

INTEGRITY OF PURPOSE: A LEGAL PROCESS APPROACH TO DESIGNING A FEDERAL ANTI-CORRUPTION COMMISSION

ABSTRACT

This article draws from traditional legal process theory to advance a methodology for the design of a federal anti-corruption commission. Legal process theory stresses the dynamic, evolving, and interactive nature of legal institutions within a systemic context. It highlights the fact that the strength of legal systems depends upon their institutional components functioning harmoniously according to purpose, and observing appropriate institutional boundaries. Drawing from the legal process literature, we articulate a theory of ‘integrity of purpose’: a vision of how institutions can be designed to fulfil their roles through simultaneous pursuit of their mandates and cognisance of their boundaries. We then apply integrity of purpose to inform design choices surrounding several aspects of a potential federal anti-corruption commission: its normative purpose, investigative jurisdiction, and power to conduct formal hearings and issue findings. Our approach treats questions of institutional purpose as inseparable from questions of procedure, and presents a novel means of translating legal analytic principles into a forward-thinking framework for institutional design.

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I INTRODUCTION

The time is ripe for a renewed conversation about the purpose and design of standing anti-corruption commissions across Australia. Such commissions have been prominent fixtures in Australian public and political life at the state level for more than three decades. Their creation in the 1980s and 1990s followed the sweep of ‘new administrative law’ reforms designed to strengthen and increase the accessibility of public accountability mechanisms.¹ Since that time, each state has created a standing anti-corruption commission, and there has been ongoing debate about their proper role and conduct. The Commonwealth government has resisted calls for it to create a federal commission, but in the wake of recent bribery, expenses and foreign donations scandals, pressure to do so is growing.²

Any civic institution having the lifespan, profile, and influence of Australia’s anti-corruption commissions is bound to attract ongoing critical attention. For the most part, this is a good thing: revisiting foundational questions of institutional design is essential to ensuring that anti-corruption commissions remain relevantly faithful to their animating values and limits. Such debates offer a rich and informative base from which to derive questions of institutional purpose and design for a possible federal body. These questions include:

1. What precisely is the impropriety against which standing anti-corruption commissions are directed?
2. How should commissions be integrated with the existing mandates, powers, and activities of institutional counterparts, including, for instance, the police and the processes of criminal law?
3. Should jurisdictional concepts like ‘corruption’ and ‘integrity’ be cast broadly, allowing commissions latitude to investigate and address wrongdoing of diverse varieties, or narrowly, confining the powers of commissions to highly specific mandates?
4. What powers do commissions require to achieve their objectives?
5. Are the specified institutional objectives of commissions best advanced by undertaking their functions in public or in private?

¹ For further discussion of the ‘new administrative law’ reforms in Australia during this period, see: Matthew Groves and Hoong Lee, ‘Australian Administrative Law: The Constitutional and Legal Matrix’ in Matthew Groves and Hoong Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 1, 12–14.

² This has manifested, for instance, in two recent parliamentary inquiries into the question. See Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Report* (2017); Senate Select Committee on the Establishment of a National Integrity Commission, Parliament of Australia, *Interim Report* (2016).

6. To what extent should the pursuit of those objectives be balanced against possibly harsh effects of the exercise of the commissions' powers on individuals?
7. How can institutional design reconcile the pursuit of the commissions' objectives with higher-order public law principles, including natural justice?

There are no straightforward answers to these questions, and their resolution will ultimately depend on balancing a range of competing priorities in context. That process will nevertheless be aided by linking specific design decisions to coherent and consistent base principles which reflect the commission's essential purpose and its fidelity to values latent in Australia's legal system (and indeed, in the very idea of the rule of law). To this end, we offer an approach rooted in legal process theory.

Legal process theory describes a field of analytic jurisprudence that held broad influence over American legal scholars in the middle of the 20th century. By focusing attention on the manner in which procedure simultaneously enables and bounds public purposes, the legal process school presents a distinct and very pragmatic way of understanding legal institutions and their interrelation. We employ principles from that school to advance our own theory of *integrity of purpose*: a vision of how institutions can be designed so as to fulfil their roles through simultaneous pursuit of their mandates and cognisance of their boundaries.

While the legal process tradition has fallen into relative desuetude, its influence is felt in many familiar legal approaches, including in the conventional account of statutory interpretation, in ascertaining questions of jurisdiction, and in reconciling discrete legal outcomes with higher order principles of law. What our unearthing and deployment of traditional legal process theory reveals is that these methods are useful not only to conventional legal problem-solving, but to informing proactive, pragmatic, forward-looking decisions in the design of legal institutions themselves. It is this goal that we pursue in applying our integrity of purpose approach to advance design features for a future federal anti-corruption commission.

In Part II, we introduce legal process theory and link its tenets to recent scholarship on the 'integrity branch' in Australian law. Legal process theory helps to shed light on the dynamic, interactive, and evolving nature of institutions comprising the integrity branch. We incorporate each of these ideas into our theory of integrity of purpose, outlining an analytic to guide the introduction of new integrity institutions to an existing governance landscape. In Part III, we apply integrity of purpose to address a series of design questions that accompany the creation of a federal anti-corruption commission. Our account moves from the theoretical to the practical: having shared a legal process account of what it means for legal institutions to embody distinct purposes and honour intended boundaries, we offer a series of specific recommendations about the powers and procedures of a new federal commission.³ Several of these recommendations challenge the current design and conduct of anti-corruption commissions at the state level.

³ The recommendations about institutional design made in this article develop those that were made to the Senate Select Committees referred to in above n 2.

II FROM LEGAL PROCESS THEORY TO INTEGRITY OF PURPOSE

A An Introduction to Legal Process Theory

One of the reasons that legal process theory provides a useful starting point from which to consider the design of anti-corruption commissions, and integrity mechanisms more generally, is because at its core is an optimism about the role and capacity of institutions. Legal process theory conceives of law in facilitative terms — as the ‘doing of something’⁴ — and of legal institutions as official embodiments of collective goals. This optimistic, facilitative disposition informs a constructive approach to legal problem-solving and an interest in root questions of institutional design. In addition to lending strong analytic tools to this end, legal process theory complements the view of public power espoused in some of the most influential Australian scholarship on the integrity branch.

The optimism of the legal process school was in part reflective of the time at which it emerged. The Second World War and New Deal ushered the birth of the modern American administrative state, with government assuming an increasingly active role in public life through the proliferation of new administrative and regulatory agencies. The early legal process theorists were immersed in these changes, viewing them as essential to securing widespread social prosperity. Like the legal realists who preceded them, the legal process scholars thus rejected a view of law that demanded rigid adherence to formal principles at the expense of contextual enforcement of legislative objectives.⁵ Unlike some legal realists, however, they did not view legal reasoning as simply instrumental and subordinate to the optimisation of public policy. Legal process theorists retained the view that governance by law involved fidelity to fundamental restraints on power, and that legal reasoning itself had an analytically and normatively distinct quality.⁶ They located the source of this distinctness in the latent qualities of the legal system itself, treating the latter as a complex of procedures effected to rationally further social objectives. The legal process view thus elevated the normative significance of procedure: legal procedure was both the means through which societal goals were defined and pursued, and simultaneously a source of restraint that ensured fidelity of such action to purpose and to the public interest.

⁴ See Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 148 (prepared for publication from the 1958 Tentative Edition by William N Eskridge, Jr, and Phillip P Frickey).

⁵ See Eskridge and Frickey’s discussion in their Introduction to Hart and Sacks’ text (‘An Historical and Critical Introduction to *The Legal Process*’): *ibid* xci. See also David M Kennedy, ‘Henry M Hart, Jr, and Albert M Sacks’ in David M Kennedy and William W Fisher III (eds), *The Canon of American Legal Thought* (Princeton University Press, 2006) 245.

⁶ See, eg, Kennedy, *ibid* 249, and the detailed historical account of the legal process tradition offered in Eskridge and Frickey’s Introduction, above n 4.

The legal process school⁷ is best reflected in the work of Henry M Hart, Jr and Albert M Sacks, whose posthumously published book of course materials — *The Legal Process: Basic Problems in the Making and Application of Law*⁸ — was widely taught in American law schools and influenced a generation of scholars and practitioners.⁹ While intended as a pedagogical text, Hart and Sacks built their materials on two principles of deep analytic significance: the principle of institutional settlement and the principle of reasoned elaboration. We explain each of these principles below before considering their application to integrity institutions in Australia.

1 *Institutional Settlement*

Hart and Sacks considered legal systems to arise from ‘abstract understandings’ about the terms of community existence — that is, understandings about the type of conduct that should be tolerated, encouraged, and disallowed.¹⁰ In their view, at root, legal systems comprise institutionalised means of defining these understandings, implementing or revising them, and resolving ambiguities that arise from their practical enforcement.¹¹ This emphasis on means is the lynchpin of legal process theory. As Hart and Sacks wrote:

substantive understandings or arrangements about how the members of an interdependent community are to conduct themselves in relation to each other and to the community necessarily imply the existence of what may be called *constitutive* or *procedural* understandings or arrangements about how questions in connection with both types of arrangement are settled. The constitutive arrangements serve to establish and govern the operation of regularly working — that is, *institutionalized* — procedures for the settlement of questions of group concern.¹²

Among the constitutive arrangements identified by Hart and Sacks are the familiar institutions of government: elected legislatures, administrative agencies and courts (to name a few). In the legal process view, each of these institutions are composites of *procedure* calibrated to enable particular forms of social action. Thus while the procedures of elections and lawmaking enable the translation of societal goals into law, the procedures of administrative or judicial decision-making allow those goals to gain practical meaning in context. Crucial to the operation of a legal system is that the outcomes of various properly constituted procedures be recognised as authoritative. This is the requirement imposed by the principle of institutional settlement,

⁷ In this article we use the term ‘legal process theory’ to refer collectively to a school of thought that shared common intellectual commitments but was by no means uniform. As Kennedy, above n 5, 245, helpfully writes: ‘The “legal process” was always more a collection of ideas, focal points for inquiry, and characteristic attitudes than a tight method or disciplined school of thought.’

⁸ Hart and Sacks, above n 4.

⁹ See, eg, Kennedy, above n 5, 243; Eskridge and Frickey, above n 4, cxiii..

¹⁰ Hart and Sacks, above n 4, 1–3.

¹¹ *Ibid* 3.

¹² *Ibid* (emphasis in original).

which Hart and Sacks expressed as follows: ‘a decision which is the duly arrived at result of duly established procedures ... “ought” to be accepted as binding upon the whole society unless and until they are changed.’¹³

The principle can be illustrated with a familiar example. An implicit source for the authority of a judicial decision is the procedural quality of the dispute which precedes it. Adjudicative procedure affords disputing parties the opportunity to frame their respective interpretations of the law on their own terms. At least in theory, it structures the disputing parties as equals, empowers them with control over the presentation of a dispute, and obliges a neutral arbiter to issue a decision that rationally accounts for their claims. The structural fairness of this procedure is intended to secure the rational assent of the parties to its outcome, regardless of whether they agree with that outcome in substance.¹⁴

Having observed an adjudicative procedure in deciding a legal dispute, a court’s pronouncement of the law must be accepted as binding unless and until it is overridden by the outcome of another, properly constituted process — for example, legislative intervention on the disputed point of law, which itself relies upon the procedural authority of elections, manner and form requirements for legislative enactment, and so on. Importantly, while a court’s decision binds the parties in the individual resolution of their dispute, it also commands the respect of broader society (including the other institutions of the state) to the extent that it involves pronouncing on a question of law. Respect for the authority of the judicial decision reflects respect for the court’s distinct competency and role-assignment, which is both verified and bounded by the proper observance of judicial procedure.

Legal process theory involves multiplying the principle of institutional settlement at a societal level, recognising its presence in the day-to-day working of myriad institutional arrangements, each interacting with one another to form a coherent whole. The method of legal analysis thus commanded by the theory lies in understanding how the respective authority of distinct procedures interrelate in the resolution of given social problems.¹⁵ From a legal process perspective, this is what lawyers are doing in resolving a range of common legal issues, for example: determining whether a given issue falls to a particular administrative agency for resolution; identifying the

¹³ Ibid 5.

¹⁴ This example is taken from Lon L Fuller’s account in Lon L Fuller ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353, 355–6. For an account of Fuller’s relationship to the legal process school, see David M Kennedy, ‘Lon L Fuller’, in Kennedy and Fisher III, above n 5, 209–17; Eskridge and Frickey, above n 4, c–cii; William N Eskridge Jr, ‘Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms’ (2013) 57 *Saint Louis University Law Journal* 865, 865–6; and Robert G Bone, ‘Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation’ (1995) *Boston University Law Review* 1273, 1276–79.

