With this in mind the relationships a standing ACT independent integrity body has with its integrity counterparts are important, including referral procedures, ability to monitor investigations it refers on and having the power to subsequently investigate a matter it has referred, where it felt the matter had not been adequately dealt with.
- 10.9 Its role is limited to specific areas where the standing regulatory capacities of other integrity counterparts are thought to be vulnerable or lacking. It has a role that is 'focused in areas that buttress rather than conflict with'⁷⁴⁰ the roles of other integrity counterparts.
- 10.10 It seeks to reserve to do only that investigative work which others cannot or will not do.⁷⁴¹

STANDING INTEGRITY BODIES—PERFORM A DISTINCTIVE ROLE IN AN INTEGRITY SYSTEM

- 10.11 A standing integrity body performs a distinctive role in an integrity system. This role is underpinned by virtue of their specific functions and exceptional powers. Further, the specific functions and exercising of exceptional powers thus require specialised staff with special skills.
- 10.12 Importantly, the distinctive role performed by such a body is shaped by the nature of corruption itself and the complexities associated with its exposure.

⁷³⁹ Submission No. 30—Roger Wettenhall and Chris Aulich, p. 2.

⁷⁴⁰ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017, p. 13.

⁷⁴¹ Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August.

10.13 Corruption is inherently difficult to uncover or expose because of its insidious nature and as the former NSW Premier commented in the second reading speech for the NSW Independent Commission Against Corruption (ICAC):

...corruption is by its nature *[is]* secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain. If the commission is to be effective, it obviously needs to be able to use the coercive powers of a Royal commission.⁷⁴²

10.14 A former NSW ICAC Commissioner highlights that:

The investigation and exposure of corruption is an extremely difficult task. Secrecy is at the core of corrupt conduct. Few paper trails are left and false paper trails are created. Electronic communications and continuously developing sophisticated technology are formidable means of concealing misconduct. The persons likely to be involved in large-scale corruption are usually experienced and astute and have deep pockets. They surround themselves with skilled lawyers, accountants and technical experts and are often protected politically. So, if corruption involving public office is to be fought effectively, specialist anti-corruption agencies are needed with special powers and resources.⁷⁴³

10.15 The focus of a designated stand-alone integrity body is public corruption (it is not a crime commission). Its focus is the public sector and its coverage should extend to the conduct of private individuals where such conduct affects public administration.

10.16 It should retain only the most significant and serious allegations of corruption—legislation should provide for it to refer matters to other investigatory agencies to be dealt with—this will be the most sensible way to deal with the majority of matters that will come to the attention of the commission. The body will have a role in monitoring referred investigations and will retain only the most significant and serious allegations of corruption.

FUNCTIONS—ARE THREE-FOLD: (I) INVESTIGATION, REFERRAL AND REPORTING;
(II) CORRUPTION PREVENTION; AND (III) PUBLIC EDUCATION

10.17 A standing integrity body's functions are three-fold: (i) investigation, referral and reporting; (ii) corruption prevention (including research and risk mitigation)—internal; and (iii) public education—external. These functions are consistent with those advanced in theory and in practice. The theoretical underpinnings for the three-fold functions are:

⁷⁴² Hon. Nick Greiner. (1988) Second Reading Speech—NSW ICAC Act 1988, 26 May.

⁷⁴³ Ipp, D. (2017) 'Accountability and the Law: Anti-corruption agencies in Australia', *Accountability and the Law Conference*, August, p. 4.

- The body is not solely an investigative body—in that, where lessons are to be learned from investigation outcomes—their communication and dissemination (as it concerns research and risk mitigation) are inherently linked to the functions of corruption prevention.
- The public education function is premised on the overarching ethos of an integrity body to uphold and model high levels of probity and ethics coupled with communicating the outcomes of investigations, facilitating transparency, public education and awareness of corruption issues to foster deterrence and public awareness and understanding of the role of the institution.

STANDING INTEGRITY BODIES ARE INVESTIGATORY BODIES

10.18 A standing integrity body is an investigatory body—it should not have prosecution functions. Its investigation process is not a court exercising criminal jurisdiction, it cannot and does not seek to convict or punish and it should not encroach or infringe upon functions which properly reside elsewhere.⁷⁴⁴

10.19 The former NSW ICAC Commissioner—Ian Temby QC has acknowledged that whilst at times the hearings of the Commission can ‘look and feel like proceedings before a court of law...the Commission is not a court of law’.⁷⁴⁵ Further, to illustrate the bounded nature of an anti-corruption body’s mandate, the following opening statement by an Assistant Commissioner on the first day of a hearing is instructive:

...this is not a court case. No one has been charged with a criminal offence. No one can be convicted in these proceedings. The hearing is part of an on-going investigation being conducted by the Commission. The object of the investigation is to get to the truth...⁷⁴⁶

10.20 A summary of the differences between an investigatory proceeding/process and a prosecutorial/legal proceeding is detailed in Table 10.1.

⁷⁴⁴ Cowdrey, N. (2017) Lessons from the NSW ICAC: ‘This watchdog has teeth’, *Accountability and the Law Conference*, August.

⁷⁴⁵ Temby, I. (1991) ‘ICAC: Working in the public interest’, *Current Issues in Criminal Justice*, Volume 2 Number 3, p. 13.

⁷⁴⁶ Assistant Commissioner Roden—quoted in Temby, I. (1991) ‘ICAC: Working in the public interest’, *Current Issues in Criminal Justice*, Volume 2, Number 3, p. 14.

Table 10.1—Differences between investigatory and prosecution functions⁷⁴⁷

Anti-corruption type body investigatory function	Prosecution function (after referral to the DPP)
<ul style="list-style-type: none"> Investigates corruption and does so primarily in an inquisitorial process that is not bound by the rules or practice of evidence—any material and information considered reliable may be relied upon. Civil test or bar Hearings may become adversarial. Findings are made. Findings or opinion are not findings or opinions of criminal guilt but findings of fact. If the material available points to the commission of criminal offences, processes are put in place to refer matters to the DPP. 	<ul style="list-style-type: none"> The prosecution process then begins. It is accusatorial and adversarial. Criminal test The evidence available must be evaluated and any prosecution may proceed only upon the strength of evidence that is legally admissible. This means that in many cases the informational basis for adverse findings by an ACB will not enable the prosecution test to be satisfied and prosecutions will not proceed. This outcome does not reflect in any way upon the validity of an ACB's findings or its processes in pursuit of its purposes.

10.21 The designation of a standing integrity body as an investigatory body informs its functions, powers and other important procedures such as ensuring that appropriate mechanisms are put in place to minimise harm done to civil rights in the investigative process; and the status of evidence in an investigatory proceeding.

STANDING INTEGRITY BODIES HAVE UNIQUE ACCOUNTABILITY REQUIREMENTS

10.22 Anti-corruption type bodies, whilst statutory bodies, by virtue of their specialised role and powers have a 'sophisticated accountability regime' that involves 'multiple external stakeholders and multiple mechanisms'.⁷⁴⁸ Professors Wettenhall and Aulich refer to it as a 'very special model of autonomy/accountability'.⁷⁴⁹

10.23 Stone and Sheldrick (2013) have identified four types of stakeholders as being relevant in the accountability equation:

- citizens in general;
- citizens (or individuals) making a complaint (or allegation of corruption);
- citizens (or individuals) under investigation; and
- Parliament.⁷⁵⁰

⁷⁴⁷ Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August.

⁷⁴⁸ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October, p. 5.

⁷⁴⁹ Submission No. 30—Roger Wettenhall and Chris Aulich.

⁷⁵⁰ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

10.24 A summary of an anti-corruption body accountability regime as it concerns citizens in general is detailed at Table 10.2.

10.25 A summary of an anti-corruption body accountability regime as it concerns citizens (or individuals) making a complaint (or allegation of corruption) is detailed at Table 10.3.

10.26 A summary of an anti-corruption body accountability regime as it concerns citizens (or individuals) under investigation is detailed at Table 10.4.

10.27 A summary of an anti-corruption body accountability regime as it concerns Parliament is detailed at Table 10.5.

Table 10.2—Anti-corruption body accountability regime—citizens in general⁷⁵¹

Stakeholder group	Accountability mechanism(s)/requirement(s)
<p>Citizens in general</p> <p>Citizens in general have a legitimate expectation that the public sector is committed to addressing corruption.</p> <p>Anti-corruption bodies are visible and high profile institutions designed to address corruption in the public sector. The public rightly has an interest in such bodies.</p>	<p>To meet this legitimate expectation—an anti-corruption body (ACB) must consider the following accountability mechanisms/requirements as it concerns citizens in general:</p> <ul style="list-style-type: none"> ▪ As any citizen could potentially be at risk of investigation—there is a legitimate expectation that the exceptional powers possessed by these bodies are used ‘only as strictly required by their purposes and in ways which are as minimally invasive of civil liberties as possible’. ▪ In a parliamentary democracy, citizens will rely on their relationship with their elected members to have their legitimate expectations satisfied—however, this should be augmented by more direct forms of accountability, including: information on the activities of such bodies, in particular a requirement to account for its work and for the use it has made of its powers. This should be in the form of reporting annually to Parliament. Such information would satisfy citizens generally about the activities of an ACB but would also provide a basis for elected members to ask questions about the activities undertaken by the Body. ▪ Information flow should be assisted by a statutory requirement that the Body report to Parliament ‘as and when’ on its completed investigations and the Parliament (via an oversight type committee). The oversight committee should not be restricted as to the information it may request or receive. ▪ An ACB should not have a blanket non-disclosure provision for it to determine what information it discloses (as it would not be appropriate). However, there may be special (or exceptional) circumstances, where an ACB may deem non-disclosure as to be not in the public interest. It should have provisions to make such a determination. ▪ An ACB to be required to meet regularly with Parliament (via an oversight committee). ▪ Information flow would be assisted by the creation of an inspector/inspectorate function to supervise the operational activities of an ACB and to receive complaints about the Body. ▪ Holding public hearings is considered to be an important aspect of direct accountability of an ACB to citizens. An ACB is similar to a royal commission, and is thus a non-representative body with exceptional powers that impact on civil liberties. Holding public hearings or examinations in public is considered to be a powerful mechanism for satisfying citizen expectations about such a body’s use of its significant powers.

⁷⁵¹ Stone, B. and Sheldrick, M. (2013) ‘Anti-Corruption Authorities and Accountability: The Western Australian Case’, Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

Table 10.3—Anti-corruption body accountability regime—citizens (or individuals) making a complaint (or allegation of corruption)⁷⁵²

Stakeholder group	Accountability mechanism(s)/requirement(s)
<p>Citizens (or individuals) making a complaint (or allegation of corruption)</p> <p>These citizens have a personal interest in the anti-corruption body. These citizens have a legitimate expectation with regard to their personal interest and the accountability regime should contain mechanisms to ensure that these expectations are satisfied.</p>	<p>To meet this legitimate expectation—an anti-corruption body (ACB) must consider the following accountability mechanisms/requirements as it concerns citizens(or individuals) wishing to make or making a complaint (or allegation of corruption):</p> <ul style="list-style-type: none"> ▪ Any citizen should be able to make a complaint to the anti-corruption body. ▪ If the body decides not to act on the complaint the person should be notified of that decision—this provides a baseline level of satisfaction that the complaint has received consideration. A higher level of satisfaction would involve the Body giving a reason for its decision in the form of a statement of reasons. However, given the nature of these types of complaints, due to the personal interests involved it may not be feasible or in the public interest to provide a statement of reasons. ▪ If an individual is not satisfied with an ACB’s response they should have an avenue (and be entitled) to lodge a complaint. In the ACB context this function is fulfilled by an inspector/inspectorate mechanism.

⁷⁵² Stone, B. and Sheldrick, M. (2013) ‘Anti-Corruption Authorities and Accountability: The Western Australian Case’, Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

Table 10.4—Anti-corruption body accountability regime—citizens (or individuals) under investigation⁷⁵³

Stakeholder group	Accountability mechanism(s)/requirement(s)
<p>Citizens (or individuals) under investigation</p> <p>These citizens have a personal interest in the anti-corruption body. These citizens have a legitimate expectation with regard to their personal interest and the accountability regime should contain mechanism to ensure that these expectations are satisfied.</p> <p>An ACB's legal framework must contain mechanisms to minimise the effect on the rights of a person under investigation. The principal mechanism is to restrict the limitation of rights to the investigative process and to deny an anti-corruption body a disciplinary role.</p>	<p>To meet this legitimate expectation—an anti-corruption body (ACB) must consider the following accountability mechanisms/requirements as it concerns citizens(or individuals) under investigation:</p> <p>An ACB's legal framework must contain mechanisms to minimise the effect on the rights of a person under investigation. In practice, at a minimum, this should take the form of an anti-corruption body:</p> <ul style="list-style-type: none"> ▪ being empowered to make assessments and form opinions about the occurrence of corruption; ▪ being empowered to make recommendations about whether consideration should be given to prosecution or disciplinary action, and reporting these to Parliament; and ▪ being prohibited from drawing conclusions about whether a criminal or disciplinary offence has been or potentially may be committed by an individual. <p>Other mechanisms required in the legal framework to mitigate harm done to rights in the investigative process include:</p> <ul style="list-style-type: none"> ▪ whilst an individual subject to investigation is usually prohibited from disclosing that they are the subject of an investigation, they should be able to disclose restricted matters to a legal practitioner for the purpose of obtaining legal advice; ▪ an individual be permitted to have legal representation at any hearing/examination conducted by an ACB (though this may be of limited assistance, as most of the rights possessed by an individual subject to investigation or prosecution in the justice system are denied in this process); ▪ before reporting anything adverse to a person or body, the Body be required to give the person or body 'a reasonable opportunity to make representations' to the Body; and ▪ where an ACB makes a recommendation that consideration be given to prosecuting a person, the prosecuting body should be required to notify the person prior to a charge being laid and the ACB should be required to disclose to the prosecuting body all material relevant to the prosecution in its possession. This material in turn, should also be required to be disclosed to the accused. <p>A citizen feeling wronged by their treatment, either during the process of investigation or by the publication of an opinion/or finding that their activity constitutes corruption, has a legitimate expectation that they have an avenue to make a complaint and that it will be independently investigated. Two mechanisms traditionally available to a complainant as it concerns an ACB are to seek: (i) judicial review (limited to whether an ACB has exceeded its authority⁷⁵⁴); or (ii) an investigation via the inspector/inspectorate mechanism (or both).</p> <p>Exoneration protocol—where an individual is subsequently cleared of any personal corruption after a finding of corruption.</p>

⁷⁵³ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

⁷⁵⁴ In considering whether the WACCC had exceeded its authority—Martin CJ said in *Cox v. the CCC* 2008, in considering this question the court needed to relate the limitations on the use of power ordinarily assumed by the courts to apply to an administrator—such as procedural fairness, taking into account an irrelevant consideration, failure to take into account a relevant consideration—to the relevant statutory context.

Table 10.5—Anti-corruption body accountability regime—Parliament⁷⁵⁵

Stakeholder group	Accountability mechanism(s)/requirement(s)
<p>Parliament</p> <p>Accountability regimes for anti-corruption bodies break significantly from that applied traditionally in the context of ministerial responsibility; and to statutory bodies <i>per se</i> and its subset of specialised integrity bodies. This is due to the unique role these bodies have, the exceptional powers they are conferred with, coupled with the potential at times to be involved in the investigation of members of parliament (including ministers).</p> <p>In practice, whilst ministers need to be further distanced from the administration and accountability regime of these bodies—to some extent parliament steps in to fill the role vacated by a responsible minister.</p> <p>Whilst parliament's legitimate expectations as it concerns accountability crosses over with that of citizens in the context of electoral representation, its expectations are further shaped by its creation of the statutory scheme to address corruption in the public sector. It therefore has a responsibility to ensure the effectiveness of the legislative framework—a legitimate expectation it shares with citizens in general.</p>	<p>To meet this legitimate expectation—an anti-corruption body (ACB) must consider the following accountability mechanisms/requirements as it concerns Parliament:</p> <p>Parliament should have five oversight functions—namely:</p> <ul style="list-style-type: none"> (i) to monitor the activities of an anti-corruption body; (ii) to investigate suggestions or indications that an anti-corruption body may not be performing appropriately, or as well as it might, and publicly report its conclusions; (iii) if necessary, to take remedial action, either by suggesting the anti-corruption body modify its practice or by making amendments to the statutory scheme; (iv) a responsibility to review the Body's legislative framework at regular intervals to ensure it has the necessary powers and resources to carry out its role and mandate; and (v) a role in safeguarding the independence of an ACB through formalised involvement in the appointment of an integrity commissioner; and determination of the budget for an ACB. This should be accompanied by transparency measures to inform the Parliament (and by extension citizens in general) that each of the processes underpinning appointment and budget are robust and, where, consensus is not achieved, mechanisms are in place to report this. <p>Parliament can be assisted in fulfilling its oversight role by:</p> <ul style="list-style-type: none"> ▪ a standing committee of the Parliament; ▪ an inspector/inspectorate mechanism; and ▪ public interest monitor mechanism.

⁷⁵⁵ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

COMMITTEE COMMENT

10.28 In setting out its views as to the design, form, functions and powers of a standing ACT independent integrity body, the Committee emphasises that it has been informed by the views of contributors to the Inquiry but also the body of theory and practice as it concerns the concept of standing anti-corruption commissions, designated stand-alone integrity bodies, or specialised anti-corruption institutions.

10.29 Accordingly, the Committee's views as to the design, form, functions and powers of a standing ACT independent integrity body embody the guiding principles set out in this chapter together with the views put forward by contributors to the Inquiry. It is noted that many of the contributors, either in full or in-part, referred to the concepts underpinning the guiding principles.

10.30 In summary, the guiding principles are:

- Addressing corruption requires constant vigilance—a risk based approach to managing its deterrence, disruption, detection and diversion is the best form of mitigation.
- A standing integrity body exists to serve the public—it needs to acquit its purpose to the community and broker public confidence in and awareness of its integrity activities.
- A standing integrity body has a role in nurturing public confidence in an integrity context and bringing an authoritative leadership, organising and coordinating focus to an integrity framework.
- Integrity is a system of measures and agencies that work together. A standing integrity body seeks to reserve to do only that investigative work which others cannot or will not do.
- A standing integrity body performs a distinctive role in an integrity system. This role is shaped by the nature of corruption itself and the complexities associated with its exposure. This underpins the basis of the Body's specific functions and exceptional powers.
- A standing integrity body's functions are three-fold: (i) investigation, referral and reporting; (ii) corruption prevention (including research and risk mitigation)—internal; and (iii) public education—external.
- A standing integrity body is an investigatory body—it should not have prosecution functions. Its investigation process is not a court exercising criminal jurisdiction.
- A standing integrity body has unique accountability (independence and oversight) requirements.

11 INTEGRITY BODY FRAMEWORK

11.1 This chapter sets out the Committee's views as it concerns the framework for a standing ACT independent integrity body. It considers the following elements:

- instructive legislation;
- statement of purpose;
- functions;
- focus;
- nomenclature; and
- type of corruption model.

INSTRUCTIVE LEGISLATION

11.2 The framework for a designated integrity body will be informed by models in place in other jurisdictions. However, as noted earlier in this report, choices about integrity frameworks are complex and require careful deliberation. In settling on an integrity framework, it is important to acknowledge that the solution may not lie in copying a model *per se* from another jurisdiction but rather identifying new or different institutional options to respond to the specific needs of a jurisdiction as it concerns integrity gaps and vulnerabilities.⁷⁵⁶

11.3 A number of contributors cautioned that adopting a model from another jurisdiction may not result in the best design for the ACT's unique context. It was also noted that the ACT had the added advantage of looking at models elsewhere in that both failures and successes of other models provide lessons that may be relevant to the ACT.⁷⁵⁷

COMMITTEE COMMENT

11.4 The Committee agrees that the solution does not lie in copying a model *per se* from another jurisdiction. The Committee is of the view that the solution that would best suit the ACT should draw from different institutional options as a means of responding to the specific needs and context of the ACT as it concerns integrity gaps and vulnerabilities. Importantly, at the

⁷⁵⁶ Brown, A.J. and Head, B. (2004) 'Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia's Integrity Systems', Paper presented to the *Australasian Political Studies Association Conference*, University of Adelaide, 29 September to 1 October 2004, p. 17.

⁷⁵⁷ Submission No. 13—Benedict Sheehy (PhD), p. 2.

same time it should distinguish and extract the lessons from those institutional options or models in place elsewhere.

- 11.5 Accordingly, the Committee in setting out its proposed framework for a standing ACT independent integrity body is informed on a foundational basis by the NSW Independent Commission Against Corruption (ICAC) model, its accompanying legislative framework, body of jurisprudence and the lessons arising since its implementation in 1988. It also draws on a range of key distinguishing features and elements from other models, particularly the Independent Broad-based Anti-Corruption Commission (IBAC) Victorian model, and accompanying legislative frameworks as best practice on an instructive basis.

STATEMENT OF PURPOSE

- 11.6 The statement of purpose for a standing ACT independent integrity body details the primary objectives or goals of such a body. It also assists with identifying the object of its enabling legislation.
- 11.7 In considering the statement of purpose in the respective legislation of state-based anti-corruption bodies—in the main, they have in common the concept of twin objectives—uncovering corruption and improving public confidence. The correlation between the two objectives is also important, in that addressing corruption in the public sector has a positive effect on public confidence in the integrity of government.

COMMITTEE COMMENT

- 11.8 In considering its position in relation to the primary objectives of a standing ACT independent integrity body and the object of the legislative framework for such a body, the Committee is informed by the respective legislation of the state-based anti-corruption bodies, in particular the NSW ICAC, and the work of Hoole and Appleby (2017)⁷⁵⁸.
- 11.9 The Committee is of the view that the primary objectives/goals of a standing ACT independent integrity body should be:
- ...to investigate, expose and prevent corruption, and foster public confidence in the integrity of the ACT Government.

⁷⁵⁸ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017.

11.10 The Committee notes that the primary objectives/goals are inextricably linked—in that, effective investigation, exposure and prevention of corruption in public administration strengthens public confidence in government integrity. These twin objectives are also set out in the NSW ICAC Act—which has a specific purpose ‘to prevent corruption and enhance integrity in the public sector’.

11.11 The Committee suggests that the object of an Act establishing a standing ACT independent integrity body could be:

To investigate, expose and prevent serious or systemic corruption and foster public confidence in the integrity of the ACT Government by empowering an independent integrity body with authority to investigate public sector activities.

11.12 The Committee therefore makes the following recommendation:

Recommendation 4

11.13 The Committee recommends that a standing ACT independent integrity body should have as its primary objective(s) to investigate, expose and prevent corruption and foster public confidence in the integrity of the ACT Government.

FUNCTIONS

11.14 Several contributors⁷⁵⁹ to the inquiry expressed the view that in addition to an investigative function, a standing ACT independent integrity body should also have prevention and public education functions.

11.15 A standing integrity body’s functions are three-fold: (i) investigation, referral and reporting; (ii) corruption prevention (including research and risk mitigation)—internal; and (iii) public education—external. These functions are consistent with those advanced in theory and in practice. The theoretical underpinnings for the three-fold functions are:

- The body is not solely an investigative body—in that, where lessons are to be learned from investigation outcomes—their communication and dissemination (as it concerns research and risk mitigation) are inherently linked to the function of corruption prevention.
- The public education function is premised on the overarching ethos of an integrity body to uphold and model high levels of probity and ethics coupled with communicating the

⁷⁵⁹ Including: Submission No. 1—IBAC Victoria; Submission No. 17—QLD CCC; Submission No. 14—Australian Commission for Law Enforcement Integrity; Submission 19—ACT Public Sector Standards Commissioner; Submission No. 16—Rhyl Hurley; Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD); Submission No. 15—Law Society of the ACT.

outcomes of investigations, facilitating transparency, and awareness of corruption issues to foster deterrence and enhance public understanding of the role of the institution.

INVESTIGATION, REFERRAL AND REPORTING FUNCTION

11.16 Further detail as to the scope of the investigation, referral and reporting function of a standing ACT independent integrity body is covered in the following chapters.

CORRUPTION PREVENTION FUNCTION

11.17 As to the importance of corruption prevention, a former NSW ICAC Commissioner has commented:

Corruption prevention has to do with improving systems before they have been suborned, rather than waiting until a system has been attacked and then attempting to ascertain the conduct in question and find the culprits. The corruption prevention strategy, which is a public document available for anyone to see, is based upon these three propositions. First, prevention is better than cure. Secondly, corruption prevention is a managerial function. Thirdly, accountability makes for committed management.⁷⁶⁰

11.18 The scope of a corruption prevention function should recognise that such a body is not solely an investigative body—in that, where lessons are to be learned from investigation outcomes—their communication and dissemination (as it concerns research and risk mitigation) are inherently linked to the function of corruption prevention.

