

Chapter 2

Key issues

2.1 This chapter first outlines the key issues raised in evidence regarding the National Integrity Commission Bill 2018 (the McGowan NIC bill) and the National Integrity Commission Bill 2018 (No. 2) (the Greens NIC bill), as follows:

- The possible need for a national integrity commission.
- The jurisdiction of the proposed Australian National Integrity Commission (NIC), including the definition of 'corrupt conduct', possible oversight of the judiciary by the NIC, and oversight of historical instances of corrupt conduct.
- The powers of the proposed NIC, including how matters may be referred to the NIC, whether the NIC should be empowered to hold public hearings, and the ability of the NIC to make findings of corrupt conduct.
- Provisions for the protection of whistleblowers.
- The structure of the proposed NIC, including the resources provided for it.
- The oversight of the proposed NIC by the Parliamentary Joint Committee on the Australian National Integrity Commission and the Parliamentary Inspector.
- How the NIC will interact with existing integrity agencies, including the independence of those agencies and the effect of mandatory reporting requirements.

2.2 The chapter also outlines the key issues regarding the National Integrity (Parliamentary Standards) Bill 2018 (the NIPS bill).

2.3 The chapter concludes by providing the committee's view.

Is there a need for a national integrity commission?

2.4 A number of inquiry participants supported the establishment of a national integrity commission.¹ For example, Transparency International Australia (TIA) submitted that 'now is the time' for reform, and advanced that '[t]rust and confidence in the integrity of Parliament, the public sector and the system of government, is at an all-time low.'² It submitted that the current multi-agency integrity framework:

...is inadequate and fails to provide a comprehensive and coordinated approach to preventing, detecting and investigating corruption, and to prevent, manage and resolve parliamentary integrity issues.³

1 For example, Transparency International Australia, *Submission 12*, pp. 7–8; New South Wales Ombudsman (NSW Ombudsman), *Submission 15*, p. 2; Australian Council of Trade Unions, *Submission 16*, p. 3.

2 Transparency International Australia, *Submission 12*, p. 2.

3 Transparency International Australia, *Submission 12*, p. 2.

2.5 Similarly, the Accountability Round Table (ART) took issue with the current model involving the Australian Commission for Law Enforcement Integrity (ACLEI):

Independent experts in the formulation and implementation of public policy, particularly as it relates to national integrity commissions...know, and have known since its inception, that the Australian Commission for Law Enforcement Integrity (ACLEI) is not only a deeply flawed model but that the Commission has always been woefully under-resourced by successive Federal governments.⁴

2.6 The National Integrity Committee (The Australia Institute) (the National Integrity Committee) submitted that 'an ineffective commission is worse than no commission at all' and emphasised the need for a commission that would 'fill a serious gap in Australia's capacity to minimise corruption' at the Commonwealth level.⁵

2.7 The New South Wales Ombudsman (NSW Ombudsman), Mr Michael Barnes, stated that 'generally we wholeheartedly support the creation of the National Integrity Commission with the functions and powers set out' in the NIC bills. He explained:

In our view the bills' provisions are consistent with the principles which underpin an effective integrity commission—in particular, those provisions which provide for independence from government control; a focused, proactive approach to preventing corruption and instilling a culture of integrity across the public sector; and a broad jurisdiction in terms of who it can investigate and for what conduct, including non-criminal conduct if it's serious and systematic.⁶

2.8 It was noted by Ombudsman Western Australia that many countries have established an anticorruption commission, as in fact Australian states and territories have also done.⁷

2.9 In contrast to the above witnesses, the Institute of Public Affairs (IPA) opposed the establishment of a national integrity commission altogether, arguing that:

...based on the historical experience with state level anti-corruption agencies, a federal National Integrity Commission would not be appropriate or desirable, and would invite abuses of power.⁸

2.10 The IPA further submitted that 'it is not clear that corruption is such a problem in Australia that a federal agency – especially one with extraordinary investigative powers – is needed'. It noted that there is already 'a suite of federal regulators with

4 Accountability Round Table, *Submission 10*, p. 1.

5 National Integrity Committee (The Australia Institute) (National Integrity Committee), *Submission 6*, p. 1.

6 Mr Michael Barnes, NSW Ombudsman, Office of the NSW Ombudsman, *Committee Hansard*, 8 February 2019, p. 41.

7 Ombudsman Western Australia, *Submission 3*, p. 2.

8 Institute of Public Affairs, *Submission 5*, p. [1].

responsibility for enforcing existing laws against corrupt conduct', and that it 'would appear that these bodies are achieving their intended purpose'.⁹

2.11 The IPA also acknowledged survey results reflecting 'a population that is undeniably cynical about Australia's public institutions', but submitted that 'the causes of this cynicism are complex. It cannot necessarily be attributed to – nor accepted as evidence of – widespread corrupt conduct.'¹⁰ Mr Gideon Rozner, Director of Policy at the IPA, contended that establishing the NIC:

...won't do anything to enhance the trust in our public institutions. All the public will see is a rolling series of baseless accusations that make the adversarial and chaotic nature of our politics even worse. I think it will turn our political system further into a perennial sideshow.¹¹

Jurisdiction of the commission and the definition of 'corrupt conduct'

2.12 Consistent with its opposition to the establishment of a national integrity commission, the IPA expressed concern that an anticorruption commission may exceed its jurisdiction. Mr Rozner told the committee that 'inevitably these bodies become overzealous' and 'exceed their ambit'.¹² His colleague, Mr Morgan Begg, Research Fellow, elaborated:

At the state level, we've seen that these anticorruption agencies have become overenthusiastic. It's a symptom of what happens when you set up a special body, particularly a specialist body with a virtuous or very moral purpose, in this case challenging corruption. It's a very laudable objective, and unfortunately what happens is that these specialist bodies can become prone to pursuing those objectives without balancing considerations for the rule of law or considering what their appropriate jurisdiction is or faithfully executing their powers without going too far.¹³

2.13 Other inquiry participants supported a broad scope for the proposed national integrity commission.¹⁴ For example, TIA submitted that the commission:

...must have a broad jurisdiction, sufficient to cover all forms of serious or systemic corruption within or affecting any part of the public sector, the Parliament, parliamentarians and their staff, the executive and the judiciary.¹⁵

9 Institute of Public Affairs, *Submission 5*, Attachment 1, p. 8.

10 Institute of Public Affairs, *Submission 5*, Attachment 1, p. 9.

11 Mr Gideon Rozner, Director of Policy, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 29.

12 Mr Rozner, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 28.

13 Mr Morgan Begg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 28.

14 For example, National Integrity Committee, *Submission 6*, p. 1; Australian Council of Trade Unions, *Submission 16*, p. 2.

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

2.14 One key issue affecting the scope of the proposed NIC is the definition of 'corrupt conduct'.

2.15 TIA submitted that while it prefers the breadth of the definition in the McGowan NIC bill to the government's proposed approach, it considers that:

...a better approach again would be a simpler version of the [New South Wales] and Queensland definitions which make clearer which forms of either criminal or non-criminal official misconduct (and associated non-official behaviour by private sector actors) fall within jurisdiction for prevention, investigation, findings of fact and recommendations.¹⁶

2.16 The National Integrity Committee proffered a definition of 'corrupt conduct', and supported the inclusion, within that definition, of 'any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official'.¹⁷

2.17 The Hon Anthony Whealy QC, a member of the National Integrity Committee, submitted that the definition in the McGowan NIC bill is 'quite a good one', but supported the inclusion of:

...corrupt conduct of the kind where a public official acting honestly is nevertheless seriously misled by improper and inappropriate conduct to act in a certain way...We're not talking about a dishonest public official; we're talking about an honest public official who is seriously misled—for example, by a fraudulent tenderer. There could be millions of dollars involved, and the tender could be dishonest and fraudulent. We think that an anticorruption body must have the ability to investigate that action, even though it doesn't in the end expose any corruption on the part of the public official who may have been totally believing of what he'd been told.¹⁸

2.18 Similarly, the Crime and Corruption Commission Queensland (CCC Queensland) supported a definition that captures:

...the conduct of people outside the public sector that impairs or could impair public confidence in public administration by means of certain frauds and other dishonest acts which may result in loss of state revenue or improperly securing an appointment in the public sector.¹⁹

2.19 The CCC Queensland also noted that applicable definition in the *Crime and Corruption Act 2001* (Qld) 'is similar' to that proposed by the McGowan NIC bill.²⁰ It stated that the Queensland definition 'is considered to be generally consistent' with law

16 Transparency International Australia, *Submission 12*, p. 8.

17 National Integrity Committee, *Submission 6*, p. 5.

18 The Hon Anthony Whealy QC, Member, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 3.

19 Crime and Corruption Commission Queensland, *Submission 2*, p. 2; also see Mr Alan MacSporran QC, Chairperson, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, pp. 46–47.