¹⁵ Hart and Sacks, above n 4, 6.

standard of deference owed to that agency by a court; and navigating the coordinate responsibility of other agencies for common elements in the problem.

It will be readily apparent that none of these questions could be meaningfully addressed without an understanding of the purposes that underlie distinct procedures. This is where the second analytic principle identified by Hart and Sacks — the principle of reasoned elaboration — comes into play.¹⁶

2 Reasoned Elaboration

As discussed above, Hart and Sacks believed that legal systems emerge organically from the need to create authoritative means of promulgating abstract social understandings into concrete forms. In the most obvious sense, this process is embodied in the enactment of a new statute, translating an erstwhile abstract social goal into law through the authoritative complex of procedures signified by elections and legislative action. Inevitably in this process, aspects of the motivating social goal will remain inchoate.¹⁷ A simple example is offered by statutory terms that admit a range of possible interpretations, but which are not defined exhaustively in statutory text. A legislature might thus enact a law prohibiting the use of vehicles in a park,¹⁸ but leaving open the exact scope and meaning of the term ‘vehicle’ as it is to be applied in context.

The principle of reasoned elaboration is intended to guide the interpretation of ‘general directive arrangements’ — which may include individual laws, policies, and principles, but may also comprise amalgamations of these and other sources of directive authority — recognising that these arrangements inevitably contain inchoate qualities.¹⁹ The principle can also be applied as a lens for critiquing the

¹⁶ The principle of reasoned elaboration recurs at several points in *The Legal Process*, but is first introduced and explained by Hart and Sacks in Chapter 1, Part II: ‘The Processes of Official Judgment Involved in the Administration of General Directive Arrangements’: *ibid* 143. See also Eskridge and Frickey, above n 4, xci-xcii.

¹⁷ See Eskridge and Frickey, *ibid*, xciii.

¹⁸ This example of an issue in legal interpretation is taken from H L A Hart’s paradigmatic debate with Lon L Fuller on the moral characteristics of law. See H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard Law Review* 593.

¹⁹ Hart and Sacks, above n 4, 113–14. The term ‘general directive arrangement’ is difficult to define without reliance on abstractions. Hart and Sacks identified these arrangements as general ‘understandings’ about the types of process appropriate to addressing various questions in a legal system, and about the existence of institutions authorised to promulgate new authoritative processes for handling certain questions or problems: *ibid*. For the purposes of this article, we confine our attention to laws, policies, principles, and agencies emanating from recognised government sources as species of ‘directive arrangement.’ Hart and Sacks’ definition of the term is broader and deeper, encompassing root sources of social consensus that confer legitimacy on official lawmaking processes themselves.

legal interpretations of public officials in executing their assigned roles.²⁰ It has two key requirements. The first is that new applications of a directive arrangement must be consistent with other established applications of it — that is, officials must build rationally from the interpretations of their predecessors in elaborating the meaning of a directive arrangement in a new context.²¹ The second is that applications of a directive arrangement must align with the arrangement’s specific purpose, and — to the greatest extent possible while honouring that purpose — with higher order values of the legal system.²²

On its face, the principle of reasoned elaboration is not strikingly different from a conventional doctrine of purposive interpretation — and indeed, the approach to legal interpretation developed by the legal process theorists directly influenced modern doctrines of statutory interpretation in the United States and elsewhere.²³ When courts adhere to the precedents established by earlier decisions and search for the underlying purpose of a statutory provision, they are honouring the principle of reasoned elaboration.

However, it must be kept in mind that reasoned elaboration is not just about interpreting statutes *per se*: it is about discerning and implementing the proper role of legal institutions themselves — including administrative agencies, courts, and even legislatures — in terms that align with institutional purpose and honour systemic coherence. The interpretation of statutes is but one instance where the principle of reasoned elaboration must be honoured.

The principle of reasoned elaboration is meant to illuminate an important dimension to the relationship between lawmakers and legal interpreters. Hart and Sacks refer to the officials responsible for implementing directive arrangements as exercising a ‘power’ of reasoned elaboration.²⁴ The term ‘power’ signifies that those officials have been vested with the distinct capacity to give meaning to directive arrangements in context: it has been left to their judgment to determine how inchoate aspects of the arrangements will be realised as a matter of practical reality. In turn, this helps frame one of the chief dilemmas confronting lawmakers in the design and creation of a new directive arrangement. Those officials must ask how much of the directive arrangement to leave inchoate — deferring to the interpretive judgment of future officials — and conversely how much control they wish to exert over the future applications of the arrangement (for example, through the use of highly

²⁰ The principle of reasoned elaboration is most prominent in Hart and Sacks’ treatment of the interpretive roles and comparative institutional advantages of courts. Kennedy’s summary of the principle, for example, references it exclusively in relation to the judiciary: above n 5, 247. It is nevertheless clear from Hart and Sack’s introduction of the principle that they intended it to pertain generally to ‘officials’ charged with elaborating the inchoate qualities of directive arrangements in context: above n 4, 147.

²¹ Hart and Sacks, *ibid* 147.

²² *Ibid* 147–8.

²³ See, eg, Eskridge, above n 14.

²⁴ Hart and Sacks, above n 4, 143.

specific and prescriptive statutory language).²⁵ Hart and Sacks observed of directive arrangements:

they speak out of the past to the present. There are special arts in discerning as truly as possible what the past has to say to the present. There are even more difficult arts in speaking intelligibly and sensibly to the future. These arts are all at the heart of the lawyer's craft.²⁶

The significance of this observation will become clearer in our later discussion of the statutory frameworks governing anti-corruption commissions.

Finally, reasoned elaboration necessarily implies that legal systems, and the individual institutions that comprise them, are dynamic and evolving. A responsibility for officials to apply directive arrangements in a manner consistent with past applications means that, over time, the inchoate qualities of legal institutions will be narrowed as their practical applications are consolidated. Here the principles of institutional settlement and reasoned elaboration are mutually reinforcing. Since the principle of institutional settlement demands respect for the outcomes of settled official procedures, the substantive decisions emanating from such procedures — each of them observing the principle of reasoned elaboration — will in turn provide authoritative guidance which narrows the interpretive scope for future elaboration of the relevant directive arrangements.²⁷

Institutional settlement and reasoned elaboration are thus principles by which various government institutions interpret and exercise their roles recognising each other's corresponding authority, and recognising a duty of fidelity to agency-specific purpose and to the fundamental values of the legal system. One of their greatest analytic strengths is that they treat those institutions as dynamic. Creators of new legal institutions never write on a blank slate, but rather 'reckon with the choices previously made in that society and with the social conditions and institutions that they have brought about.'²⁸ Moreover, when a legislature sets out the framework for a new institution through legislation, this is not the end of the story: the legislation itself must be interpreted and applied, and the officials doing so will give substantive content to the institution's characteristics. For a legal system to function coherently, it is critical that those officials adopt interpretations which respect the authority of institutional counterparts, build logically from the past interpretations of officials who preceded them, align with the animating purposes of their institutions, and honour fundamental values of the legal system itself. This is what the principles of institutional settlement and reasoned elaboration are meant to achieve.

²⁵ Ibid 138–43. Hart and Sacks distinguish between the interpretive latitude afforded to future officials by rules, standards, policies, and principles — each different types of direction that can comprise components of multifaceted directive arrangements.

²⁶ Hart and Sacks, above n 4, 113–14.

²⁷ For an illustration of this narrowing process, see *ibid* 150–1, where Hart and Sacks discuss the mandate of the then US Federal Trade Commission.

²⁸ *Ibid* 111.

B Legal Process Theory, Integrity Systems, and 'Integrity of Purpose'

The dominance of legal process theory in the middle of the 20th century would ultimately be displaced by a more fragmented landscape of American legal thought brought about by the civil rights movement, which challenged the school's optimism about the substantive virtue and social legitimacy of duly-constituted procedures.²⁹ The root principles of institutional settlement and reasoned elaboration are nonetheless latent in many modern legal doctrines,³⁰ including, as we have indicated above, the purposive interpretation of statutes. They also have distinct utility in navigating issues related to the design and conduct of integrity institutions, including anti-corruption commissions. This is so for two reasons. The first is that institutional settlement and reasoned elaboration reinforce an essential concept of what it means for integrity institutions to themselves act with *integrity*. The second is that they present a means of ensuring the commissions act *coherently and harmoniously* with institutional counterparts, accounting for their intended role within a legal system. Both of these values have been highlighted as crucial features of Australia's modern 'integrity' institutions of government.

It will be uncontroversial to suggest that anti-corruption commissions must display their own institutional integrity. Australia has seen a growing body of scholarship devoted to the powers and potential of an 'integrity branch' of government,³¹ a concept defined most forcefully by the Hon James Spigelman:³²

[I]n any stable polity there is a widely accepted concept of how governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of government functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.³³

²⁹ See Eskridge and Frickey, above n 4, cxviii; Kennedy, above n 5, 249–50; and Kent Roach, 'What's New and Old About the Legal Process' (1997) 47 *University of Toronto Law Journal* 363, 365.

³⁰ On the continuing relevance and influence of the legal process school, see Roach, *ibid*; Eskridge and Frickey, above n 4, cxxv–cxxxiv; Eskridge, above n 4.

³¹ See, eg, the papers delivered at the Australian Institute of Administrative Law's 2012 Annual Conference, *Integrity in Administrative Decision Making*, in Adelaide on 19–20 July 2012. A list of those papers can be accessed at Australian Institute of Administrative Law, *2012 National Administrative Law Conference* <[http://www.aial.org.au/_literature_145145/Conference_Program_\(2012\)](http://www.aial.org.au/_literature_145145/Conference_Program_(2012))>. The term 'integrity branch' is generally credited to Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 694–96.

³² See, eg, J J Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724; J J Spigelman, 'The Significance of the Integrity System' (2008) 4 *Original Law Review* 39; James Spigelman 'Institutional Integrity and Public Law: An Address to the Judges of Hong Kong' (2014) 44 *Hong Kong Law Journal* 779.

³³ Spigelman, 'The Integrity Branch of Government', above n 32, 725.

According to this vision, the integrity branch comprises both institutions formally mandated to hold others to account — such as anti-corruption commissions — and more diffuse instruments of integrity, including policies, individual officials, and accountability systems.³⁴ Integrity itself ‘goes beyond matters of legality’, but ‘is not so wide as to encompass any misuse of power.’³⁵ It requires that each public institution observe ‘fidelity to the public purposes for the pursuit of which the institution was created,’ and obey ‘the public values, including procedural values, which the institution [is] expected to obey.’³⁶ Spigelman’s account of the integrity branch thus has two implications for anti-corruption commissions: it both formally places them within the branch as institutions mandated to pursue a particular form of accountability,³⁷ but it also imposes on them, like all government agencies, a duty of institutional integrity.

This duty is framed in terms that echo tenets of legal process theory, stressing the importance of institutional fidelity to purpose and to broader ‘public values’, which in turn are directly linked with ‘procedural values’. Spigelman would appear to treat procedure in a manner reminiscent of Hart and Sacks — that is, as something which effects purpose through simultaneously facilitating and restraining the use of public power. He writes of public law:

Public law is, or should be, primarily concerned with the way the institutionalised governance system *generates* power, rather than focussing, as is often done, on the way in which power is constrained. Constraint is an inextricable component of the *conferral* of government power.³⁸

This complements the legal process position that legal systems at large comprise institutionalised means of effecting collective purpose. Procedure is essential to legal systems in the same manner that grammar is essential to language: it provides the necessary constraints through which meaning can be conveyed.³⁹ Legal process theory is thus highly conducive to assessing the observance of integrity, as both an institutional and a systemic value, in exactly the terms envisaged by Spigelman.

Legal process theory also complements a further important theme to emerge from scholarship on Australia’s integrity branch. It will be recalled that Spigelman’s account of the integrity branch is institutionally pluralistic. The 2005 report of Australia’s

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ See further Tom Bathurst, ‘New Tricks For Old Dogs: The Limits of Judicial Review of Integrity Bodies’ (The James Spigelman Oration 2017, 26 October 2017) 2.

³⁸ Spigelman, ‘Institutional Integrity and Public Law: An Address to the Judges of Hong Kong’, above n 32, 783 (emphasis in original).