11.19 Further, with regard to allocating a corruption prevention role to such a body—importantly, it does not abdicate agency heads from their respective responsibilities (and accountability) with regard to staffing powers and their obligations in respect of employment matters—in particular, codes of conduct and public service values and ethics. Effectively in public service jurisdictions, while the respective national/state/territory government is the legal employer, staffing powers set out in respective public sector legislation are vested in agency heads (and equivalents). This gives to agency heads (and equivalents) all the rights, duties, powers of an employer in respect of public sector employees in their agency (subject to a statutory framework). Within such a framework, agency heads have a range of obligations (and accountabilities) relating to public sector employment matters that includes, amongst other things, public service codes of conduct and public service values and ethics, merit in employment; and workplace diversity.

⁷⁶⁰ Temby, I. (1991) 'ICAC: Working in the public interest', *Current Issues in Criminal Justice*, Volume 2 Number 3, p. 15.

PUBLIC EDUCATION FUNCTION

- 11.20 The scope of a public education function should recognise that the overarching ethos of an integrity body is to uphold and model high levels of probity and ethics coupled with communicating the outcomes of investigations, facilitating transparency, and awareness of corruption issues to foster deterrence and enhance public understanding of the role of the institution.

COMMITTEE COMMENT

- 11.21 As it concerns functions of a standing ACT independent integrity body, the Committee makes the following recommendation:

Recommendation 5

- 11.22 The Committee recommends that a standing ACT independent integrity body should have the following functions: (a) investigation, referral and reporting; (b) corruption prevention (including research and risk mitigation); and (c) public education.**

- 11.23 The Committee is of the view that it would be lacking care to establish such a body without these three functions. Corruption does not exist in a vacuum and its remediation and prevention together with fostering public confidence as it concerns government integrity does not either.

- 11.24 The Committee's views concerning the scope of the investigation, referral and reporting function of such a body is detailed in the chapters following.

- 11.25 As it concerns the scope of a corruption prevention function, the Committee makes the following recommendation:

Recommendation 6

- 11.26 The Committee recommends that the corruption prevention function of a standing ACT independent integrity body should include communicating and disseminating (as it concerns research, risk mitigation and prevention) lessons learned from investigation outcomes.**

- 11.27 The Committee emphasises, as it concerns the corruption prevention function that designating such a role to a standing integrity body does not abdicate agency heads from their respective responsibilities (and accountability) with regard to staffing powers and their obligations in respect of employment matters—in particular, codes of conduct and public service values and ethics.

11.28 As it concerns the scope of the public education function, the Committee makes the following recommendation:

Recommendation 7

11.29 The Committee recommends that the public education function of a standing ACT independent integrity body should be focused on upholding and modelling high levels of probity and ethics together with communicating the outcomes of investigations, facilitating transparency, and awareness of corruption issues.

FOCUS OF A STANDING INDEPENDENT INTEGRITY BODY

11.30 Contributors to the inquiry, in the main, were generally of the view that the focus of a standing ACT independent integrity body should be on corruption and integrity connected with public administration.

11.31 This focus is also consistent with theory and practice as it concerns standing anti-corruption commissions, designated stand-alone integrity bodies, or specialised anti-corruption institutions. The corruption focus or frame for these types of bodies is focused on the correlation between corruption and the quality of public administration and its effect on integrity and trust in government.

11.32 The focus of a standing ACT independent integrity body informs its jurisdiction and scope of conduct which is discussed in chapter 12.

COMMITTEE COMMENT

11.33 As it concerns the focus of a standing ACT independent integrity body, the Committee makes the following recommendation:

Recommendation 8

11.34 The Committee recommends that the focus of a standing ACT independent integrity body should be on corruption and integrity connected with public administration.

NOMENCLATURE

- 11.35 The choosing of a name for a standing independent integrity body is important—in that it ensures that its functions are correctly captured and communicated. It also ensures consistency in practice and accurately reflects its relationship with integrity counterparts.
- 11.36 The OECD is of the view that an “anti-corruption agency” combines in one institution a multifaceted approach of prevention, investigation and education.⁷⁶¹
- 11.37 The name of an integrity body in addition to signalling its functions should also seek to capture and communicate the overarching ethos of the Body to uphold and model high levels of integrity (probity and ethics).

COMMITTEE COMMENT

- 11.38 The Committee notes it has recommended that a standing ACT independent integrity body should have the three-fold functions of: (a) investigation, referral and reporting; (b) corruption prevention; and (c) public education. Further, the Committee has recommended that the primary objectives of the Body should be to investigate, expose and prevent corruption and foster public confidence in the integrity of the ACT Government.
- 11.39 The Committee therefore makes the following recommendation:

Recommendation 9

- 11.40 The Committee recommends that a standing ACT independent integrity body should be named as an Anti-Corruption and Integrity Commission (ACIC) to ensure consistency with theory and practice and to accurately reflect its objectives, functions and relationships with other integrity stakeholders.**

TYPE OF CORRUPTION MODEL

- 11.41 The type of corruption model that operates in a jurisdiction can be broadly classified as one of two types of models—either a:

⁷⁶¹ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat.

- generalist model—whole-of-government, anticorruption/misconduct functions including overseeing the public service, police, elected officials and local government and combating organised crime by taking active roles in intelligence gathering and investigations; or
- specialist (bifurcated) model—in contrast, separates the agencies responsible for integrity and crime.⁷⁶²

11.42 There are key arguments for and against each model. Prasser (2012) has identified these as follows:

The case for the generalist/merged model include: (1) that organised crime has strong links to both police and political corruption, and it thus makes sense for this problem to be tackled by a merged agency; (2) the merging creates cost efficiencies; and (3) merging gives an integrity body a broader base and therefore greater status and independence from government. The case against the model include: (1) that it distracts an integrity body from a core anti-corruption function; (2) that a merger might undermine an integrity body's independence in scrutinising police and other investigative agencies; and (3) that civil liberties concerns surrounding the use of investigative powers may be more pronounced in a larger-scale, merged integrity body.⁷⁶³

11.43 In considering the establishment of a federal integrity body, Hoole and Appleby (2017) are of the view that such a body should be designed in accordance with the specialised/bifurcated model for two primary reasons:

The first is the potential for a generalist/merged model to confuse the core purpose of the institution. This has consequences for a legal process account and creates further ambiguity for officials tasked with interpreting and operationalising the legislative framework. The second is related: the importance of maintaining the utmost independence of such a commission from institutions including the police to ensure integrity to purpose can be achieved.⁷⁶⁴

11.44 As it concerns state-based anti-corruption bodies, the Queensland Crime and Corruption Commission and WA Corruption and Crime Commission have an integrated model that includes policing and public sector agencies. In NSW, its integrity body does not cover policing, a separate body—the NSW Law Enforcement and Integrity Commission⁷⁶⁵—has responsibility for policing.

⁷⁶² Prasser, S. (2012) 'Australian Integrity Agencies in Critical Perspective', 33 *Policy Studies*, pp. 21–25.

⁷⁶³ Prasser, S. (2012) 'Australian Integrity Agencies in Critical Perspective', 33 *Policy Studies*, pp. 21, 27.

⁷⁶⁴ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017, pp. 15–16.

⁷⁶⁵ Formerly the Police Integrity Commission.

11.45 As to the bifurcated system that operates in NSW, Prenzler and Faulkner have commented:

New South Wales is unique in having an ICAC and a separate Police Integrity Commission. During the Wood Inquiry the ICAC argued it lacked the resources and full range of powers to properly uncover police misconduct. However, Commissioner Wood (1996:chapter 5) held the view that policing in New South Wales carried a high risk profile for misconduct to the extent that a dedicated police anticorruption commission was required. The bifurcated system has strong support in New South Wales and there is no imperative for amalgamation. There might be some efficiency gains from amalgamation but the important point is that the current system provides coverage of the public sector by agencies with royal commission powers.⁷⁶⁶

11.46 Importantly, the type of corruption model a jurisdiction decides to adopt rests on whether oversight of police will be integrated with the same body mandated to cover all other public sector agencies.

11.47 The question posed, as it applies to the ACT, has an added dimension, in that, the framework for the delivery of policing services to the Territory is unique in Australia as all other jurisdictions have their own police services. This framework derives historically from the AFP's provision of policing services in the ACT prior to self-government in 1988. The funding and delivery of policing services in the ACT mean that the arrangements to prevent and respond to corruption in the Commonwealth sphere apply to ACT Policing, that is, the Australian Commission for Law Enforcement Integrity (ACLEI) covers Australian Federal Police (AFP) employees including ACT Policing and this oversight is supplemented by the AFP's internal investigations unit known as AFP Professional Standards.

11.48 All corruption matters relating to AFP appointees are referred to ACLEI, and may be investigated jointly with AFP, solely by ACLEI or as an AFP only investigation.

11.49 It is also important to note that the roles of the Federal government that give rise to corruption risk or its responsibilities to deal with corruption, are different to state/territory responsibilities. The Federal sphere deals with international and transboundary corruption issues and with corporate conduct and regulation nationally, as well as its own public sector conduct.⁷⁶⁷

⁷⁶⁶ Prenzler, T. and Faulkner, N. (2010) 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69(3), pp. 251–262.

⁷⁶⁷ Brown, A.J. (2017) 'A new federal integrity system in the making? The case for a Commonwealth anti-corruption agency', *Australian Public Law*, 11 August.

COMMITTEE COMMENT

- 11.50 The Committee notes the type of corruption model that will apply to the ACT—either a generalist (integrated) or a specialist (bifurcated)—is premised on whether an ACT ACIC will have oversight over ACT Policing.
- 11.51 Notwithstanding that an oversight arrangement for ACT Policing exists in the Commonwealth sphere—questions about whether an ACT ACIC should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community are valid. This matter is discussed further in chapter 12.

12 JURISDICTION AND SCOPE OF CONDUCT

- 12.1 This chapter considers jurisdiction, definition of conduct, scope of conduct, threshold for investigation and complaint mechanism for an ACT Anti-Corruption and Integrity Commission (ACIC).

JURISDICTION

SUBSTANTIVE JURISDICTION

- 12.2 Several contributors were of the view that any proposed integrity body should have broad responsibilities as it concerns government activities and public officials. Its focus should be public sector officials and its coverage should extend to the conduct of third parties, i.e., private individuals where such conduct affects public administration.
- 12.3 Public officials were defined as all public office holders regardless of whether such persons receive salary, wages or expenses—but can also include said officials who could be in a position of influence or power.
- 12.4 A contributor to the Inquiry commenting on actions taken in respect of the private sector was of the view that a designated integrity body should:
- ...have jurisdiction in respect of all "public office holders":
 - 8.4.1. whether in the Assembly, the judiciary or the public service broadly defined;
 - 8.4.2. whether full- or part-time;
 - 8.4.3. whether appointed under statute, employed or engaged under contract;
 - 8.4.4. [w]hether remunerated or honorary; or
 - 8.4.5. to the extent that they may exercise powers conferred under a statutory licence, but would not otherwise have jurisdiction in respect of actions taken in the private sector;⁷⁶⁸

⁷⁶⁸ Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser, p. 2.

12.5 In its submission, as it concerns actions taken in respect of the private sector, the Law Society of the ACT advised the Committee that:

...careful consideration should be given to extending the reach of the IIC to entities who are contracted to undertake government work.⁷⁶⁹

SUB-JURISDICTION—AS IT APPLIES TO MLAS AND JUDICIAL OFFICERS

12.6 As to its jurisdiction concerning the Assembly, the general views of contributors was that a designated integrity body should have jurisdiction where the standing regulatory capacities of the Assembly are vulnerable and it should have regard to the separation of powers and parliamentary privilege. In the context of proposed arrangements, coverage of MLAs and modifications to the Commissioner for Standards role, the Clerk of the Assembly advised the Committee that:

...the jurisdiction of an independent integrity commission as it concerns MLAs should be clearly delineated and narrow. A commission should not be given the function to investigate or to form judgements in relation to matters which properly fall within the domain of the Assembly to look after its own affairs—i.e. in relation to possible contempts, breaches of the standing orders or Assembly resolutions (including the code of conduct and declaration of members' interests requirements).

These matters should continue to be dealt with, for the most part, by the existing arrangements based on relevant parliamentary procedure, statute and constitutional provisions. The establishment of an independent integrity commission should not have the effect of displacing the Assembly Commissioner of Standards arrangements but with some modifications.

...the Commissioner of Standards [*be*] at the centre of all complaints or allegations made about the conduct of MLAs and at the same time enable an independent integrity commission to investigate serious criminal conduct relating to the performance of a member's duties as an elected representative...⁷⁷⁰

12.7 The Clerk also went on to suggest, as it concerns MLA staff, that the Committee should:

...consider the jurisdiction of the Commissioner of Standards, the Assembly itself, and any putative integrity commission to investigate the conduct of members' staff, including staff employed by ministers, employed under the *Legislative Assembly (Members' Staff) Act 1989*.⁷⁷¹

⁷⁶⁹ Submission No. 15—Law Society of the ACT, p. 2.

⁷⁷⁰ Submission No. 3—Clerk, ACT Legislative Assembly, pp. 30–35.

⁷⁷¹ Submission No. 3—Clerk, ACT Legislative Assembly, p. 39.

SHOULD JURISDICTION BE EXTENDED TO INCLUDE ACT POLICING?

- 12.8 Whilst some contributors acknowledged that ACT Policing was already subject to an oversight arrangement in the Commonwealth sphere, questions about whether an ACT designated body should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community were also raised.
- 12.9 In the event that an independent integrity body in the ACT was established, ACT Policing was of the view that coverage of ACT Policing by such a body would ‘create duplication and a requirement for de-confliction with other integrity bodies’—on this basis ACT Policing proposed that the current oversight framework as it applied to ACT Policing and the broader Australian Federal Police (AFP) was adequate.⁷⁷²
- 12.10 In its supplementary submission, ACT Policing’s Chief Police Officer told the Committee that the ACT community ‘is entitled to be regularly assured of the integrity of its police service’ and that a:

...number of avenues already exist for this assurance to be provided both to the Minister and in the public domain as previously outlined. The MPES [*Minister for Police and Emergency Services*] currently has access to ACT Policing corruption information from ACLEI [*Australian Commission for Law Enforcement Integrity*]. Additional complaint data about ACT Policing is available via Professional Standards Quarterly Reporting and the Annual report.

ACTP [*ACT Policing*] is willing to provide additional information upon request, subject to the requested information complying with the confidentiality provisions under Part V of the AFP [*Australian Federal Police*] Act, as well as secrecy provisions within the LEIC [*Law Enforcement and Integrity Commissioner*] Act.

Importantly ACTP would in good faith, consider all further discussion with the Minister and the Committee, as to how increased assurance and greater transparency could be maintained.⁷⁷³

- 12.11 In the context of whether there may be barriers in delineating the AFP from ACT Policing for the purposes of an investigation by a proposed ACT Integrity body, ACT Policing further advised:

It is recommended the Committee seek further advice from the ACT Government Solicitor regarding this question, in particular the effect of s27 of the Australian Capital Territory (Self-Government) Act 1988 and the ability of the Territory to pass laws effecting Commonwealth agencies and officers in the manner proposed.

⁷⁷² Submission No. 25—ACT Policing, p. 8.

⁷⁷³ Submission No. 25a—ACT Policing, p. 6.

It would be difficult to delineate between the functions of ACT Policing and broader AFP, for the purpose of an ACT IIC, without the support of a Commonwealth policy. It is ACTP's understanding that under the current legislation there would be no means of compulsorily acquiring information from the AFP, in compelling AFP employees to appear before an ACT IIC.

Furthermore, this may result in a range of regimes dealing with misconduct by ACT Policing, namely the AFP Act, LEIC Act and any additional ACT legislation created for the ACT IIC. This may create inconsistencies throughout investigative functions and final outcomes.⁷⁷⁴

12.12 The submission to the inquiry by Ms Hurley noted that:

It appears that ACT policing integrity matters are already dealt with separately. So long as the ACT government and peoples have some satisfactory feed-in to that system, it should remain separate.⁷⁷⁵

12.13 As to whether ACT Policing should be subject to the jurisdiction of an ACT ACIC, the Narrabundah Griffith Community Association advised the Committee that it:

...believes that it would be desirable for the AIIC to have the scope to investigate the AFP, at least to the extent that their activities involve the provision of policing services to the ACT. However, we also recognise that the ACT does not have its own police force but purchases policing functions from the Commonwealth via the Australian Federal Police (AFP). The AFP has its own internal investigation unit. Even if the Commonwealth were agreeable to an arrangement whereby a Territory based organisation such as an Integrity Commission could investigate a federal body (such as the AFP, or even the Division which deals with ACT policing), setting appropriate arrangements in place to allow this would require (probably lengthy) negotiations between the Commonwealth and Territory Governments.

This process might unreasonably delay or defer the establishment of the AIIC. Consequently the GNCA believes that at this stage it would be preferable to establish the AIIC as soon as possible and to omit the ACT policing side of the AFP from the scope of any AIIC's area of responsibility at the beginning. After establishing the AIIC the Territory Government can subsequently engage with the Commonwealth Government on the appropriate mechanisms to allow the ACT policing side of the AFP to also be subject to the AIIC in due course. The GNCA recommends that the ACT adopt this approach.⁷⁷⁶

⁷⁷⁴ Submission No. 25a—ACT Policing, p. 6.

⁷⁷⁵ Submission No. 16—Rhyl Hurley, p. 4.

⁷⁷⁶ Submission No. 28—Griffith Narrabundah Community Association, pp. 14–15.

12.14 In connection with police complaints, a contributor to the inquiry was of the view that there were ‘grounds for a detailed review of the efficacy of the existing police complaints process’ in the ACT and suggested that ‘consideration be given to enhancing the current police complaints process’.⁷⁷⁷ Further detail as to how this contributor⁷⁷⁸ felt the current process could be enhanced is set out in chapter three.

COMMITTEE COMMENT

12.15 This section sets out the Committee’s views as it concerns: (i) substantive jurisdiction; (ii) sub-jurisdiction as it applies to MLAs, MLA staff and Judicial Officers; and (iii) sub-jurisdiction as it concerns ACT Policing.

SUBSTANTIVE JURISDICTION

12.16 The Committee is of the view that the substantive jurisdiction of an ACT ACIC should cover all public officials. Public officials is to include all persons receiving a salary, wages or other payment from the ACT Government Service, its statutory authorities, agencies or boards. This would include parties delivering contracted work or services on behalf of government.

12.17 The Committee is also of the view that whilst the focus is primarily on public officials, the jurisdiction of an ACIC should extend to the conduct of third parties, i.e., where the conduct of persons other than public officials may have a possible impact on public administration or is likely to threaten public confidence in the integrity of government.

12.18 This could include, for example: conduct that might amount to blackmailing or defrauding a public official; collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under ACT statutes. This is the type of conduct that Justice Gageler identified as having the capacity to:

- undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials; and
- affect the integrity of government processes, threatening equality of access to government services and contracts, and undermining accountability for how taxpayers’ money is spent and public assets are utilised.⁷⁷⁹

⁷⁷⁷ Submission No. 7—Jon Stanhope, p. 1.

⁷⁷⁸ Submission No. 7—Jon Stanhope.

⁷⁷⁹ *NSW Independent Commission Against Corruption vs Margaret Cunneen & Ors* [2015] HCA 14, 15 April 2015.

12.19 The Committee notes that the High Court ruling in 2015⁷⁸⁰, as it concerns extending the NSW Independent Commission Against Corruption's (ICAC) definition of corrupt conduct to third parties, appears to confine 'that jurisdiction to where the third parties' conduct would give rise to (or could give rise to) wrongdoing or impropriety on the part of a public official in exercising their official functions in one or more of the following ways: (a) a dishonest or partial exercise of a power; (b) a breach of public trust; or (c) a misuse of information'.⁷⁸¹

12.20 The Committee therefore makes the following recommendations:

Recommendation 10

12.21 The Committee recommends that the substantive jurisdiction of an ACT Anti-Corruption and Integrity Commission should cover all public officials. Public officials is to include all persons receiving a salary, wages or other payment from the ACT Government Service, its statutory authorities, agencies or boards. This would include parties delivering contracted work or services on behalf of government.

Recommendation 11

12.22 The Committee recommends that in investigating possible wrongdoing or impropriety on the part of a public official in exercising their official functions that the substantive jurisdiction of an ACT Anti-Corruption and Integrity Commission may extend to the conduct of third parties, i.e., where the third parties' conduct would give rise to (or could give rise to) wrongdoing.

SUB-JURISDICTION AS IT APPLIES TO ACT POLICING

12.23 The Committee notes that whilst an oversight arrangement for ACT Policing exists in the Commonwealth sphere—questions about whether an ACT ACIC should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community are legitimate. The Committee is of the view that any such decision should be informed by:

⁷⁸⁰ NSW ICAC vs Margaret Cunneen & Ors [2015] HCA 14, 15 April 2015—The definition of "corrupt conduct" does not extend to conduct that adversely affects or could adversely affect merely the efficacy of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision.

⁷⁸¹ Commentary from Clayton Utz on the consequences of the HCA [2015] 14—<https://www.claytonutz.com/knowledge/2015/april/icac-v-cunneen-implications-for-corruption-watchdogs> [accessed 21 October 2017].

- views on whether there are any gaps and vulnerabilities in the current ACT policing integrity framework (real and perceived);
- arguments for and against ACT policing being covered by an ACT ACIC, such as whether it would create duplication and a requirement for de-confliction with other integrity bodies;
- whether corruption risk and associated responsibilities to deal with corruption in the federal sphere (and thus the AFP) are different to state/territory responsibilities; and
- whether there are any structural and legislative impediments for the Australian Commission for Law Enforcement Integrity (ACLEI) to refer matters relating to ACT Policing to an ACT ACIC.

12.24 The Committee is of the view that the ACT Government and the ACT Legislative Assembly have limited opportunities for operational oversight of policing services funded by the ACT taxpayer and delivered to the ACT community.

12.25 It is therefore the Committee's view, that an ACT ACIC should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community. The Committee considers that there are gaps and vulnerabilities in the current ACT policing integrity framework (real and perceived) and these cannot be addressed satisfactorily by strengthening measures (such as additional reporting).

12.26 Further, if an ACT ACIC is established with the scope of conduct and jurisdiction as intended by the Committee, in its view, the argument that bringing ACT Policing under an ACT ACIC would 'create duplication and a requirement for de-confliction with other integrity bodies' would not be supported.

12.27 The Committee also notes that the arrangements to prevent and respond to corruption in the Commonwealth sphere (and which apply to ACT Policing) may be more focused and attuned to addressing corruption risk in the federal sphere, which are different to state/territory corruption risk and responsibilities.

12.28 Whilst there appears to be no structural and legislative impediments for ACLEI to refer matters relating to ACT Policing to an ACT ACIC, the Committee acknowledges that this will require discussions with the Commonwealth and potentially amending Commonwealth legislation.

12.29 The Committee therefore makes the following recommendations:

Recommendation 12

12.30 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should have oversight over policing officers funded to deliver services by and to the ACT taxpayer and community.

Recommendation 13

12.31 The Committee recommends, as it concerns ACT Policing, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC), together with a Memorandum of Understanding with the Australian Commission for Law Enforcement Integrity (ACLEI), must:

- (a) provide for the ACLEI to refer corruption matters relating to ACT Policing to the ACT ACIC;**
- (b) provide for the ACT ACIC to operate cooperatively with ACLEI and other agencies, including those in other jurisdictions for joint investigations and information sharing;**
- (c) establish an appropriate framework for inter-agency coordination; and**
- (d) establish an appropriate framework for information sharing to enable the exchange of relevant intelligence and documentation when an investigation is commenced.**

SUB-JURISDICTION—AS IT APPLIES TO MLAS, MLA STAFF AND JUDICIAL OFFICERS

12.32 The Committee notes that issues relating to whether an MLA or a judicial officer has engaged in conduct that contravenes either MLA or judicial professional standards are covered by each of the respective institutional standing regulatory capacities (in accordance with the separation of powers). It is noted that judicial officers are subject to the recently formed Judicial Council and MLAs to the Assembly's parliamentary integrity framework. The scope of these integrity frameworks are discussed in chapter nine.