20 Crime and Corruption Commission Queensland, *Submission 2*, pp. 1–2.

in New South Wales and Victoria, and that it is 'appropriate given the increasing degree of outsourcing and public-private partnerships in the delivery of government services'.²¹

2.20 The Community and Public Sector Union (CPSU) also referred to outsourcing in the public service, and advanced the view that the NIC should 'have a wide enough scope to ensure it covers not just [Australian Public Service] employees but also contractors and subcontractors'.²²

2.21 Regarding whether non-criminal conduct should be included in the definition, Mr Whealy of the National Integrity Committee supported its inclusion, recognising 'that some of that behaviour that people don't want to see is not necessarily criminal behaviour'. He explained:

In all of the state anticorruption agencies there is a definition of corrupt conduct, and in all of those states it's no longer the case that corrupt conduct must be criminal. That's so important because there can be a lot of corrupt conduct the public would regard as corrupt that wouldn't meet the notion of a criminal offence...This legislation in each of the states points to what is improper, even if it's not criminal.²³

2.22 The ACT Government confirmed that the relevant definition in its jurisdiction 'is not strictly tied to conduct that amounts to a criminal offence, as it also captures conduct such as a serious disciplinary offence'.²⁴

2.23 In the view of the Police Federation of Australia, investigations by the proposed NIC 'must not involve matters that fall short of corruption or serious misconduct'. It submitted:

Any activity that falls short of such conduct, does not warrant the independent investigation of an external agency, with the great powers afforded it. Those matters are better handled through internal investigation with external review to ensure accountability.²⁵

2.24 Aside from the policy intent of the definition of 'corrupt conduct', a representative of the Attorney-General's Department stated that there are 'potentially some drafting issues' relating to the definition in the NIC bills.²⁶ The representative provided one example in relation to the Greens NIC bill. She explained that

21 Crime and Corruption Commission Queensland, *Submission 2*, p. 2.

22 Community and Public Sector Union, *Submission 8*, p. 3; also see Mr Michael Tull, Assistant National Secretary, PSU Group, Community and Public Sector Union, *Committee Hansard*, 8 February 2019, p. 22

23 Mr Whealy, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 7.

24 ACT Government, *Submission 13*, p. 2.

25 Police Federation of Australia, *Submission 9*, p. 2.

26 Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 35.

subclause 9(2), which lists conduct that could constitute corrupt conduct, does not adequately link to subclause 9(1). This means that subclause 9(2):

...could, for example, be taken to mean that any illegal gambling at a state level unconnected to any Commonwealth issues could be purported to be covered...²⁷

Oversight of the judiciary

2.25 Judicial officers would not be covered by the proposed NIC, but the NIC bills establish a review process to consider a system of integrity oversight for Commonwealth judicial officers.²⁸

2.26 Mr Whealy of the National Integrity Committee argued that the judiciary should be subject to integrity oversight.²⁹ The Hon David Ipp AO QC of the National Integrity Committee stated:

Whether it's done in the bills or whether it is done by a federal judicial commission is not material to us, but we agree that there should be no distinction made between judges and anyone else.³⁰

2.27 Ms Fiona McLeod SC, Chair of TIA, stated that the proposed commission should have a broad jurisdiction that covers the judiciary 'in due course, after consultations with them'.³¹ She further explained:

There should be consultation with the heads of jurisdiction to ensure that they are comfortable with the way it is managed and the way it operates. There are some good state models now, of course, that could be examined in taking this step. I would see that as a next step in terms of these bills.³²

2.28 The ART submitted that the NIC should 'be able to initially examine any allegations of serious judicial misconduct and corruption', while emphasising that a 'body that is totally independent of the Executive' was required for investigations in relation to the judiciary.³³ Dr Colleen Lewis, Director at the ART, emphasised that the 'most important thing is that the separation of powers is protected'.³⁴

27 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 39.

28 Explanatory Memorandum, McGowan NIC bill, p. [3]; Explanatory Memorandum, Greens NIC bill, p. 2; also see clause 278 of the NIC bills.

29 Mr Whealy, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 11.

30 The Hon David Ipp AO QC, Member, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 11; also see National Integrity Committee, *Submission 6*, p. 8.

31 Ms Fiona McLeod SC, Chair, Transparency International Australia, *Committee Hansard*, 8 February 2019, p. 53; also see Transparency International Australia, *Submission 12*, p. 3.

32 Ms McLeod, Transparency International Australia, *Committee Hansard*, 8 February 2019, p. 54.

33 Accountability Round Table, *Submission 10*, p. 2.

34 Dr Colleen Lewis, Director, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 54; also see Accountability Round Table, *Submission 10*, p. 2.

2.29 Dr Lewis' colleague at the ART, Professor Charles Sampford, further explained that while it is up to the parliament to decide about the continued tenure of a judge, it is 'not a great body for engaging in investigations'. He stated:

Before any motion to impeach a judge is moved, there needs to be an independent high-quality investigation into any allegations. This could in theory be done by the National Integrity Commission or it could be done by separate judicial commissions.³⁵

2.30 Professor Sampford added that an NIC is likely to have greater expertise than a judicial commission due to having a greater workload, and that this is 'an argument but not a conclusive argument' for including judges in the remit of the NIC.³⁶

2.31 Mr Barnes, the NSW Ombudsman, noted that 'there is no federal judicial commission' and contended that 'the NIC's jurisdiction should extend to federal judicial officers'. He stated:

We recognise that at Commonwealth level the separation of powers means that exactly the same procedures couldn't be used to investigate and report on alleged corruption by judicial officers. However, with necessary modification and the involvement of the heads of jurisdiction, those challenges can be overcome, in our view.³⁷

2.32 Regarding the current arrangements in Victoria, Ms Cathy Cato, Executive Director at the Victorian Inspectorate, noted that there is a separate judicial commission with oversight of the judiciary.³⁸ The Chairperson of the CCC Queensland, Mr Alan MacSporran QC, explained the situation in Queensland:

In Queensland we have jurisdiction, as the CCC, over judicial officers. Complaints of judicial misconduct have to be notified to the head of the jurisdiction, and they are required to provide cooperative assistance and to not impede in any way our independent investigation.³⁹

Historical instances of corrupt conduct

2.33 As explained in chapter 1, the Greens NIC bill limits the functions of the Integrity Commissioner such that the Commissioner may not investigate corrupt conduct that occurred more than ten years before the commencement of the bill. The McGowan NIC bill contains no such limitation.

35 Professor Charles Sampford, Director, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 54.

36 Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 54.

37 Mr Barnes, NSW Ombudsman, *Committee Hansard*, 8 February 2019, p. 41.

38 Ms Cathy Cato, Executive Director, Legal and Integrity, Victorian Inspectorate, *Committee Hansard*, 8 February 2019, p. 44.

39 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 44.