³⁹ This analogy is adapted loosely from Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 178, describing the ‘grammar of public law.’ Loughlin’s thesis is cited approvingly in Spigelman, ‘Institutional Integrity and Public Law’, above n 32, 783.

National Integrity Systems Analysis ('NISA')⁴⁰ — still the best available inventory of Australian integrity institutions — deepens this pluralistic account through the metaphor of a bird's nest. The metaphor suggests that integrity is achieved through multiple interlocking measures that, while individually insufficient, reinforce one another to protect something fragile and vital at their core.⁴¹

The authors of the NISA report deliberately declined to advocate for the adoption of *specific* anti-corruption and integrity promoting institutions. Wishing for their study to be useful in a range of jurisdictional settings, they instead highlighted the need for a given matrix of institutions to function together harmoniously and coherently within their respective contexts.⁴² The principles of institutional settlement and reasoned elaboration are similarly agnostic about the specific features of a given legal system; they are concerned rather with ensuring that the system itself is internally coherent and effective, measured against its own purposive underpinnings. By enquiring whether a given exercise of power aligns with its proper purpose, honours appropriate (and limiting) procedure, and coheres with a rational account of relevant public values, the principles of institutional settlement and reasoned elaboration work to ensure the kind of inter-institutional strength highlighted by the NISA study as essential to an effective integrity system.

These observations clarify why legal process theory is useful to scrutinising whether institutions and systems succeed in fostering integrity according to the terms suggested by Spigelman, the NISA study, and other Australian scholars of the integrity branch. Beyond simply providing useful analytic clarity and reinforcement to the themes of that literature, however, legal process theory presents a foundation for design principles which can be proactively adopted to inform the creation of new integrity institutions, such as a federal anti-corruption commission. While institutional settlement and reasoned elaboration were presented by Hart and Sacks as interpretive aids to navigating a legal landscape already in motion, we advocate use of the principles to pre-emptively inform questions of design surrounding a new institution about to be deployed in such a landscape.

Borrowing Spigelman's language, we argue that a new federal anti-corruption commission must be designed to achieve *integrity of purpose*. Integrity of purpose is shorthand for the long-term compliance of a public body with the principles of institutional settlement and reasoned elaboration. It is intended to recognise that institutions evolve over time as their constituting legislation is interpreted and applied, and that institutional fidelity to purpose across time relies on the integrity of communication

⁴⁰ Transparency International Australia and the Key Centre for Ethics, Law, Justice and Governance, 'Chaos or Coherence: Strengths, Opportunities and Challenges for Australia's Integrity Systems' (Final Report, National Integrity Systems Assessment, 9 December 2005).

⁴¹ Ibid 15, citing Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave MacMillan, 2013) 232.

⁴² Ibid.

between legislators and officials.⁴³ As an aide for the design of prospective institutions, integrity of purpose requires that legislators and policymakers anticipate the dynamic and evolving role that a new institution will play in context. Accounting for the institution's place within a system, it requires that the institution exhibit respect for the settled authority of institutional counterparts and that it align with individual animating principles and with the higher order principles of the legal system. Institutional architects are thus challenged to cast their minds into the future, anticipate interpretive challenges that might confront the institution, and ensure the clearest possible forward-looking communication of institutional aims and limits. Crucially, these aims and limits must be embodied in institutionally distinct procedure.

III INTEGRITY OF PURPOSE AND THE DESIGN OF A FEDERAL ANTI-CORRUPTION COMMISSION

In this Part, we consider what the theory of integrity of purpose means for key elements in the design of a prospective federal anti-corruption commission. Our objectives are twofold. First, we wish to illustrate how the theory of integrity of purpose informs principled and pragmatic design choices, thus establishing an approach that can be employed to confront a broader series of issues than those considered in the article. Second, we wish to advocate for a limited number of design features of particular importance. The issues selected to illustrate the application of integrity of purpose reflect areas in which we believe the design of anti-corruption commissions presently lack coherent and principled guidance. Our conclusions thus challenge some of the current design features of state-level commissions.

The questions that we consider in this Part are as follows:

1. Should a basic normative statement be set out in legislation to direct the purpose of the commission, and if so, what should its content be?
2. How should the commission's jurisdiction be defined, both in respect of the substantive issues it is mandated to pursue and the individuals or organisations it is empowered to oversee?
3. How should the commission's hearing powers be defined and exercised, including its powers to publicly examine individuals, investigate various types of misconduct, and publicly report findings?

Two caveats are necessary before proceeding. First, we must acknowledge the limited scope of our own application of integrity of purpose in this article. The starting point of our approach — a survey of the current integrity landscape, with a view to identifying areas of vulnerability that a new anti-corruption commission could fill — is a major research undertaking in its own right. Our own contribution in this respect is preliminary, limited both by the scope of a single article and by our chief goal of

⁴³ See Hart and Sacks, above n 4, 113–14.

proving the merit of integrity of purpose as a design theory. The institutional survey we undertake in this article is thus limited in breadth (the number of institutions considered) and depth (the level of detail in which we analyse individual institutions). We acknowledge that future researchers applying our theory with greater comprehensiveness and depth may come to more richly informed design conclusions.

The second caveat is closely connected to the first. The most rigorous application of integrity of purpose would begin without preconception as to the type of institution that it ultimately recommends. It might thus be determined that enhancement of the integrity landscape is best served by refining the interrelation and design of existing institutions, or that a new commission is warranted but in terms that differ vastly from institutional precedents — for example, by obviating reliance on coercive hearing powers or on legalistic methods of examination and cross-examination. In this article, however, we have employed an integrity of purpose approach in a more tentative manner, with some limited preconceptions about institutional form, which in turn guides our appraisal of what new strengths an anti-corruption commission could contribute. We accept the premise that anti-corruption commissions by their nature will ordinarily require coercive investigative and hearing powers, for example. We also accept the proposition that the unique characteristics of corruption — its covert and potentially systemic nature, and its inherent connection to the abuse of authority — justify the use of extraordinary investigative powers in contrast to other subjects of wrongdoing presently managed through the standing investigative capacities of police and other agencies. We have accepted these starting points for two reasons. The first is an acknowledgement of the current political pressures for the Commonwealth to adopt a federal anti-corruption commission akin to those operating in the states. While a deeper and more rigorous application of integrity of purpose may yield different starting points, this would undermine the immediate usefulness of the approach to informing the shape of the current debate. The second is, while accepting the implication of the current political climate, we nonetheless wish to demonstrate how those starting points, accepted on their own terms, recommend different features of institutional design than those modelled by some state-level commissions.

With these caveats in mind, it is now possible to identify some of the key design features that would attend a new federal anti-corruption commission that honours integrity of purpose.

*A Suppressing Corruption and Fostering Confidence: the Goal and Content
of a Normative Purpose Statement in Legislation*

The first issue for consideration is whether the new commission should be directed by a normative purpose statement in its governing legislation, and if so, what that statement should be. Integrity of purpose clearly supports the inclusion of such a statement in the basic sense, which can only lend clarity and coherence to the operation of an institution provided the statement is well-conceived and meaningfully informs other aspects of the institution's power and procedure. Legislative purpose statements are not uncommon or particularly controversial. With the judicial endorsement of contextual and purposive construction as the dominant approach to

statutory interpretation in Australia, there has been a proliferation of increasingly detailed objects provisions. Integrity of purpose nonetheless reveals the importance of a legislative purpose statement in a different light.

Recognising that the legislative framework for an institution needs to be interpreted and applied by officials, and that institutions evolve in context according to those interpretations, a legal process approach directs legislators to contemplate the degree of interpretive latitude they intend to defer to institutional officials in the future. A statutory framework that gives only a basic, or ‘thin’, statement of institutional purpose leaves considerable latitude for those officials to develop the meaning of the statement in context, evolving the practical conduct of the institution accordingly. Conversely, a more refined and detailed, or ‘thick’, purpose statement reflects an attempt by the legislator to narrow and direct the potential future conduct of the institution.⁴⁴ At the point of design, it provides a stronger anchor by which questions of process, jurisdiction, and power can be based. For the future officials tasked with administering these institutions, it provides a foundational basis on which to interpret and operationalise their processes, jurisdiction, and powers over time. If they do so with fidelity to the goals that have been articulated by legislative drafters, and using procedures appropriate to those goals, they will build public, social, and political legitimacy for their institutions, even as they respond to issues that are not addressed definitively in the legislation itself.

It is helpful to briefly consider the type of institution for which a thin statement of institutional purpose would be appropriate. Imagine, for example, that an administrative body is constituted to confer civic awards on individuals for service to their communities. Here a very limited legislative statement of purpose could be useful in allowing an adjudicative panel maximum discretion to employ their community knowledge and expertise.⁴⁵ A more expansive discretion in such a context also does not pose a danger to the integrity of higher order systemic principles such as individual liberties. An anti-corruption commission is clearly an institution of a different sort: assuming it will be vested with strong investigative powers that engage potentially harsh effects, a more detailed and limiting articulation of institutional purpose will be warranted. The concern is not solely about protecting the rights of those who may be affected by the institution, but about the integrity of the institution itself. A strong normative statement in legislation will safeguard against the institution evolving in a way that undermines public, social, and political legitimacy by provoking conflict

⁴⁴ This discussion of ‘thin’ and ‘thick’ legislative purpose statements is a simplified rendition of the drafting dilemmas identified by Hart and Sacks in distinguishing between rules, standards, principles, and policies as different forms of legal direction — and in exploring their interrelation: above n 4, 138–43. See also Eskridge and Frickey, above n 4, xciii–xciv.

⁴⁵ Hart and Sacks would refer to the panel as exercising a ‘power of continuing discretion’, meaning a power ‘where judgment remains largely unfettered by previous decisions and the necessity of justifying each new decision’ consistently with past decisions: above n 4, 153.

with other institutions, incoherence, or troubling misuses of power. In other words, it helps guard against the institution compromising its own integrity of purpose.

The pursuit of an appropriate legislative purpose statement for a new federal commission thus demands a survey of the institutional landscape into which a new commission will be deployed. It directs us to ask what legislative interpretive aids are appropriate to ensure that the commission will evolve a way that strengthens rather than weakens the existing integrity landscape, contributing a new valuable purpose that is presently missing from it. Answering this question involves two steps. First, it requires an inventory of the relevant existing institutions, with particular attention to those that serve recognised roles in relation to corruption. This serves to identify vulnerabilities or gaps: in what areas could the landscape be strengthened through the incorporation of new public goals and new procedures? Second, it involves translating the results of the survey into a foundational concept of what a new anti-corruption should do and how it should do it. Both the substantive and procedural elements of this account are essential — indeed they are inseparably linked — as we cannot talk meaningfully about why an institution is needed without considering how the institution is to operate distinctly from its counterparts. This foundation will supply the essential content for a normative statement of institutional purpose, which in turn will inform more specific legislative provisions.

As noted above, a detailed and comprehensive survey of the relevant institutions exceeds the scope of this article.⁴⁶ We can nevertheless begin the process by considering four institutions of obvious relevance: the Australian Commission for Law Enforcement Integrity (‘ACLEI’), the Commonwealth Ombudsman, the Auditor-General, and the new Independent Parliamentary Expenses Authority. Even this limited survey proves useful to identifying areas of systemic vulnerability that could form the basis for a new anti-corruption commission.

1 *Surveying the Landscape*

The ACLEI is the clearest federal counterpart to standing anti-corruption commissions that exist at the state level, and thus an appropriate place to begin our survey. While functionally similar to those state counterparts, the ACLEI is distinguished by a narrow jurisdictional focus on Commonwealth law enforcement agencies, including the Australian Crime Commission, the Australian Federal Police, and the Department of Immigration and Border Protection.⁴⁷ This focus nevertheless

⁴⁶ More comprehensive surveys have been undertaken, for instance in the 2017 Senate Select Committee on a National Integrity Commission Report, above n 2, ch 2, and are currently underway as part of the Australian Research Council Linkage Project entitled *Strengthening Australia’s National Integrity System: Priorities for Reform*, which is reviewing Australia’s integrity framework. The 2017 Senate Select Committee’s third recommendation was to review the question of a national integrity commission following this research, and the release of the work of the Open Government Partnership.

⁴⁷ *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 5 (‘Commonwealth Act’).

concerns a field in which the consequences of corruption are particularly acute: the power of these agencies to immediately impact civil liberties, combined with the likelihood that their officials will encounter criminal activity, suggests that they especially warrant strict enforcement of institutional integrity. Within this field, the federal Integrity Commissioner ('the Commissioner') — as head of the ACLEI — has a robust capacity to detect corruption, enforce integrity, and inform the public, as reflected in several features of institutional design.