12.33 The Committee also notes the vulnerability regarding the standing regulatory capacity of the conduct of members' staff, including staff employed by ministers, employed under the *Legislative Assembly (Members' Staff) Act 1989*.

12.34 With regard to the institutions of Parliament and the Courts/Judiciary—the Committee is of the view that an ACIC has a role to play where the standing regulatory capacities of the Parliament and the Judiciary are thought to be lacking or vulnerable. The specific mandate for coverage as it concerns MLAs, MLA staff, and judicial officers would be in accordance with the scope of conduct as set out in the ACIC's enabling legislation.

12.35 Importantly, the Committee acknowledges that an ACIC needs to have regard to the public interest in the separation of powers, including the independence of the Judiciary and a Parliament's right to control its own affairs.

12.36 The Committee therefore makes the following recommendations:

Recommendation 14

12.37 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) have oversight over Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers.

Recommendation 15

12.38 The Committee recommends, as it concerns Members of the Legislative Assembly (MLAs), MLA staff, and Judicial Officers, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC) must:

- (a) ensure that judicial independence and parliamentary privilege is maintained;**
- (b) have regard to the separation of powers;**
- (c) with respect to parliamentary privilege, clearly define the boundaries between the powers of an ACT ACIC and parliamentary privilege;**
- (d) include a legislated process to deal with items that might be subject to disputed claims of privilege;**
- (e) make it clear that any code of conduct binding MLAs, MLA staff, and Judicial Officers augments and does not restrict the definition of corruption included in the Act; and**
- (f) establish a process where conduct crosses over into other jurisdictions—that, an ACT ACIC shall first take the decision to proceed with an investigation.**

12.39 The Committee acknowledges that an ACT ACIC in carrying out its functions must be able to obtain information as it requires and considers necessary. The Committee notes that the execution of a search warrant on the premises of a Parliament raises important issues in the context of the separation of powers and a Parliament's right to control its own affairs—in particular, 'determining what members' documents constitute 'proceedings in Parliament' where they are subject to seizure under the terms of a search warrant'.⁷⁸² As it concerns anti-corruption (and equivalent) bodies, these difficulties were first encountered in NSW when the NSW ICAC:

...exercised a search warrant which resulted in the Legislative Council Privileges Committee reporting that the Independent Commission Against Corruption had unintentionally breached parliamentary privilege in the way they exercised the warrant. Consequently the Committee, and the Commission, both reported on the

⁷⁸² NSW Parliament. (2014) Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, Report No. 3/55, November, p. 3.

desirability of a protocol to place such matters on a more formal footing. The Presiding Officers entered into a Memorandum of Understanding with the Commissioner of the Independent Commission Against Corruption on 11 December 2009.⁷⁸³

12.40 The procedures accompanying such a Memorandum of Understanding (MOU), amongst other things, should: (a) acknowledge that the documents and things with respect to which parliamentary privilege may be claimed include 'electronic documents'; (b) consider whether coverage extends beyond the execution of search warrants at a Parliament to include any premises occupied or used by a member; (c) include procedures which enable a member who was not present at the execution of a warrant to make a claim of parliamentary privilege over items that have been seized; (d) provide for a member to claim parliamentary privilege over items which have been removed by an officer of an anti-corruption type body for examination at another location to determine whether they may be seized under a warrant; and (e) consider timeframes within which members may make claims of parliamentary privilege where items have been seized or removed for examination.⁷⁸⁴

12.41 The Committee therefore makes the following recommendation:

Recommendation 16

12.42 The Committee recommends, as it concerns the ACT Legislative Assembly, that the enabling legislation for an ACT Anti-Corruption and Integrity Commission (ACIC) specify the requirement for a Memorandum of Understanding (MOU) between the statutory head of the ACIC and the Speaker of the ACT Legislative Assembly on the execution of a judicially approved search warrant on the premises of the Legislative Assembly.

DEFINITION OF CORRUPTION

12.43 In general as it concerned definition of corruption, contributors making comment were of the view that it should be broad but limited to a specific mandate. This is consistent with reinforcing a distinction between the work of a designated anti-corruption type body and the jurisdiction of other bodies in the integrity system.

⁷⁸³ NSW Parliament. (2014) Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, Report No. 3/55, November, p. 3.

⁷⁸⁴ NSW Parliament. (2014) Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the revised Memorandum of Understanding between the Presiding Officers and the Commissioner of the Independent Commission Against Corruption*, Report No. 3/55, November.

12.44 A contributor commenting on the appropriateness and robustness of the definition of corrupt conduct in the NSW ICAC Act, told the Committee:

I noticed that the definition survived the ICAC inquiry set up by Mike Baird, with Gleeson, a former Chief Justice, and McClintock. They left the definitions as they stood, because you are looking at more than criminality. But it is a pretty good list. I think it has stood the test of time since 1988 and I think those definitions have been adopted by other jurisdictions.⁷⁸⁵

12.45 Another contributor also commenting on definitions of corruption in the statutes of state-based anti-corruption type bodies told the Committee that:

The New South Wales definition is the widest. It covers practically anything. Anywhere that the commissioner thinks there may be corruption, in effect, he or she is allowed to investigate.⁷⁸⁶

12.46 The same contributor added that this why it would be 'desirable to go to the wider end', as found in the definitions provided to the NSW ICAC, and this was 'one of the reasons why that has been so successful'. The perceived failings of the ICAC were due to 'completely different reasons'.⁷⁸⁷

12.47 In response to further questions regarding definitions, the contributor told the Committee that the relevant Act in Queensland was 'often held up as being the one with the best all-round performance', but that the 'width' of the NSW ICAC legislation was 'desirable as a starting point'.⁷⁸⁸

COMMITTEE COMMENT

12.48 The Committee heard a lot of evidence as it concerned definitions of corruption in the statutes of state-based anti-corruption type bodies. The Committee has carefully examined the appropriateness and robustness of the definitions of corrupt conduct in other jurisdictions and has formed the view that the definition of corruption in the NSW ICAC Act is widely tested, it has stood the test of time since 1988, its definition is looking at more than criminality, and it has an established body of jurisprudence in relation to its operation.

12.49 The Committee believes that the definition of corrupt conduct is important in reinforcing a distinction between the work of an ACT ACIC and the jurisdiction of other bodies in the

⁷⁸⁵ Mr Quentin Dempster, *Transcript of Evidence*, 1 September 2017, p. 102.

⁷⁸⁶ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁷⁸⁷ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

⁷⁸⁸ Mr Stephen Charles QC, AO, *Transcript of Evidence*, 7 September 2017, p. 150.

integrity system. This is consistent with the view that an ACIC should do only that investigative work which others cannot or will not do.

12.50 Further, the Committee is of the view that an ACIC's scope of conduct should reinforce a distinction between its work and the criminal law. It follows therefore that an ACIC should rely on a definition of corruption that 'does not incorporate criminal law analytic criteria'.⁷⁸⁹

12.51 While the Committee believes that the focus should necessarily be on serious and systemic corruption, any legislation should not be drafted in a way that would unduly limit the scope of an ACT ACIC. The Committee further notes that lower level misconduct should not be captured by an ACIC scope and its associated definition of corruption, and should continue to be investigated by other integrity counterparts.

12.52 The Committee received some submissions focusing on individual cases relating to concerns about the exercise of official powers in compliance with relevant legislation, policies and standards. These submissions suggest that a definition of corruption should capture serious and/or systemic instances of nepotism. In the Committee's view, the NSW ICAC definition of corruption⁷⁹⁰ should permit conduct relating to serious and/or systemic instances of nepotism to be considered by an ACT ACIC.

12.53 The Committee notes that: (i) the terms 'serious' and 'systemic' inform different investigative powers and responsibilities; and (ii) allows the statutory head of an ACIC discretion to make interpretative judgements and decisions.

12.54 The Committee therefore makes the following recommendations:

Recommendation 17

12.55 The Committee recommends that the definition of 'corrupt conduct', as set out in Part 3 of the NSW *Independent Commission Against Corruption Act 1988*, should form the definition of 'corrupt conduct' in the enabling legislation of an ACT Anti-Corruption and Integrity Commission.

⁷⁸⁹ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017.

⁷⁹⁰ Official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition)—section 8(2)(a), NSW *Independent Commission Against Corruption Act 1988*.

Recommendation 18

12.56 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's (ACIC) scope of conduct be focused on investigating matters where they involve serious or systemic corruption. While the Committee believes that the focus should necessarily be on serious and systemic corruption, any legislation should not be drafted in a way that would unduly limit the scope of an ACT ACIC.

Recommendation 19

12.57 The Committee recommends that the terms 'serious' and 'systemic' should each be defined in an ACT Anti-Corruption and Integrity Commission's enabling legislation—as follows:

- (a) 'serious corruption' should be defined as corrupt conduct that is likely to threaten public confidence in the integrity of government; and**
- (b) 'systemic corruption' should be defined as it is in the Australian Commission for Law Enforcement Integrity (ACLEI) statute—that is, as a pattern of corrupt conduct.**

12.58 The Committee acknowledges the importance of ensuring that the concept of 'corrupt conduct' adopted in the enabling legislation of an ACT ACIC is reflected in the terms of offences under the *Criminal Code 2002*. The Committee also notes the views of the ACT Bar Association that it would not be possible to determine if such an offence was reflected in current ACT legislation until the threshold test had been determined.

12.59 The Committee therefore makes the following recommendation:

Recommendation 20

12.60 The Committee recommends that the ACT Government take advice as to whether the concept of 'corrupt conduct' adopted in the enabling legislation of an ACT Anti-Corruption and Integrity Commission is reflected in the terms of offences under the *Criminal Code 2002*. If it is not reflected, the Committee recommends that the Code should be amended so that it defines in statute the new standard or offence of 'corrupt conduct'.

THRESHOLD FOR INVESTIGATION

12.61 As noted in the preceding section, a number of contributors in the context of scope of conduct raised the importance of the threshold to commence an investigation—for example, 'reasonably satisfied' versus 'reasonable suspicion'—as being important.

12.62 The threshold for investigation is critical to the effectiveness of an anti-corruption type body—in that, if it is too high, the Body is limited in its ability to act. If it is too low, it can be argued that it permits a body to commence an investigation, using investigative and coercive powers, on the basis of limited evidence, and can be accused of contravening procedural fairness/natural justice requirements. More importantly though, is that the investigation threshold determines when such a body can use its investigative/coercive powers.

12.63 Hoole and Appleby (2017) suggest that an investigation threshold of ‘reasonable suspicion’ would address the challenges of determining a threshold that is neither too high or too low as it would balance the requirements for procedural fairness whilst permitting an anti-corruption type body to investigate where initially there may only be limited evidence. They suggest that this would be the case for the following reasons:

- such a threshold would ensure consistency with and respect of higher order values of the legal system, whose jurisdictional limits curtail the possible impacts of investigative powers on individuals and preserve the fundamental principle that individuals should not be exposed to official scrutiny without a pressing public objective;
- its incorporation as a threshold for the use of investigative powers would reflect the broad oversight and confidence-raising goals of an anti-corruption type body;
- in contrast, for example, with a criminal prosecution that requires a high evidentiary onus before it can proceed, a ‘reasonable suspicion’ threshold would give an anti-corruption type body flexibility to determine whether reported complaints or concerns, which may have only limited initial evidence to support them, point the way to actual instances of corruption; and
- the actual deployment of investigative powers would be limited by the requirement that the ‘suspicion’ itself focus on subjects of ‘serious’ or ‘systemic’ corruption.⁷⁹¹

12.64 This recommended course of action is informed by amendments in 2016 to Victoria’s *Independent Broad-based Anti-Corruption Commission (IBAC) Act 2011*, which revised the threshold IBAC could commence an investigation employing coercive powers from having to be ‘reasonably satisfied’ to having ‘reasonable suspicion’ of the occurrence of serious corrupt conduct.⁷⁹²

12.65 It was argued and supported in practice over the first year of operation of the IBAC Act that ‘reasonably satisfied’ established a higher threshold or standard inferring ‘belief’, as opposed to mere suspicion. A special report following the IBAC’s first year of operation identified problems with this threshold.⁷⁹³

⁷⁹¹ Hoole, G. and Appleby, G. (2017) ‘Integrity of Purpose: Designing a Federal Anti-Corruption Commission’, Conference paper prepared for *National Integrity Conference*, March 2017.

⁷⁹² July 2016.

⁷⁹³ Submission No. 31—Accountability Round Table; IBAC. (2014) *Special report following IBAC’s first year of being fully operational* (pursuant to section 162 of the *Independent Broad-based Anti-corruption Commission Act 2011*), April.

COMMITTEE COMMENT

- 12.66 The Committee agrees that care needs to be taken in determining the threshold at which an ACT ACIC can commence an investigation on the basis that it triggers when the Commission can use its investigative/coercive powers. The Committee further agrees that the threshold for investigation is critical to the effectiveness of an ACIC—in that, if it is too high, the Commission is limited in its ability to act and if it is too low, it may permit the Commission to commence an investigation using investigative and coercive powers, on the basis of limited evidence.
- 12.67 The Committee supports an investigation threshold of ‘reasonable suspicion’ for an ACIC to commence an investigation. The Committee considers that it balances the requirements for procedural fairness whilst permitting an ACIC to investigate, where initially there may only be limited evidence.
- 12.68 The Committee therefore makes the following recommendation:

Recommendation 21

- 12.69 The Committee recommends that an investigation threshold of ‘reasonable suspicion’ (as per the Victorian *Independent Broad-based Anti-corruption Commission Act 2011*) of the occurrence of corrupt conduct be required for an ACT Anti-Corruption and Integrity Commission to commence an investigation.**

POWERS OF PRELIMINARY INVESTIGATION

- 12.70 Some standing integrity bodies have powers to conduct preliminary investigations that do not include the use of coercive authority. The Victorian IBAC Act was recently amended, amongst other things, to supplement IBAC Victoria’s coercive investigative powers with new powers of preliminary investigation.
- 12.71 The rationale for powers to conduct preliminary investigations means that complaints and concerns can be minimally investigated in order to inform the decision of whether to launch a coercive investigation.

COMMITTEE COMMENT

- 12.72 The Committee is of the view that the use of non-coercive powers of inquiry, as part of preliminary investigation, to give *prima facie* consideration to subjects properly within an ACT ACIC’s jurisdiction would be a useful supplement to informing a decision of whether to commence an investigation where coercive powers were applied.

12.73 The Committee is also of the view that the power to hold a preliminary investigation would also be a useful mechanism to minimise the effect on the rights of a person under investigation and would strengthen procedural fairness considerations as a means of balancing expectations about an integrity body's use of its discretion.

12.74 The Committee therefore makes the following recommendation:

Recommendation 22

12.75 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to conduct preliminary investigations that do not include the use of coercive authority.

COMPLAINTS

12.76 In general, the views of contributors as to whether the work of a designated integrity body should only be on the basis of referrals or whether it should also be empowered to receive complaints from citizens, supported that such a body be visible, accessible and a contact point for all citizens to make complaints/and report corruption concerns.

12.77 Further, contributors were of the view that this should be supplemented with referrals from: within government (ACTPS); other integrity stakeholders/bodies and *vice a versa*; and that there be mandatory reporting—such as staff at an executive level having a duty to notify. It was also suggested that any requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.

12.78 Contrary to the general view of contributors, in its submission UnionsACT submitted that:

...it is of the view that the principle means by which a commission can initiate an investigation should be by referral. The referral could be from the range of existing bodies and commissions within the ACT,⁷⁹⁴

12.79 Anti-corruption type bodies are visible and high profile institutions designed to address corruption in the public sector. The public rightly has an interest in such bodies—making these bodies visible, accessible and empowered to receive complaints from citizens is one of the key ways of acquitting this legitimate expectation.⁷⁹⁵

⁷⁹⁴ Submission No. 22—UnionsACT.

⁷⁹⁵ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

12.80 Further, there is also a legitimate expectation, as it concerns citizens generally, citizens making complaints and citizens subject to an alleged complaint, that confidentiality requirements apply to complaints and referrals until such time as an integrity body decides to conduct a public inquiry.⁷⁹⁶

COMMITTEE COMMENT

12.81 The Committee believes that an ACT ACIC must be visible, accessible and a contact point for public complaints and referrals from its integrity counterparts. Whilst the Committee is of the view that this level of visibility and accessibility is an important element of an ACIC's accountability regime, equally important is the requirement for confidentiality to apply to complaints and referrals until such time as an ACIC decides to hold public hearings or report.

12.82 The Committee therefore makes the following recommendations:

Recommendation 23

12.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) must be visible, accessible and a contact point for: (a) citizens and public servants to make complaints and report corruption concerns; (b) referrals from within government (ACT Public Service); (c) referrals from other integrity stakeholders/bodies; and (d) referrals from other designated stakeholders.

Recommendation 24

12.84 The Committee recommends that complaints/referrals as received by an ACT Anti-Corruption and Integrity Commission (ACIC) are to be triaged using set criteria—such as: dismiss/refer/investigate. The triage criteria as detailed in the Victorian *Independent Broad-based Anti-corruption Commission Act 2011* are a useful reference point.

12.85 The Committee acknowledges that notification of a decision concerning the outcome of an ACT ACIC's consideration of a complaint or referral would signal an end to the complaint consideration stage. Formal notification of an ACIC's decision in this regard would be important in satisfying the legitimate expectations of a citizen making a complaint and an

⁷⁹⁶ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

individual who may be subject to a complaint. Formal notification may include communication of a decision or an ACIC giving a reason for a decision in the form of a statement of reasons.

Recommendation 25

12.86 The Committee recommends that confidentiality requirements are to apply to all complaints and referrals as received by an ACT Anti-Corruption and Integrity Commission (ACIC) until such time as the Commission decides to conduct public hearings or report.

12.87 The Committee notes that referrals within the integrity system are to be informed by respective jurisdiction and scope of conduct for other integrity counterparts together with mandated inter-institutional cooperation and information-sharing requirements. Further detail on these matters is set out in chapter 13.

12.88 Consistent with the practice that applies to other standing anti-corruption type bodies, the Committee is of the view that mandatory reporting should also apply within the ACT—such that Directors-General (and equivalents) have a duty to notify the ACT ACIC of any information or allegation that raises a corruption issue in his or her agency. Further, these requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.

12.89 The Committee notes that a contributor was of the view that ‘it would be beneficial if a decision not to make such a notification was defined as...corrupt’.⁷⁹⁷ The Committee further notes that a failure to comply with a mandatory reporting requirement should attract penalties for non-compliance—such as in the form of fines or sanctions.

12.90 The Committee therefore makes the following recommendations:

Recommendation 26

12.91 The Committee recommends that mandatory reporting should apply within the ACT Public Service—such that Directors-General (and equivalents) have a duty to notify an ACT Anti-Corruption and Integrity Commission of any information or allegation that raises a corruption issue in his or her agency. Further, these requirements for mandatory reporting should be accompanied by the development of guidelines to assist those to whom mandatory reporting provisions apply.

⁷⁹⁷ Submission No. 21—Inner South Canberra Community Council, Attachment, p. 5.

Recommendation 27

12.92 The Committee recommends that where Directors-General (and equivalents) knowingly or wilfully fail to comply with an ACT Anti-Corruption and Integrity Commission's duty to notify it of any information or allegation that raises a corruption issue in their agency, penalties should apply.

12.93 The Committee also acknowledges that linked to complaint and referral processes is a requirement that appropriate steps are taken by an ACIC to protect the safety of anyone providing assistance to it or anyone consequently at risk.

Recommendation 28

12.94 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should be empowered to take steps to protect the safety of anyone providing assistance to it or anyone consequently at risk. Appropriate provisions should be put in place to ensure protection of complainants or persons making reports, for example, protection from reprisals and victimisation. The Committee considers that these protections would be consistent with protections in other legislation.

13 RELATIONSHIPS WITH OTHER INTEGRITY STAKEHOLDERS

- 13.1 Several contributors noted that the relationships an ACT anti-corruption type body has with other integrity stakeholders are important and represent valuable inter-institutional cooperation and information-sharing toward common public goals. At a minimum enabling legislation for a designated integrity body should formalise these relationships and provide for: (i) referral mechanisms; (ii) provision for exchange of information; (iii) inter-agency arrangements; and (iv) relationship management procedures.⁷⁹⁸
- 13.2 The importance of avoiding duplication with the jurisdiction of existing integrity bodies and, where applicable, maintaining the separation of powers, was also emphasised.⁷⁹⁹
- 13.3 Integrity is a system of measures and agencies that work together. With this in mind, the relationships a future ACT Anti-Corruption and Integrity Commission (ACIC) has with its integrity counterparts are important, including referral procedures, ability to monitor investigations it refers on and having the power to subsequently investigate a matter it has referred, where it felt the matter had not been adequately dealt with.
- 13.4 The forms of inter-institutional cooperation and information-sharing that are needed to support and maintain integrity, transparency and accountability in the public sector, and which are implicit in the concept of an integrity system, need to be formalised and provided for in the enabling legislation of an ACT ACIC. Consequent amendments to the enabling legislation and policy frameworks of other integrity stakeholders may also be required. As it concerns relationships with other integrity stakeholders, an ACT ACIC's enabling legislation should provide a framework for:
- referral mechanisms;
 - provision for exchange of information;
 - inter-agency arrangements;
 - relationship management; and
 - designation of a lead body.

⁷⁹⁸ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 33—ACT Legislative Assembly Commissioner for Standards; Submission No. 7—Tony Harris; Submission No. 13—Benedict Sheehy (PhD); Submission No. 16—Rhyl Hurley; Submission No. 20—Canberra Alliance for Participatory Democracy (CAPaD).

⁷⁹⁹ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 33—ACT Legislative Assembly Commissioner for Standards.

- 13.5 It is acknowledged that information sharing and referrals as it concerns MLAs is likely to encounter issues with parliamentary privilege—and a requirement to compel the provision of information on the outcome of an investigation would be contrary to maintaining privilege. The provision of this information is important to ensure the public can have confidence that any improper conduct of MLAs is being investigated/addressed. Provisions would therefore need to be considered, that respect the maintenance of privilege, but which provide for reporting on the outcome of an investigation to ensure matters concerning MLAs are investigated and dealt with appropriately.⁸⁰⁰

COMMITTEE COMMENT

- 13.6 The Committee acknowledges that integrity is a system of measures and agencies that work together. It follows therefore that the relationships an ACT ACIC has with its integrity counterparts are important. The relationships should collectively support and maintain integrity, transparency and accountability in the public sector whilst respecting the specific role and contribution each entity brings to the integrity system.
- 13.7 An ACT ACIC's role is limited to specific areas where the standing regulatory capacities of other integrity counterparts are thought to be vulnerable or lacking. It has a role that is 'focused in areas that buttress rather than conflict with'⁸⁰¹ the roles of other integrity counterparts.
- 13.8 As it concerns the designation of a lead agency in the integrity system, the Committee believes that an ACT ACIC, as informed by its purpose, should have a role in fostering public confidence in an integrity context and bring an authoritative leadership, organising and coordinating focus to the ACT public sector and parliamentary integrity framework.
- 13.9 The Committee therefore makes the following recommendation:

Recommendation 29

- 13.10 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) as informed by its purpose, should have a role in fostering public confidence in an integrity context and bring an authoritative leadership, organising and coordinating focus to the ACT public sector and parliamentary integrity framework.**

⁸⁰⁰ Refer Martin, B. (2016) Anti-Corruption, Integrity and Misconduct Commission Inquiry—Final report, May.

⁸⁰¹ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017, p. 13.