2.34 Mr Tull of the CPSU noted that the NIC bills provide for some retrospectivity, which he said was 'important'.⁴⁰

2.35 The CCC Queensland submitted that the *Crime and Corruption Act 2001* (Qld) has 'never imposed any limit on the historical application of the definition of corrupt conduct'.⁴¹

Powers of the proposed National Integrity Commission

2.36 The IPA expressed concern that that the proposed NIC, with its coercive powers, would 'seriously compromise legal rights, democratic principles and the rule of law'.^{42,43}

2.37 The IPA suggested the NIC bills contain at least 12 provisions 'that breach the right to silence or remov[e] the privilege against self-incrimination' (six provisions in each bill).⁴⁴

2.38 One power discussed by the IPA relates to findings by the National Integrity Commissioner that are critical of a person. Mr Begg of the IPA stated that 'as I understand it, where the commissioner is satisfied that there is an allegation of criminality that they don't have to inform the person'. He called this 'one of the more bizarre aspects of the bill', as:

[t]o my mind that would be one of the situations where you most need to inform the person because the consequences are so severe.⁴⁵

2.39 Other inquiry participants submitted that it is appropriate that the NIC have the powers of a royal commission.⁴⁶ For example, the National Integrity Committee stated that the NIC:

...must be granted the investigative powers of a Royal Commission to undertake its work, to be executed at the discretion of the Commissioner. These powers would include the power to initiate its own investigations, and the power to make arrests, to conduct searches, and to gather and hold evidence.⁴⁷

40 Mr Tull, Community and Public Sector Union, *Committee Hansard*, 8 February 2019, p. 23; also see Community and Public Sector Union, *Submission 8*, p. 4.

41 Crime and Corruption Commission Queensland, *Submission 2*, p. 2.

42 Institute of Public Affairs, *Submission 5*, Attachment 1, p. 7.

43 Institute of Public Affairs, *Submission 5*, p. [1].

44 Institute of Public Affairs, *Submission 5*, Attachment 1, p. 11.

45 Mr Begg, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, pp. 27–28.

46 See, for example, Accountability Round Table, *Submission 10*, p. 2; Transparency International Australia, *Submission 12*, p.3; Mr Barnes, NSW Ombudsman, *Committee Hansard*, 8 February 2019, p. 41; Ms McLeod, Transparency International Australia, *Committee Hansard*, 8 February 2019, p. 53.

47 National Integrity Committee, *Submission 6*, p. 1.

2.40 On this point, Mr Ipp of the National Integrity Committee, emphasised that 'a hearing before [the Independent Commission Against Corruption] or an anticorruption agency is not a judicial hearing; it is a means of investigation'.⁴⁸ He elaborated:

It's really very similar to a police investigation where the police investigate a person not really knowing whether the person is guilty or not but assembling whatever evidence they can, and that person can't say, 'What you're doing and what you're asking is contrary to the rules of evidence,' because it's not a court case; it's an investigation...The rights of royal commissions have been around for a couple of hundred years because the law recognises that the overall public interest demands that, in special cases, those laws should be abrogated where there is an investigation of the kind that takes place with a royal commission and, it follows, by an anticorruption agency.⁴⁹

2.41 Mr Ipp stated that an anticorruption agency is 'nothing more, in effect, than a roving royal commission. It's roving because it can decide what it investigates or not, but its rights are no more and no less than a royal commission's'.⁵⁰

2.42 The CPSU submitted that the NIC should be allowed to use covert tactics such as listening devices and optical surveillance, but 'only under strict oversight'. It continued that there should be no arbitrary use of coercive powers, and due process should apply.⁵¹

2.43 The CCC Queensland noted that the NIC bills do not 'expressly vest the NIC with the array of law enforcement powers available under Commonwealth legislation'.⁵² It recommended that:

...the NIC, like state anti-corruption agencies, have express powers of telecommunication interception and other related powers under the *Telecommunications (Interception and Access) Act 1979*. Depending on policy preference, the NIC (and its authorised officers) may also have express powers for controlled operations, integrity testing and assumed identities under the *Crimes Act 1914* and surveillance powers under the *Surveillance Devices Act 2004*.⁵³

2.44 A representative of the Attorney-General's Department noted that the NIC bills, as drafted, do not provide the full suite of powers to the proposed NIC:

Because of those issues about intersection with other acts, the bill itself gives some powers to the Integrity Commission, but not the full suite,

48 Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 5.

49 Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 6.

50 Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 6; also see, for example, Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51.

51 Community and Public Sector Union, *Submission 8*, p. 6; also see, for example, National Integrity Committee, *Submission 6*, p. 8.

52 Crime and Corruption Commission Queensland, *Submission 2*, p. 3.

53 Crime and Corruption Commission Queensland, *Submission 2*, p. 4.

because there have been no amendments to pick up anything like telecommunications interception, surveillance devices, assumed identities and control operations. All of those kinds of things would need consequential amendments in order to give this body the full suite of investigative powers.⁵⁴

2.45 Regarding the treatment of legal professional privilege, the NSW Ombudsman noted that the NIC bills do not:

...require legal practitioners to disclose privileged communications to the Commission. This poses challenges to investigating bodies by preventing access to what may be highly relevant information, particularly given that organisations and individuals may use legal advisers to shield their actions and decisions from scrutiny.

I suggest that the Commissioner be able to require, although not necessarily disclose, the production of information claimed to be privileged.⁵⁵

2.46 The National Integrity Committee similarly saw the abrogation of legal professional privilege as 'eminently justifiable', and submitted that in the experience of the New South Wales Independent Commission Against Corruption (ICAC), the abrogation of the privilege 'has on many occasions proved to be essential to a successful investigation'.⁵⁶

2.47 The National Integrity Committee also highlighted that the NIC bills provide for a limited abrogation of public interest immunity.⁵⁷ It submitted that:

...claims for public immunity privilege or parliamentary privilege, or of commercial confidentiality, should not be available to those under investigation by the Commission, save to the extent that the Commission may, if it considers it in the public interest to do so, order that information or documents be kept confidential.⁵⁸

Referring matters to the proposed National Integrity Commission

2.48 Some inquiry participants supported the proposed NIC being able to receive referrals from the general public.⁵⁹ TIA submitted that the NIC 'must have the ability to receive complaints from the public, and to use its discretion as to how best to proceed'.⁶⁰ Professor Sampford of the ART also emphasised the importance of the

54 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 31.

55 NSW Ombudsman, *Submission 15*, p. 3.

56 National Integrity Committee, *Submission 6*, p. 7.

57 Also see, for example, discussion of immunities in Crime and Corruption Commission Queensland, *Submission 2*, p. 6.

58 National Integrity Committee, *Submission 6*, pp. 7–8.

59 For example, Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 8.

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

NIC accepting information from the public. He suggested that, similar to police work, the work of the NIC could benefit from small pieces of information:

[T]here are often little titbits of information which are insufficient to form a reasonable suspicion that a person has actually committed a crime but, if all the little bits are added together, in that case the police can think, 'There's something suspicious here; we have to investigate it.'...So cutting off the national integrity commission from the source of criminal intelligence that is most used by normal police forces, which is information from the public, is a huge mistake.⁶¹

2.49 Some inquiry participants were asked about the risk that a person might refer alleged conduct of their political opponent to the NIC, and that regardless of the legitimacy of their allegation, the person would receive political benefit.

2.50 Mr Rozner of the IPA said that that is 'a very real risk'. He explained that:

...these avenues often create the opportunity for political opponents to refer people for the sake of being referred. Again, it's a shorthand way of running somebody through the mud and damaging their credibility with absolutely no evidence or cause necessarily.⁶²

2.51 When asked a similar question, Mr MacSporran of the CCC Queensland acknowledged that this has historically been an issue, and explained:

We've endeavoured to deal with it in this way: to publicly campaign, if you like, and educate the public and others, including politicians and elected officials, that, if they are genuinely concerned about corrupt behaviour, they should come to us as the appropriate agency to deal with it, but they should do so confidentially. We promote that on the basis that if, at the end of the day, we conclude there is nothing corrupt about the conduct, for reasons we are able to articulate to the complainant, and the complainant then disagrees with our assessment of that matter, they can then go public and express their views in that way. But ordinarily, if they accept our advice that there is no corrupt conduct for reasons which we express reasonably, there is no harm done to reputations, and the matter goes nowhere.⁶³

2.52 Mr MacSporran also stated that he was:

...reluctant to take it further to the point where we routinely prosecute people who make allegations that can't be substantiated publicly, because I think the greater good is served by encouraging all complainants to come forward. The last thing we want is to discourage people by the threat of prosecution, unless it's a very clear case, and those are few and far between in our experience.⁶⁴

61 Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 57.