First is the authority of the Commissioner to initiate investigations on his or her own motion, thus enabling independent scrutiny of law enforcement agencies as and when necessary, without the need for referral by the government or others.⁴⁸ Second is the ability to report dissatisfaction with agency responses to investigations, thus ensuring that recalcitrant officials are exposed, at minimum, to public awareness and pressure to comply with the ACLEI's findings and recommendations.⁴⁹ Third is the standing responsibility to submit a public annual report to Parliament, lending valuable transparency to matters within the Commissioner's ambit of investigation and providing oversight that helps to ensure the ACLEI's own integrity of purpose.⁵⁰

Other than its narrow jurisdiction, the ACLEI suffers from at least one significant flaw: it has an incredibly low public profile. This may be partly on account of the ACLEI's jurisdictional restriction to issues arising within Commonwealth law enforcement agencies, combined with the secrecy with which it necessarily conducts much of its activities. Whatever the reasons for its low profile, it is unfortunate given the significance of the ACLEI in the Commonwealth anti-corruption landscape. If anti-corruption institutions are intended not only to root-out instances of corruption, but to broadly foster confidence in government — a distinction we consider in further detail below — then public awareness and understanding of the institutions is essential.

We next consider the Commonwealth Ombudsman ('the Ombudsman'). The Ombudsman is tasked with reviewing complaints arising from the exercise of official powers by federal agencies and officials.⁵¹ It also serves a standing oversight role in respect of specific powers exercised by certain Commonwealth agencies. Conceived as an integrity institution, the Ombudsman helps to ensure that official powers are not exercised in an abusive manner, and that they conform to relevant legislation, policies, and standards.⁵² It provides an important point of contact for facilitative, confidential

⁴⁸ Ibid s 38.

⁴⁹ Ibid s 57. While this section confers authority on the Commissioner to follow up on government responses to investigations, which ordinarily occur in private, the special reporting power conferred by s 203 of the Commonwealth *Act* likely also provides latitude to report dissatisfaction with government responses to the reports of public inquiries.

⁵⁰ Ibid s 201.

⁵¹ *Ombudsman Act 1976* (Cth) ss 5(1)(a), 15(1).

⁵² Ibid s 15(1), defining the types of wrongdoing or misconduct the Ombudsman may identify in a report.

reporting of concerns related to the Commonwealth public service — including on potential issues of corruption — and lends important values of conciliation, privacy, and problem-solving to the Commonwealth integrity framework.

These characteristics are at once a source of institutional strength and weakness. The privacy that surrounds most of the Ombudsman's work no doubt facilitates candour and provides a secure environment in which problems may be resolved constructively between a complainant and the relevant Commonwealth agency. Perhaps unfairly, this may also limit public awareness of the extent to which the Ombudsman succeeds in fostering integrity within the public service, given that public reporting may result in conflict between the Ombudsman and a department. An emphasis on privacy and 'soft power' may diminish the Ombudsman's capacity to deter the worst instances of corruption. Some features of the Ombudsman's procedural flexibility diminish at least the appearance of independence: this is the case in respect of the Ombudsman's duty to consult a Minister before including findings that are critical of government in a public report.⁵³ It should nonetheless be acknowledged that the Ombudsman has broad reporting powers, including the ability to publicise follow up reports in the face of government inaction on findings and recommendations.⁵⁴

The Auditor-General is an independent officer of Parliament appointed pursuant to the *Auditor-General Act 1997* (Cth). In addition to the financial auditing of Commonwealth departments and agencies, the Auditor-General conducts performance audits evaluating the operations of both specific Commonwealth bodies and entire sectors of Commonwealth activity.⁵⁵ While routine financial auditing is a crucial feature of any government accountability framework, the Auditor-General's performance audit powers provide the most robust and flexible capacity to serve as an integrity-promoting institution. The Auditor-General has the broadest jurisdiction of the federal institutions considered thus far, combined with the strongest institutionalised protections for independence and the greatest transparency attaching to its final reports. Its focus on systemic problems, and capacity to examine issues on a cross-sectoral and inter-institutional basis, lends an indispensable element to the Commonwealth integrity framework.

The Auditor-General is not an intuitive institutional starting point for investigating corruption and integrity concerns, however. Its role does not include the investigation of complaints, and neither public servants nor individual citizens have standing to raise concerns with the Auditor-General. Moreover, the Auditor-General's contact with integrity and corruption issues is largely incidental to a broader mandate relating to the scrutiny of public sector performance and financial management. Despite having a broad jurisdiction, the Auditor-General does not have the institutional flexibility to address integrity and corruption issues in as nuanced or multifaceted way as the ACLEI or the Commonwealth Ombudsman. The Auditor-General may detect and report maladministration, but it does not have a clear institutional mandate to

⁵³ Ibid s 8(9).

⁵⁴ Ibid ss 16–17.

⁵⁵ *Auditor-General Act 1997* (Cth) ss 16–17.

forensically study its cause or to correct misconduct. As a practical matter, instances of corruption that do not involve the management of public funds may simply escape the Auditor-General's scrutiny.

Finally, in 2017, the Commonwealth Parliament passed the *Independent Parliamentary Expenses Authority Act*.⁵⁶ The *Act* establishes the Independent Parliamentary Expenses Authority ('the Authority') with an extremely limited mandate: it has advisory, monitoring, reporting, and auditing functions relating to the various expenses of members of parliament. The Authority has 'power to do all things necessary or convenient to be done for or in connection with the performance of its functions',⁵⁷ and more explicit information gathering powers, specifically to require the production of information or documents,⁵⁸ although the privilege against self-incrimination and legal professional privilege limit this power.⁵⁹

2 *Identifying Vulnerabilities and Gaps*

The institutions surveyed are part of a multifaceted system of governance that includes federal laws, regulations, and policies, standing agencies with their own oversight mechanisms, ad hoc institutions such as commissions of inquiry, administrative tribunals, the courts, and ultimately Parliament itself, particularly through its committees, most notably Senate estimates.⁶⁰ It is nevertheless possible, based on our limited survey, to identify institutional vulnerabilities and gaps that a new anti-corruption commission could serve to fill.

One clear gap in current institutional capacity is the ability to scrutinise the conduct of ministers and parliamentarians. Only the Authority has the express mandate to monitor the conduct of members of Parliament or of government Ministers, and that mandate is limited to the exceedingly narrow issue of members' expenses. The Ombudsman is statutorily restricted from scrutinising parliamentarians, and the Auditor-General's systemic mandate clearly does not embrace such a role. The ACLEI has *incidental* ability to investigate ministers and members of Parliament, and would only exercise such power were such individuals to be implicated in a corruption issue under investigation by the Commissioner.

Traditionally, the exposure of Ministers and other parliamentarians to coercive authority has been confined to hearings constituted by parliamentary committees or commissions of inquiry (including royal commissions), or to proceedings in the criminal justice system. These measures signify the exceptional nature of making parliamentarians answerable for their conduct via coerced hearings. The principle of responsible government, and Parliament's inherent power to pose questions and

⁵⁶ *Independent Parliamentary Expenses Authority Act 2017* (Cth).

⁵⁷ *Ibid* s 13.

⁵⁸ *Ibid* s 53.

⁵⁹ *Ibid* ss 55, 58.

⁶⁰ See also Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 14th ed, 2016) 478.

demand documents from government Ministers, serve as crucial standing mechanisms of accountability. Nevertheless, with the exception of the criminal justice system — which is limited to addressing misconduct that is criminal in nature — all of these accountability mechanisms rely upon the initiative of elected officials themselves. While Parliament’s ability to regulate itself is no doubt an important source of confidence in government, taken alone it may be vulnerable to partisanship or to the calculated self-interest of majority governments — especially where the subject in issue is corruption, which has the potential to taint the public’s perception of an entire administration.

Second, there is a limited ability to investigate government agencies through hearings — whether in public or in private — outside the law enforcement context. While the Ombudsman has a relatively broad jurisdiction (excepting the conduct of Ministers), the Ombudsman does not ordinarily convene formal hearings, let alone public hearings in a manner reminiscent of a royal commission.⁶¹ The ACLEI’s jurisdiction to do so is confined to the law enforcement context. As such, the robust investigative tools of examination and cross-examination are not widely exercised by integrity agencies other than the ACLEI. To the extent that public hearings can help to facilitate transparency, public education and awareness of corruption issues, and to foster deterrence, these effects too are limited beyond the ACLEI.

Third, by parcelling oversight functions and substantive areas of jurisdiction among various agencies, the current federal landscape may lack an instrument for confronting systemic and pervasive corruption that crosses existing oversight boundaries. That is, should a crisis of confidence arise in the integrity of government writ large, implicating multiple different agencies, the only existing tool that could be calibrated to the necessary investigative scope would be an ad hoc commission of inquiry. Given that such inquiries depend on the executive for their creation and for setting their terms of reference, they may provide cold comfort when it is the executive itself that is implicated in public concern.

Finally, there is a seeming lack of coherence in the federal integrity landscape as a whole. 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.

⁶¹ The Ombudsman does have authority to compel the production of information and documents, including the attendance of persons to answer questions, and the power to examine witnesses under oath: see the *Ombudsman Act 1976* (Cth) ss 9, 9(2), and 13. While these parallel the coercive powers of a royal commission, they are not used by the Ombudsman as its chief instruments of investigation, and the forensic scrutiny of facts through formal hearings is not popularly associated with the Ombudsman as it is the case of a royal commission. The Ombudsman’s *Fact Sheet* on investigations indicates that most investigations are conducted informally, with a ‘large majority’ of complaints being resolved without the use of coercive powers: Commonwealth Ombudsman, *Fact Sheet: Ombudsman Investigations* (online) <http://www.ombudsman.gov.au/__data/assets/pdf_file/0030/35598/Ombudsman-Investigations.pdf>.

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 of the institutions under review, 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.

3 Developing a Legislative Purpose Statement

Accounting for these vulnerabilities and gaps, we may begin to sketch a possible legislative statement of purpose for a new federal anti-corruption commission. The commission could be conceived as a means of exercising broad oversight, including oversight of elected officials, for the purpose of suppressing corruption and fostering public confidence in the integrity of the Commonwealth government. It could also be conceived as a means to expand the availability of strong investigative and hearing powers in settings where those are desirable but currently lacking. Moreover, it could be conceived as a means for introducing a high profile and accessible venue for citizens and public servants to report corruption concerns, bringing greater coherency and simplicity to the integrity landscape.

Each of these ideas engages important counterpoints reflecting the existing strengths of the landscape, however, which serve to narrow a foundational account of institutional purpose. Recognising that the self-regulating character of Parliament is an important source of public confidence in government (indeed, in democracy itself), it may be appropriate that the oversight powers exercised by a new, external agency be limited to specific areas where the standing regulatory capacities of Parliament are thought to be vulnerable. Recognising the Ombudsman's valuable ability to conciliate, problem solve, and encourage candour within the public service, it may be appropriate that the powers of a new commission be sufficiently focused so as to avoid interference with these functions. Finally, recognising that the ACLEI has a specialist ability to investigate not only corruption, but organised criminal activity in an area of public life where its risk is especially pronounced, a new commission's role could be focused in areas that buttress rather than conflict with the ACLEI.

Bringing these considerations together, a foundational account of institutional purpose begins to take greater shape. The new commission could be conceived to exercise broad oversight of government, including parliamentarians, but only with respect to very specific subject-matter. The latter limitation reflects an attempt to preserve the self-regulating power of Parliament, carving out only a narrow purposive exception to that standing authority. It also preserves the capacity of the Ombudsman to continue its work without interference from an additional agency liberally wielding coercive investigative powers. A narrowly drawn substantive focus for the new commission could also reinforce the goal of preserving the existing authority of the ACLEI.

Clearly, the latter two objectives would require further and more detailed legislative specification within a new federal commission's constituting statute, defining the precise fields in which it is to defer to the standing authority of the Ombudsman and

the ACLEI. Given that the ACLEI already performs several of the functions that our survey suggests could be conferred on a new federal commission, we acknowledge the possibility that the ACLEI could be absorbed by a new commission exercising broader oversight responsibility. In this article however, our account of a new federal commission is developed on the basis that its jurisdiction could be reconciled with the ACLEI through specific jurisdictional provisions informed by a foundational account of institutional purpose.