13.11 As it concerns relationships with other integrity stakeholders, the Committee makes the following recommendation:

Recommendation 30

13.12 The Committee recommends, as it concerns relationships with other integrity stakeholders, that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation, at a minimum, should:

- (a) provide for the ACIC to operate cooperatively with other integrity agencies, including those in other jurisdictions—for joint investigations or information sharing with these jurisdictions;**
- (b) provide an appropriate framework for inter-agency coordination;**
- (c) detail information sharing provisions to enable the exchange of relevant intelligence and documentation when an investigation is commenced;**
- (d) provide for appropriate referral mechanisms which allow the ACIC to refer matters to other bodies, that fall outside its jurisdiction and scope of conduct;**
- (e) provide the ACIC, in referring matters to other integrity stakeholders, with power to give directions and guidance with regard to the conduct of the matter and to require the agency to provide a report as to the investigation undertaken and its results;**
- (f) include, where the ACIC refers a complaint or report concerning an MLA to the Commissioner for Standards to specify that the Commissioner be obligated (as opposed to compelled) to provide a report as to the outcome of the referral. The ACIC will be able to report publicly that it has made such a referral and this will leave the onus on the ACT Legislative Assembly to explain what has happened to the referral; and**
- (g) include, where the ACIC refers a complaint or report concerning a member of the Judiciary to the Judicial Council, to specify that the Judicial Council be obligated (as opposed to compelled) to provide a report as to the outcome of the referral. The ACIC will be able to report publicly that it has made such a referral and this will leave the onus on the Judicial Council to explain what has happened to the referral.**

14 POWERS

14.1 Anti-corruption and integrity bodies mandated with the role of exposing and investigating corruption require a broad set of powers to be effective. It has been argued that the suite of powers required by such bodies is necessary because of the nature of corruption, in that it ‘is an extraordinary crime’, and that ‘it is almost impossible to detect or expose using ordinary investigative powers’. There are many reasons why these characteristics prevail:

Perhaps the most fundamental is that corruption has many of the characteristics of a “victimless crime”. If, for example, private contractors are skimming money from a major public contract, it is difficult to notice that this has occurred. Often it requires a very careful analysis of the detail of the contracts. More often than not the corruption will go undetected.

Another special difficulty is that corruption is one of those crimes which is organised by persons who are usually the most knowledgeable about the processes and, hence, most likely to be aware of the loopholes.

...

It also requires the provision of two exceptional powers, a power to compel the production of evidence which otherwise would have been protected by the legal professional privilege; and a power to compel a person to give evidence even though that evidence may tend to incriminate them.

Before explaining why those powers are particularly necessary here, it should be pointed out that these powers are routinely granted to Royal Commissioners. It is true that, on their face, the application of such powers may interfere with ordinary protections provided in the criminal justice system, but there are adjustments in place to protect against any damage to the individual. When the exceptional powers are exercised it is pursuant to a qualification which allows the individual to take an objection so that, in the event any criminal or other proceedings are pursued, the privilege over the evidence and documents is restored. So the temporary relaxation in the operation of the privileges does no permanent damage to the individual.⁸⁰²

14.2 These powers can be organised as follows:

- power to initiate or conduct own inquiries (own motion powers);
- investigative and coercive powers;
- power to hold public hearings;

⁸⁰² Watson, G. (2017) ‘The Darkest Corners: The case for a federal integrity commission’, Conference keynote: *Accountability and the Law Conference*, August, p. 13.

- power to make findings only;
 - power to make disciplinary decisions and provide mediation;
 - power to take action for contempt—failure to appear and failure or refusal to answer any question;
 - power to refer suspected instances of criminality for prosecution;
 - reporting powers—power to report publicly on the outcome of investigations; and
 - power to look at past events (where a body is newly established)—issues regarding retrospectivity.
- 14.3 The general tenor of the views of contributors was that a standing ACT independent integrity body should have wide ranging and significant powers to be effective but equally important was that such powers should be proportionate and tempered by appropriate controls.
- 14.4 The power to hold public hearings is discussed in chapter fifteen. In considering the suite of other powers, the general view was that they were necessary and supported (some with qualifications) with the exception of the power to make disciplinary decisions and provide mediation. A number of contributors were of the view that such power risked shifting the body into a legal proceeding as opposed to an investigative proceeding. A contributor was also wary of the power to initiate or conduct own inquiries and the power to make findings.
- 14.5 The Committee's views and position concerning the aforementioned powers are set out below.

POWER TO INITIATE OR CONDUCT OWN INQUIRIES

- 14.6 The power to initiate or conduct own inquiries is commonly referred to as own motion powers. 'Own motion investigations' are those which investigatory bodies can set in train under their own initiative. Alternatives would include: statutory settings that allowed such bodies to investigate only in response to complaints; or in connection with referrals from other bodies or the legislature. A capacity to conduct own motion investigations describes a more active role for an integrity commission and increases its independence reducing the requirement to rely on other bodies for triggers for investigations.
- 14.7 Prenzler and Faulkner state in relation to own motion investigations that:
- This is a standard power for integrity commissions and widely seen as an important means of exposing hidden or 'victimless' corruption and preventing the escalation of corruption (Parliament of the Commonwealth of Australia 2009:32, Parliament of Tasmania 2009:2, Appendix 4). Proponents of integrity commissions appear to hold to a consensus position in favour of own motion powers, whereas opponents tend to be silent on the issue. A 2001 survey of integrity agencies found that the agencies that lacked own motion powers — mainly Ombudsmen — claimed they needed the power

to adequately address suspected misconduct and support public confidence (Prenzler and Lewis 2005).⁸⁰³

COMMITTEE COMMENT

- 14.8 The Committee notes the broad support from contributors that an ACT Anti-Corruption and Integrity Commission (ACIC) should have the power to initiate or conduct its own inquiries. The Committee considers that without such a power, the Commission risks becoming reactive as opposed to proactive and would be constrained by a reliance on complaints and referrals to trigger an investigation. The insidious nature of corruption requires an ACIC to have the power to initiate an investigation as it considers necessary. Such a power would be consistent with the Commission's two objectives of investigating, exposing and preventing corruption and fostering public confidence in the integrity of government.
- 14.9 The Committee notes the exception to support for own motion powers as expressed by UnionsACT which was 'wary of a Commission with broad powers to initiate its own investigations'.⁸⁰⁴ The Committee acknowledges this concern and considers that the power for an ACT ACIC to initiate or conduct its own inquiries must be for the purposes of investigating, exposing and preventing corruption and fostering public confidence in the integrity of government.
- 14.10 The Committee therefore makes the following recommendation:

Recommendation 31

- 14.11 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have own motion powers for the purposes of investigating, exposing and preventing corruption and fostering public confidence in the integrity of the ACT Government.**

INVESTIGATIVE AND COERCIVE POWERS

- 14.12 Investigative and coercive powers include the following.

⁸⁰³ Prenzler, T. and Faulkner, N. (2010) 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69(3), pp. 259–260.

⁸⁰⁴ Submission No. 22—UnionsACT, p. 4.

POWERS TO REQUIRE ATTENDANCE AND ANSWERS TO QUESTIONS

- 14.13 Powers to require attendance and compel answers to questions provide investigatory bodies with significant inquisitorial powers. Without those powers, people being investigated would have the power to refuse to attend or respond to questions, which would reduce the efficacy of inquiries and increase the time required to complete them.

POWERS TO APPLY FOR WARRANTS TO SEARCH PROPERTIES AND SEIZE EVIDENCE

- 14.14 Powers to ‘apply for search warrants and seize evidence’ provide a significant element in the powers of investigatory bodies. Similar to powers to compel witnesses to appear and respond to questions, such powers prevent investigations from being halted or impeded as a result of a refusal by people under investigation to provide materials relevant to an investigation.

POWER TO ENGAGE IN COVERT TACTICS

- 14.15 Power to engage in covert tactics—including: listening devices, optical surveillance, undercover agents and targeted integrity tests. Powers for investigatory bodies to engage in covert investigatory processes support the capacity of investigatory bodies to gain evidence of misconduct by reducing the likelihood that persons under investigation will be alerted to the fact that they are under investigation, and that they might alter their behaviour so as to elude detection or punishment.
- 14.16 As is the case for powers to compel witnesses, search premises, and seize materials, such powers provide investigatory bodies with a capacity to conduct investigations independently of other entities with investigatory powers, such as the Courts and the police, and thus contribute to the strength and the independence of such bodies.
- 14.17 Several contributors noted the inevitable tension that exists between civil liberties/personal rights and an anti-corruption type body’s use of investigative and coercive powers. Whilst noting general support for investigative and coercive powers—this support was qualified by an emphasis on the importance of placing reasonable limits on the circumstances in which such powers can be exercised. Examples included:
- requiring (subject to exceptions) that when witnesses are summonsed that they be given notice of the subject matter of the questions they will be asked;
 - ensuring that warrants that are issued for an integrity body’s investigation are issued by the Courts rather than the Body itself;
 - any action to engage in covert tactics should be subject to obtaining a warrant through a judicial officer;
 - as it concerns engaging in a controlled operation—that detailed and prescriptive criteria should be included in any legislation which permits an integrity body to engage in a controlled operation and that punitive measures should also be in place to protect against unauthorised controlled operations in connection with an integrity body’s work; and

- evidence gathered about unrelated third parties should form no part of an integrity body's investigation.

14.18 Aspects of investigative coercive powers not supported were:

- where an integrity body may engage in entrapment—reservations were expressed about a commission body being in a position where its officers may engage in entrapment (refer J D Heydon, 'The Problems of Entrapment' (1973) 32 *Cambridge Law Journal*, pp. 268; 270–272)⁸⁰⁵; and
- an integrity body not have the power to arm its officers⁸⁰⁶.

14.19 In its submission, as it concerns limits to coercive powers, UnionsACT was of the view that:

The integrity commission should principally be an investigatory body. If the commission were granted coercive powers, they should be limited to an investigatory function, e.g., powers that allow it to: *[s]*eek information; and *[r]*equire the provision of documents.⁸⁰⁷

COMMITTEE COMMENT

14.20 The Committee notes that in the main, there was broad support for an ACT ACIC to be given sufficient powers to address corruption at all levels, including covert and coercive powers if considered appropriate.

14.21 Further, the power to compel the production or giving of evidence which would otherwise be protected by legal professional privilege and privilege against self-incrimination, respectively, should be codified in an ACIC's legislative framework.

14.22 The Committee also considers that it is important to codify in enabling legislation, that an ACIC investigates corruption, in the main, via an inquisitorial process that is not bound by the rules or practice of evidence.

14.23 The Committee is of the view that the enabling legislation for an ACT ACIC must contain mechanisms to guard against these exceptional powers being abused including safeguards to avoid any unwarranted violation of personal rights of a person under investigation.

14.24 As it concerns coercive powers, the Committee believes it is important to distinguish the differences between “controlled activities and operations” and “integrity testing (or

⁸⁰⁵ Submission No. 6—Guy Boland.

⁸⁰⁶ Submission No. 28—Griffith Narrabundah Community Association.

⁸⁰⁷ Submission No. 22—UnionsACT, p. 4.

entrapment)".⁸⁰⁸ As the Committee understands, the difference rests on the acceptability of the way in which an 'offence may be facilitated or induced in order to gain evidence'.⁸⁰⁹ A "controlled activity or operation" requires conduct, where there is reasonable suspicion of corrupt or criminal activity, which facilitates or induces an opportunity for an offence. Whereas, "integrity testing (or entrapment)" requires conduct, where there is reasonable suspicion of corrupt or criminal activity, which instigates an offence or causes an offence to occur.⁸¹⁰ In the Committee's view these are important differences.

14.25 The Committee therefore makes the following recommendations:

Recommendation 32

14.26 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have powers to: (a) require attendance by witnesses and compel answers to questions; (b) apply for warrants to search properties and seize evidence; and (c) apply for warrants to engage in covert tactics—including: listening devices and optical surveillance.

Recommendation 33

14.27 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation must contain mechanisms to ensure procedural fairness and to guard against its investigative and coercive powers being abused. This should include safeguards to avoid any unwarranted violation of personal rights of a person under investigation; and placing reasonable limits on the circumstances in which such powers can be exercised. This should include:

- (a) requiring that when witnesses are summonsed that they be given notice of the subject matter that will be discussed (provided it does not unduly prejudice the investigation);**
- (b) ensuring that warrants that are issued for an ACIC investigation are issued by the Courts rather than the Commission itself;**
- (c) any action to engage in covert tactics should be subject to obtaining a warrant through a judicial officer;**

⁸⁰⁸ NSW Police Service. (1996) Integrity Testing Information Pamphlet; Newton, S. (1997) 'Integrity Testing as an Anti-Corruption Strategy', *Australian Police Journal*, Vol. 51, Issue 4, pp. 222–224; Colvin, E. (2002) 'Controlled Operations, Controlled Activities and Entrapment', *Bond Law Review*, Volume 4, Issue 2, pp. 227–250.

⁸⁰⁹ Colvin, E. (2002) 'Controlled Operations, Controlled Activities and Entrapment', *Bond Law Review*, Volume 4, Issue 2, p. 229.

⁸¹⁰ Colvin, E. (2002) 'Controlled Operations, Controlled Activities and Entrapment', *Bond Law Review*, Volume 4, Issue 2, p. 229.

- (d) as it concerns engaging in a controlled operation—that detailed and prescriptive criteria should be included in any legislation which permits the ACIC to engage in these activities and that punitive measures should also be in place to protect against unauthorised controlled operations in connection with an ACIC’s work;**
- (e) evidence gathered about unrelated third parties should form no part of an ACIC’s investigation (unless it is relevant to the investigation);**
- (f) that evidence given by a suspect under compulsion cannot be used against that suspect in any subsequent prosecutions; and**
- (g) if proceedings are proceedings for an indictable offence, an ACIC must, to the extent it thinks it is necessary to do so, ensure that the accused’s right to a fair trial is not prejudiced.**

Recommendation 34

- 14.28 The Committee recommends that an ACT Anti-Corruption and Integrity Commission’s enabling legislation must provide that the protections afforded by legal professional privilege and privilege against self-incrimination respectively are waived in circumstances where the Commission uses its power to compel the production or giving of evidence.**

Recommendation 35

- 14.29 The Committee recommends that an ACT Anti-Corruption and Integrity Commission is not bound by the rules of evidence and can inform itself on any matter in such a manner as it sees fit.**

Recommendation 36

- 14.30 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should not have the power: (a) to engage in integrity testing; and (b) arm its officers.**

- 14.31 The Committee is of the view that the limitation on an ACT ACIC’s power to engage in integrity testing and arm its officers should be reviewed as part of a five year statutory review period. Discussion on a statutory review period for an ACT ACIC’s enabling legislation is set out in chapter 16.

- 14.32 As it concerns the limitation on an ACT ACIC’s power to engage in integrity testing, the Committee notes that this would be inconsistent with the Australian Commission for Law Enforcement Integrity’s (ACLEI) powers and any coverage it would have regarding ACT policing officers. The Committee is therefore of the view that any referrals from ACLEI would be exempt from this restriction.

Recommendation 37

14.33 The Committee recommends, to ensure consistency with the powers of the Australian Commission for Law Enforcement Integrity (ACLEI), where it concerns conduct of ACT Policing officers, that an ACT Anti-Corruption and Integrity Commission have the power to engage in integrity testing.

POWER TO MAKE FINDINGS

14.34 The power of an anti-corruption body to make findings of fact is important, as it distinguishes such a body from a legal proceeding. Importantly, such a body (and its investigation process) is not a court exercising criminal jurisdiction—it cannot convict or punish and, on this basis, it cannot usurp functions which properly reside elsewhere.

14.35 With this in mind, an anti-corruption body (and its investigation process) does not have the accompanying requirements and safeguards of the judicial process. Accordingly, it can only make findings, however these findings are not findings of criminal guilt but findings of fact.

14.36 Importantly though, statutes governing anti-corruption type bodies must explicitly restrict such bodies from reaching formal determinations of law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers. For example, in Western Australia, section 217A of the *Anti-Corruption Commission Act 1988* stated that the Commission must ‘not publish or report a finding or opinion that a particular person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence’, and that a finding of opinion that misconduct has occurred is not to be taken as a finding of guilt.⁸¹¹

COMMITTEE COMMENT

14.37 The Committee acknowledges that the power to make findings of fact—either that corruption has occurred or not occurred signals a conclusion to an ACT ACIC investigation. Equally important is that this must be balanced with an explicit restriction on the Commission from reaching formal determinations of law, including findings of criminal guilt.

14.38 The Committee therefore makes the following recommendations:

⁸¹¹ Stone, B. and Sheldrick, M. (2013) ‘Anti-Corruption Authorities and Accountability: The Western Australian Case’, Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

Recommendation 38

- 14.39 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to make findings of fact that corruption has occurred and that such a finding is not to be taken as a finding of guilt.**

Recommendation 39

- 14.40 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's enabling legislation must explicitly restrict the Commission from reaching formal determinations of law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers.**
- 14.41 The Committee notes that power to 'make findings only' was not supported by UnionsACT. In its submission UnionsACT noted that:
- The experience in NSW and other jurisdictions is that the ability for a Commission to make public findings can have serious adverse consequences for individuals. This can amount to a penalty, even if a court later finds that the individual committed no wrong-doing. UnionsACT therefore does not support an ACT Integrity Commission to have powers to make public findings.⁸¹²
- 14.42 The Committee acknowledges the position expressed by UnionsACT and notes that in its view the power to make findings of fact—either that corruption “has occurred” or “not occurred” signals a conclusion to an ACT ACIC investigation and is important in that regard.
- 14.43 The development of an exoneration protocol may assist with addressing the concerns expressed by UnionsACT. In that, there may be times when individuals are subsequently exonerated or cleared of any personal corruption—after a finding of corruption by an ACT ACIC.
- 14.44 The Committee notes that the *Report of NSW ICAC Inspector* (2016) recommended an 'exoneration protocol' which was not supported. Former NSW DPP—Nicholas Cowdrey is of the view that anti-corruption type bodies could give consideration to some mechanism for the public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person's reputation has been attacked publicly. Suitable guidelines could be drawn up to govern such a process.⁸¹³

⁸¹² Submission No. 22—UnionsACT, p. 4.

⁸¹³ Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August, p. 31.

14.45 The Committee also notes that the *Report of the Independent Panel reviewing NSW ICAC* (2016)—raised the concept of an “exoneration protocol”. It recommended that the concept be examined by the relevant NSW Parliamentary Joint Committee.

14.46 The Committee believes that there is merit in considering an exoneration protocol in circumstances where an individual is subsequently exonerated or cleared of any personal corruption—after a finding of corruption by an ACT ACIC.

14.47 The Committee notes that in other jurisdictions, anti-corruption and integrity type bodies and its officers have protection from any action, liability, claim or demand. This means that any matter or action done by the entity or its officers, if the matter or action was done in good faith for the purposes of executing the Body’s enabling legislation or other legislation, the entity or its officers are not subject to any action, liability, claim or demand.

14.48 The Committee therefore makes the following recommendation:

Recommendation 40

14.49 The Committee recommends that an ACT Anti-Corruption and Integrity Commission institute an Exoneration Protocol that can be accessed in circumstances where an individual is subsequently exonerated or cleared of any personal corruption—after a finding of corruption. The Protocol amongst other things should include:

- (a) a mechanism for public acknowledgement of the exoneration or clearance of any person if corruption is not found after the person’s reputation has been attacked publicly; and**
- (b) the development of guidelines to govern such a process.**

POWER TO MAKE DISCIPLINARY DECISIONS AND PROVIDE MEDIATION

14.50 Powers to make disciplinary decisions and manage a mediation program can provide investigatory bodies with additional and alternative means of dealing with people considered to have been engaged in misconduct, and people alleging misconduct, beyond those provided by the criminal justice system.

14.51 In connection with such powers, Prenzler and Faulkner state that:

A standard feature of anticorruption commissions in Australia is that they do not have the power to take disciplinary action against holders of public office when they believe disciplinary action is warranted. Nor do they have the power to prosecute criminal matters, although in some instances they might be able to prosecute intermediate matters before a misconduct tribunal. The issue has generated surprisingly little debate, but it lies behind widespread disillusionment when individuals found by a commission to have engaged in misconduct are ‘let off’ with little or no consequence...⁸¹⁴

14.52 Prenzler and Faulkner go on to state that:

The problem might in part be solved by granting commissions summary jurisdiction over disciplinary matters — including the power to fine, demote and sack public servants; and to make findings of unethical conduct against politicians; subject to an appeals process. Commissions have also been frustrated with delays by public prosecutors (Committee on the ICAC 2008:2) and one option is to allow them to independently prosecute matters in the courts following excessive delays.⁸¹⁵

14.53 As to an ACT anti-corruption type body having the power to make disciplinary decisions and provide mediation, a contributor to the Inquiry commented:

Clearly, an ICAC must be able to find that a person has acted corruptly or is corrupt. This element would go further by allowing the body to suspend or impose a penalty or dismiss a person who has been found to have acted corruptly. Alternatively, the body can mediate such penalties with the agency responsible for the person found to have acted corruptly. It is more common that an anti-corruption body allows another authority, such as the courts or an employer to determine the appropriate penalty or response when a person is found to be corrupt. Providing this power might be efficient in that the anti-corruption body deals with the whole matter. But the lack of division of power - as between judge, jury and executioner - might be questionable;⁸¹⁶

COMMITTEE COMMENT

14.54 The Committee does not support an ACT ACIC having powers to make disciplinary decisions and manage a mediation program. The Committee believes that such a power would shift an ACIC into a legal proceeding as opposed to an investigative proceeding. This arguably creates

⁸¹⁴ Prenzler, T. and Faulkner, N. (2010) ‘Towards a Model Public Sector Integrity Commission’, *Australian Journal of Public Administration*, Vol. 69(3), p. 260.

⁸¹⁵ Prenzler, T. and Faulkner, N. (2010) ‘Towards a Model Public Sector Integrity Commission’, *Australian Journal of Public Administration*, Vol. 69(3), p. 260.

⁸¹⁶ Submission No. 21—Inner South Canberra Community Council, Attachment, p. 3.

a number of issues as it concerns the body stepping outside its mandate and the conflict that arises when the investigative arm begins determining and imposing sanctions.

14.55 Further, the Committee notes that such a role would be contrary to the view that a key mechanism to minimise the effect on the rights of a person under investigation, aside from restricting the limitation of rights to the investigative process, is to deny an ACIC a disciplinary role.

14.56 The Committee, however, is of the view that where an ACT ACIC refers a complaint or report to an integrity counterpart it should be informed (where applicable) of the outcome of any disciplinary proceedings.

14.57 The Committee therefore makes the following recommendations:

Recommendation 41

14.58 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should not have powers to make disciplinary decisions nor manage a mediation program.

Recommendation 42

14.59 The Committee recommends that where an ACT Anti-Corruption and Integrity Commission refers a complaint or report to an integrity counterpart it should be informed (where applicable) of the outcome of any disciplinary proceedings.

POWER TO TAKE ACTION

14.60 The power to take action for, and where applicable punishment of, contempt of an anti-corruption type body, in circumstances such as a failure or refusal to appear as a witness and to answer any question, is important in providing for such a body to regulate its internal proceedings.

COMMITTEE COMMENT

14.61 The Committee supports the power of an ACT ACIC to take action, including punishment, for any contempt of the Commission. The Committee therefore makes the following recommendations:

Recommendation 43

- 14.62 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should have the power to take action for, and where applicable take action against any contempt of the Commission (subject to parliamentary privilege).**

Recommendation 44

- 14.63 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should not have the power to take action against a person for an act or omission where it is established that there was a reasonable explanation for the act or omission concerned.**

POWER TO REFER FOR PROSECUTION PURPOSES

- 14.64 The power to refer suspected instances of criminality to other authorities without reaching actual findings of criminal wrongdoing or initiating criminal prosecutions can be vexed at times.
- 14.65 A possible issue has included that referred evidence might be misused by subsequent authorities taking advantage of its coerced origins.⁸¹⁷ This risk can be mitigated by specifying in the enabling legislation of an anti-corruption type body the manner in which evidence will be gathered and shared with other agencies, so as to minimise any risk that such evidence will be misused, and to improve the prospects of that material being used in subsequent prosecutions.
- 14.66 The flow on effect that any increase in referrals from an anti-corruption type body may have on other agencies in the integrity system, such as the Director of Public Prosecutions (DPP) needs to be acknowledged and addressed.

COMMITTEE COMMENT

- 14.67 The Committee is of the view that the power to refer suspected instances of criminality to other authorities without reaching actual findings of criminal wrongdoing or initiating criminal prosecutions reinforces the concept of an integrity system comprising a system of measures and agencies that work together. Further, it draws an important distinction between an ACT

⁸¹⁷ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March 2017.

ACIC's investigative function and role and any legal proceeding that may eventuate—as it concerns process, powers and decision makers.

14.68 The Committee is also of the view that an ACT ACIC should be empowered to refer suspected instances of criminality to appropriate authorities, subject to existing legal restrictions against reliance on derivative evidence by those authorities.

14.69 The Committee acknowledges that sufficient resources need to be provided to the DPP to manage any increase in workload that may arise from referrals from an ACT ACIC.

14.70 The Committee therefore makes the following recommendations:

Recommendation 45

14.71 The Committee recommends that an ACT Anti-Corruption and Integrity Commission be empowered to refer suspected instances of criminality to appropriate authorities, subject to existing legal restrictions against reliance on derivative evidence by those authorities.