62 Mr Rozner, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 29.

63 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 43.

64 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 43.

2.53 When asked about what remedies might be available if a person's reputation was damaged by false allegations, Mr MacSporran stated that there is '[n]othing other than the civil law of defamation, unfortunately'. He also noted that there may also be 'a backlash at the polls from an increasingly aware public who understand the nuances of some of these things'; a similar point was made by the NSW Ombudsman, Mr Barnes.⁶⁵

Hearings of the National Integrity Commission

2.54 A number of inquiry participants supported, subject to certain criteria, the ability of the proposed NIC to hold public hearings.⁶⁶

2.55 For instance, the National Integrity Committee submitted that the power to hold public hearings, subject to certain provisos, is 'crucial'.⁶⁷ It suggested that it 'is now generally accepted that it is difficult to uncover corruption without the aid of public hearings', but it also acknowledged that public hearings should be held 'sparingly and only where they are demanded by the public interest'.⁶⁸

2.56 The ART similarly advanced that the NIC should be able to hold public hearings, and noted that the Victorian Independent Broad-based Anti-corruption Commission (IBAC) has used its public hearing powers 'sparingly and wisely'—of the 69 inquiries (including preliminary inquiries) it has completed to date, five public hearings were held.⁶⁹ Dr Lewis of the ART emphasised that:

...discretion to hold a public hearing must be in the hands of the commissioners appointed to run the integrity commission. If parliamentarians don't have faith in a particular person to be able to do that then they shouldn't be appointing them in the first place. Public hearings are absolutely crucial, and I really think they're non-negotiable.⁷⁰

2.57 Ms McLeod of TIA also suggested that the ability to hold public hearings is 'absolutely vital':

This commission has to have the role of not just investigating and reporting on or passing on its findings of fact that could support findings of corruption; it has to have an educative and preventive role, and in appropriate cases it has to have that power of public hearings...If the threshold is, as it is in Victoria, that the commissioner takes into account the potential risks for damage to reputation, that they consider that there's a

65 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 44; Mr Barnes, NSW Ombudsman, *Committee Hansard*, 8 February 2019, p. 44.

66 See, for example, Crime and Corruption Commission Queensland, *Submission 2*, p. 6; Community and Public Sector Union, *Submission 8*, p. 6; Transparency International Australia, *Submission 12*, p. 3; NSW Ombudsman, *Submission 15*, p. 2.

67 National Integrity Committee, *Submission 6*, p. 2.

68 National Integrity Committee, *Submission 6*, p. 2.

69 Accountability Round Table, *Submission 10*, p. 2.

70 Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 57.

public interest in having a public hearing, and it's considered to be exceptional, then there should be a public hearing.⁷¹

2.58 Mr MacSporran of the CCC Queensland explained that his organisation generally holds public hearings 'in a corruption prevention context, as opposed to exposing corrupt behaviour that might ultimately be prosecuted'. He explained:

We have a policy view that, if we conduct public hearings, we have to be very careful that we're not going to prejudice the fair trial of someone who might ultimately be charged with a corruption offence. Our public hearings are mostly designed to expose weaknesses in systems of governance and so forth with a view to making recommendations that might, in the public interest, address those deficiencies. We're not usually about exposing corruption with a view to handing the public hearing transcript over to the DPP to lay charges and prosecute.⁷²

2.59 The IPA expressed its opposition to public hearings. Mr Rozner posited there is a risk that 'hearings in these matters become perennial show trials that raise a lot of media attention and trash the reputation of the person subjected to them'.⁷³ More generally, Mr Begg of the IPA suggested that the question of whether hearings should be public is one of the issues with 'quasi-judicial bodies' such as the proposed NIC:

On the one hand, if it's a public hearing, you're effectively defaming people as a matter of course by involving them in corruption inquiries. On the other hand, if they're closed inquiries, they're not open to the public; there's less oversight and it's a more opaque process...you can't really get it right in these formats. That is why we should rely on the traditional methods in the common-law courts.⁷⁴

2.60 Unlike the proposed NIC, the public sector division of the government's proposed Commonwealth Integrity Commission would not be permitted to hold public hearings. A representative of the Attorney-General's Department explained the government's rationale for this approach:

The government's view on the absence of a public hearing power in the [government's] current proposal is very much because it's appropriate for a court to be holding those public hearings and making any ultimate public determination of culpability. Obviously that is particularly so when we are talking criminal corrupt conduct.⁷⁵

2.61 A separate, technical issue was raised by the National Integrity Committee regarding the provisions in the NIC bills on public hearings. The National Integrity

71 Ms McLeod, Transparency International Australia, *Committee Hansard*, 8 February 2019, pp. 56–57.

72 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 46.

73 Mr Rozner, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 29.

74 Mr Begg, Institute of Public Affairs, *Committee Hansard*, 8 February 2019, p. 28.

75 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 38.

Committee submitted that the current draft of the NIC bills would allow a decision of the NIC to hold a public hearing to be challenged in court. It stated that in order to respond to any such challenge, the NIC would be 'obliged to expose its hand in order to demonstrate the seriousness of the corruption issue'. In addition, the court challenge would cause a delay 'during which a person under investigation for corruption will have the opportunity to destroy or conceal evidence'. The National Integrity Commission supported re-drafting the NIC bill to prevent this from occurring.⁷⁶

The ability of the proposed National Integrity Commission to make findings

2.62 The committee heard some discussion about whether the proposed NIC should be able to make findings of corrupt conduct or findings of criminality.⁷⁷

2.63 Mr MacSporran of the CCC Queensland confirmed that his organisation does not 'prosecute, make findings of corruption or make any findings of fact'.⁷⁸

2.64 Ms McLeod stated that TIA supports the NIC 'being able to make findings of fact rather than findings of corruption'. She explained that this approach:

...strikes a balance between the intrusion on the role of the court and the protection of the individual's reputation and rights. If a standing commission has the power to make findings of fact and then refer those matters for investigation and presentation, you still get the protection of a prosecutorial agency having to make decisions about admissible evidence, reasonable prospects and public interest in terms of proceedings.⁷⁹

2.65 The National Integrity Committee submitted that while its members agreed the NIC should have no power to make findings of criminality,⁸⁰ they were divided on whether the NIC should be empowered to make findings of corrupt conduct:

After a detailed consideration of powerful opposing views amongst members of the Integrity Committee, the majority, not without hesitation, took the preliminary view that the Commission must have the power to make findings of fact, but should not have the power to make corrupt conduct findings.⁸¹

2.66 The National Integrity Committee provided rationales, held by a majority of its members, against allowing corrupt conduct findings. These included the following:

- A national integrity commission 'is a branch of the Executive, and is not a court'.

76 National Integrity Committee, *Submission 6*, p. 7.

77 See, for example, Community and Public Sector Union, *Submission 8*, p. 5.

78 Mr MacSporran, Crime and Corruption Commission Queensland, *Committee Hansard*, 8 February 2019, p. 46.

79 Ms McLeod, Transparency International Australia, *Committee Hansard*, 8 February 2019, p. 56; also see Transparency International Australia, *Submission 12*, p. 3.