The legal process concerns underlying this exercise will be evident. The identification of institutional vulnerabilities and gaps informs a foundational account of what the new institution is meant to achieve. Conversely, recognition of existing system strengths informs limits required for the new commission to function coherently with its institutional counterparts, supplementing rather than subverting their strengths. The development of a normative purpose statement is thus done with a view to the new commission interacting harmoniously in an existing, purposive framework of institutions.

To this end, one further consideration is important in developing a statement of institutional purpose. We have so far employed the concepts of ‘suppressing corruption’ and ‘fostering confidence in government’ as though they have a straightforward instrumental relationship: if corruption is identified and suppressed, the result will be to strengthen public confidence. In fact the relationship between the two concepts may be more nuanced. Suppressing corruption is a matter of fact, while fostering confidence is a matter of social perception. Certainly public confidence in government is likely to be enhanced by the belief that functioning mechanisms exist to eliminate corruption. Yet the public work of a new commission, including bringing previously undetected instances of corruption into the light, may also impact public confidence in government negatively — at least in the short-term — through the very act of highlighting misconduct.⁶² In this sense, heightened public identification and redress of corruption may paradoxically weaken immediate confidence in government integrity.

A sensible resolution to this paradox could be to suggest that any short-term costs to public confidence are worth the long term gains of suppressing corruption. This resolution depends, however, on the exposed misconduct accurately reflecting subjects of pronounced public concern. A commission that investigates and reports on alleged misconduct too liberally, combining vague interpretive guidelines with robust and highly public investigate powers, could create a sensational and misleading impression that government corruption is widespread. This is a further reason to

⁶² See, eg, Ian McAllister, ‘Corruption and Confidence in Australian Political Institutions’ (2014) 49 *Australian Journal of Political Science* 174, noting an apparent increase in public perception of corruption within Australia’s public sector following several high profile royal commissions in the 1970s. See also Diana Bowman and George Gilligan, ‘Public Awareness of Corruption in Australia’ (2007) 14 *Journal of Financial Crime* 438, 447, noting that public sector agencies may be more vulnerable to public perceptions of corruption in Australia due to their higher levels of institutional scrutiny.

narrow the substantive focus of an anti-corruption commission and to articulate that focus with precision. The potential short term injury to public confidence in government will be justified when misconduct is sufficiently grave that the public has a strong interest in its exposure, while the (hopefully) limited instances in which this arises will build confidence over time. That injury may not be justified, however, and could indeed be exacerbated were a commission to wield public powers of investigation in respect of less grave concerns that are already mitigated by existing integrity measures.

Our limited institutional survey, combined with the twin concerns of fostering confidence and actually suppressing corruption, support a legislative purpose statement allowing the following lines. The statement should capture the goal of establishing a commission with broad responsibility for oversight, public prominence and accessibility, but limited to a specific and well understood substantive focus. Recalling that the legislative purpose statement is a starting point for expressing foundational ideas that will be elaborated by more specific provisions concerning jurisdiction and procedure, we suggest that the following statement could be appropriate for a statute establishing a new federal commission:

The object of this Act is to suppress corruption and foster public confidence in the integrity of the Commonwealth government by empowering an independent commission with authority to investigate Commonwealth government activities, including through the receipt and consideration of public complaints, with the goal of identifying and reporting instances of serious or systemic corruption.

This language reflects the clear goals of establishing a commission with broad oversight over a narrow subject, and that models functional independence and accessibility to public complainants. It establishes a firm foundation for structuring the conduct of a commission in line with the priorities identified above, to be supplemented by more specific jurisdictional and procedural provisions that flesh out the commission's intended relationship with institutional counterparts — for example, by defining areas in which it must defer to the investigative authority of the ACLEI.

The narrow targeting of this statement of purpose to addressing public sector corruption identifies the proposed commission as a 'specialised/bifurcated' institution. This classification draws from Scott Prasser's work, in which he identifies two models for anti-corruption commissions: the 'generalist/merged' model and the 'specialist/bifurcated' model.⁶³ The generalist model performs 'whole-of-government, anti-corruption/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.'⁶⁴ The 'specialist/bifurcated' model, in contrast, separates the agencies responsible for

⁶³ Scott Prasser, 'Australian Integrity Agencies in Critical Perspective' (2012) 33 *Policy Studies* 21, 27.

⁶⁴ *Ibid.*

integrity and crime.⁶⁵ In effect, a generalist/merged model would combine the functions of a proposed national integrity commission and that of the Australian Crime Commission. A specialised/bifurcated model would keep them separate.

Our support for a specialised/bifurcated model flows from two considerations. The first is the potential for a generalist/merged model to confuse the core purpose of the institution. This dilutes integrity of purpose and raises unnecessary ambiguity for officials tasked with interpreting and operationalising the legislative framework. The second consideration is related: the foundational purpose we have identified for a new commission suggests the importance of maintaining the utmost independence from other agencies, including the police.

Finally, the legislative language we have suggested in relation to the commission's investigative focus — 'serious and systemic corruption' — foreshadows a critical jurisdictional limitation. Similarly, the terms 'identifying and reporting' foreshadow aspects of how the new commission is to go about fulfilling its purpose, implying significant procedural restraints. In the next Part, we consider these subjects in light of integrity of purpose, moving from a foundational account of institutional purpose to the practical implications of that account for more specific questions of institutional design.

B Framing and Limiting Jurisdiction to Ensure Integrity of Purpose Over Time

In the preceding section we identified the purposive foundations for a potential federal anti-corruption commission. The commission could be conceived with broad oversight responsibilities, but limited to a specific substantive mandate, for the twin goals of suppressing corruption and fostering public confidence in government. We now begin to consider how this purposive foundation should inform more specific design issues related to the jurisdiction of the new commission, focusing on two interrelated concerns:

- i. The appropriate scope of conduct that should fall within the Commission's investigatory jurisdiction; and
- ii. the agencies and individuals that should fall within the jurisdiction of the Commission.

We have already noted that rooting specific design choices in a strong legislative statement of purpose will help to ensure consistency between a new anti-corruption commission and the existing features of a legal system — what we might refer to as a kind of inter-institutional coherence. The issues considered in this section will also demonstrate how integrity of purpose demands intra-institutional coherence: a mutually reinforcing and informing relationship between the characteristics of the institution itself. Questions of jurisdiction anticipate questions of investigative procedure, for example, because it is difficult to meaningfully determine who should

⁶⁵ Ibid.

be subject to an institution's power without some concept of the form that power will take, and vice-versa. The simple point in this observation is that integrity of purpose forces us to approach design choices in a holistic and integrated manner. The more nuanced point is that this challenges instrumental assumptions that might otherwise inform institutional design. The approach commanded by integrity of purpose amounts to more than simply articulating an institutional purpose statement and then identifying powers and procedures which rationally further that statement. Rather, it involves designing an institution attentive to the fact that its *purpose* and its *manner of achieving that purpose* are inseparably linked: both are definitive of the systemic value contributed by an institution, and both are constraining of its role.⁶⁶

1 *Scope of Conduct*

We suggest that integrity of purpose would be fostered by a new federal commission being limited to investigating matters raising a *reasonable suspicion of serious or systemic corruption*. The key components of this statement must each be addressed in turn. It will be helpful, however, to begin with a global overview of how the statement complements our foundational account of the commission. Integrity of purpose is fostered by the statement on three levels.

First, the statement explicitly ties any extraordinary investigative powers conferred on the commission to the specific needs identified through our institutional survey, ensuring that those powers are exercised only in service of a well-defined mandate which accounts for the corresponding roles of other institutions. Second, recalling that our institutional survey was limited and that integrity of purpose requires consistency with higher order values of the legal system, these 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 absent a pressing public objective. Third, our incorporation of a 'reasonable suspicion' threshold for the use of investigative powers reflects the broad oversight and confidence-raising goals of the commission. Unlike, for example, a criminal prosecution which requires a high evidentiary onus before it can proceed, the commission should have 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. Importantly, while a flexible threshold of 'reasonable suspicion' supports this goal, the actual deployment of investigative powers remains limited by the requirement that the suspicion itself focus on subjects of serious or systemic

⁶⁶ The necessary link between ends and means at the stage of institutional design — that is, the idea that ends and means are mutually informing and thus cannot be considered entirely apart from each other — was developed most forcefully by Lon L Fuller in his essay: Lon L Fuller, 'Means and Ends', in Kenneth I Winston (ed), *The Principles of Social Order: Selected Essays of Lon L Fuller* (Hart, 2001) 61. An excellent modern illustration of Fuller's thesis is provided by Roderick A Macdonald, 'The Swiss Army Knife of Governance' in Pearl Eliadis, Margaret M Hill and Michael Patrick Howlett. (eds), *Designing Government: From Instruments to Governance* (McGill-Queen's University Press, 2005) 203.

corruption. We address the possibility of judicial challenges to this threshold later in this Part.

Different statutory regimes in place across the Australian state jurisdictions already direct their commissions to focus investigative functions on ‘serious or systemic wrongdoing’. However, many of these regimes fail to define such wrongdoing, or to create an enforcement framework around the limit so as to give it any real practical consequence. This was a factor in the controversy that surrounded the New South Wales Independent Commission Against Corruption’s (‘ICAC’) investigation of Margaret Cunneen SC, resulting in the 2015 High Court decision *ICAC v Cunneen*.⁶⁷ Following that decision, an Independent Panel headed by former Chief Justice of the High Court the Hon Murray Gleeson and Bruce McClintock SC recommended that the *Independent Commission Against Corruption Act 1988* (NSW) (‘NSW Act’) be amended to specify that the ICAC can only make *findings* of ‘corrupt conduct’ if it is ‘serious corrupt conduct’.⁶⁸ This change, which was incorporated with the adoption of s 74BA, meant that the ICAC’s investigative powers embraced suspicions of corruption generally, but could only escalate to the formal reporting of adverse findings when the corruption was found to be ‘serious’. This was intended to balance the ICAC’s need for investigative latitude with fairness to the persons affected.⁶⁹

The lingering difficulty with this approach is that ‘serious’ corrupt conduct is nowhere defined in the legislation, nor for that matter is ‘systemic’ corrupt conduct. The same defect is present in every statute governing Australia’s state-level anti-corruption commissions. Failure to define these terms defers significant interpretive latitude to the officials responsible for implementing these commissions. It escalates the risk that the incremental evolution of jurisdiction, as concepts like ‘serious’ and ‘systemic’ are interpreted in new contexts, could lead to missteps that compromise the underlying purpose of a commission. This could include, for example, the commission reaching into spheres better reserved for other institutions, provoking conflict or incoherence and weakening confidence in the system as a whole.

An instructive counter-example to Australia’s state-level commissions is supplied by the Commonwealth *Act*, the legislation governing the ACLEI. That statute supplements its definition of ‘corrupt conduct’ — the abuse of official power or perversion of the course of justice⁷⁰ — with further definitions of ‘serious corruption’ and ‘systemic corruption’. Section 5 defines serious corruption to mean conduct that could result in a charge punishable, on conviction, by a term of imprisonment for 12 months or more. Systemic corruption is then defined to mean instances of corrupt conduct (which may or may not constitute serious corruption) that reveal a *pattern* of corrupt conduct.

⁶⁷ (2015) 256 CLR 1 (‘*Cunneen*’).

⁶⁸ Murray Gleeson and Bruce McClintock, ‘Independent Panel — Review of the Jurisdiction of the Independent Commission Against Corruption’ (Report, NSW Department of Premier and Cabinet, 30 July 2015) (‘Gleeson-McClintock review’) 64 [9.6.6].

⁶⁹ See generally, *ibid* 63–66 [9.6]–[9.7].

⁷⁰ *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 6.

Within the ACLEI statute, these terms inform different investigative powers and responsibilities in relation to different types of corruption issue. For present purposes, we refer to them to make the more limited point that serious and systemic corruption are capable of clear legislative definition. For reasons that will be apparent in our later discussion of a prospective federal commission's hearing powers, we would not support a definition of 'serious corruption' that relies on factual analogies to the criminal law — indeed, we feel this risks confusing the roles of commissions and courts and runs contrary to integrity of purpose. But it is nevertheless possible to differentiate between ideas of 'corruption' that would be mismatched with a commission's strong investigative powers and others that align closely with the commission's motivating purpose.

For example, we do not believe that it would align well with the purpose of a new federal commission were it to wield investigative powers over civil servants suspected of misusing office resources, such as computer access, stationery, or printing supplies for their personal needs. Although this behaviour could be accurately described as 'corrupt' in the sense that it involves the abuse of a position for personal gain, it is hardly likely to impact public confidence in government (unless it becomes systemic, in which case it would satisfy the second branch of our proposed statutory definition). The situation would be different if the same civil servants were falsifying expense accounts to consume public money, or demanding kickbacks from tenderers for government contracts. This conduct would certainly weaken public confidence in the integrity of government, and its detection and suppression would align closely with the foundational purpose of a new federal commission.