Recommendation 46

14.72 The Committee recommends that sufficient resources need to be provided to the ACT Office of the Director of Public Prosecutions to manage any increase in workload that may arise in connection with referrals from an ACT Anti-Corruption and Integrity Commission.

14.73 Further discussion as it concerns investigations, gathering of evidence and any subsequent prosecutions raises the question as to the prime purpose of an ACIC—in that, is it to investigate and expose corruption or to investigate so as to gather evidence for prosecutions?

14.74 The Committee is of the view that its prime purpose is both, and therefore acknowledges that a balance needs to be struck between these two objectives and care needs to be taken to identify and understand the different imperatives and underlying principles that apply to an investigator and a prosecutor. The Committee notes the means by which the Commission gathers evidence (including by compulsory examination) will impact upon the admissibility of the evidence in criminal proceedings.⁸¹⁸

14.75 Accordingly, the Committee is of the view that a framework needs to be put in place to regulate how evidence is to be gathered and shared between an ACT ACIC and the ACT DPP to minimise any risk that such evidence will be misused and to improve the prospects of that

⁸¹⁸ Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August, p. 27.

material being used in subsequent prosecutions. This could also include a protocol to ensure timely communication to assist in pursuing matters of mutual interest.

Recommendation 47

14.76 The Committee recommends that enabling legislation for an ACT Anti-Corruption and Integrity Commission include provisions that: (a) will regulate the manner in which evidence is gathered and shared with other agencies so as to improve the prospects of that material being used in subsequent prosecutions and to minimise any risk that such evidence will be misused; and (b) set out a mechanism for timely communication between the Commission and the ACT Director of Public Prosecutions to assist in pursuing matters of mutual interest.

POWER TO REPORT PUBLICLY

14.77 The power to report publicly on the outcome of investigations including findings of serious and systemic corruption and their relevant factual foundations is an important accountability mechanism. Such a power should include a number of reporting mechanisms designed to be responsive to the multiple stakeholders that have an interest in an anti-corruption type body's accountability regime. These mechanisms are detailed in the Committee comment section.

14.78 All state-based anti-corruption type bodies have the power to report publicly on the outcome of investigations with the exception of South Australia (SA). The SA ICAC is not permitted to make reports to Parliament on specific investigations. Sections 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012 (SA)*, provide for the Commissioner to 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. However, under section 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. The SA Integrity Commissioner has criticised this constraint on his powers to report and bring to the attention of Parliament and the public his findings and recommendations in relation to specific investigations.⁸¹⁹

⁸¹⁹ Sections 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012 (SA)*; Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March.

COMMITTEE COMMENT

14.79 The Committee is of the view that an ACT ACIC must be able to publicly report the findings that result from any investigation, including findings of serious and systemic corruption and their relevant factual foundations. Further, as considered necessary, an ACT ACIC should have the power to limit its public reporting where it may not be in the public interest.

14.80 The Committee notes that exceptions to public disclosure in the form of reporting would be where, in the opinion of the statutory head of an ACIC, disclosure would compromise an ongoing investigation, or place an individual in danger, or prejudice an upcoming judicial proceeding.

14.81 The Committee therefore makes the following recommendations:

Recommendation 48

14.82 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should have the power to publicly report the findings that result from any investigation, including findings of serious and systemic corruption and their relevant factual foundations. The power to report should include:

- (a) powers to report and bring to the attention of the Assembly and the public findings and recommendations in relation to specific investigations;**
- (b) a statutory power of ‘follow-up’—the ability to report publicly on the Government’s compliance (or lack thereof) with past reports and recommendations;**
- (c) power to make a special (confidential) report to the designated Assembly oversight committee—where the statutory head of the ACIC considers that the disclosure of the information in a report to the Assembly would, on balance be contrary to the public interest; and**
- (d) power to decline to report a matter which, in the opinion of the statutory head of the ACIC, should remain confidential.**

Recommendation 49

14.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) be provided with exceptions to public disclosure in the form of reporting where disclosure, based on a public interest test, would compromise an ongoing investigation, place an individual in danger, or prejudice an upcoming judicial proceeding.

POWER TO DEAL WITH VEXATIOUS COMPLAINANTS

- 14.84 Arguments in favour of the power for an anti-corruption type body to ‘prosecute complainants who are patently vexatious’ could emphasise two arguments in favour of providing this power.
- 14.85 First, such a power could be seen as protective of an integrity body’s resources. It can be assumed that any integrity body will be faced by a complex environment consisting of greater and lesser forms of potential misconduct, and that such a body should have the power to protect and regulate its workload so as to maintain the effectiveness of the Body.
- 14.86 A second imperative is to protect against misuse of an anti-corruption type body—that is, to use the integrity process maliciously to persecute or otherwise malign an individual or organisation, potentially in the absence of checks and balances that may exist when matters are pursued through the Courts.
- 14.87 Those contributors to the Inquiry expressing a view on the matter of managing vexatious complainants were of the view that integrity bodies need to be able to deal with these types of complainants. There was a general view that this should be dealt with by providing an integrity body with the power to not proceed where there are reasonable grounds to believe that a complaint is vexatious, as opposed to having a power to prosecute vexatious complainants.

COMMITTEE COMMENT

- 14.88 The Committee supports the notion that an ACT ACIC should have power to exercise discretion over the extent to which complaints may be investigated. In that way such a power provides protection both for the resources of the ACIC and from the possibility that complaints may be used for purposes not contemplated by the Commission’s enabling legislation.
- 14.89 The Committee acknowledges that ultimately an ACT ACIC needs to be able to deal with vexatious complainants—to preserve the resources and time of the Commission; to protect against misuse of an integrity process to maliciously persecute or otherwise malign an individual or organisation; and to have the capacity to avoid substantive investigation into all complaints in instances where there may be good cause to consider that their basis is questionable.
- 14.90 The Committee is of the view that an ACT ACIC needs to have appropriate powers for dealing with vexatious complainants. This power can take the form of either having discretion to not proceed where there are reasonable grounds to believe that a complaint is vexatious or having the power to prosecute vexatious complainants.

14.91 The Committee also acknowledges that it is inevitable that with the introduction of a new type of watchdog/institution it is likely to attract additional (complaints) and possibly vexatious complaints.

14.92 It would seem to the Committee that the discretion to not proceed would be more consistent with the view that the Commission has an investigative focus and not a judicial focus. Further, having a power to prosecute may seem excessive if the Commission can ignore vexatious complainants.

14.93 The Committee believes it is important to distinguish between vexatious complainants and those complainants who make false or knowingly misleading claims or complaints. Appropriate penalties should be established for these types of complainants.

14.94 Further, the Committee is of the view that an additional measure to dissuade either potentially vexatious or false or misleading complaints could require that the act of making or lodging a complaint comprises a statutory declaration.

14.95 The Committee therefore makes the following recommendations:

Recommendation 50

14.96 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) have the power to deal with vexatious complainants. This power should take the form of the statutory head of the ACIC having discretion to not proceed where there are reasonable grounds to believe that a complaint is vexatious.

Recommendation 51

14.97 The Committee recommends that an ACT Anti-Corruption and Integrity Commission have the power to impose appropriate penalties on those complainants, who knowingly or wilfully make false or misleading claims or complaints.

RETROSPECTIVITY

14.98 Retrospectivity or the power to deal with acts before an integrity body is established is an important consideration. In particular, as many such institutions are established following revelations of corruption and/or perceptions that corruption was going unchallenged, there are often expectations that such a body should be able to deal with old allegations or allegations about things that happened before it commenced operation.

14.99 Ultimately, the dilemma is how much discretion a newly created integrity body should have to examine acts or conduct before it commenced operation.

14.100 As to this dilemma, the OECD notes:

In many countries, including transition economies in Eastern Europe, specialised anti-corruption institutions have been created after the change of government which gained power on a strong anti-corruption platform. As a result, there are political and public expectations not only to ensure good governance of the new administration, but also to pursue abuses of the previous governments.

While this expectation might be highly legitimate in some circumstances, focus on the past give rise to two important caveats: it can taint (rightfully or wrongly) the newly established anti-corruption institution with a label of pursuing politically motivated persecutions. It can result in a disproportionate allocation of resources of the newly established institution on the past cases – making it impossible to pursue current cases effectively. Accordingly, as much as possible, the jurisdiction should be prospective and oriented towards the future. Its retrospective focus should be limited to only the most severe and clearly indicated cases.⁸²⁰

14.101 In summary, the inevitable tensions that must be balanced are the expectations to hold potential perpetrators accountable, and to be seen to be doing this, with potential to taint a newly established body with a specific agenda, whilst also impacting on resources that may limit such a body in its ability to deal with current cases.

14.102 These inevitable tensions were well captured in the second reading speech for the Tasmanian Integrity Commission Bill 2009⁸²¹:

The first of these is retrospectivity. There has been quite a bit of debate about whether the Integrity Commission should be able to deal with old allegations or allegations about things that happened before it commenced operation.

Mr Speaker the Government takes the view that the Commission must be able to look into these matters if it is to enjoy public confidence so there is no specific cut off point imposed by the Bill.

We have to be realistic though and recognise that when the Commission opens its doors there are going to be people wanting it to investigate allegations which go back many years; allegations which have already been properly and thoroughly investigated; and even some allegations which, quite honestly, were trivial or malicious in the first place.

The Bill takes the approach of leaving it up to the Commission to decide which matters to investigate but provides some guidance about the tests to be applied, including public interest, in deciding whether to accept a complaint. These tests will apply

⁸²⁰ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, p. 22.

⁸²¹ Parliament of Tasmania. (2009) Second reading speech for the Tasmanian Integrity Commission Bill 2009, p. 22.

whether the complaint is about something that happened ten years ago or ten minutes ago.⁸²²

14.103 Contributors making comment were of the view that the rule of law should apply to the operations of an ACT anti-corruption body, nonetheless in general, no limit on timeframes around which former actions can be assessed was supported. This was on the basis that contributors felt that such a body must be able to look into matters that happened before it commenced operation if it is to enjoy public confidence. Notwithstanding, it was noted that as much as possible, the jurisdiction of the new body should be prospective and oriented towards the future. Its retrospective focus should be limited to only the most severe and clearly indicated cases.

14.104 As to guiding principles for decisions about undertaking investigations into historical matters an anti-corruption type body should consider the likelihood of any probative evidence being available to 'reasonably support the commission's findings or deter future wrong doing'.⁸²³ It is noted that offences must have existed at the time for them to be relevant.

COMMITTEE COMMENT

14.105 The Committee acknowledges the inevitable tensions that must be balanced when considering whether an ACT ACIC should have the power to look into matters that happened before it commenced operation as an ACIC. These include: expectations that potential perpetrators will be held accountable; potential to taint a newly established Commission with a specific agenda; and diverting resources that may limit the Commission in its ability to deal with current cases.

14.106 The Committee also acknowledges that an ACT ACIC must be able to look into matters that happened before it commenced operation if it is to enjoy public confidence.

14.107 The Committee acknowledges that there may be some issues with retrospectivity for new offences either under the Commission's enabling legislation or the Criminal Code, that is, individuals can only be prosecuted under offences that existed at the time.

14.108 The Committee therefore makes the following recommendation:

⁸²² Parliament of Tasmania. (2009) Second reading speech for the Tasmanian Integrity Commission Bill 2009, p. 22.

⁸²³ Submission No. 6—Guy Boland, p. 3.

Recommendation 52

14.109 The Committee recommends that an ACT Anti-Corruption and Integrity Commission (ACIC) should not be limited as to the timeframes around which former actions can be assessed; but is of the opinion that the operational focus of an ACT ACIC should largely be prospective and focused on current matters.

15 POWER TO HOLD PUBLIC HEARINGS

- 15.1 Powers to hold public hearings increase the standing and investigatory power of investigatory bodies by placing their proceedings in the public domain. One aspect of the importance of public hearings is that it supports public confidence in investigatory bodies, and in processes intended to reduce, control and punish misconduct in relevant areas. A second, additional, aspect is that public hearings contribute to the respect and perhaps dread that people engaged in misconduct would feel if they were subject to an investigation by an investigatory body.
- 15.2 This represents what may be termed a ‘moral’ dimension of sanctions available to an investigatory body. ‘Moral dimension’ or ‘moral effect’ refers to effects other than those arising from formal prosecution, where for example potential loss of reputation as a result of airing details of misconduct may serve to discourage wrong-doing. In this way, public hearings and similar may act as a deterrent to misconduct, in addition to that provided by the threat of formal sanctions under the criminal justice system which may arise from proceedings of integrity commissions.

COMMITTEE COMMENT—EXAMINATIONS VS. HEARINGS

- 15.3 The Committee notes that the WA Corruption and Crime Commission refers to ‘examinations’ rather than ‘hearings’ to emphasise that the Commission is not able to assign punishment. The Committee considers that this terminology is worth adopting for an ACT Anti-Corruption and Integrity Commission (ACIC).

Recommendation 53

- 15.4 **The Committee recommends that an ACT Anti-Corruption and Integrity Commission’s enabling legislation refer to examinations (public and private) as opposed to hearings (public and private) to reinforce the investigatory proceeding that applies.**
- 15.5 The Committee notes that for the remainder of its report it will refer to examinations (public and private) as opposed to hearings (public and private).

THE HOLDING OF PUBLIC EXAMINATIONS

- 15.6 The power to hold public examinations is a contentious matter and the views of contributors to the Inquiry can be organised on a continuum ranging from mandating the power to hold

public examinations to mandating the holding of private examinations with a range of options in between.

15.7 In the main, the controversy that surrounds the holding of public examinations is related to legitimate expectations about an integrity body's use of its discretion. In making a case for the power to hold public examinations it must therefore be tempered by measures that are designed to keep a check on such discretion.

15.8 The former Chair of the Fitzgerald Inquiry into corruption in the Queensland government, Tony Fitzgerald QC has noted the inevitable tensions that arise in connection with the power to hold public examinations:

One contentious area is the use by such bodies of compulsory private interrogations and public hearings. That is a proper subject for serious debate and ongoing review. My opinion, based on my personal experience, is that interrogations must sometimes be held in private to protect confidential information, including the scope and direction of investigations and the identity of informants, and that public hearings are sometimes essential to ensure that the voting public is properly informed and supportive of essential work when it is properly carried out.⁸²⁴

MANDATING OF PUBLIC EXAMINATIONS

15.9 Contributors supporting the mandating of public examinations submitted that such a power was a key accountability mechanism and, in many ways, the holding of public examinations represents the public face of an integrity body. Further, if examinations were held in secret, the public would have no confidence in the operations of the integrity body. It was noted also that there appeared to be a correlation between an effective anti-corruption type body and holding public examinations.

15.10 As to the significance of holding examinations in public with regard to accountability, Lord Justice Salmon who chaired the Royal Commission into the investigation of tribunals of inquiry into British public administration stated:

...it is only when the public is present at an inquiry that it will have complete confidence that everything has been done for the purpose of arriving at the truth.⁸²⁵

⁸²⁴ Submission No. 2—Quentin Dempster—Attachment—Email from Tony Fitzgerald QC to Quentin Dempster 12 February 2016.

⁸²⁵ Salmon, C. B. (1966) Royal Commission on Tribunals of Inquiry. *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, London: HMSO, p. 38.

15.11 In making the case for mandating the holding of public examinations, the submission by Mr Harris⁸²⁶ noted the reluctance by some legislators to allow anti-corruption bodies to undertake public examinations, preferring instead to limit their use to a minimum. It suggested that the arguments put forward to support minimal use, such as examinations being equivalent to a kangaroo court or tainting reputations unfairly was unfounded—for the following reasons:

- public examinations such as those conducted by the NSW Independent Commission Against Corruption (ICAC) nearly always follow private investigations that have provided the ICAC with adequate evidence to suggest the existence of corruption. Further, in the case of the NSW ICAC a correlation between public examinations and corruption findings was noted, in that over the last ten years, there have been an annual average of 7.2 investigation reports involving findings of corruption with public examinations averaging 8.1 per annum;
- it is not in the interests of anti-corruption bodies to conduct public examinations that do not result in corruption findings;
- again using the ICAC as a model, notes there have only been a couple of cases where ICAC findings of corruption have been overturned by NSW courts and that these appeals can be seen to have succeeded on technical grounds;
- in Australian jurisdictions, serious indictable offences must first be considered by public committal hearings before a magistrate. Those who argue that there should be no public examinations by anti-corruption bodies need to consider this precedent. Further, if arguments against public examinations prevail, it suggests there should be no open court hearings;
- mandated private processes offend the principle that justice must be accorded by public processes. Private examinations give the public no confidence that justice has been accorded properly, professionally, impartially and diligently; and
- acknowledges that whilst it is true that more public attention is given to public examinations involving prominent people such as Ministers of the Crown, parliamentarians and legislators and senior, appointed public officials, public examinations about these officers are in the minority, and the close media attention given to such examinations is entirely understandable—on the basis that it is those public officers who can do most damage to the social contract.⁸²⁷

MANDATING PRIVATE EXAMINATIONS

15.12 Some contributors were of the view that examinations should be held in private and that concerns with regard to accountability would be balanced where an integrity body has the power to publicly report the findings that result from any hearing in an investigation report. The main arguments for private examinations were to avoid: unnecessarily tainting

⁸²⁶ Submission No. 8—Tony Harris.

⁸²⁷ Submission No. 8—Tony Harris, pp. 2–3.

reputations; or the possibility of undeserved reputational damage; or potential to compromise the integrity of judicial proceedings.

- 15.13 The South Australian (SA) ICAC has no power to conduct public examinations. In November 2015, the SA Integrity Commissioner requested that his enabling legislation be amended to allow public examinations into less serious conduct—misconduct and maladministration.⁸²⁸ The Commissioner has renewed that request in response to a serious maladministration investigation that he is currently undertaking.⁸²⁹ In contrast, the SA Integrity Commissioner has accepted that:

...corruption investigations (which involve criminal conduct) should remain private, and that the public should be informed of investigations into serious criminal conduct only when the matter has reached the courts, where the hearing will be (generally) held in public but constrained by the rules of evidence and the availability of privilege claims for witnesses.⁸³⁰

DEFAULT FOR PRIVATE OR PUBLIC EXAMINATIONS WITH A PUBLIC INTEREST TEST

- 15.14 Some contributors submitted that the default should be private examinations with public examinations in exceptional circumstances, such as where the public interest outweighed the holding of a private hearing. Academics Hoole and Appleby (2017) favour a presumption that examinations will be private with a public interest test as follows:

...that public hearings only be convened when a commissioner determines that the subject of an investigation concerns both serious and systemic corruption, and that the subject has provoked a crisis of public confidence in government.⁸³¹

- 15.15 Other contributors were of the view that the power to hold public examinations should be available but that this should be informed by a public interest test. There were different views as to whether such a test should be prescriptive or of a broad nature leaving discretion for the statutory head to make the decision.

⁸²⁸ Refer, for example, the comments of Commissioner Lander to the Public Integrity Commission reported in Leah MacLennan, 'South Australia's ICAC Commissioner says fractured relationship with Police Ombudsman "improving"', *ABC News*, 10 November 2015, online: <http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066>

⁸²⁹ Refer online: <http://www.adelaidenow.com.au/news/south-australia/icac-investigating-government-agencies-over-allegations-of-serious-and-significant-misuse-of-public-resources/news-story/799e2c44ada8f00a9dc44d9d95e2157a>

⁸³⁰ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March.

⁸³¹ Hoole, G. and Appleby, G. (2017) 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission', Conference paper prepared for *National Integrity Conference*, March, pp. 26–27.

- 15.16 Amongst other considerations, a public interest test is a mechanism that strengthens procedural fairness considerations as a means of balancing expectations about an integrity body's use of its discretion.

COMMITTEE COMMENT

- 15.17 In considering all the views of contributors, the Committee acknowledges that a balance must be drawn between the legitimate objectives of public examinations (transparency and accountability of the conduct of the body, public confidence in its operations, the discovery of further evidence, the education of the public, the general deterrent effect) and the possibility of undeserved reputational damage or the potential to compromise the integrity of judicial proceedings. The power to hold public examinations informed by a public interest test can strengthen procedural fairness considerations to balance expectations about an integrity body's use of its discretion.
- 15.18 Tests of the public interest can be separately identified and can include: the number of people affected; the seriousness of the allegations; whether the alleged practices are widespread, and whether they occur frequently. Caution needs to be exercised in having guidelines which are too prescriptive on the basis of risk, in that they present, 'if too particular, of decisions being challenged on the basis that the guidelines are inadequate in some respect or the decision was not in accordance with the guidelines'.⁸³²
- 15.19 In considering an ACT ACIC's power to hold public examinations, the Committee has carefully considered the views of contributors together with the guiding or foundational principles it has set out in chapter 10.
- 15.20 The Committee recalls that at recommendation 48 it has recommended that, unless there is a very strong reason otherwise, an ACT ACIC must publicly report the findings that result from any investigation. The Committee considers this to be an important part of the transparency process.
- 15.21 The Committee is of the view that an ACT ACIC should have the power to hold public examinations and the decision to hold a public examination should be informed by a public interest test [based on the test set out in the NSW *Independent Commission Against Corruption Act 1988*]. The Committee notes that the public interest test set out in the NSW ICAC legislation is well balanced, in that, it is not too broad nor too prescriptive. Importantly it leaves discretion for the statutory head of an ACIC to decide. It also avoids the danger of

⁸³² Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August.

having guidelines which are too prescriptive and which can create a risk, according to a former NSW DPP, of 'decisions being challenged on the basis that the guidelines are inadequate in some respect or the decision was not in accordance with the guidelines'.⁸³³

15.22 The Committee therefore makes the following recommendations:

Recommendation 54

15.23 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should have the power to hold public examinations. The decision on whether to hold public or private examinations should be informed by a public interest test.⁸³⁴

Recommendation 55

15.24 The Committee recommends that when determining whether a public or private examination should be held, the following should be considered by an ACT Anti-Corruption and Integrity Commission in making that decision:

- (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 examination); and**
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.**

15.25 The Committee is also firmly of the view that measures must be taken to strengthen procedural fairness considerations to balance expectations about an ACT ACIC's use of its discretion when it comes to holding public examinations.⁸³⁵ A suitable measure could take the form of the statutory head of an ACIC providing a statement of reasons to the person to be the subject of the examination. It may be useful for an ACIC to develop guidelines setting out the

⁸³³ Cowdrey, N. (2017) Lessons from the NSW ICAC: 'This watchdog has teeth', *Accountability and the Law Conference*, August, p. 5.

⁸³⁴ Mr Chris Steel MLA and Ms Bec Cody MLA expressed a preference for the IBAC Victoria model of a default for private examinations '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' (Section 117(1), *Independent Broad-based Anti-corruption Commission Act 2011*).

⁸³⁵ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

various measures (and their application) it has instituted to strengthen procedural fairness considerations as it concerns the holding of public examinations.

Recommendation 56

15.26 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission, as it concerns a decision to hold a public examination be subject to a statutory requirement to ‘sign a statement explaining why the public interest outweighs the potential for prejudice or privacy infringements’, provide a copy to the person to be the subject of the examination, and give that person the opportunity to ‘make representations as to why the statement may be incorrect’.

15.27 The Committee is also of the view that an ACT Anti-Corruption and Integrity Commission should be required to conduct its examinations, especially those open to the public, in accordance with Lord Justice Salmon’s principles of fair procedure for public inquiries. These include: informing witnesses of allegations against them and the substance of the supporting evidence; giving witnesses the opportunity to be questioned by their own counsel; hearing any witnesses a person called before an examination may wish to call; and allowing witnesses to test, by cross-examination conducted by their own counsel, any evidence which may affect them.⁸³⁶ Further detail on the Salmon principles of fair procedure for public inquiries is at **Appendix D.**

Recommendation 57

15.28 The Committee recommends that an ACT Anti-Corruption and Integrity Commission be required to conduct its examinations, especially those open to the public, in accordance with Lord Justice Salmon’s principles of fair procedure for public inquiries.

⁸³⁶ Salmon, C. B. (1966) Royal Commission on Tribunals of Inquiry. *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, London: HMSO, p. 38.