80 National Integrity Committee, *Submission 6*, p. 5.

81 National Integrity Committee, *Submission 6*, p. 2.

- The proceedings of a national integrity commission 'are inquisitorial rather than adversarial. At commission level, the standard of proof never reaches that which applies in criminal proceedings: beyond reasonable doubt. Rather, it operates on the civil standard: the balance of probabilities.'
- 'For the very reason that serious and systemic corruption is seriously inimical to the proper functioning of society, findings of corruption where a criminal offence is involved must be made only after very careful and independent assessment of the evidence, and by a tribunal such as a court which is independent of the Commission.'⁸²

2.67 Mr Ipp of the National Integrity Committee was in the minority that supported the ability of the NIC to make findings of corrupt conduct. He provided a rationale based on his experience:

In the great case of Eddie Obeid and his cohorts, which involved at least 10 people involved in corrupt conduct, the facts were extremely complicated. They involved tracing disguises through trusts, companies and shareholders, with money passing secretly. If there were simply factual findings there in regard to each issue, without connecting the dots and demonstrating that they all add up to corrupt conduct in the end, very few people would appreciate the extent of the corruption. One of the main purposes of an anticorruption agency is to expose corruption. It exposes it, really, through public inquiries and through media reports. But, if in a complicated case the factual findings are so many and so complex that no journalist is going to read that report from beginning to end with any care, as is inevitably the case, a great deal of the commission's work will be lost.⁸³

2.68 One implication of the approach proposed by Mr Ipp, discussed at the committee's hearing, is that the NIC would be able to make a finding of corrupt conduct based on the evidence before it, but it would not be able to take further action. Rather, the person would need to be prosecuted in the courts, but the court would have to rehear the matter and do so under more restrictive rules of evidence.⁸⁴

2.69 The National Integrity Committee noted other rationales, held by its minority, that support an ability for the NIC to make corrupt conduct findings. These rationales included that 'a finding that a person has not been guilty of corrupt conduct will firmly protect reputation'.⁸⁵

2.70 In addition, Mr Ipp contended that:

[t]o try to define crimes that cover every kind of corruption is just about impossible, and, the more legislation, the more complex, the more difficult, the more gaps there are for people to slip through. So that's why having the

82 National Integrity Committee, *Submission 6*, p. 5.

83 Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, pp. 4–5.

84 See Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 6.

85 National Integrity Committee, *Submission 6*, p. 5.

ability to make corrupt conduct findings where there is no criminal conduct is a failsafe. It's a backstop.⁸⁶

Provisions relating to the protection of whistleblowers

2.71 Several inquiry participants welcomed additional measures for the protection of whistleblowers.⁸⁷ For instance, the Australian Council of Trade Unions (ACTU) submitted that it was:

...also clear that there is a need for better whistle-blower protections for those who speak out about corruption and malpractice. At present, there is a strong disincentive for whistleblowers to come forward, given the lack of protection and potential risk to their careers and reputations.⁸⁸

2.72 The Police Federation submitted that the proposal to establish a Whistleblower Protection Commissioner is 'commendable', but the proposed office:

...must have sufficient resources and legislative powers to manage and resolve complaints efficiently and ensure the safety and well-being of employees who report these matters throughout the reporting/investigation process.

There likewise needs to be a process to deal with malicious complaints.⁸⁹

2.73 The NSW Ombudsman, Mr Barnes, told the committee that the 'joint public-private whistleblower protection oversight model' set out in the NIC bills 'breaks new ground and is strongly supported by my office'.⁹⁰ Mr Barnes provided some of the reasons that his office supports the proposed model:

The mandatory reporting regime, whereby public sector agencies are required to notify whistleblower protection issues to a dedicated oversight body, would allow for high-risk and complex matters to be identified early and support to be provided, both to the whistleblower and to the relevant agencies, so that proactive action is taken to prevent detriment occurring or escalating. Current Australian legislation only provides legal protection to whistleblowers to remedy harm after the fact.

The oversight model also clearly separates responsibilities for supporting the whistleblower and investigating the substantive allegations they have disclosed. This ensures the independence of any investigation, while recognising the vulnerable position of a whistleblower and their need for an advocate. One of the ways the bills achieve this is by appointing a separate whistleblower protection commissioner with distinct functions and staff. We strongly support that proposal. Further, it provides a special account to fund legal and other support, and to compensate whistleblowers who have

86 Mr Ipp, National Integrity Committee, *Committee Hansard*, 8 February 2019, p. 7.

87 See, for example, Community and Public Sector Union, *Submission 8*, p. 8; Transparency International Australia, *Submission 12*, p. 3.

88 Australian Council of Trade Union, *Submission 16*, p. 2.

89 Police Federation of Australia, *Submission 9*, p. 4.

90 Mr Barnes, NSW Ombudsman, *Committee Hansard*, 8 February 2019, p. 41.

suffered detriment. We also support that proposal. The commission itself can commence any proceedings for remedies, to mediate a dispute or to seek an enforceable undertaking. The practical value of this to whistleblowers cannot be understated, both in providing justice and encouraging staff in organisations to come forward more generally.⁹¹

2.74 Notwithstanding the above points, the NSW Ombudsman also raised some concerns, including that certain whistleblower protection functions are not included in the NIC bills and that they would form part of a fragmented and complex legislative framework.⁹² It recommended 'avoiding the prescriptive approach taken in the Bill and instead...adopting a principles-based approach to any whistleblower protection legislation'.⁹³

2.75 The Commonwealth Ombudsman pointed to some technical issues with how the whistleblower protection provisions would interact with the *Public Interest Disclosure Act 2013*.⁹⁴ As Mr Michael Manthorpe, the Commonwealth Ombudsman, explained, the issues relate to:

...how the public interest disclosure activities that we perform would sit vis-a-vis the whistleblower protection authority. In making sure that that worked in an effective way, there are some technical issues that we pointed out in our submission that would need to be worked through.⁹⁵

Structure of the proposed National Integrity Commission

2.76 Regarding the governance of the proposed NIC, the ART suggested a model in which four part-time commissioners would be appointed to support the National Integrity Commissioner.⁹⁶ It suggested that this would 'open the national integrity commission to outside perspectives, which would help to prevent a too insular culture from forming'.⁹⁷ Of the four part-time commissioners:

...one should be a legal practitioner with a proven record in civil liberty-related matters and the remaining three should have a mixture of skills including senior management experience and community engagement.⁹⁸

2.77 In a similar vein, the National Integrity Committee submitted that the independence of the commission would be enhanced by the appointment of at least

91 Mr Barnes, NSW Ombudsman, *Committee Hansard*, 8 February 2019, pp. 41–42; also see NSW Ombudsman, *Submission 15*, p. 3.

92 NSW Ombudsman, *Submission 15*, pp. 5–6.

93 NSW Ombudsman, *Submission 15*, p. 5.

94 Commonwealth Ombudsman, *Submission 17*, p. 4

95 Mr Michael Manthorpe, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman, *Committee Hansard*, 8 February 2019, p. 34.

96 Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51.

97 Accountability Round Table, *Submission 10*, p. 2.

98 Accountability Round Table, *Submission 10*, p. 3.

two deputy commissioners 'with the same attributes of character and qualifications as the Commissioner and who with the Commissioner would be the members of the senior management team'. It suggested the benefit of this approach is that:

...all could be involved in the decision-making process when politically controversial decisions had to be made. Having Deputy Commissioners with particular expertise and responsibilities would also be a benefit.⁹⁹

2.78 However, the National Integrity Committee also noted that an 'experienced and wise Chief Commissioner must not be inhibited in the making of correct decisions by the intervention of less experienced and perhaps less wise deputies'. It expressed a preliminary view that the chief commissioner should be required to consult the deputies on important matters, but nonetheless make the final determination.¹⁰⁰

2.79 The ACTU suggested that there should be three National Integrity Commissioners, as this would 'help protect against a corrupt Commissioner being appointed', and also means that 'any conspiracy involving a Commissioner is more likely come to light'. The ACTU submitted that the three commissioners may be of equal status, or there may be one commissioner and two deputies.¹⁰¹

2.80 Regarding who might be appointed as the National Integrity Commissioner, some inquiry participants submitted that the commissioner should be a judge, former judge, or qualified for appointment as a judge.¹⁰² The ACTU submitted that being qualified for appointment as a judge is insufficient; the candidate should be a current or former judge.¹⁰³

2.81 The National Integrity Committee set out several criteria for the independence of the NIC, including the following relating to the commissioners:

First, those with the rank of Commissioner or Deputy Commissioner must be persons of such quality and reputation as would enable them to resist the pressure, which they will surely encounter, to act otherwise than in accordance with their duty. Secondly, they must have a limited period of tenure of office, with no prospect of re-appointment following the expiration of that period, but with security of tenure until such expiration. Thirdly, their remuneration must not be diminished following their appointment.¹⁰⁴

99 National Integrity Committee, *Submission 6*, p. 4.

100 National Integrity Committee, *Submission 6*, p. 4.

101 Australian Council of Trade Unions, *Submission 16*, p. 8.

102 Note that this position is consistent with subclause 187(2) of the NIC bills. Also see National Integrity Committee, *Submission 6*, p. 2; Accountability Round Table, *Submission 10*, p. 2.