As such, in limiting the investigative jurisdiction of a new commission to serious or systemic corruption, we suggest that 'serious corruption' be statutorily defined as corrupt conduct that is likely to threaten public confidence in the integrity of government. 'Systemic corruption' should be defined as it is in the ACLEI statute — that is, as a pattern of corrupt conduct. The significance of including a separate definition for systemic corruption is that such an occurrence will presumptively endanger public confidence, even if the individual acts taken alone would not be considered 'serious'. Corrupt conduct itself should be defined consistently with a common sense understanding of the term: that is, as dishonest or fraudulent use of a public position or of public resources for personal gain. Certainly, each of these definitions leaves interpretive latitude for future commissioners. Perhaps most significantly, it relies on their judgement, integrity, and expertise to determine when an issue rises to the level of threatening public confidence in the integrity of government. The point in developing this statutory language is not to remove the commissioners' judgement, but to inform it with clear interpretive aids concerning the underlying purpose of the institution.

The new commission would thus be able to exercise investigative powers where it had a reasonable basis to suspect the occurrence corruption falling into either of these two categories. Unlike the Independent Panel report on the ICAC, we do not support an initial threshold for investigative powers that is lower than the types of finding the commission may eventually reach. If the commission is to model integrity of purpose and evolve harmoniously within a systemic framework, its legislative statement of

purpose, investigative and reporting powers should each align. A situation in which the commission may initiate an investigation based on mere suspicion of corruption, not reasonable suspicion of the specific *type* of corruption at which the institution has been purposively targeted, invites transgression and incoherence in the use of official power.

It might be objected that a ‘reasonable suspicion’ requirement invites pre-emptive legal challenges to a commission’s jurisdiction by those subject to its investigative powers. As New South Wales Chief Justice Tom Bathurst, speaking extra-judicially, said:

[I]t could be argued that such review exposes the bodies in question to harassment and interferes with their functions by unmeritorious claims designed to frustrate or stifle a legitimate inquiry.⁷¹

Two answers lie to this objection. First, the alternative of requiring something less than reasonable suspicion — for example, the *prima facie* possibility of serious or systemic corrupt conduct — leaves the commission open to applying coercive investigative powers with virtually no initial limit. This is inconsistent with the principled limits placed on such powers throughout the common law. It must be remembered that the use of coercive power during an investigation is exceptional: barring the extraordinary instrument of a royal commission, or limited instances where the public interest has elsewhere justified coercive investigations (such as the anti-terrorism context), investigations conducted by Australian police or other agencies observe traditional common law protections and do not compel individuals to give evidence against themselves. By recognising that departure from this approach is exceptional in the corruption context, we are cautioned against allowing the exceptional power to become unwieldy and endanger the rights of individuals.

Second, characterising such litigation in presumptively negative terms is misleading. Any institution with the power to adversely impact individuals is likely to attract challenges on judicial review, and, indeed, as Chief Justice Bathurst CJ points out, *must* be subject to such challenges.⁷² This would be the case even without a ‘reasonable suspicion’ standard. Integrity of purpose challenges us to recall that the legislative framework governing an institution will always have inchoate elements that gain specific content through the interpretive roles of officials; with time, the indeterminacy of such features will narrow as institutional officials resolve new interpretive challenges in a manner consistent with the decisions of their predecessors. To the extent that judicial challenges may test the decisions of a commission’s early appointees, either affirming their wisdom or refining their interpretation of the commission’s role, they contribute to this process of institutional coalescence. The authoritative precedent of early litigation will narrow the ambit for future challenges to a commission’s decisions on judicial review, especially when courts

⁷¹ Bathurst, above n 37, 8.

⁷² *Ibid.*

display deference to the wisdom of commission officials. The idea that a reasonable suspicion threshold will provoke copious litigation, or that limited early instances of litigation are inherently damaging, are both exaggerated.

The approach advocated here is consistent with recent amendments made to the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) ('Victorian Act'), which removed a former requirement that the Independent Broad-based Anti-corruption Commission ('IBAC') be 'reasonably satisfied' of the occurrence of serious corrupt conduct before it could commence an investigation employing coercive powers.⁷³ 'Reasonably satisfied' connoted a standard approximating 'belief', as opposed to mere suspicion. A special report following the IBAC's first year of operation identified problems with this threshold: it meant that some corrupt conduct allegations that may have been credible were not investigated for failure to meet the threshold, and for want of an appropriate alternative authority to which they could be referred.⁷⁴ The Victorian Act was thus amended to authorise commencement of an investigation on the grounds of reasonable suspicion.⁷⁵

Importantly, the IBAC's coercive investigative powers were also supplemented with new powers of preliminary investigation — which did not include the use of coercive authority — so that complaints and concerns could be minimally investigated in order to inform the decision of whether to launch a coercive investigation.⁷⁶ While such powers of preliminary investigation fall outside the scope of the questions addressed in this article, we would simply note that the use of non-coercive powers of inquiry to give prima facie consideration to subjects properly within a commission's jurisdiction makes imminent sense.

One important difference between our approach and that adopted under the Victorian Act, however, is that the latter equates 'serious corrupt conduct' with criminal misconduct, and thus explicitly directs IBAC officials to consider subjects of criminality in deciding whether to commence an investigation or in reaching adverse findings. We prefer an approach that reinforces a firm distinction between the work of anti-corruption commissions and the criminal law, thus relying on a definition of corruption which does not incorporate criminal law analytic criteria. We return to the importance of distinguishing between the work of an anti-corruption commission and standing processes of criminal law in our later discussion of a commission's hearing powers.

⁷³ See discussion in Parliament of Victoria, 'Integrity Legislation Amendment Bill 2014' (Research Brief No 10, Parliamentary Library and Information Service, October 2014) 7–8, 14–15.

⁷⁴ Ibid, 7–8. See also Independent Broad-Based Anti-Corruption Commission, Parliament of Victoria, *Special Report Following IBAC's First Year of Being Fully Operational* (2014) 25.

⁷⁵ See above n 73, 14–15. See also the Victorian Act s 60(2).

⁷⁶ Victorian Act s 60(2A).

2 Agencies and Individuals Subject to Jurisdiction

We now move to consider the agencies and individuals that should fall within the investigative scope of a new federal commission. Our legislative purpose statement refers not only to the oversight of government agents and officials, but to government ‘activities’. How should the boundaries of government activity be drawn? Should third parties be subject to a commission’s powers, for example, when their activities raise concerns about the integrity of government agencies, officials, or processes? Clearly extending a commission’s powers in this way would further the objective of suppressing corruption in an instrumental sense. Integrity of purpose imposes a more strenuous demand, however, requiring that we match the commission’s jurisdiction precisely to the particular problem that occasions recourse to the exceptional power of a new commission. In other words, do the reasons that justify the creation of a new commission in the first place embrace the oversight of parties outside government?

The *Cunneen* controversy is again relevant to this question. The High Court’s decision in *Cunneen* turned on the statutory construction of ‘corrupt conduct’ in the then s 8 of the *NSW Act*. The majority of the Court accepted that Ms Cunneen’s alleged conduct did not fall within the statutory definition of ‘corrupt conduct’ because, first, it was alleged to involve Ms Cunneen in her personal capacity (not in her capacity as a Crown prosecutor); and second, while it might have affected or hindered the police officer from conducting the investigation, it did not involve dishonest or improper conduct *on the part of the police officer*.

Justice Gageler, in dissent in the case, noted that the majority’s interpretation of s 8 consequently obstructed the Commission’s power to investigate conduct that might amount to defrauding a public official, state-wide endemic collusion among tenderers for government contracts, and serious and systemic fraud in making applications for licences, permits, or clearances issued under New South Wales statutes.⁷⁷ The type of conduct that Gageler J identified clearly has the capacity to undermine public confidence in government decision-making, even if it involves no improper conduct on the part of government officials. This conduct also has the capacity to affect the integrity of government processes, threatening equality of access to government services and contracts, and undermining accountability for how taxpayers’ money is spent and public assets are utilised. As discussed in Part II, the ICAC had exercised its investigative powers in respect of such conduct in the past, prompting the New South Wales government to pass urgent remedial legislation preserving the authority of these past investigations. The Gleeson-McClintock review also supported the inclusion of certain third party conduct in the ICAC’s investigative jurisdiction,⁷⁸ a view ultimately adopted by Parliament (although the new statutory terms would have excluded the alleged conduct of Ms Cunneen).⁷⁹

⁷⁷ See, eg, *Cunneen* (2015) 256 CLR 1, 36–7 [91]–[92].

⁷⁸ Gleeson and McClintock, above n 68, 39–40 [7.4.13]–[7.4.15].

⁷⁹ *NSW Act* s 8.

Given that third party fraud or subversion of important government activities could endanger public confidence in government, there is a strong *prima facie* basis for including such activities in a commission's jurisdiction. This position is corroborated by our institutional survey, which suggests a limited capacity for existing integrity institutions to impose scrutiny on third parties in response to the types of concern identified above. Nevertheless, whether to extend the investigatory powers of the commission to the conduct of non-government officials is not a straightforward issue.

The extraordinary investigative powers that are conferred on anti-corruption commissions are ordinarily justified on the basis that government corruption is of a peculiar nature: it can be systemic, shrouded in secrecy, and difficult for traditional investigative agencies to uncover. It also inherently involves the abuse of public power. These are the characteristics that differentiate public sector corruption from other types of misconduct, including other forms of criminal activity, which can be mitigated adequately by the standing authority of existing agencies such as the police. The conduct of private individuals and organisations does not necessarily engage the same distinct concerns. Unlike public officials, these actors are not vested with a public trust in the performance of their roles, nor are they vested with official powers capable of abuse. They have not undertaken, as many public officials have, an express commitment to hold their personal conduct to strict standards of scrutiny. The case for preserving traditional common law protections against coercive scrutiny of their conduct is thus stronger than it is for public officials.

Answers to these concerns must be found on two levels. First, the limited investigative focus of the commission mitigates civil liberty concerns, if only partially, by confining the commission's powers to a narrow field associated with a legitimate and heightened public interest. This distinguishes the investigative focus of the commission from other traditional subjects of criminal law: it is the heightened public interest in securing the integrity of government, including in its dealings with private persons, that justifies the superimposition of an additional investigative power where other agencies limited by the traditional common law protections might already hold authority. It follows, however, that the level of incursion on traditional liberties should be tailored to the objective. In addition to narrowing the commission's investigative scope and imposing a reasonable suspicion threshold on the exercise of its powers, the potential injury that can flow from such hearings should be minimised to reflect a focused and purposive incursion on civil liberties.

This can be achieved through careful tailoring of its procedures and ultimate outcomes to purpose. The strong evidentiary and procedural safeguards of the criminal law reflect the exceptional prejudice that can flow from a criminal proceeding — both in terms of outcome (a criminal conviction and suspension of personal liberty), and in terms of intrinsic effects, including the stress and stigma of public accusation. Should a new commission exercise investigative powers without equivalent safeguards, it follows that its outcomes and procedures should similarly reflect a significantly lesser prejudice than criminal proceedings.

We accordingly support the extension of a commission's investigative jurisdiction to persons and organisations outside government whose activities raise reasonable

suspicion of serious or systemic corruption, provided the activity is of such a nature that it would threaten public confidence in government, and subject to further limits on both the manner in which inquiry investigations are conducted and the outcomes that can flow from them. It is to these matters that we now turn.

C Integrity of Hearing Powers

One of the strengths that we considered a new federal anti-corruption commission could add to the Commonwealth integrity landscape is the capacity to hold hearings. Hearings lend the ability to identify and test evidence through the robust instruments of examination and cross-examination. They can also provide individuals under investigation with a forum in which to contest allegations before they crystallise into adverse findings. Finally, they can be a means of ascertaining valuable information to share with the public or with other agencies comprising parts of the integrity system. Here, we consider the precise dimensions of the hearing power that are appropriate to enabling these objectives in line with integrity of purpose.