16 ACCOUNTABILITY AND INDEPENDENCE

- 16.1 For anti-corruption type bodies to be effective their legislative framework—firstly, must support the Body to be independent from the Executive—in terms of appointment, budget, removal, free from direction and control, discretion to determine the type of work, wide information and investigative gathering powers, and reporting directly to the Parliament; and secondly, equally importantly, should reflect the need for the Body to be accountable for that independence.⁸³⁷ Professors Wettenhall and Aulich have coined the concept of such a body needing to have its independence assured but equally important being accountable for that independence—as the ‘accountability equation’.⁸³⁸
- 16.2 Several contributors to the Inquiry noted that the oversight model for an independent integrity body should occupy a position that necessitates a relationship involving the Assembly as opposed to the Executive Government. The importance of the relationship with the Assembly was emphasised as a requirement to ensure independence and accountability.
- 16.3 The principal form of oversight suggested by contributors was in the form of an Assembly oversight committee.⁸³⁹ Different views were expressed as to whether this oversight role should fall to an existing committee or whether it should fall to a new committee created for this purpose. It was suggested by some contributors that an Assembly oversight committee model could be strengthened by designating the statutory head of an ACT anti-corruption type body as an Officer of Parliament.⁸⁴⁰
- 16.4 Further, some contributors noted that oversight arrangements should also extend to include an inspectorate/inspector type mechanism for overseeing an integrity body’s use of its special powers.

⁸³⁷ Funnell, W. (1996) Executive Encroachments on the Independence of the Commonwealth Auditor-General, *Australian Journal of Public Administration*, **55**, 4, pp. 109–123; English, L. and Guthrie, J. (2000) Mandate, Independence and Funding: Resolution of a Protracted Struggle between Parliament and the Executive Over the Powers of the Australian Auditor-General, *Australian Journal of Public Administration*, **59**, 1, pp. 98–111; Lawson, C. (2009) ‘Can the Executive influence the ‘independence’ of the Auditor-General under the Auditor-General Act 1997 (Cth)?’, *Australian Journal of Administrative Law*, **16**, 90, pp. 90–114; Robertson, G. (2009) *Independence of Auditors-General—A survey of Australian and New Zealand Legislation*, Commissioned by the Victorian Auditor-General’s Office, July.

⁸³⁸ Submission No. 30—Roger Wettenhall and Chris Aulich.

⁸³⁹ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 30—Roger Wettenhall and Chris Aulich; Submission No. 4—ACT Legislative Assembly Ethics and Integrity Adviser; Submission No. 21—Inner South Canberra Community Council—Attachment.

⁸⁴⁰ Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 30—Roger Wettenhall and Chris Aulich.

CONSTRUCTING AND INTERPRETING INDEPENDENCE

- 16.5 The literature suggests that there are different constructions for interpreting the independence of statutory office holders such as Integrity Commissioners. Broadly speaking these can be organised into two groups—substantive (unconditional, real, unqualified) versus conditional (functional, symbolic, qualified) independence (Barrett, 1996; Funnell 1995; 1996; Taylor 1995).
- 16.6 Whilst the different constructions of independence can be theoretically organised into two groups, the independence of Integrity Commissioners in various jurisdictions will be located somewhere between the two groups. Where an Integrity Commissioner (IC) is positioned will be reliant on the degree to which they are subject to influence from the Executive, or alternatively, the degree to which their respective Parliament is involved with various aspects of their management.
- 16.7 Some in the literature regard independence to comprise three elements—legal, fiscal and political elements.⁸⁴¹ Each of these elements is discussed below.
- Legal independence provides a statutory framework that is concerned with protecting the individual that holds the statutory office. It also specifies behaviour which could be interpreted as interfering with the functions of the Office as a means of safeguarding the Office.
 - Political independence is concerned with ensuring that no overt or covert attempts can be made by political actors to influence the work of the office holder.
 - Financial independence is concerned with ensuring that an office holder is not reliant on appropriations at the initiative of the Executive Government.
- 16.8 However, as discussed, irrespective of a declaration in statute that provides legal independence, for example, that an IC is not subject to direction, where an executive government has influence over the budget of an Integrity Commissioner, there is no financial independence and a form of conditional or functional independence must therefore exist.
- 16.9 In summary, where an executive government has indirect controls over an Integrity Commissioner, for example, in determining the budget appropriation and/or appointment, their independence is conditional or qualified.

⁸⁴¹ Funnell, W. (1996) 'Executive Encroachments on the Independence of the Commonwealth Auditor-General', *Australian Journal of Public Administration*, 55, 44, pp. 109–123; Coghill, K. (2004) 'Auditing the independence of the Auditor-General', paper presented as part of the Australian National University's Political Science Program, 11 February, pp. 1–19; Barrett, P. (1996) 'Some Thoughts about the Roles, Responsibilities and Future Scope of Auditors-General', *Australian Journal of Public Administration*, 55, 4, pp. 137–146.

MANDATING INDEPENDENCE

16.10 Invariably, integrity agencies such as an Anti-Corruption and Integrity Commission (ACIC) can cause ‘displeasure from time to time’⁸⁴² with the Executive Government, by exposing incompetence or raising politically sensitive matter(s) with regard to performance.⁸⁴³ The two key parameters critical to the independence of an ACIC are the extent to which: (i) an ACIC’s budget appropriation is determined by the Executive; and (ii) the appointment of an IC can be influenced by the Executive. Several contributors highlighted the importance of the relationship an ACT ACIC has with the Assembly as a requirement to ensure independence and accountability.

EXTENT OF RELATIONSHIP WITH PARLIAMENT

16.11 An ACIC, in the first instance, is a non-departmental public body (NDPB)—statutory body created by Parliament for a specific purpose. All NDPBs require independence and autonomy to carry out their responsibilities. Further, by virtue of their creation, they are intended to be distanced from the Executive Government.

16.12 All NDPBs share the following characteristics:

- an instrument of Parliament creates these bodies and prescribes their functions and operating systems, including the intended form of relationship such a body is to have with the Executive Government;
- another instrument of Parliament is required to make any changes a body’s functions and operating systems;
- they are created to have some degree of independence from the Executive Government
- ministers are distanced from the day to day administration, as compared with departmental bodies; and
- their respective accountability regime differs to that applied traditionally in the context of departmental bodies.

16.13 As noted above, all NDPBs have some degree of independence from the Executive Government, in that ministers need to be distanced from the administration and accountability regime of these bodies. To some extent Parliament steps in to fill role vacated by a responsible minister. Though the extent of the role taken up by Parliament (and

⁸⁴² Temby, I. (1993) Safeguarding Integrity in Government, *Papers on Parliament* (Australian Senate), No. 7, pp. 7–8.

⁸⁴³ Lawson, C. (2009) Can the Executive influence the ‘independence’ of the Auditor-General under the Auditor-General Act 1997 (Cth)?, *Australian Journal of Administration*, **16**, 90, p. 92.

ultimately the relationship an NDPB will have with Parliament) is determined by the type and functions of the NDPB.⁸⁴⁴

IS AN INTEGRITY COMMISSIONER AN OFFICER OF THE PARLIAMENT?

16.14 The purest form of relationship an NDPB can have with Parliament would be one where the statutory head is regarded as an Officer of Parliament. The concept of an Officer of Parliament, who performs work on behalf of Parliament, has developed over the last three decades or more, partly in response to a decline in what has been referred to as the traditional notion of ministerial responsibility, but also because the process of government has become more complex and difficult for citizens to access.

16.15 Some contributors suggested that the parliamentary oversight committee model could be strengthened by designating an integrity commissioner as an Officer of the Parliament. It is important to consider whether an Integrity Commissioner meets the criteria for an Officer of the Parliament.

16.16 A 1989 report by the NZ Parliament's Finance and Expenditure Committee identified five criteria for determining or establishing an Officer of Parliament. These criteria are:

- an Officer of Parliament is created to provide a check on the arbitrary use of power by the Executive;
- an Officer of Parliament must only discharge functions which the House of Representatives itself, if it so wished, might carry out;
- Parliament should consider creating an Officer of Parliament only rarely; and
- Parliament should from time to time review the appropriateness of each Officer of Parliament's status as an Officer of Parliament, and
- each Officer of Parliament should be created in separate legislation principally devoted to that position.⁸⁴⁵

16.17 As to the second criterion of the aforementioned NZ Parliament's Finance and Expenditure Committee criteria, the reasoning behind its inclusion was that some statutory office holders

⁸⁴⁴ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October; Wettenhall, R. (2011) 'Integrity agencies: the significance of the parliamentary relationship', *Policy Studies*, Vol. 33, No. 1, January, pp. 65–78; and Thynne, I. (2006) 'Statutory bodies: how distinctive and in what way?', *Public organization review*, Vol. 6, No. 3, pp. 171–184.

⁸⁴⁵ New Zealand (NZ) Finance and Expenditure Committee. (1989) *Report on the Inquiry into officers of Parliament*, pp. 5–6.

on the basis of their powers, for example, those with judicial powers, would not be 'appropriate as officers of Parliament, since Parliament itself does not have these powers'.⁸⁴⁶

16.18 The former Clerk of the NZ House of Representatives has advised that:

...an officer of Parliament must undertake functions that Parliament itself would undertake.⁸⁴⁷

16.19 The Victorian Public Accounts and Estimates Committee (PAEC), in its *Report on a Legislative Framework for Officers of Parliament* noted that the term Officer of Parliament is:

...used as a means to denote that some statutory office holders have a special relationship with Parliament and to emphasise those officers' independence from the executive government. Historically, auditors-general and ombudsmen have been regarded as the core officers of Parliament, with the main role of investigating the actions of the executive government and, in some cases, protecting the various rights of individual citizens. Recently, Electoral Commissioners have been included in this category, on the basis that their office protects fairness in elections on behalf of Parliament and its electors.⁸⁴⁸

16.20 The PAEC's research identified a number of bodies which have some characteristics of the Officer of Parliament model, having been established in statute and have safeguards (such as restrictions on dismissal, or the right to report to Parliament) but do not have enough characteristics to be described as Officers of Parliament, such as the Director of Public Prosecutions.⁸⁴⁹

COMMITTEE COMMENT

16.21 In light of the analysis above, on balance the Committee is of the view that the statutory head of an ACT ACIC should be an Officer of the Assembly.

16.22 While debate can be made on an alternative approach, the importance of financial and operational independence from the Executive is a primary consideration for the Committee. The Auditor General and the Ombudsmen are key elements of the integrity framework in the

⁸⁴⁶ Victorian Public Accounts and Estimates Committee. (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria, p. 30.

⁸⁴⁷ Victorian Public Accounts and Estimates Committee. (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria, p. 31.

⁸⁴⁸ Victorian Public Accounts and Estimates Committee. (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria, p. 30.

⁸⁴⁹ Victorian Public Accounts and Estimates Committee. (2006) *Report on a Legislative Framework for Independent Officers of Parliament*, February, Parliament of Victoria, p. 30.

ACT, and are both Officers of the Assembly. The Committee is of the view that aligning those elements of the integrity framework in the same governance structure is beneficial.

16.23 The Officer of the Parliament framework in the ACT enables key issues of concern for the Committee to be addressed. It provides a mechanism for the Assembly to consider the budget for the agency separate from the general government appropriations. Budgets for Officers of the Assembly need to be drawn up in the Legislative Assembly in consultation between specific standing committees and the Speaker. The Speaker will then transmit the budget proposals to the Treasurer who, while not bound to adopt the budget, must report and explain any failure to implement the suggested budget. Current practice is that the Speaker will appear before budget cabinet to make representations on behalf of the budget of the Legislative Assembly and its Officers.

16.24 The framework also includes a mechanism for appointment by the Speaker of the Assembly:

- based on the advice of the relevant Assembly committee;
- in accordance with the merit principles set out in the Public Sector Management Act; and
- in consultation with party leaders.

16.25 The Speaker must also be satisfied that appointees are experts in their field.

16.26 The Committee therefore makes the following recommendations:

Recommendation 58

16.27 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission be designated as an Officer of the Assembly.

Recommendation 59

16.28 The Committee recommends, as it concerns an ACT Anti-Corruption and Integrity Commission's (ACIC) relationship with the ACT Legislative Assembly, that it be pursuant to the Officer of the Assembly framework and include the following requirements:

- (a) the ACIC to be oversighted by, and required to report to, an Assembly standing committee. The standing committee to be a committee established pursuant to Standing Order 215 (not Standing Order 16⁸⁵⁰). The Committee to be chaired by a non-government member, its membership to be representative of the Assembly and the secretary to the Committee should not be a statutory office holder;**

⁸⁵⁰ SO 16—establishes the Administration and Procedure Committee.

- (b) involvement by the Assembly (a combination of the Assembly as a whole and the relevant Assembly standing committee) in the appointment and dismissal of the statutory head of the ACIC; and**
- (c) involvement by the Assembly (a combination of the Assembly as a whole and the relevant Assembly standing committee) in the approval of the budget for the ACIC.**

16.29 Further detail on aspects of the relationship between the ACIC and the Assembly including appointment of the statutory head of the ACIC, oversight and reporting, and funding arrangements are set out following.

APPOINTMENT OF INTEGRITY COMMISSIONER(S)

16.30 As to views on whether a three commissioner (as is now the case in NSW) or a single commissioner model was preferred, the bulk of contributors did not express a view either way.

16.31 Those contributors expressing a view included the ACT Bar Association which was ‘not attracted to the idea recently adopted in NSW of having multiple Commissioners. The structure is cumbersome and unnecessary’⁸⁵¹ and the Science Party, which was of the view that an ACT integrity body should have three commissioners⁸⁵².

16.32 The general view of contributors was that the Commissioner should be appointed for a fixed non-renewable term, have legal qualifications and the appointment process should involve the Assembly. Some contributors submitted additional considerations, including that appointments to the statutory head and senior management positions should not be permitted from existing ACT Government public servants or those who have been public servants in the ACT Public Service for a period of 10 years previously.

16.33 Some contributors suggested that the arrangements for the appointment of a Campaign Advertising Reviewer, pursuant to the *Government Agencies (Campaign Advertising) Act 2009*, may serve as a useful guide for determining a process, involving the Assembly, for appointing the statutory head of an ACT integrity body.⁸⁵³

16.34 There is an important relationship between the term of an appointment of an Integrity Commissioner (IC) and independence. Factors such as security of independence, duration of appointment and eligibility for reappointment are important aspects of appointment terms.

⁸⁵¹ Submission No. 12—ACT Bar Association, p. 3.

⁸⁵² Submission No. 23—Science Party, p. 1.

⁸⁵³ Submission No. 3—Clerk, ACT Legislative Assembly p. 40; Submission No. 19—ACT Public Sector Standards Commissioner.

Further, these aspects have the potential to safeguard and strengthen the independence of a Commissioner.

16.35 The terms of appointment for ICs that currently apply in Australian jurisdictions are summarised in the table below.

Table 16.1 Term of appointment of Integrity Commissioners in Australian jurisdictions

Jurisdiction	Integrity Commissioner (or equivalent) term of appointment
NSW	New three commissioner model—Chief Commissioner and two part-time commissioners—all 5 years, non-renewable. Single Commissioner model—5 years, non-renewable.
VIC	5 years—non-renewable.
QLD	5 years—renewable for one term only.
SA	7 years—renewable but can only hold office for terms not exceeding 10 years (in total).
WA	5 years—renewable for one term only.
TAS	Initial term not exceeding 5 years—renewable for one term only—total term not exceeding 10 years.
NT	Not operational yet—Martin report recommended: 5 years—renewable for one term only.
Commonwealth (ACLEI)	For a period not exceeding 5 years with option to renew. The sum of periods for which the Integrity Commissioner holds office must not exceed 7 years.

16.36 Having a set term of appointment that is also non-renewable contributes to the independence of an IC in a number of ways. It may help to:

- reduce the possibility that the timing of an appointment may be influenced by extraneous factors;
- enable an IC to plan their work independently, more strategically and over an extended period so that a series of sequential and related investigations may be undertaken over time;
- reduce the impact that any undue compression of time or cessation may have on the IC's performance in the role or delivery of long term projects;
- enable the timing of the commencement and cessation of a term of appointment to be determined independently of electoral cycles;
- ensure that the term of appointment of an IC extends beyond one electoral term;
- reduce the risk that the term of an IC's appointment may be shortened if they were to produce an adverse report on the operations of Government; and
- reduce the influence that the Executive may have on determining the term of appointment—which may undermine or indirectly influence the IC's independence.

COMMITTEE COMMENT

- 16.37 The Committee acknowledges that there is an important relationship between the level of parliamentary involvement in the appointment process, term of an appointment of a statutory office holder and real or perceived independence. Factors such as security of independence, duration of appointment and eligibility for reappointment are important aspects of appointment terms. Further, these aspects have the potential to safeguard and strengthen the independence of these office holders.
- 16.38 The Committee notes, as it concerns terms of appointment for ICs that currently apply in Australian jurisdictions, terms range from between five to seven years with some jurisdictions providing eligibility for reappointment (with specified conditions, such as one term only or not exceeding a specified total duration).
- 16.39 The Committee also notes that the principle of fixed non-renewable terms is well supported in the literature as an important accountability mechanism for safeguarding the independence of designated office holders in both the private and public sectors. Fixed non-renewable terms are important safeguards to avoid an office holder becoming complacent in a role, provides for new perspectives via turnover, can limit opportunities for capture and avoid situations where office holders may pursue special interests.
- 16.40 As it concerns the appointment of an ACT ACIC IC, the Committee makes the following recommendations:

Recommendation 60

- 16.41 The Committee recommends that the appointment of an Integrity Commissioner for an ACT Anti-Corruption and Integrity Commission should comply with the following requirements:**
- (a) a single Commissioner model;**
 - (b) appointment as an independent statutory officer;**
 - (c) appointment for a fixed term between 5–7 years non-renewable;**
 - (d) appointment by the ACT Legislative Assembly—pursuant to the Officer of the Assembly framework;**
 - (e) to be qualified for appointment as Commissioner the person must be a former Judge of a Supreme Court or the Federal or High Court, or be a legal practitioner of not less than ten years standing;**
 - (f) no age restriction should apply; and**
 - (g) the Commissioner must not be a former or current Member of the Legislative Assembly, or any other Australian Parliament.**

Recommendation 61

16.42 The Committee recommends that the following additional requirements should be applied as it concerns the appointment of an Integrity Commissioner for an ACT Anti-Corruption and Integrity Commission:

- (a) the Commissioner to have a legislative duty to avoid actual or perceived conflicts of interest. A legislative direction may be appropriate for consequences to follow if the existence of a conflict of interest (real or perceived) is established;**
- (b) that the appointee not have (or had) any political affiliations; and**
- (c) appointments to the position should not be permitted from the ranks of existing ACT Government public servants or those who have been public servants in the ACT Public Service for a period of 10 years previously.**

Recommendation 62

16.43 The Committee recommends that the enabling legislation for an ACT Anti-Corruption and Integrity Commission should provide for the appointment of an acting commissioner to act as Commissioner during any period for which there is no person appointed as commissioner or the Commissioner is absent from, or unable to discharge, official duties. A consultative process with the ACT Legislative Assembly pursuant to the Officer of the Assembly framework should be used with regard to proposals for acting arrangements.

16.44 The Committee further notes that provisions also need to be made in an ACT ACIC's legislative framework for the suspension and removal of the Commissioner. This should be pursuant to the Officer of Assembly framework and be in accordance with specified criteria—including: for misbehaviour; for physical or mental incapacity, if the incapacity substantially affects the exercise of the Commissioner's functions; if the Commissioner becomes bankrupt or personally insolvent; or if the Commissioner has been guilty of corrupt conduct. The procedures for either suspension or removal of the Commissioner should ensure procedural fairness.

Recommendation 63

16.45 The Committee recommends that the enabling legislation for an ACT Anti-Corruption and Integrity Commission should provide for the suspension and removal of the Commissioner. The process should comply with the following requirements:

- (a) suspension and removal of the Commissioner to be pursuant to the Officer of the Assembly framework;**
- (b) be in accordance with specified criteria—including: for misbehaviour; for physical or mental incapacity, if the incapacity substantially affects the exercise of the**

Commissioner's functions; if the Commissioner becomes bankrupt or personally insolvent; or if the Commissioner has been guilty of corrupt conduct ; and

- (c) the procedures for either suspension or removal of the Commissioner should ensure procedural fairness.**

FUNDING ARRANGEMENTS

16.46 Several contributors to the Inquiry were of the view that the Assembly should have a major role in determining the budget for an independent ACT integrity body.

COMMITTEE COMMENT

16.47 The Committee is of the view that Assembly involvement in the budget appropriation for an ACT ACIC is an essential requisite for independence and protecting its funding at times when the Commission may cause displeasure for the Government of the day. This level of involvement would be pursuant to the Officer of the Assembly framework.

Recommendation 64

16.48 The Committee recommends that funding arrangements for an ACT Anti-Corruption and Integrity Commission (ACIC) should be pursuant to the Officer of the Assembly framework

16.49 The Committee also notes that decisions about whether or not an ACT ACIC investigated a matter should not be made on the basis of funding availability. The Committee considers that it may be useful to provide budget flexibility for a newly established ACIC given its workload as a new body will be difficult to predict, especially in the years post establishment.

16.50 The Committee also suggests that it may be appropriate to provide the IC with discretion to expend resources to pursue a particular investigation above and beyond annual budgetary allocation when it is in the public interest to do so.

ACCOUNTABILITY REGIME IN PRACTICE

16.51 Former NSW ICAC Commissioner, Ian Temby QC frames the accountability regime of an ACIC as being in the public interest:

How does the Commission seek to protect the public interest? I submit that the only safe and proper approach is to recognize that rights are enjoyed by, and the Commission owes duties to, all members of the population, including those who become involved in investigations it decides to take on. The investigations are therefore carefully chosen and defined. ... Whenever an investigation is commenced,

its scope and purpose is formally defined and recorded. The special statutory powers, including coercive powers, can only be utilised with respect to a matter so commenced. Accordingly, Commission staff do not roam around town, knocking on doors and demanding answers to questions. They know the matters with respect to which they can (if authorised, and the authorisations have to be given individually) exercise coercive powers, and it is only in respect of that very limited number of matters.⁸⁵⁴

16.52 Accountability regimes for anti-corruption and integrity type bodies break significantly from that applied traditionally in the context of ministerial responsibility; and to statutory bodies *per se* and its subset of specialised integrity bodies. This is due to the unique role these bodies have, the exceptional powers they are conferred with, coupled with the potential at times to be involved in the investigation of members of Parliament (including ministers).

16.53 Whilst Parliament's legitimate expectations as it concerns accountability of these types of bodies 'crosses over with that of citizens in the context of electoral representation', its expectations are further shaped by 'its creation of the statutory scheme to address corruption in the public sector'. It therefore has a responsibility to ensure the effectiveness of the legislative framework—'a legitimate expectation it shares with citizens in general'.⁸⁵⁵

16.54 To acquit its responsibilities in this regard, Parliament should have five oversight functions—namely: (i) to monitor the activities of the anti-corruption body; (ii) to investigate suggestions or indications that the anti-corruption body may not be performing appropriately, or as well as it might, and publicly report its conclusions; (iii) if necessary, to take remedial action, either by suggesting the anti-corruption body modify its practice or by making amendments to the statutory scheme; (iv) reviewing the legislative framework at regular intervals to ensure the body has the necessary powers and resources to carry out its role and mandate; and (v) safeguarding the independence of an anti-corruption body through formalised involvement in the appointment of its statutory head and determination of its budget.⁸⁵⁶

16.55 Parliament can be assisted in fulfilling its oversight role by:

⁸⁵⁴ Temby, I. (1991) 'ICAC: Working in the public interest', *Current Issues in Criminal Justice*, Volume 2 Number 3, p. 12.