103 Australian Council of Trade Unions, *Submission 16*, pp. 6–8.

104 National Integrity Committee, *Submission 6*, p. 3.

Resourcing the National Integrity Commission

2.82 A number of inquiry participants contended that the proposed NIC should have appropriate resources to fulfil its functions.¹⁰⁵ For instance, the ART submitted that it:

...strongly advocates for a well resourced, independent national integrity commission, adequately staffed by experts in the investigation of corruption and in its prevention. The latter element is crucial for a number of reasons, not the least being the identification of system-wide 'red flags' to prevent corruption occurring and recurring and to prevent the perception among public servants in particular, that a 'one stop shop' anti-corruption body only exists to wield a big stick.¹⁰⁶

2.83 The CPSU also submitted that 'it is essential that staff are trained and resourced appropriately.'¹⁰⁷ Mr Osmond Chiu, Senior Policy and Research Officer at the CPSU, suggested that staffing 'in the vicinity of 400 [average staffing level]' would be needed for a national integrity commissioner, as well as offices in several state capital cities. He noted that this was 'reaffirmed by the 2018 Griffith University Transparency International options paper on a national integrity commission'.¹⁰⁸

2.84 A representative of the Attorney-General's Department explained the resourcing approach being considered by the government for its proposed Commonwealth Integrity Commission:

The government's proposal paper gave an indication that the initial estimate for resourcing would be something in the order of \$100 million to \$125 million over the forward estimates but said that that would be subject to further consideration. And so we are giving that further consideration. One issue with the bills before the committee is that, because the remit is so extensive, the sheer volume of information—allegations—that might make its way through the commission to sort through really does have the potential to be overwhelming. It would potentially be given to some of the other integrity agencies and that would be quite significant in terms of any resourcing that would enable that to be managed. The government does have a more focused proposal.¹⁰⁹

2.85 National Integrity Committee suggested that the National Integrity Commissioner should 'have the right to address Parliament about the financial needs of the Commission'. It stated:

105 See, for example, National Integrity Committee, *Submission 6*, p. 3; Transparency International Australia, *Submission 12*, p. 4; NSW Ombudsman, *Submission 15*, p. 2.

106 Accountability Round Table, *Submission 10*, p. 1.

107 Community and Public Sector Union, *Submission 8*, p. 3.

108 Mr Osmond Chiu, Senior Policy and Research Officer, PSU Group, Community and Public Sector Union, *Committee Hansard*, 8 February 2019, p. 19.

109 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 38.

Such an opportunity should be made available at least annually, and at an appropriate time before the Treasurer's federal budget speech. By like reasoning, the government should be required to give a public explanation for any failure to meet the Commission's request for funds. The Commission should then be provided with a one-line budget sufficient to enable it to discharge to the full all its statutory functions.¹¹⁰

Oversight of the proposed National Integrity Committee

Parliamentary Joint Committee on the Australian National Integrity Commission

2.86 Some submitters welcomed the proposed establishment of the Parliamentary Joint Committee on the Australian National Integrity Commission (PJC NIC).¹¹¹

2.87 The ART stated that it 'fully supports' the establishment of the PJC NIC.¹¹² The National Integrity Committee submitted that the composition of the proposed PJC NIC is 'impeccably even-handed, provided that independents continue to be elected'. It suggested that the NIC bills 'should provide for the possibility that this may not be so'.¹¹³

Parliamentary Inspector

2.88 The ART also supported the appointment of a Parliamentary Inspector and argued that the Inspector 'must be an independent officer of the Parliament'. While The Inspector would have roles overseeing the NIC, including monitoring the exercise of power by the NIC, the ART added that the Inspector:

...must not interfere, in any way, with the national integrity commission's decision to investigate a matter, to conduct an inquiry (in public or privately) or to interfere with any decision by the national integrity commission to conduct ongoing investigations.¹¹⁴

2.89 The Victorian Inspectorate submitted that the model of Parliamentary Inspector proposed in the NIC bills is 'very different to that of the Victorian Inspectorate model'.¹¹⁵ The Victorian Inspectorate submitted:

In my experience, an oversight body such as the Parliamentary Inspector needs to be invested with clear powers in order to be able to successfully deal with jurisdictional challenges raised by an oversight body. Specifying powers by reference to those of the National Integrity

110 National Integrity Committee, *Submission 6*, p. 4.

111 See, for example, Transparency International Australia, *Submission 12*, p. 8; Australian Council of Trade Unions, *Submission 16*, p. 6.

112 Accountability Round Table, *Submission 10*, p. 3.

113 National Integrity Committee, *Submission 6*, p. 6.

114 Accountability Round Table, *Submission 10*, p. 3; also see National Integrity Committee, *Submission 6*, p. 6.

115 Victorian Inspectorate, *Submission 1*, p. 1. These differences are discussed at Victorian Inspectorate, *Submission 1*, pp. 1–2; also see Ms Cato, Victorian Inspectorate, *Committee Hansard*, 8 February 2019, p. 42.

Commissioner and dependent on regulations is very much a sub-optimal way of legislating. Further, the operational limitations on the Parliamentary Inspector as outlined above restrict the independence and effectiveness of the Parliamentary Inspector with a consequential impact on the quality of oversight of which the Parliamentary Inspector will be capable.¹¹⁶

2.90 One issue highlighted by Ms Cathy Cato, an Executive Director at the Victorian Inspectorate, concerned the level of independence of the proposed Inspector:

The operational limitations on the parliamentary inspector, which include only performing the core functions if so requested by the proposed joint committee on the Australian National Integrity Commission, restrict the independence and effectiveness of the parliamentary inspector, with a consequential impact on the quality of oversight of which the inspector will be capable. An oversight body such as the parliamentary inspector also needs to be vested with clear powers in order to be able to successfully deal with any challenges to its jurisdiction that may be raised by a body that it oversees. The bills are not clear in this respect, as they specify the parliamentary inspector's powers by reference to those of the National Integrity Commissioner and with a scope that is dependent on regulations.¹¹⁷

Interaction with Australia's existing multi-agency integrity framework

2.91 Some inquiry participants, including state agencies, commended the NIC bills for their provisions relating to cooperation and coordination between agencies.¹¹⁸ However, other inquiry participants expressed concern about potential overlap between the proposed NIC and existing agencies.

2.92 The Inspector-General of Intelligence and Security (IGIS) noted that the functions of the proposed NIC include investigating the conduct of personnel within the intelligence agencies currently overseen by IGIS.¹¹⁹ IGIS highlighted various ways in which it already can and does 'deal with issues that could be described as corruption and other misconduct'.¹²⁰ However, it also acknowledged that its oversight is different to that of the proposed NIC, as its functions do not involve investigating 'suspected criminal conduct by particular individuals for the purposes of obtaining evidence for a potential criminal prosecution or other law enforcement action'.¹²¹

2.93 IGIS advised the committee that it 'supports the broad approach to cooperation contemplated by the Bills'. However, it also submitted that to the extent

116 Victorian Inspectorate, *Submission 1*, p. 2.

117 Ms Cato, Victorian Inspectorate, *Committee Hansard*, 8 February 2019, p. 42.

118 See, for example, Crime and Corruption Commission Queensland, *Submission 2*, p. 6; NSW Ombudsman, *Submission 15*, pp. 2–3.