The power to hold hearings, and the manner in which that power should be exercised, each depend in part on an account of the types of outcomes that hearings may produce. Attentiveness to the outcomes of anti-corruption hearings in turn reinforces purposive considerations about how the commission should interact with the standing processes of criminal law. In this section we thus consider the outcomes that can flow from hearings together with the manner in which hearings are to be conducted. Our analysis is focused on the following issues: (i) whether a commission should be empowered to recommend or initiate criminal charges based on hearing findings; (ii) whether hearings should occur in private or in public; and (iii) what types of public reporting and follow-up powers should flow from commission hearings. We begin with the commission's capacity to recommend or initiate criminal proceedings, as this subject helps bring into focus a commission's intended relationship with the criminal law — a key consideration underlying our recommendations across each of the subjects considered in this section.

1 Maintaining Integrity of Purpose by Prohibiting Findings of Guilt or the Initiation of Prosecutions

It is well established that standing investigative commissions are not courts and do not have the accompanying requirements and safeguards of the judicial process. A federal anti-corruption commission would almost certainly be constitutionally restricted from reaching formal determinations of law, including findings of criminal guilt, as this would usurp the judicial role and violate the separation of powers established by Ch III of the *Australian Constitution*.⁸⁰ An equivalent restriction is also

⁸⁰ The adjudication of criminal guilt under Commonwealth law is a task exclusively for a court established under Chapter III of the Constitution: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. The High Court has recognised that it is compatible with this principle for non-judicial bodies to determine whether a person has engaged in conduct amounting to a criminal offence,

made explicit in the statutes governing many state level anti-corruption commissions. For example, in Western Australia, s 217A of the *Anti-Corruption Commission Act 1988* states 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 or opinion that misconduct has occurred is not to be taken as a finding of guilt.

The constitutional limits enforced at the federal level by Ch III are strongly connected to legal process concerns. By strictly defining and protecting the jurisdiction of the federal courts, the Constitution cements their distinct purpose and institutional competency to determine questions of legal right and to adjudicate criminal guilt. Just as the judicial power is constituted by the separation of powers, so too is it limited in furtherance of the public interests underlying the other two branches. While Ch III thus solves one design issue — whether a commission may reach findings of criminal guilt — more difficult issues lie in locating the precise boundaries between the commission and the criminal law. In particular, should a new commission be empowered to refer criminal suspicions (as opposed to findings) to other agencies, and should it be empowered to lay criminal charges itself?

In the 1990 decision of *Balog v Independent Commission Against Corruption*,⁸¹ the High Court defined the New South Wales ICAC’s function as one of facilitating the actions of other agencies — particularly prosecutorial agencies — by conducting investigations.⁸² The Court emphasised the need for the ICAC to limit itself in drawing conclusions that would express findings of guilt. This reflects similar underlying concerns to those arising from Ch III: expressing findings of guilt could be perceived as the commission usurping a judicial role, and perhaps more importantly, would be tantamount to imposing criminal stigma on individuals absent the safeguards of the judicial process. Both would have detrimental consequences for public confidence in the fairness and integrity of the commission itself. Yet the public might also lose confidence should anti-corruption commissions identify factual misconduct with obvious elements of criminality, but with no further consequences following for the individuals and organisations adversely implicated.

There are three possible resolutions to this quandary. The first is that anti-corruption commissions could be vested with the power to lay criminal charges. This resolution rests on a potentially fraught distinction between laying a charge, which necessarily implies a strong opinion as to criminal guilt, and a formal ‘finding’ of criminal guilt. Some state anti-corruption commissions are currently empowered to commence prosecutions for statutory, disciplinary, and other offences. Under s 50 of the *Crime and Corruption Act 2001* (Qld), the Queensland Crime and Corruption Commission can bring prosecutions for corrupt conduct in disciplinary proceedings before

when that occurs as a step in an administrative process that leads, for example, to the imposition of regulatory sanctions: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 371 [33].

⁸¹ (1990) 169 CLR 625.

⁸² *Ibid* 632.

the Queensland Civil and Administrative Tribunal. In Victoria, under s 190 of the Victorian *Act* the IBAC or a sworn IBAC Officer authorised by the Commissioner has the power to bring proceedings for an offence in relation to any matter arising out of an IBAC investigation. In both cases, while commission officials can initiate prosecutorial proceedings, it is ultimately left to a judge or administrative tribunal to decide questions of guilt or regulatory culpability.

In our view, these models are troubling. The division between investigative and prosecutorial functions has deep roots in Australia's tradition of rule of law: it reflects the principle that decisions to prosecute should be informed by the public interest, and taken by independent officials whose distance from an investigation insulates them from preconception and bias. It is not clear why this principle should be disrupted in the case of prosecuting crimes related to corruption. Remember that the distinct characteristics of corruption — its secrecy, potentially systemic nature, and necessary connection to the abuse of power — both justify and purposively limit the exceptional use of coercive power in anti-corruption investigations. Would these characteristics also necessitate the relocation of prosecutorial judgment *after* corruption investigations have already been completed, and a viable basis for charges has been established? Caution must be exercised to ensure that the original basis for one exceptional power is not extended to unduly sustain another. We struggle to identify a reason why the distinct nature of corruption necessitates the commencement of related criminal prosecutions by an agency other than the public prosecutor. The fact that compelled evidence from an anti-corruption commission's investigation will not be admissible in a criminal prosecution corroborates this position: it affirms that the prosecutor's judgment is separate from the preceding investigation, and driven by a different systemic role.

The second possibility is that anti-corruption commissions could refer suspected instances of criminality to other institutional authorities, such as the police. This would spare the commissions from directly opining on criminality, limiting them to simply transferring suspicious or concerning information. At one level, this seems conducive to systemic coherence and to fostering respect for the authority of other institutions: were a federal anti-corruption commission to receive a complaint that is strongly suggestive of criminal conduct, but that does not concern serious or systemic corruption, referral could ensure that the complaint is properly investigated without the commission overstepping its bounds.

The matter is more complicated if the subject of referral is more than a *prima facie* complaint, however. Should the commission exercise extraordinary investigative and hearing powers unavailable to the police, then transfer evidence so obtained to police or to prosecutors, it may enable the latter agencies to do indirectly what they cannot do directly. While evidentiary safeguards lie against the use of derivative evidence in criminal prosecutions, that is, evidence obtained by virtue of separate coercive proceedings, these measures are not perfect in ensuring that police or prosecutors do not 'reverse-engineer' a case from a coerced record.

A final possibility is that anti-corruption commissions could be strictly limited to factual reporting alone. This approach effectively treats the commissions as

internally-coherent and closed processes: their aim is to investigate specific subject-matter, with the power to report on that subject-matter following observance of appropriate procedures and satisfaction of appropriate evidentiary standards. Other agencies may avail themselves of the commissions' reports for the purpose of commencing further investigations, but the commissions themselves have nothing to do with these further actions (or, more importantly, with the exercise of any judgment as to whether such actions are warranted). This approach has the benefit of minimising any risk of institutional overstep or undue interference with civil rights. Its cost may be that it requires such a vigilant separation of institutional duties that it obviates valuable inter-institutional cooperation and information-sharing toward common public goals. Notably, this approach would also imply that the High Court fundamentally mischaracterised the role of anti-corruption commissions in *Balog* when it stressed their capacity to enable prosecutions by other agencies.

We believe that integrity of purpose is best reflected in the middle position, allowing a commission to refer suspected criminality to other authorities without reaching actual findings of criminal wrongdoing or initiating criminal prosecutions. The possible shortcoming of this approach — that referred evidence might be misused by subsequent authorities taking advantage of its coerced origins — must be offset by confidence that those authorities will abide by their own integrity of purpose, adhering to appropriate procedures and principles that safeguard individual liberty in these consequential settings. This confidence is consistent with the view of an integrity system comprising multiple interlocking mechanisms which work together to secure horizontal accountability — the law restricting use of derivative evidence in criminal prosecutions being one such mechanism. Moreover, empowering anti-corruption commissions with the ability to refer suspected criminality to other authorities reflects the values of inter-institutional awareness, respect for jurisdiction, competence, and authority that underlie integrity of purpose. Finally, this approach aligns with the earlier conclusion that in defining a federal commission's investigative jurisdiction, 'serious and systemic corruption' should not import criteria from the criminal law. This properly distinguishes between factual findings, which are the target of the commission, and criminal subjects that are the purview of other agencies to which the commission can make referrals.

2 Integrity of Purpose and Evidentiary Hearings

We now turn to the capacity of a federal anti-corruption commission to hold formal evidentiary hearings. Our focus is on locating an appropriate balance between privacy and publicity in the conduct of hearings. This is perhaps the most controversial element of commission design. Certainly, it is the topic that has attracted the greatest volume of popular commentary and debate in recent years, spurred largely by the impact of ICAC hearings on (now) prominent personalities such as Margaret Cunneen SC, former Labor Minister Eddie Obeid, and former Liberal Premier Barry O'Farrell. This commentary has sadly tended to gravitate to extremes: either commission hearings are thought to require categorical privacy in order to safeguard individual reputations, or to require categorical publicity so as to expose misconduct and deter its recurrence. Neither position reflects considered attention to the distinct role that an anti-corruption commission plays within a legal system.

Our application of integrity of purpose leads us to support private evidentiary hearings in the ordinary course, subject to exceptions responsive to the public interest and to an ultimate power for commissions to issue public reports, which are considered again below. Our reasons for supporting private hearings nevertheless depart from categorical assumptions about the defence of individual reputations or generalisations about commission conduct inspired by discrete instances in which commissions have overstepped. Rather, integrity of purpose supports the use of private hearings because it reinforces the fundamental nature of commissions as investigative institutions — albeit ones vested with exceptional powers.

It should first be acknowledged that credible arguments lie in support of both public and private hearings. Public hearings certainly enhance the public's ability to observe the commission in the conduct of its investigative work. Quite apart from raising awareness of possible corruption issues and potentially deepening public knowledge about the conduct (positive or negative) of officials, the publicity of hearings may lead others with knowledge about subjects under investigation to come forward. Publicity may thus act as an important investigative tool. Moreover, the publicity of hearings may enhance their deterring effect by escalating the costs — especially to political actors — of personal implication in any impropriety. Perhaps most importantly, public hearings may allow a commission that is acting fairly and according to well-conceived procedures to be *seen* doing so, brokering public understanding of its role and confidence in its efficacy.

This optimistic account of public hearings must be tempered, however, by the reality that most hearings are not followed in detail by public observers. Rather, public impressions are shaped almost exclusively by hearing coverage in media. Even when a commission and its officials model procedural and individual integrity, media portrayals may fail to capture the nuances of investigative procedure or honour the need to suspend judgment of witnesses. Public hearings run the inherent risk of being portrayed as trials and perceived as such, with the individuals involved — including those against whom findings of impropriety are never reached — bearing personal indignity and stigma. Even where findings of impropriety are made, the public may conflate such findings with judicial findings of guilt. This misperception is injurious to individuals but also harms the commission itself by fostering misunderstanding of its role.

While public hearings may encourage some individuals to come forward and give evidence to an investigation, it may deter others. This could be the case where corruption relates to systemic failures — that is, breakdowns in administrative systems of accountability and oversight, for which responsibility is diffuse. Individuals may be reluctant to expose themselves to scrutiny for involvement in what are system-wide deficiencies. In such cases, the privacy of hearings may facilitate greater cooperation, voluntary acknowledgment of errors, and candour.

The belief that public hearings have a strong deterrent effect on corruption may also be overstated. Where corrupt acts are calculated and deliberate, it is not clear that their perpetrators would be any more deterred by exposure in a public commission hearing than they would be by exposure to a public criminal trial, and there is scant

evidence that the publicity of prosecution deters criminal activity. Whether the danger of public exposure helps deter the types of system failure that can enable corruption is an open question: perhaps the threat of exposure will spur public officials to be more vigilant in crafting and enforcing accountability measures, but the nature of systemic failures may be such that they defy straightforward assumptions about deterrence.⁸³

Finally, public hearings may jeopardise the ongoing investigations of other authorities, even tainting the capacity to develop pools of unbiased jurors for future criminal trials concerning subjects that have received widespread coverage.

In the previous section, we discussed important distinctions between the roles of investigators and prosecutors, and the higher order principles those distinctions serve. We also highlighted a closely related distinction between investigative commissions and courts — namely that only the latter are empowered to reach formal legal determinations, such as findings of criminal guilt. This distinction is not simply a matter of formality, but reflects foundational ideas about the purposes of the two different institutions. The purpose of courts is to decide legal questions in a manner that is final and consequential for those affected, and court procedures are accordingly tailored to reflect the highest standards of justice and impartiality required for that purpose. These include the fact that judicial hearings occur in public, where they can be exposed to the highest scrutiny, and the fact that participants are entitled to robust procedural rights and evidentiary privileges.