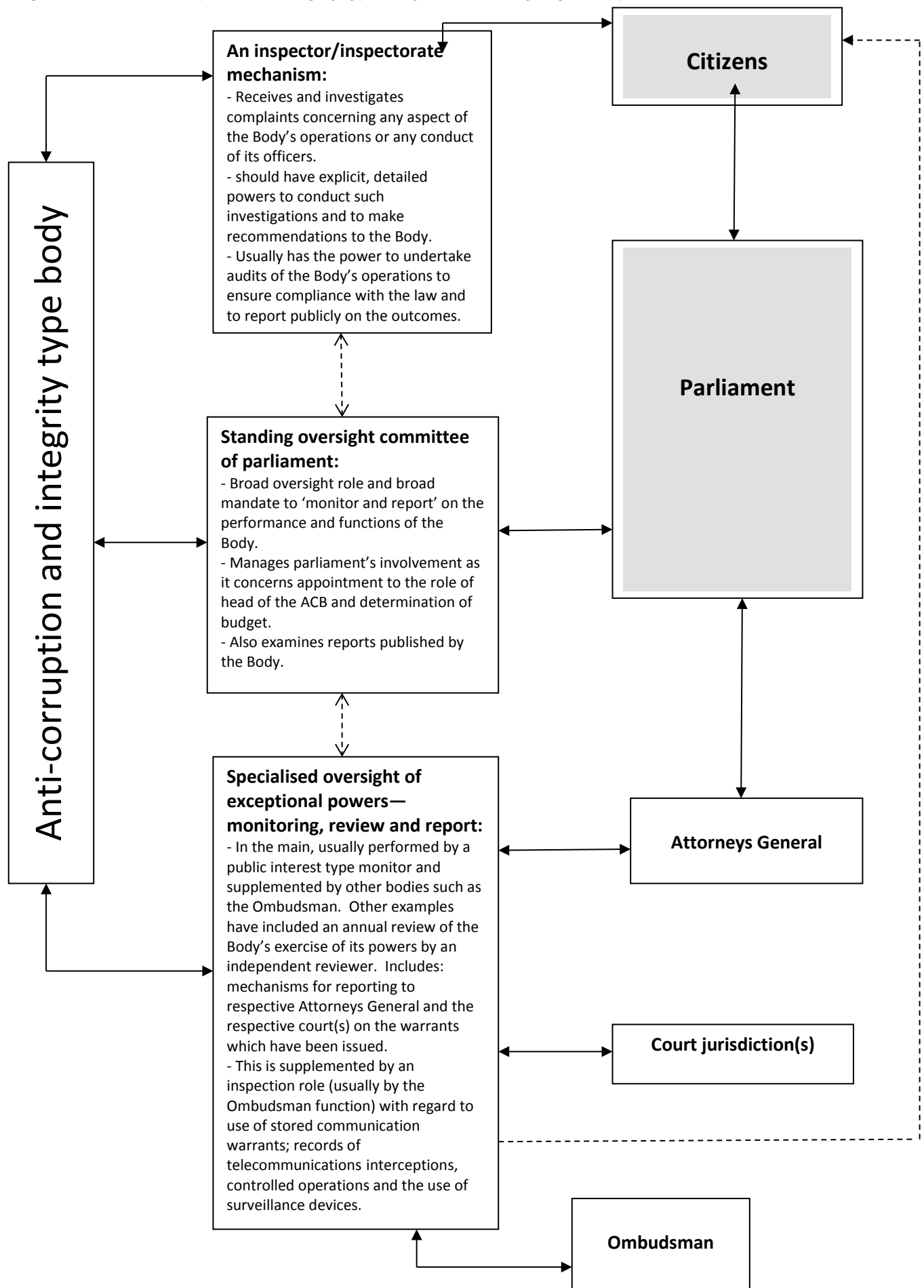
⁸⁵⁵ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October.

⁸⁵⁶ Stone, B. and Sheldrick, M. (2013) 'Anti-Corruption Authorities and Accountability: The Western Australian Case', Paper presented at the *Australasian Study of Parliament Group Conference*, Parliament of Western Australia, 2–4 October; Wettenhall, R. (2011) 'Integrity agencies: the significance of the parliamentary relationship', *Policy Studies*, Vol. 33, No. 1, January, pp. 65–78; Temby, I. (1991) 'ICAC: Working in the public interest', *Current Issues in Criminal Justice*, Volume 2 Number 3, pp. 11–16; Thynne, I. (2006) 'Statutory bodies: how distinctive and in what way?', *Public organization review*, Vol. 6, No. 3, pp. 171–184.

- A standing committee of the Parliament—broad oversight role and broad mandate to ‘monitor and report’ on the performance and functions of an anti-corruption type body. It has a level of involvement as it concerns appointment to the role of head of an anti-corruption body and determination of its budget. It also examines reports published by the Body.
- An inspector/inspectorate mechanism—receives and investigates complaints concerning any aspect of an anti-corruption body’s operations or any conduct of its officers. It should be given explicit, detailed powers to conduct such investigations and to make recommendations to the anti-corruption body. It usually has the power to undertake audits of an anti-corruption body’s operations to ensure compliance with the law and to report publicly on the outcomes.
- Specialised oversight of exceptional powers—monitoring, review and report:
 - In the main, usually performed by a public interest type monitor and supplemented by other bodies such as the Ombudsman. Other examples have included an annual review of an anti-corruption body’s exercise of its powers by an independent reviewer.
 - Mechanisms for reporting to respective Attorneys General and the respective court(s) on the warrants which have been issued.
 - This is supplemented by an inspection role (usually by the Ombudsman function) with regard to use of stored communication warrants; records of telecommunications interceptions, controlled operations and the use of surveillance devices.

16.56 A summary of an anti-corruption and integrity type body’s accountability regime in practice is detailed at Figure 16.1.

Figure 16.1—Anti-corruption and integrity type body accountability regime in practice



COMMITTEE COMMENT

- 16.57 The Committee acknowledges that accountability regimes for anti-corruption type bodies break significantly from that applied traditionally in the context of ministerial responsibility; and to statutory bodies *per se* and its subset of specialised integrity bodies. This is due to the unique role these bodies have, the exceptional powers they are conferred with, coupled with the potential at times to be involved in the investigation of members of Parliament (including ministers).
- 16.58 An ACT ACIC is thus a unique agency that requires specialised arrangements to guarantee its independence and accountability. This is accompanied by specialised arrangements for accountability as it concerns the independence bestowed on it and oversight of its exceptional powers.
- 16.59 The Committee notes that the relevant Assembly Committee, as part of any inquiries it may resolve to undertake, for example to review and report on the effectiveness of an ACT ACIC, its enabling legislation and/or accountability for its performance, provides opportunities for direct citizen participation, in the first instance via the call for written submissions.
- 16.60 The Committee notes the issue of scale and cost and observes that a part-time model be instituted to provide oversight as it concerns complaints relating to any aspect of an ACT ACIC's operations or any conduct of its officers; and to review the operations (in the form of monitoring, review and report) of an ACT ACIC.
- 16.61 The Committee therefore makes the following recommendations:

Recommendation 65

- 16.62 The Committee recommends that the accountability and oversight regime for an ACT Anti-Corruption and Integrity Commission (ACIC) must include:**
- (a) oversight by a relevant Assembly standing committee—broad oversight role and broad mandate to 'monitor and report' on the performance and functions of an ACIC;**
 - (b) oversight by an inspector/inspectorate type mechanism—to receive and investigate complaints concerning any aspect of an ACIC's operations or any conduct of its officers; and**

- (c) oversight of the ACIC's exceptional powers⁸⁵⁷—in the form of monitoring, review and report.

Recommendation 66

16.63 The Committee recommends that a part-time Inspector be appointed to: (a) provide oversight as it concerns complaints relating to any aspect of an ACT Anti-Corruption and Integrity Commission's (ACIC) operations or any conduct of its officers; and (b) to conduct a review of the operations (in the form of monitoring, review and report) of an ACT ACIC at a minimum every 12 months.

16.64 The Committee considers the terms and scope of appointment for the ACT Legislative Assembly Ethics and Integrity Adviser may be instructive as it concerns the appointment of a part-time Inspector. The Committee also notes that eligibility criteria will need to be determined for the role and the Assembly should be involved (a combination of the Assembly as a whole and the relevant Assembly standing committee) in the appointment and dismissal of the Inspector.

16.65 The Committee is of the view that the eligibility criteria and process for appointment, and dismissal, of the Inspector should mirror that of the Integrity Commissioner.

Recommendation 67

16.66 The Committee recommends that the eligibility criteria, and process for appointment, and dismissal, of a part-time Inspector for an ACT Anti-Corruption and Integrity Commission (ACIC) should mirror that which applies for the ACIC's Integrity Commissioner.

PARLIAMENTARY OVERSIGHT COMMITTEE ARRANGEMENTS

16.67 As noted earlier, the principal form of oversight suggested by contributors was in the form of a parliamentary oversight committee. Different views were expressed as to whether this oversight role should fall to an existing committee or whether it should fall to a new committee created for this purpose. A benefit of designating the role to a new committee is that it can allow for specialisation and development of expertise amongst members and avoids the situation of oversight becoming merely a function of an existing standing committee with other responsibilities.

⁸⁵⁷ As detailed in chapters 14 and 15—in particular, its investigative and coercive powers.

- 16.68 Where oversight arrangements are allocated to one of the current standing committees, the Committee is of the view that it should not fall to the Administration and Procedure Committee for a number of reasons. That Committee is a house type committee not a designated scrutiny and oversight committee and its secretary is a statutory office holder (elevating this statutory office holder to a position that would be out of balance to other statutory office holders).
- 16.69 Whilst noting that committee oversight will be pursuant to the Officer of the Assembly framework, the Committee has detailed its views with regard to the appropriate Assembly committee to which oversight should fall, including the composition of the committee and other matters at recommendation 59.
- 16.70 The Committee has also set out its views as to the role of the oversight committee, specifically at paragraph 16.55, and throughout this chapter.

ACCOUNT FOR PERFORMANCE

- 16.71 An important component of accountability for an anti-corruption type body is how it accounts for its work or performance.
- 16.72 Prenzler and Faulkner in their paper, 'Towards a Model Public Sector Integrity Commission' (2010), are of the view that such a commission should 'account for its work using a variety of performance measures, including stakeholder satisfaction, prosecution outcomes and case study reports'.⁸⁵⁸
- 16.73 In considering the legislative regimes for the State-based anti-corruption bodies, they all have some form of reporting requirement to account for their work (with the exception of Tasmania). Of all the acts considered, the *Independent Commission Against Corruption (ICAC) Act 1988* (NSW) is the most detailed and prescriptive with regard to reporting obligations for an integrity body. In practice, the NSW ICAC'S Annual Report 2015–16 provides further reporting, including reporting on prosecution outcomes, other performance indicators, and case studies.
- 16.74 This is contrasted with the *Tasmanian Integrity Commission Act 2009* that does not appear to make specific provision or obligations for its Commission to use the performance measures proposed by Prenzler and Faulkner. Notwithstanding, in practice the Tasmanian Integrity

⁸⁵⁸ Prenzler, T. and Faulkner, N. (2010), 'Towards a Model Public Sector Integrity Commission', *Australian Journal of Public Administration*, Vol. 69(3), p. 11.

Commission reports against the kind of performance measures that are consistent with contemporary practice for public sector agencies.

16.75 As with any public agency its performance and conduct must be measured. However, the former NSW DPP, Nicholas Cowdrey QC cautions that:

It would be a grave mistake to measure the conduct of an ICAC or an IC by reference to criminal prosecutions/charges, not to mention convictions. So other criteria of success need to be identified: the level of corrupt conduct in public administration or the public sector; perhaps some rating on an index of corruption perception. Other benchmarks could be devised.⁸⁵⁹

16.76 The OECD also cautions against an over reliance on statistical data (such as number of complaints received, investigations and prosecutions opened and completed, convictions achieved, administrative orders, guidelines and advice issued, laws and regulations drafted or reviewed), in that, whilst they provide valuable information and are also objective indicators, they ‘reveal little about the quality of justice or governance’.⁸⁶⁰

16.77 The OECD notes that any methodology for assessing the performance of anti-corruption type bodies needs to be adapted to each jurisdiction and the Institution’s functions. Further, in any such assessment design, the OECD suggests:

The performance of an anti-corruption institution should be measured against a carefully designed set of quantitative indicators (statistical data and measures of public perceptions) and qualitative indicators (expert assessment and surveys) deriving from the functions that the institution carries out. ... Quantitative and quantitative indicators, including statistical data, have to be complemented by monitoring evaluations...⁸⁶¹

16.78 As to the challenges associated with assessing performance, former NSW ICAC Commissioner—Ian Temby has noted that not everything an anti-corruption body does takes place in public, ‘a very great deal of work is done elsewhere. For example, assessment of nearly 2,000 other complaints and reports of possible corrupt conduct, and especially corruption prevention work’.⁸⁶²

⁸⁵⁹ Cowdrey, N. (2017) ‘Lessons from the NSW ICAC: “This watchdog has teeth”’, *Accountability and the Law Conference*, 17 August.

⁸⁶⁰ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, p. 17.

⁸⁶¹ OECD. (2008) *Specialised Anti-Corruption Institutions—Review of Models*, OECD Secretariat, p. 17.

⁸⁶² Temby, I. (1991) ‘ICAC—‘Working in the public interest’’, *Current Issues in Criminal Justice*, Volume 2, Number 3, p. 15.

COMMITTEE COMMENT

- 16.79 The Committee acknowledges that assessing the performance of anti-corruption type bodies is an important transparency mechanism that provides accountability. The Committee also acknowledges that given the nature of the work of these bodies, assessing their performance is challenging and not as straightforward as many observers would suggest.
- 16.80 The Committee is of the view that an ACT ACIC should be subject to annual reporting requirements as per the *Annual Report (Government Agencies) Act 2004*. In addition, this should include: detailed information as it concerns matters referred and investigated by the ACIC during the reporting period; information on investigations that have resulted in prosecution or disciplinary action in that year; the number of search warrants issued by judicial officers; a description of its activities during that year in relation to its prevention and education functions; and should also present case studies on the work of the Commission.
- 16.81 The Committee notes that the relevant Assembly oversight Committee has a broad role in monitoring and reporting on an ACT ACIC's activities and performance (as per recommendation 65). This would include: consideration of annual reports, case study reports; the annual review of the Commission's operations (as per recommendation 66); and any statutory review of the Commission's legislative framework (as per recommendation 69).
- 16.82 The Committee therefore makes the following recommendation:

Recommendation 68

- 16.83 The Committee recommends that an ACT Anti-Corruption and Integrity Commission should be subject to annual reporting requirements as per the *Annual Report (Government Agencies) Act 2004*. In addition, the annual report should contain, amongst other things, detailed information as it concerns matters referred and investigated by the ACIC during the reporting period. The reporting requirements as detailed in section 76 of the *Independent Commission Against Corruption Act 1988 (NSW)* are instructive.**

STATUTORY REVIEW PERIOD

- 16.84 Generally, statutory review periods are designed to ensure a timely evaluation of the implementation and performance of a specific statute or Act. Some statutes prescribe review periods that can range from between three to five years.
- 16.85 The purpose of a statutory review process is to:
- update and consolidate legislation—factoring in the performance of a specific Act in achieving its objective(s) and building upon guidance and best practice in other jurisdictions; and

- ensure that the statute is meeting the needs of the operating environment and its stakeholders.

COMMITTEE COMMENT

16.86 The Committee is of the view that the enabling legislation of an ACT ACIC must be reviewed every five years after commencement of the Act.

16.87 The Report on the Review should be presented to the Legislative Assembly within three months after the review has started and be referred to the relevant Assembly oversight committee for inquiry and report.

16.88 The Committee therefore makes the following recommendation:

Recommendation 69

16.89 The Committee recommends that the enabling legislation of an ACT Anti-Corruption and Integrity Commission must be reviewed every five years after commencement of the Act. The Report on the Review should be presented to the ACT Legislative Assembly within three months after the Review has started and be referred to the relevant Assembly oversight committee for inquiry and report.

17 STAFFING AND RESOURCING

- 17.1 A number of contributors to the Inquiry were of the view that the structure of an ACT Anti-Corruption and Integrity Commission (ACIC) as it concerns staffing and resources was an important element underpinning the effectiveness of the Body. The ACT Bar Association was of the view that such a body needs:

...sufficient staff to undertake something more than a secretariat function.⁸⁶³

- 17.2 This chapter sets out the Committee's broad views as it concerns staffing and resourcing of an ACT ACIC.

COMMITTEE COMMENT

- 17.3 The Committee agrees that an ACT ACIC should have sufficient staff to undertake more than a secretariat function. Accordingly, in addition to the appointment of a statutory head of the Commission, the Office of the ACIC will need to be staffed with suitably skilled and qualified staff at senior and junior positions—to cover the administrative, investigative and prevention and education functions of the Commission.
- 17.4 The Committee notes that the accompanying policy and treasury costing for the 2016 General Election integrity measures, as proposed by each of the three parties⁸⁶⁴ represented in the Assembly, detailed a staffing profile⁸⁶⁵ for either the Office of an Integrity Commissioner or a corruption type commission. The Committee considers that these proposed staffing profiles may be instructive in determining an appropriate minimum staffing level for an ACT ACIC (subject to the operational discretion of an ACIC's statutory head).

⁸⁶³ Submission No. 12—ACT Bar Association.

⁸⁶⁴ ACT Greens. (2016) 2016 Election Policies; ACT Greens. (2016) Election commitments and costing—GRN038/GRN038C; Canberra Liberals. (2016) Election commitments and costing—LIB016/LIB016C; ACT Labor. (2016) 2016 Election Policies; ACT Labor. (2016) Election commitments and costing—LAB044/LAB044C

⁸⁶⁵ These staffing profiles ranged from between 9 to 14.5 fulltime equivalents—ACT Greens [14.5 staff (including Commissioner)]; Canberra Liberals [9 staff plus Commissioner and Board members]; and ACT Labor [10 staff (including Commissioner) plus Board members and general corporate services to be provided through the Justice and Community Safety Directorate].

SPECIALISED INVESTIGATIVE CAPABILITY

- 17.5 As to 'specialised' investigative capabilities, it is the view of the Committee that due to scale considerations, and an anticipated time lag for such a function to mature, it would not be feasible for an ACT ACIC to have a standing specialised investigative capability in-house.
- 17.6 The Committee acknowledges that the administration of such powers is expensive in terms of infrastructure, requires specialised personnel with sufficient skill sets and warrants a specialised oversight regime.
- 17.7 The Committee is also of the view that sourcing these specialised capabilities from a larger state-based anti-corruption type body, for example, would deliver a better return for the ACT taxpayer as opposed to having such a function in-house, in addition to having access immediately to skilled and experienced officers.
- 17.8 Accordingly, the Committee is of the view that an ACT ACIC's specialised investigative capability services should be purchased from one of the state-based anti-corruption bodies; and that an arrangement is in place that provides for these services on an as needed basis.
- 17.9 The Committee therefore makes the following recommendation:

Recommendation 70

- 17.10 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's specialised investigative capability services should be purchased from a state-based anti-corruption body; and that an arrangement is in place that provides for these services on an as-needed basis.**

MANAGERIAL AUTONOMY AND RESOURCING

- 17.11 It is the Committee's view that the statutory head of an ACT ACIC should have a level of autonomy that takes account of the Commission's ability to carry out its functions and duties together with the Commission's ability to attract and retain a suitable level of staff resources.
- 17.12 The Committee acknowledges that while the Commission will have baseline staffing, in addition to investigative capability as noted in the previous section, it may need a capacity to scale up its staffing on an as needs basis. For example, to access skills in a specialised area or additional staff to support investigation requirements. The Committee notes it may also be feasible to source these types of staff from a larger state-based anti-corruption body.
- 17.13 It is noted that it is likely that the enabling legislation of an ACT ACIC will provide for staff of the Commission to be employed under the *Public Sector Management Act 1994*. This requirement, given the unique and specialised role an ACIC has, may have a bearing on the Commission's ability to recruit staff with suitable skills and experience.

17.14 The Committee is of the view that the managerial autonomy and ability of the statutory head of an ACT ACIC to resource the Commission could be strengthened by including a provision that allows the statutory head to engage persons on terms and conditions they see fit.

17.15 However, the Committee emphasises that in any determination of the terms and conditions on which staff could be engaged, it would be appropriate for the statutory head to have regard to the general terms and conditions of employees of the ACT Public Service (ACTPS).

17.16 The Committee therefore makes the following recommendation:

Recommendation 71

17.17 The Committee recommends that the statutory head of an ACT Anti-Corruption and Integrity Commission be permitted to engage persons on terms and conditions the statutory head sees fit. In any determination of the terms and conditions on which staff could be engaged, it would be appropriate for the statutory head to have regard to the general terms and conditions of employees of the ACT Public Service (ACTPS).

NOT SUBJECT TO DIRECTION

17.18 At a minimum, the Committee is of the view that where staff are performing functions and duties in accordance with an ACT ACIC's enabling legislation, that the Act should include a provision recognising that the staff assisting the statutory head of the ACIC are not subject to the direction of any person other than the statutory head, or a person authorised by the statutory head.

17.19 The Committee therefore makes the following recommendation:

Recommendation 72

17.20 The Committee recommends that an ACT Anti-Corruption and Integrity Commission's (ACIC) enabling legislation should include a provision recognising that the staff assisting the statutory head of the Commission are not subject to the direction of any person other than the statutory head, or a person authorised by the statutory head in relation to matters dealing with investigative functions and duties performed pursuant to the ACIC's enabling legislation.

ASSURING INDEPENDENCE OF SENIOR STAFFING

17.21 The Committee notes that it is arguable that with the extensive powers concentrated in an ACT ACIC, that continuity of senior staffing that outlives the term of any statutory head may not be desirable.

17.22 The Committee is of the view that appointments to senior management positions within an ACT ACIC should not be permitted from the ranks of existing ACT Government public servants or those who have been public servants in the ACT Government for a period of 10 years previously. Further, appointment terms for these positions should be for fixed terms (with the possibility of extension).

17.23 The Committee therefore makes the following recommendation:

Recommendation 73

17.24 The Committee recommends that appointments to senior management positions within an ACT Anti-Corruption and Integrity Commission should not be permitted from the ranks of existing ACT Public Service (ACTPS) employees or those who have been public servants in the ACTPS for a period of 10 years previously. Further, appointment terms for these positions should be for fixed terms (with the possibility of extension).

GENERAL EMPLOYMENT PROVISIONS AND SPECIAL CONDITIONS

17.25 The Committee believes that a number of general employment provisions and special conditions should apply to staff working for an ACT ACIC—and therefore makes the following recommendation:

Recommendation 74

17.26 The Committee recommends that the following employment provisions and special conditions should apply to staff working for an ACT Anti-Corruption and Integrity Commission (ACIC):

- (a) staff to have a legislative duty to avoid actual or perceived conflicts of interest. A legislative direction may be appropriate for consequences to follow if the existence of a conflict of interest (real or perceived) is established;**
- (b) staff not to have (or had) any political affiliations;**
- (c) former AFP or ACT Policing police officers are not eligible for appointment to positions within an ACT ACIC;**
- (d) staff to be subject to certain confidentiality requirements. Current or former staff members must not record, divulge or communicate any information acquired in the course of carrying out their duties, except in the performance of those duties; and**
- (e) eligibility for employment to be subject to security clearance/assessments.**

18 APPLICATION OF OTHER LEGISLATION

- 18.1 The application of other legislation is an important consideration in the establishment of an anti-corruption body. This includes legislation relating to human rights, privacy, freedom of information and public interest disclosures.

HUMAN RIGHTS CONSIDERATIONS

- 18.2 Human rights considerations are of particular importance given the ACT is a human rights jurisdiction. Several contributors to the Inquiry noted the importance of ensuring that individuals subject to investigation are afforded procedural fairness and natural justice.⁸⁶⁶
- 18.3 Other contributors specifically raised that in a jurisdiction where the *Human Rights Act* (2004)(ACT) has application ‘restraint needs to be applied in respect of how fundamental rights (such as the privilege against self incrimination) are to be modified’.⁸⁶⁷

COMMITTEE COMMENT

- 18.4 The Committee acknowledges the inevitable tension that exists between civil liberties/personal rights and an anti-corruption type body’s use of investigative and coercive powers.
- 18.5 The Committee is of the view that the application of human rights considerations is addressed by ensuring that reasonable limits are placed on the circumstances in which such powers can be exercised. Further, this can be supplemented by ensuring that procedural fairness and natural justice considerations are an inbuilt part of the work of an ACT Anti-Corruption and Integrity Commission (ACIC).
- 18.6 The Committee notes these considerations have been emphasised throughout its report in the context of the accountability regime applicable to an ACT ACIC and more specifically in its chapters on powers generally and power to hold public examinations. It also notes that creating such bodies, as a former WA Corruption and Crime Commissioner has noted, signals:

⁸⁶⁶ Includes: Submission No. 6—Guy Boland; Submission No. 31—Accountability Round Table; Submission No. 15—Law Society of the ACT; Submission No. 12—ACT Bar Association.

⁸⁶⁷ Submission No. 12—ACT Bar Association.