119 Inspector-General of Intelligence and Security, *Submission 11*, p. 1.

120 Inspector-General of Intelligence and Security, *Submission 11*, p. 2.

121 Inspector-General of Intelligence and Security, *Submission 11*, p. 3.

there is concurrent jurisdiction, it will be important for both agencies to have access to 'legislative tools that clearly enable information-sharing and cooperation to avoid duplication and ensure appropriate coordination, subject to the requirements of security'.¹²²

2.94 Separately, the Commonwealth Ombudsman noted that some of the activities of the proposed Parliamentary Inspector 'are already within the remit of the Ombudsman'. In particular, the Commonwealth Ombudsman's office:

...already inspects and reports to Parliament on whether law enforcement agencies have secured appropriate authorisations to exercise certain covert and intrusive powers. This Office also has a complaints investigation role and broad powers to undertake own motion investigations into systemic issues that might be apparent from individual complaints.¹²³

2.95 The Commonwealth Ombudsman also suggested that:

...further consideration is required to avoid the risk of duplication of effort between the Parliamentary Inspector and the Ombudsman. One approach could be to vest the Parliamentary Inspector role in the Ombudsman and his Office. This would obviate the need for a further proliferation of integrity-related bodies. Alternatively, further drafting could be commissioned to differentiate the respective roles of the Parliamentary Inspector and the Ombudsman.¹²⁴

2.96 Ms Sarah Chidgey, Deputy Secretary at Attorney-General's Department, stated that while an integrity commission would 'obviously add' to the existing multi-agency framework, it is important that the commission does not 'duplicate or complicate arrangements'.¹²⁵ Ms Chidgey highlighted that various existing integrity agencies already have misconduct and maladministration within their remit, including IGIS, the Inspector-General of the Australian Defence Force and the Inspector-General of Taxation. She stated that 'more thought would need to be given to their roles in a context where this [NIC] would very much reach out into all the matters that they currently have responsibilities for'.¹²⁶

The independence of existing Commonwealth agencies

2.97 Some inquiry participants discussed the potential implications of the proposed NIC on the functions of existing agencies. For instance, the Australian National Audit Office (ANAO) submitted that the NIC bills in their current form:

...would impact negatively on the independence of the Auditor-General and the effective administration of Auditor-General functions under the Auditor-General Act in a number of respects. Of particular concern is the

122 Inspector-General of Intelligence and Security, *Submission 11*, p. 3.

123 Commonwealth Ombudsman, *Submission 17*, p. 2.

124 Commonwealth Ombudsman, *Submission 17*, p. 3.

125 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 31.

126 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 35.

extension of the coercive and mandatory information-gathering powers of the Commission and office holders to the Auditor-General and ANAO staff in the performance of Auditor-General functions.¹²⁷

2.98 As explained by Dr Tom Ioannou, Group Executive Director at the ANAO:

...we prefer arrangements that do not weaken the Auditor-General's independent conduct of his statutory functions or reporting to parliament. For example, we wish to avoid a situation where the Auditor-General may be required to stop an audit or review activity if another integrity agency is undertaking an investigation or is considering doing so. We also wish to avoid the circumstance where the Auditor-General is required to negotiate on the contents of his reports to the parliament. We believe that collaborative mechanisms enabling the new office-holders that are proposed would enable them to bring any concerns that they may have to the Auditor-General's attention, and we believe there are workable alternatives to some of the propositions put in the bills.¹²⁸

2.99 The Commonwealth Ombudsman noted that under the NIC bills, in certain circumstances it would be possible for the NIC to refer a matter to the Ombudsman and then manage or oversee the Ombudsman's investigation into the matter. For example, the proposed NIC could provide the Ombudsman with detailed or general guidance that must be followed. Moreover, the National Integrity Commissioner would be able to direct an agency, such as the Ombudsman, not to investigate a matter that has been referred to them.¹²⁹

2.100 The Commonwealth Ombudsman submitted that, '[a]s these powers may impact on the independence of the Ombudsman we recommend an exception be considered for independent agencies such as ours.'¹³⁰

2.101 IGIS raised a similar issue to the Commonwealth Ombudsman. It submitted that allowing the NIC to manage or oversee IGIS in the performance of its statutory oversight functions:

...would be incompatible with the independence of the IGIS to determine whether, and if so how, to conduct an inquiry into a matter. The Committee may wish to consider whether the concept in the Bills of a corruption issue or whistleblower protection issue or a disclosure of wrongdoing that 'relates to a Commonwealth agency' could be clarified to avoid this outcome, which may be unintended.¹³¹

127 Australian National Audit Office, *Submission 18*, p. 2, also see pp. 8–13.

128 Dr Tom Ioannou, Group Executive Director, Australian National Audit Office, *Committee Hansard*, 8 February 2019, p. 32; also Australian National Audit Office, *Submission 18*, p. 3

129 Commonwealth Ombudsman, *Submission 17*, p. 3.

130 Commonwealth Ombudsman, *Submission 17*, p. 3.

131 Inspector-General of Intelligence and Security, *Submission 11*, pp. 3–4.

2.102 The Attorney-General's Department raised a separate issue regarding how the NIC bills would interact with the *Law Enforcement Integrity Act 2006*. Ms Chidgey stated that the NIC bills purport:

...to give the Integrity Commissioner the power to direct the Law Enforcement Integrity Commissioner, but that is quite likely to cause some legal difficulties, because the Law Enforcement Integrity Commissioner would have legal responsibilities for decision-making under their own act. Under administrative law that, I think, would mean that directions power would be a complication and would need to be further worked on to make that effective.¹³²

Mandatory reporting by Commonwealth agencies

2.103 Some Commonwealth agencies raised technical issues regarding the requirement for public officials and Commonwealth agency heads to report to the NIC regarding an allegation or information that raises a corruption issue.¹³³

2.104 The ANAO noted that the broad definition of 'corrupt conduct' may lead to a number of less serious matters being caught by the mandatory reporting requirements:

Care should be taken to ensure that mandatory reporting on a broad front does not result in the Commission receiving a lot of information on lower-level matters that may divert resources from its ability to investigate more serious matters.¹³⁴

2.105 The Attorney-General's Department made a similar point specifically in relation to the Australian Federal Police (AFP). A representative noted that 'the sheer breadth of the definition of corrupt conduct' would include a 'significant range of potential offences that the AFP currently has responsibility for'. She explained:

With the AFP, if any member of the AFP becomes aware that they're investigating any of those there's then a compulsory reference to the Integrity Commission. So I think there's a question about how that would work, because of the sheer breadth of the remit for potential criminal offences that the bills would give to the Integrity Commission.¹³⁵

2.106 IGIS highlighted that, in some circumstances, 'intelligence agencies have a legitimate national security interest in suspected public sector corruption'. This includes, for example, espionage and foreign interference investigations relating to public officials. IGIS submitted that these matters 'can be extremely sensitive and cannot be discussed in an unclassified setting':

132 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 31; also see Australian National Audit Office, *Submission 17*, pp. 7–8.

133 See clause 44 of the NIC bills.

134 Australian National Audit Office, *Submission 18*, p. 10.

135 Ms Chidgey, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 31.

IGIS notes the possibility that the mandatory reporting provisions proposed by the Bills could trigger obligations in the following cases, and notes that the Committee may wish to consider whether this is the intended effect:

- intelligence agency heads may be required to refer their ongoing security investigations to the NIC, when these investigations may be core intelligence agency activities; and
- IGIS may also be subject to reporting obligations in respect of these investigations, which will come to her attention as a result of oversight activities, especially periodic inspections of agency activities and pro-active briefings provided by agencies. Such an outcome may have a chilling effect on the willingness of agencies to pro-actively brief the Inspector-General and her staff on some matters, [and] this could make oversight by IGIS less effective.¹³⁶

2.107 IGIS also highlighted potential practical issues with oversight of intelligence agencies by a national integrity commission:

IGIS is a specialised oversight agency that is equipped to deal with managing highly classified information. Officers reviewing intelligence agency activities have the highest level of security clearance and the office space and equipment used by IGIS staff is accredited in accordance with the relevant security standards. The difficulties and cost of replicating this ability to deal with highly classified information in a new agency should not be underestimated.¹³⁷

Key issues regarding the National Integrity (Parliamentary Standards) Bill 2018

2.108 Inquiry participants that discussed the NIPS bill tended to support it.¹³⁸ Adjunct Professor the Hon Dr Ken Coghill urged support for the NIPS bill in its current form, stating:

I don't see any fatal flaws in it, and I think it would be a major advance in defending and advancing ethical conduct in the Australian parliament by members of the Australian parliament.¹³⁹

2.109 Dr Coghill linked the bill to the 'public trust principle', by which he distinguished 'members of parliament acting as trustees for the public from the public

136 Inspector-General of Intelligence and Security, *Submission 11*, p. 4.

137 Inspector-General of Intelligence and Security, *Submission 11*, p. 5.

138 See, for example, Adjunct Professor the Hon Dr Ken Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 15; Transparency International Australia, *Submission 12*, p. 9; Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51; Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 52.