Investigative commissions are not constituted for the purpose of reaching formal legal determinations. As we have conceived of a potential federal commission, its purpose would be to suppress serious and systemic corruption and to foster confidence in the Commonwealth government, goals linked to powers of fact-finding and referral as distinguished from the power to reach legal findings. This distinction also informs the principle that court-like evidentiary privileges, including the privilege against self-incrimination, don't apply in commission hearings: the purpose of the hearings is to ascertain the truth in terms that engage no immediate legal prejudice, and both the pursuit of truth and the lesser individual consequences involved justify more relaxed protections. A necessary implication of this approach is that the individual witnesses in a commission hearing may be subject to even more probing examination than would occur in a court. The key question is whether, in light of this fact, the same principles informing the open court principle pertain to the investigative hearings of an anti-corruption commission.

Most state statutes provide a wide discretion as to whether to hold a public hearing. In New South Wales, s 31 of the *NSW Act* provides that the ICAC may conduct a

⁸³ See, eg, Janet Ransley, 'Preventing Corruption: What are the Frameworks?', Presentation delivered at National Integrity 2017, Brisbane, Australia, 16 March 2017 <<http://transparency.org.au/wp-content/uploads/2017/04/Janet-Ransley.pdf>>. Ransley notes that there is 'limited evidence of deterrent effects' in detecting, investigating and prosecuting corruption, especially in organisational contexts.

public inquiry ‘if it is satisfied that it is in the public interest to do so’. Without limiting the factors to be taken into account in determining whether it is in the public interest, the Commission is directed to consider the following:

- (a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
- (b) the seriousness of the allegation or complaint being investigated,
- (c) any risk of undue prejudice to a person’s reputation (including prejudice that might arise from not holding an inquiry),
- (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The inclusion of this provision in the New South Wales statute reflects a decision by the legislative drafters to defer to the expertise of commissioners to balance privacy and publicity concerns in context, on a case-by-case basis. This is one possible approach to the dilemma at the stage of institutional design.

An alternative approach is offered by South Australia, where there is no power to conduct public hearings. In November 2015, South Australian Commissioner Bruce Lander requested that his governing legislation be amended to allow public hearings into less serious conduct — misconduct and maladministration.⁸⁴ He has renewed that request in response to a serious maladministration investigation that he is currently undertaking.⁸⁵ In contrast, he 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.⁸⁶

The foundation of our position favouring the presumptive privacy of hearings is that a commission is not a court but an investigative agency vested with extraordinary powers. It bears repeating that the purpose of imposing transparency on a court proceeding is to ensure the justice of the process: once an individual has been charged

⁸⁴ See, eg, 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* (online), 10 November 2015 <<http://www.abc.net.au/news/2015-11-10/icac-commissioner-bruce-lander-faces-public-integrity-committee/6927066>>.

⁸⁵ See Sheridan Holderhead, ‘ICAC Investigating Government Agencies over Allegations of “Serious and Systemic” Misuse of Public Resources’, *The Advertiser* (online), 4 June 2016 <<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>>.

⁸⁶ MacLennan, above n 84.

with a crime, the public interest requires a public hearing to ensure that the state's exercise of its harshest authority is exercised fairly. It could be argued that the same should be true of anti-corruption commission hearings – that is, they should take place in a setting where public scrutiny ensures the fairness and scrupulous impartiality of the presiding commissioner and other officials. By thus equating anti-corruption hearings to a court proceeding, however, we beg the question of why the traditional common law protections of that forum should be stripped. If commission hearings engage similar interests in justice to a court hearing — that is, if the grounds for summoning compelled witnesses can be analogised to 'charges', and if the factual findings of a commission can be analogised to findings of legal culpability — then the case for making them public is certainly strengthened, but so too is the case for granting witnesses court-like evidentiary and procedural safeguards. If, however, that analogy to the judicial forum is rejected — as we believe it should be — then the question remains why the unique concerns justifying the use of coercive powers by *investigators* in the corruption context should also justify their ability to use those powers in public, given the evident risks and harms. To our minds, this additional justification is lacking.

First, it is not clear that the goals of suppressing serious or systemic corruption, or of fostering public confidence in government integrity, rely on commission hearings taking place in public. Assuming that actual findings of corrupt conduct will be publicly reported and explained following those hearings — a matter we consider below — the public will have the benefit of considered findings of fact about government activities. Interim reports might also be used to counteract the concern that a lack of public awareness of inquiry hearings prevents people with valuable evidence from coming forward. The reports and findings of an inquiry, having afforded a full opportunity for individual witnesses to be heard and to respond to adverse allegations, will be less vulnerable to inaccurate or speculative media portrayal. The public will also have reassurance that an investigative body wielding extraordinary powers to compel involuntary testimony does so with respect for the privacy and dignity of those affected, only disclosing their identities where necessary to deliver the public a full and accurate account of actual findings of corruption. This approach would foster systemic harmony and coherence by eliminating the potential that commission hearings could compromise the integrity of judicial proceedings, reinforcing the purposive distinctions between commissions and courts through the observance of distinct procedures.

While thus supporting the use of private hearings in the ordinary course, we would preserve the discretion of a federal commission to convene public hearings in one instance. There may be cases where public concern surrounding an allegation of corruption is so high that it rises to a crisis of confidence in government. Here, the goals of suppressing serious and systemic corruption and of restoring confidence in government may demand immediate and pronounced action, giving the public immediate assurance that a robust investigation is underway. Moreover, the commission's own transparency in the conduct of the investigation may be essential to assuring the public that the commission is not itself susceptible to the troubling issues that are the source of concern.

We suggest the following statutory guidance for such judgement: 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. Our proposed threshold for the conduct of a public hearing has received some criticism for its workability, as well as perhaps setting the threshold too high as to ‘prevent a crisis of public confidence, as opposed to simply respond[ing] to one.’⁸⁷ In our view, while acknowledging the need for subjective judgement as to when such circumstances have arisen, this can only be exercised in context, relying on the expertise and good faith of a commissioner (or commissioners) and staff. We would also defend the narrowness of our proposed threshold by reference to the concerns that we have outlined above both for the individuals potentially investigated before, and giving evidence at, public hearings, and in relation to the reputation and standing of the commission itself.

Assuming the legislative framework governing the commission otherwise imposes presumptive privacy on hearings, we believe this represents a suitably narrow instance in which legislators may defer to the future judgment of commissioners acting in good faith to pursue the public interest. So empowering the commission is consistent with it fulfilling a systemic role presently lacking from the integrity landscape, as truly pervasive problems with government corruption could impede the affected government from constituting a royal commission for reasons of its own self-preservation, or interfere with faithful exercise of the standing law enforcement powers of other agencies.

In such circumstances, the commission should also take steps to mitigate potentially unfair effects of hearings on witnesses. It can do so by narrowing, as much as possible, the issues to be addressed in evidentiary hearings through thorough pre-hearing investigations and private interviews; prefacing public hearings with public statements by the commissioner clarifying their investigative nature and emphasising that inquiry witnesses have not been ‘charged’ with offences, nor will the hearings result in legal findings; and ensuring full and fair opportunities of reply for any witnesses facing adverse accusations or findings.

3 The Need for Public Reporting and Follow-up Powers

Recalling that the different design features of a new federal commission are to be mutually-sustaining, our position in favour of presumptively closed commission hearings relies on these hearings being complemented by three additional elements. In each case, these elements are intended to ensure public engagement with the commission as a means of fostering understanding of its institutional role and of enhancing public trust.

⁸⁷ Transparency International Australia, Submission No 21 to the Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Inquiry into the Establishment of a National Integrity Commission*, 13 April 2017, 8 (emphasis altered).

First, the commission must be able to publicly report the findings that result from any hearing, including findings of serious and systemic corruption and their relevant factual foundations. This ability is not only consistent with the commission's foundational purpose, it is essential to it. Across Australia, South Australia is unique in not allowing the ICAC to make reports to Parliament on specific investigations. Under ss 40, 41 and 42 of the *Independent Commissioner Against Corruption Act 2012* (SA), the Commissioner may report to Parliament on its more general review and recommendation powers, for example, its evaluation of practices, policies and procedures of government agencies, and recommendations it has made that government agencies change or review practices, policies or procedures. But under s 42(b), a report must not be about, or identify, a particular matter that was the subject of an assessment, investigation or referral under the *Commonwealth Act*. Commissioner Lander 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.⁸⁸ We strongly support the Commissioner's criticisms. It is difficult to conceive of how a commission can broker confidence in government if the government itself exercises control over the release of the commission's findings. The incoherence of this approach is patent. Suspending a right of reporting undermines most basic purposive account of a commission's role in fostering public confidence and government integrity; indeed, it weakens integrity through the unseemly implication of executive government serving as gatekeeper in the release of critical findings about its own conduct.

Second, commission hearings (and all aspects of commission conduct, for that matter) must honour procedural fairness. Public confidence in the integrity of private hearings, and the accuracy of conclusions they reach, would be compromised if individual witnesses were not afforded an opportunity of notice and reply to potential adverse findings that may be made against them. It would also be compromised if commissioners weren't held to stringent standards of impartiality. Both of these requirements reflect basic principles of natural justice, and their statutory codification would reinforce consistency between the specific design elements of a new federal commission and the fundamental values of Australia's legal system.

Finally, we recommend that a new federal commission have a statutory power of 'follow-up' — that is, the ability to report publicly on the government's compliance (or lack thereof) with past reports and recommendations. An example of such follow-up powers can be found in s 159 of the *Victorian Act*. Under this provision, the Victorian IBAC may make recommendations to the relevant principal officer, the responsible Minister or the Premier. Sub-section (6) then states:

- (6) The IBAC may require a person (other than the Chief Commissioner of Police) who has received a recommendation under subsection (1) to give a report to the IBAC, within a reasonable specified time, stating—

⁸⁸ Holderhead, above n 85.

- (a) whether or not he or she has taken, or intends to take, action recommended by the IBAC; and
- (b) if the person has not taken the recommended action, or does not intend to take the recommended action, the reason for not taking or intending to take the action.

This power would reinforce the institutional distinctness of a new federal commission in comparison to the discrete decision-making powers of courts, for example, or the temporally limited influence of royal commissions. Even where follow-up on reports and recommendations fails to spur action by government, it may at least force the government to articulate reasons for inaction, fostering positive systemic values of transparency and democratic dialogue.

IV CONCLUSION

This article began with an account of legal process theory, stressing its relevance to Australia's integrity branch of government. The source of that relevance lies in the unique concept of public power expressed by legal process theory — as something effected but also bounded by procedure — and in the tools offered by the theory to foster systemic strength through inter-institutional harmony and coherence. We encapsulated these values in our own theory of integrity of purpose, arguing that the introduction of a new federal anti-corruption commission to the integrity landscape must be informed by awareness of the existing features of that landscape, a distinct and specific concept of institutional purpose, and recognition that the new commission will evolve through the interpretation of its role in context and its interactions with institutional counterparts.

None of these are radical claims. In drawing from the legal process tradition, our thesis is less about challenging conventional legal analysis in relation to questions of governance and institutional design as it is about making that analysis more methodologically express, consistent, and clear on its own terms. While that aim may sound modest, its practical implications are not. Application of integrity of purpose to the design of a prospective federal anti-corruption commission challenges rather than corroborates many of the key features of existing state level commissions. By explicitly probing how the new commission could lend value to the federal integrity landscape, and recognising that questions of purpose and procedure cannot be meaningfully answered in isolation from one another, we have advocated that a new federal commission be bound by a clear legislative statement of purpose; that its jurisdiction, procedures, and outcomes should each be meaningfully differentiated from the standing agencies of criminal law; and that its use of extraordinary investigative powers, including hearing powers, should occur predominantly in private.

There is growing support for a federal anti-corruption commission. Before rushing to introduce such a body or categorically dismissing its merit, it is important to reflect on the current strengths and weaknesses of the federal integrity landscape and to define the contours that a new commission could fill. Just as integrity of

purpose involves recognising that questions of purpose cannot be considered apart from questions of procedure, so too should debates about the need (or lack thereof) for a federal anti-corruption commission be accompanied by a clear, principled, and purposive vision of what such a commission would look like. Beyond advocating for specific design features, we hope that the account developed in this article will aid this debate. Integrity of purpose can be adopted by future scholars and officials to develop more richly informed conclusions about institutional design, and to secure not just a new commission's capacity to combat corruption but to honour its own integrity in the public interest.