...the willingness of government and the community to accept the suspension of fundamental civil rights in the interests of detecting forms of serious wrongdoing with the capacity to undermine the integrity of public institutions.⁸⁶⁸

PRIVACY LEGISLATION

18.7 The application of the *Privacy Act 1988* to an ACT ACIC was noted indirectly by some contributors.

18.8 A review by the Australian Law Reform Commission (ALRC) examining Australian privacy law and practice noted that state and territory jurisdictions that have anti-corruption type bodies commonly provide for their partial exemption from the operation of privacy laws or standards. For example, the NSW Independent Commission Against Corruption (ICAC) is not required to comply with the information protection principles under the *Privacy and Personal Information Protection Act 1998* (NSW), except in connection with the exercise of their administrative and educative functions.⁸⁶⁹

18.9 In contrast to the partial exemption as applies to state-based anti-corruption bodies, the Australian Commission for Law Enforcement Integrity (ACLEI) Commissioner is exempt from the operation of the *Privacy Act 1988* 'reflecting the importance of ACLEI's information collection and intelligence-sharing role'.⁸⁷⁰ In its submission to the ALRC's review of Australian privacy law and practice, in support for its complete exemption, ACLEI argued that:

...due to its investigative and intelligence-gathering methodologies, it is not always possible to distinguish between its administrative and non-administrative operations—especially since its covert operations relate to personnel and financial management that should not be subject to normal constraints on use and disclosure.⁸⁷¹

18.10 ACLEI is required though, in consultation with the Office of the Privacy Commissioner to develop and publish information-handling guidelines.

⁸⁶⁸ Roberts-Smith, L. (2010) 'The Role of the Corruption and Crime Commission in the Constitutional System of Western Australia', *Presentation at the Public Seminar at the WA Constitutional Centre*, p. 1.

⁸⁶⁹ Australian Law Reform Council. (2008) *Australian Privacy Law and Practice* (ALRC Report 108), Chapter 37. Agencies with Law Enforcement Functions.

⁸⁷⁰ Submission No. 14—Australian Commission for Law Enforcement Integrity, p. 4.

⁸⁷¹ Australian Law Reform Council. (2008) *Australian Privacy Law and Practice* (ALRC Report 108), Chapter 37. Agencies with Law Enforcement Functions.

COMMITTEE COMMENT

18.11 In considering application of privacy legislation to an ACT ACIC, the Committee is of the view that its application should be restricted—in particular, as it concerns disclosure of personal information—acts and practices—where the disclosure is for the purpose of its investigative and intelligence-gathering methodologies (non-administrative operations).

18.12 The question that arises for the Committee is whether a partial or complete exemption is required. In the case of a partial exemption, it appears to the Committee that a requirement to comply in respect of administrative operations would be impractical. The Committee acknowledges the difficulties that may arise, in the context of investigative and intelligence-gathering methodologies, when having to distinguish between administrative and non-administrative operations.

18.13 The Committee therefore makes the following recommendations:

Recommendation 75

18.14 The Committee recommends that further work be undertaken to identify appropriate exemptions for an ACT Anti-Corruption and Integrity Commission from the operation of the *Privacy Act 1988*.

Recommendation 76

18.15 The Committee recommends that an ACT Anti-Corruption and Integrity Commission be required, in consultation with the Office of the Privacy Commissioner, to develop and publish information handling guidelines.

FREEDOM OF INFORMATION LEGISLATION

18.16 Whilst not raised by contributors the application of freedom of information legislation is an important consideration for anti-corruption type bodies. It is noted that state-based jurisdictions that have these bodies commonly provide for their partial exemption from the operation of freedom of information laws. For example, the Victorian Independent Broad-based Anti-corruption Commission (IBAC) has partial exemption as it concerns documents and information including those relating to complaints and its investigations. Specifically, section 194 of the *Freedom of Information Act 1982* as it applies to IBAC Victoria provides that:

194 Exemption from *Freedom of Information Act 1982*⁸⁷²

(1) The Freedom of Information Act 1982 does not apply to a document that is in the possession of any person or body to the extent to which the document discloses information that relates to—

- (a) a complaint; or
- (b) an investigation conducted under this Act; or
- (c) a recommendation made by the IBAC under this Act; or
- (d) a report, including a draft report, on an investigation conducted under this Act; or
- (e) information received by the IBAC under section 56⁸⁷³; or
- (f) a notification made to the IBAC under section 57⁸⁷⁴.

COMMITTEE COMMENT

18.17 In considering application of freedom of information (FOI) legislation to an ACT ACIC, the Committee acknowledges that there will be circumstances where exemptions will need to apply to an ACT ACIC.

18.18 For example, in circumstances where an investigation is underway and where information is considered to be quite sensitive, there is a good case for arguing that there should be an exemption from FOI for those records. However, as it concerns the normal day-to-day operations (administrative) of an ACT ACIC—in the Committee’s view there appears to be no compelling reason why the Commission cannot be subject to FOI requests.

18.19 The Committee therefore makes the following recommendation:

Recommendation 77

18.20 The Committee recommends that further work be undertaken to identify appropriate exemptions for an ACT Anti-Corruption and Integrity Commission (ACIC) from the operation of the *Freedom of Information Act 1989*.

⁸⁷² Section 194, *Freedom of Information Act 1982*.

⁸⁷³ Section 56—concerns where IBAC may receive information.

⁸⁷⁴ Section 57—concerns where notifications are made to IBAC.

PUBLIC INTEREST DISCLOSURE LEGISLATION

18.21 The application of the *Public Interest Disclosure Act 2012*⁸⁷⁵ to an ACT anti-corruption body was raised by some contributors.

COMMITTEE COMMENT

18.22 The Committee is of the view that the operations of the *Public Interest Disclosure Act 2012* (the PID Act) as it concerns any future ACT ACIC should be reviewed.

18.23 The Committee notes that there appeared to be no provision for a statutory review period in the PID Act which became effective 1 February 2013. Generally, statutory review periods are designed to ensure a timely evaluation of the implementation and performance against the legislation. Some statutes prescribe review periods that can range from between three to five years.

18.24 Accordingly, as the PID Act will have been operational for five years on 1 February 2018, the Committee considers that statutory review of its implementation will be timely.

18.25 The Committee therefore makes the following recommendation:

Recommendation 78

18.26 The Committee recommends that the ACT Government appoint an independent person to conduct a statutory review of the *Public Interest Disclosure Act 2012* (the PID Act). The Review, amongst other things, should consider:

- (a) any potential conflict of interest (real or perceived) as it concerns decision makers and disclosure officers under the PID Act;**
- (b) the findings of the Moss Review examining the operation of the Commonwealth *Public Interest Disclosure Act 2013* as it concerns the strengthening of that legislation to achieve the Act's integrity and accountability aims;**
- (c) the matters raised in submission No. 3 (as detailed in paragraph 3.162) to the Inquiry as it concerns the PID Act;**
- (d) application of the PID Act to any future ACT Anti-Corruption and Integrity Commission (ACIC)—in particular, its articulation with any protected disclosure provisions that may**

⁸⁷⁵ Submission No. 2—Quentin Dempster; Submission No. 12—ACT Bar Association; Submission No. 3—Clerk, ACT Legislative Assembly; Submission No. 1—IBAC Victoria.

**apply to any informants providing assistance to the ACIC or anyone consequently at risk;
and**

- (e) the suitability of an ACT ACIC for the purposes of receiving disclosures pursuant to the PID Act.**

19 OTHER MATTERS

- 19.1 A number of other matters were either raised by contributors or became apparent during the course of the Inquiry that are relevant to discussions concerned with strengthening the ACT public sector and parliamentary integrity framework. These matters concerned distributed integrity measures.

DISTRIBUTED INTEGRITY MEASURES

- 19.2 As noted in chapter three, a number of contributors made comment, either as the focus of their submission or in-part, concerning distributed integrity measures. This included the introduction of additional measure and/or the strengthening of existing measures.
- 19.3 In its submission the Griffith Narrabundah Community Association, aside from commenting on institutional arrangements, noted the importance of distributed integrity measures as an integral component of an integrity system, emphasising that:

...it seems that any serious effort to limit corruption and misconduct would also consider changes to legislation, codes of conduct and institutional arrangements to provide disincentives for corrupt behaviour, make it harder to hide such behaviour and its consequences, and make it easier to detect, discover or report such undesirable conduct.⁸⁷⁶

COMMITTEE COMMENT

- 19.4 The Committee agrees that an integrity system is a system of measures and agencies that work together.
- 19.5 An exhaustive review of the effectiveness of the range of distributed integrity measures in place in the ACT is beyond the scope of this inquiry. The Committee, however, makes comment on a number of measures it considers should be addressed in the short-term.

⁸⁷⁶ Submission No. 28—Griffith Narrabundah Community Association, p. 16.

STATUTORY OFFICE HOLDERS—REVIEW OF TERMS

- 19.6 ACT statutory office holders fulfil a range of functions and they may be responsible for an agency and its delivery of services, have an advisory or consultative role, or perform independent oversight or regulation functions for a particular activity.
- 19.7 The Committee has noted previously, as it concerns the term for the Integrity Commissioner, that the principle of fixed non-renewable terms is well supported in the literature as an important accountability mechanism for safeguarding the independence of designated office holders in both the private and public sectors.⁸⁷⁷ Fixed non-renewable terms are important safeguards to avoid an office holder becoming complacent in a role, provide for new perspectives via turnover, can limit opportunities for capture and avoid situations where office holders may pursue special interests.
- 19.8 There are some statutory office holders in the ACT that do not have set terms, or have set terms without any restriction on eligibility for reappointment. This is an undesirable situation as it concerns independence (real or perceived) and its implications are extenuated in a jurisdiction the size of the ACT with perception of the interconnectedness of relationships.
- 19.9 The Committee notes that the Auditor-General's forward program for performance audits for 2015–16 (and beyond) listed a potential audit covering statutory office holders.⁸⁷⁸ At the time, the scope for such an Audit suggested it could examine:
- the role of the statutory office holders, including their governance and administrative arrangements and compliance with legislation;
 - potential duplication of activities or gaps in roles and responsibilities; and
 - broader government arrangements for the governance, coordination and oversight of statutory office holders.⁸⁷⁹
- 19.10 The potential audit appears to be no longer listed on the forward program.
- 19.11 The Committee is of the view that a review of the terms of all statutory officer holders in the ACT should be conducted and, where it is considered as a necessary integrity safeguard, set terms for applicable appointments should be introduced. The Committee notes that when

⁸⁷⁷ ASX. (2014), *ASX Corporate Governance Principles and Recommendations* (3rd ed.); Robertson, G. (2009) *Independence of Auditors-General—A Survey of Australian and New Zealand legislation*, July, Commissioned by the Victorian Auditor-General's Office; INTOSAI. (2007), *Mexico Declaration on the Independence of Supreme Audit Institutions*; ACPAC. (1997), *Resolution—Minimum requirements for the independence of the Auditor-General*, as amended at ACPAC Biennial Conference, Sydney, February; Funnell, W. (1996) 'Executive Encroachments on the Independence of the Commonwealth Auditor-General', *Australian Journal of Public Administration*, 55, 4, pp. 109–123.

⁸⁷⁸ ACT Audit Office, 'Performance Audit Program 2014–15 and Potential Audits to Commence in 2015-16', p. 11.

⁸⁷⁹ ACT Audit Office, 'Performance Audit Program 2014–15 and Potential Audits to Commence in 2015-16', p. 11.

amending core accountability provisions, transitional arrangements between old and new legislation should ensure that the independence of incumbent office holders is not compromised.

19.12 The Committee therefore makes the following recommendation:

Recommendation 79

19.13 The Committee recommends that the ACT Government appoint an independent reviewer to examine appointment terms for statutory officer holders in the ACT and make recommendations to strengthen integrity as it concerns appointment of these office holders.

ELECTORAL MATTERS

19.14 The jurisdiction of electoral offences as it concerns public administration was a recommendation of the Martin report reviewing the establishment of an independent anti-corruption body in the Northern Territory (NT).⁸⁸⁰ Further the review of the jurisdiction of the NSW ICAC, amongst other things recommended that electoral offences also be considered. Specifically, it suggested that should Parliament be of the view that breaches of the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* or the *Lobbying of Government Officials Act 2011* should be made the subject of the ICAC's jurisdiction—that it allow the Electoral Commission to refer to the NSW ICAC for investigation possible serious breaches of electoral and lobbying laws.⁸⁸¹

19.15 The Committee believes that the ACT Electoral Commission (AEC) has extensive powers to investigate conduct that may amount to an offence under the *Electoral Act 1992*. The Committee is of the view that when considered appropriate or where the standing regulatory capacities of the AEC lack sufficient authority; the AEC may wish to refer specific matters to an ACT ACIC.

⁸⁸⁰ Martin, B. (2016) *Anti-Corruption, Integrity and Misconduct Commission Inquiry—Final report*, May.

⁸⁸¹ Independent Panel. (2016) *Review of the jurisdiction of the NSW Independent Commission Against Corruption*, 30 July.

20 CONCLUSION

- 20.1 The Committee considers that the establishment of an anti-corruption and integrity commission in the ACT will play an important role in investigating, exposing and preventing corruption. A former NSW ICAC Commissioner has highlighted why these specialised bodies are needed:

The investigation and exposure of corruption is an extremely difficult task. Secrecy is at the core of corrupt conduct. Few paper trails are left and false paper trails are created. Electronic communications and continuously developing sophisticated technology are formidable means of concealing misconduct. The persons likely to be involved in large-scale corruption are usually experienced and astute and have deep pockets. They surround themselves with skilled lawyers, accountants and technical experts and are often protected politically. So, if corruption involving public office is to be fought effectively, specialist anti-corruption agencies are needed with special powers and resources.⁸⁸²

- 20.2 Corruption is inherently difficult to uncover or expose because of its insidious nature. The establishment of standing anti-corruption commissions, designated stand-alone integrity bodies, or specialised anti-corruption institutions perform a distinctive role in an integrity system. These specialised bodies are responsible for investigating, exposing and preventing corruption in the public sector. Their unique and specialised role is shaped by the nature of corruption itself and the complexities associated with its exposure. This underpins the basis of the specific functions and exceptional powers these bodies have.
- 20.3 Of equal importance is that such bodies exist to serve the public and have an important role in fostering public confidence in an integrity context. A critical consideration in this regard is that the enabling legislation for such bodies must explicitly contain mechanisms to ensure procedural fairness and to guard against their investigative and coercive powers being misused.
- 20.4 Calls for the establishment of an independent integrity body in the ACT, mark each decade since self-government—it was raised at the outset of self-government in 1989, again in 2001 (prior to an October election that year); and again in 2016. On 15 December 2016, the Legislative Assembly established the Committee to consider the feasibility of the establishment of an independent integrity commission in the ACT.

⁸⁸² Ipp, D. (2017) 'Accountability and the Law: Anti-corruption agencies in Australia', *Accountability and the Law Conference*, August, p. 4.

- 20.5 Public opinion and the sentiments expressed by many contributors to the inquiry indicate strong support for the principle of a designated ACT independent integrity type body. The Committee emphasises the importance of the linkage between levels of trust and legitimacy of a government, in that ‘without trust we cannot stand’.⁸⁸³
- 20.6 The Committee is of the view that the ACT community and taxpayer has a right to expect that the social contract between government and the people is working in its interest. The Committee acknowledges the correlation between the establishment of an effective anti-corruption and integrity type body and improved accountability and trust in government.
- 20.7 Accordingly, the Committee has recommended that the Government establish an ACT Anti-Corruption and Integrity Commission (ACIC) to investigate, expose and prevent corruption and foster public confidence in the integrity of government. The Committee has recommended that the Government finalise the establishment of an ACT ACIC by the end of 2018.
- 20.8 The Committee has detailed in this report its views, and associated recommendations, concerning the design, form, functions and powers of an ACT ACIC.
- 20.9 The Committee acknowledges the desire by contributors to the inquiry that an ACT ACIC be established and operational during the 9th Assembly term but equally important, in the Committee’s view, is that sufficient opportunity is provided for consideration regarding the final design, form, functions and powers of such a body. The Committee considers that it is important that an ACT ACIC be established and operational during the current Assembly.
- 20.10 The Committee also acknowledges that the ACT is a human rights jurisdiction and that there needs to be appropriate safeguards in the enabling legislation of an ACT ACIC to ensure procedural fairness and to guard against its investigative and coercive powers being misused. The Committee is of the view that it has addressed the application of human rights considerations by recommending that reasonable limits are placed on the circumstances in which such powers can be exercised and by ensuring that procedural fairness and natural justice considerations are an inbuilt part of the work of an ACT ACIC.
- 20.11 The Committee wishes to thank all of those who have contributed to its inquiry, by making submissions and/or appearing before it to give evidence. The Committee recognises the significant commitment of time and resources required to participate in an inquiry of this nature and is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. In its report, the Committee has based many of its recommendations, or variations thereof, on suggestions by inquiry participants.

⁸⁸³ BBC—Radio 4—Reith Lectures. (2002) A Question of Trust, Lecture One, Onora O’Neill.

20.12 The Committee has made **79** recommendations in relation to its inquiry into the establishment of an independent integrity commission for the ACT.

Shane Rattenbury MLA
Chair

30 October 2017

Appendix A Interstate field visits

Thursday 4 May 2017

Organisation	Representative(s)
Independent Broad-based Anti-corruption Commission (IBAC)—Victoria	<ul style="list-style-type: none"> Mr Alistair Maclean, CEO, IBAC Mr John Lynch, General Counsel Ms Christine Howlett, Director of Prevention & Communication
Independent Broad-based Anti-corruption Commission Committee (a joint investigatory committee), Parliament of Victoria (IBAC Committee)	<ul style="list-style-type: none"> Hon. Kim Wells MP, Chair, IBAC Committee Ms Sandy Cook—Committee Executive Officer, IBAC Committee Ms Justine Donohue—Administrative Officer, IBAC Committee
Accountability and Oversight Parliamentary Committee (a joint investigatory committee), Parliament of Victoria (AOC Committee)	<ul style="list-style-type: none"> Mr Neil Angus MP, Chair, AOC Mr Sean Coley—Executive Officer, AOC

Friday 5 May 2017

Organisation	Representative(s)
Integrity Commission—Tasmania	<ul style="list-style-type: none"> Mr Michael Easton, A/g Chief Executive
Joint Standing Committee on Integrity (a joint investigatory committee), Parliament of Tasmania	<ul style="list-style-type: none"> Hon Ivan Dean MLC (Chair) Hon Mike Gaffney MLC, Member Ms Lara Giddings MP, Member Ms Rosalie Woodruff MP, Member Mr Todd Buttsworth—Secretary

Monday 15 May 2017

Organisation	Representative(s)
NSW Law Enforcement Conduct Commission (LECC)	<ul style="list-style-type: none"> Ms Amber Williams, Acting CEO, Law Enforcement Conduct Commission (LECC) Ms Michelle O'Brien, Acting Commissioner, Police Integrity Commission (PIC) Mr Gary Kirkpatrick, Director, Operations, Police Integrity Commission
NSW Independent Commission against Corruption (ICAC)	<ul style="list-style-type: none"> The Hon Reginald Blanch AM QC, Commissioner Mr Lewis Rangott, Executive Director, Corruption Prevention Division Mr Roy Waldon, Executive Director, Legal Division
Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, Parliament of NSW	<ul style="list-style-type: none"> Mr Lee Evans MLA, Chair Hon. Trevor Khan MLC, Member Mr Jason Ardtiti—A/g Director, Legislative Assembly Committees

Monday 15 May 2017 (contd.)

Organisation	Representative(s)
Committee on the Independent Commission Against Corruption, Parliament of NSW	<ul style="list-style-type: none">▪ Mr Damien Tudehope, MLA, Chair▪ Hon. Trevor Khan MLC, Member▪ Mr Ron Hoenig MLA, Member▪ Ms Elspeth Dyer—Committee Manager
Parliament of NSW—Clerk of Parliaments and Clerk of Legislative Council	<ul style="list-style-type: none">▪ Mr David Blunt

Appendix B List of written submissions

Submissions received by the Committee to the Inquiry:

Sub No.	Author/Organisation
1	IBAC Victoria
2	Mr Quentin Dempster (Individual)
3	Clerk, ACT Legislative Assembly
4	ACT Legislative Assembly Ethics and Integrity Adviser
4a	ACT Legislative Assembly Ethics and Integrity Adviser
5	Mr Leon Arundell (Individual)
6	Mr Guy Boland (Individual)
7	Mr Jon Stanhope (Individual)
8	Mr Tony Harris (Individual)
9	The Australia Institute
10	Dr Oliver Dowlen (Individual)
11	CPSU (PSU Group)
12	ACT Bar Association
13	Benedict Sheehy (PhD)—Associate Professor of Law (Individual)
14	Australian Commission for Law Enforcement Integrity (ACLEI)
15	Law Society of the ACT
16	Ms Rhyl Hurley (Individual)
17	Crime and Corruption Commission—Queensland
18	Ms Marea Fatseas (Individual)

Sub No.	Author/Organisation
19	ACT Public Sector Standards Commissioner
20	Canberra Alliance for Participatory Democracy (CAPaD)
21	Inner South Canberra Community Council (ISCCC)
21a	Supplementary submission—Inner South Canberra Community Council (ISCCC)
22	UnionsACT
23	Science Party
24	Canberra Liberals
25	ACT Policing
25a	Supplementary submission—ACT Policing
26	ACT Auditor-General
27	ACT Government
28	Narrabundah/Griffith Community Association Inc.
29	ACT Ombudsman
29a	Supplementary submission—ACT Ombudsman
30	Emeritus Professor Roger Wettenhall and Visiting Professor Chris Aulich—IGPA, University of Canberra
31	Accountability Round Table (ART)
32	Lady Nora Preston—Wildlife Carers Group
33	ACT Legislative Assembly—Commissioner for Parliamentary Standards

Appendix C Committee public hearings

Witnesses who appeared before the Committee at public hearings:

Thursday 20 July 2017

- Dr Maxine Cooper—ACT Auditor-General
- Mr Ajay Sharma—Principal, Professional Services, ACT Audit Office
- Ms Bronwen Overton-Clarke—ACT Public Sector Standards Commissioner
- Mr Michael Manthorpe PSM—ACT Ombudsman
- Mr Tom Duncan—Clerk, ACT Legislative Assembly
- Mr David Skinner—Director, Office of the Clerk, ACT Legislative Assembly
- Mr Stephen Skehill—ACT Legislative Assembly Ethics and Integrity Adviser
- Mr Jon White SC—ACT Director of Public Prosecutions

Monday 24 July 2017

- Mr Jack Waterford—Individual
- Mr John Edquist—Vice Chair, Inner South Canberra Community Council
- Ms Marea Fatseas—Individual

Friday 1 September 2017

- Ms Brooke Muscat, ACT Regional Secretary, CPSU (PSU Group)
- Ms Amy Knox, Union organiser, CPSU (PSU Group)
- Ms Rhyl Hurley—Individual
- Mr Ken Archer, President, ACT Bar Association
- Mr Quentin Dempster—Individual
- Mr Tony Harris—Individual

Thursday 7 September 2017

- Assistant Commissioner Justine Saunders—Chief Police Officer, ACT Policing, Australian Federal Police (AFP)
- Assistant Commissioner Ray Johnson—National Manager Reform, Culture and Standards, AFP
- Mr Michael Griffin AM—Integrity Commissioner, Australian Commission for Law Enforcement Integrity (ACLEI)
- Ms Penny McKay—General Counsel, ACLEI
- Ms Sarah Marshall—Executive Director, Operations, ACLEI
- Hon. Stephen Charles QC AO—Chair, Accountability Round Table, Anti-Corruption Working Group

Appendix D Salmon principles of fair procedure

The six principles of fair procedure under the *Tribunals and Inquiries Act 1921* were devised by Lord Justice Salmon, who, in 1966, chaired a Royal Commission on Tribunals of Inquiry following dissatisfaction with procedural aspects of Lord Denning's inquiry into the Profumo affair.⁸⁸⁴ The principles are:

- Before any person becomes involved in an inquiry, the tribunal must be satisfied that there are circumstances which affect them and which the tribunal proposes to investigate.
- Informing witnesses of allegations against them and the substance of the supporting evidence—before any person who is involved in an inquiry is called as a witness, they should be informed of any allegations made against them and the substance of the evidence in support of them.
- Witnesses should be given an adequate opportunity to prepare their case and of being assisted by legal advisers and their legal expenses should normally be met out of public funds.
- Giving witnesses the opportunity of being examined by their own solicitor or counsel and of stating their case in public at the inquiry.
- Any material witnesses a person called before an examination may wish to call at the inquiry should, if reasonably practicable, be heard.
- Allowing witnesses the opportunity of testing by cross-examination, conducted by their own solicitor or counsel, any evidence which may affect them.

⁸⁸⁴ Salmon, C. B. (1966) Royal Commission on Tribunals of Inquiry. *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, London: HMSO, p. 38.