139 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 15; also see Dr Coghill, *Submission 14*, p. 3.

having a trust in the institution of parliament or individuals in other matters'.¹⁴⁰ He stated that the principle 'goes back to the Justinian code', and explained:

The code indicates that it is the responsibility of someone who has a public appointment to act as a trustee of things that are held in common for the public as a whole. This is a principle that is not necessarily fresh in the minds of all members of parliament, but I think it is an important one because it extends from people making the rules, such as senators, through to the people who might be applying or even enforcing the rules...So, that is where the parliamentary standards legislation, I think, is an important advance.¹⁴¹

2.110 Transparency International Australia also voiced support for the NIPS bill, which it said:

...makes a significant contribution to promoting trust and confidence in the integrity of parliament, the public sector and our system of government.

It will, alongside the National Integrity Bill 2018, create a nationally-coordinated integrity framework, that goes beyond just criminal offences. It recognises the nexus that can exist between misconduct, integrity failings and corrupt conduct. It focuses on values and a much-needed code of conduct.¹⁴²

2.111 Inquiry participants commented on several elements of the bill. Many of the key points were neatly encapsulated by Adjunct Professor the Hon Dr Ken Coghill.

2.112 First, inquiry participants supported the introduction of a code of conduct for parliamentarians and their staff.¹⁴³ Dr Coghill submitted that the code of conduct proposed by the NIPS bill is 'largely in line with' the recommendations of the Commonwealth Parliamentary Association.¹⁴⁴

2.113 Dr Coghill advocated for periodic reviews of the code to enable it to keep pace with any developments. He also stated that reviews would have 'an educative function', as they would involve parliamentarians having to 'think very seriously about whether the existing code is satisfactory and adequate in its current form'. Dr Coghill noted that some parliaments review their code after each election.¹⁴⁵

2.114 Second, inquiry participants supported the establishment of a Parliamentary Integrity Adviser to provide confidential advice to parliamentarians

140 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 13.

141 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 13.

142 Transparency International Australia, *Submission 12*, p. 9; also see Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51.

143 See, for example, Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 13; Transparency International Australia, *Submission 12*, p. 9.

144 Dr Coghill, *Submission 14*, p. 3.

145 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 14.

about ethical matters.¹⁴⁶ Dr Coghill stated that there is good precedent for such an office in the British House of Commons and the Canadian House of Commons, as well as in the Integrity Commissioner of the Queensland Parliament and the Parliamentary Ethics Adviser of the New South Wales Parliament.¹⁴⁷

2.115 Third, inquiry participants supported the establishment of a Parliamentary Standards Commissioner to investigate alleged or suspected contraventions of an applicable code of conduct.¹⁴⁸ Dr Coghill contended that complaints to the Standards Commissioner should not be made public immediately.¹⁴⁹ He stated that the Standards Commissioner should provide the accused with an opportunity to be heard, including regarding provisional findings.¹⁵⁰ Moreover, the Standards Commissioner should:

...make findings of fact sufficient that the House could then make a decision as to whether there had been a breach of the code of conduct. If it were a matter of apparent breach of criminal law, then it should be referred straight to the police or the public prosecutor.¹⁵¹

2.116 Fourth, Professor Sampford of the Accountability Round Table referred to potential improvements of the provisions relating to ministerial codes of conduct:

The only thing that I wish [the NIPS bill] did more is look at failures of ministerial conduct, because at the moment we have a situation where the Prime Minister effectively decides whether a minister has breached the code of conduct and what to do about it. The Prime Minister, unfortunately, has a huge conflict of interest in deciding whether a minister has breached the code of conduct and whether he or she should be disciplined. It's a much better idea if this is taken out and given to a completely independent body.¹⁵²

2.117 Finally, while Transparency International Australia supported the NIPS bill, it also listed several 'weaknesses'. These primarily related to the fact that the bill provides for reviews of several matters—including relating to post-separation

146 See Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 13; Transparency International Australia, *Submission 12*, p. 9; Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51; Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 52.

147 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, pp. 13–14; also see Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 52.

148 See Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 13; Transparency International Australia, *Submission 12*, p. 9; Dr Lewis, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 51; Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 52.

149 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 14.

150 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 15.

151 Dr Coghill, Private capacity, *Committee Hansard*, 8 February 2019, p. 15.

152 Professor Sampford, Accountability Round Table, *Committee Hansard*, 8 February 2019, p. 52.

employment and political donations—to be conducted after the commencement of the bill, rather than addressing those matters in the current draft of the bill.¹⁵³

Committee view

2.118 The overwhelming majority of public servants working for the Commonwealth act with honesty and integrity. However, it is important that appropriate measures are in place to ensure that Commonwealth resources are used appropriately and that the public can have confidence in government institutions.

2.119 Australia's current multi-agency framework has played an important role in preventing and addressing corruption. Nonetheless, the committee considers that an integrity commission would be a useful addition to Australia's anticorruption efforts. The committee notes that the government has proposed the establishment of a Commonwealth Integrity Commission.

2.120 The committee acknowledges that many inquiry participants supported the establishment of a national integrity commission similar to that proposed by the NIC bills. However, the committee has concerns about the proposed model, including the expansive powers proposed for the NIC and how the NIC will fit with Australia's existing multi-agency framework.

2.121 A particular concern relates to how the NIC might facilitate unjustified damage to a person's reputation without due process. This includes the risk that a person may refer their political opponent to the NIC, and gain political mileage by doing so, even though the referral has no merit. It also includes the risk that public hearings of the NIC could irreparably damage a person's reputation, even though the evidence against that person is not sufficient to convict the person in a court.

2.122 The committee also notes that various technical and drafting issues were raised during the inquiry. These issues include that the proposed NIC may duplicate functions of existing agencies, or may unduly impinge on the independence of Commonwealth agencies.

2.123 It is critical that the establishment of an integrity commission be subject to careful consideration. The commission must fit appropriately into Australia's existing multi-agency integrity framework and be subject to proper process. The committee recognises that the government is currently giving this issue due consideration, including through a consultation process managed by the Attorney-General's Department. The committee has confidence in this process.

2.124 Noting that the weight of evidence to the committee concerned the NIC bills rather than the NIPS bill, the committee acknowledges that the NIPS bill was not the focus of this inquiry. The committee is conscious that the reforms proposed by the NIPS bill are substantial and would have a significant effect on the Parliament and government. These reforms include the introduction of a parliamentary code of conduct, the establishment of a Parliamentary Integrity Adviser, and the establishment

153 Transparency International Australia, *Submission 12*, pp. 10–11.

of a Parliamentary Standards Commissioner. Such major reform merits close consideration and input from a wide range of stakeholders.

2.125 The committee holds preliminary concerns about certain elements of the bill, such as the provisions relating to breaches of the proposed code of conduct. It is crucial that any enforcement of a code give due consideration to the democratic mandate held by all parliamentarians.

2.126 More generally, the committee does not consider that the limited evidence before it justifies recommending that the NIPS bill proceed. Additional work is required to consider any further measures, legislative or non-legislative, to enhance public confidence in the parliament and the conduct of parliamentarians.

Recommendation 1

2.127 The committee recommends that the National Integrity Commission Bill 2018, the National Integrity Commission Bill 2018 (No. 2) and the National Integrity (Parliamentary Standards) Bill 2018 not be passed, noting that the government is giving ongoing consideration to the establishment of a Commonwealth Integrity Commission that would be effective, well resourced, and subject to proper process.

**Senator the Hon Ian Macdonald
Chair**

