

12 February 2021

The Hon Christian Porter, Attorney-General Australia  
Attorney-General's Department  
By email: [cic.consultation@ag.gov.au](mailto:cic.consultation@ag.gov.au)

## TRANSPARENCY INTERNATIONAL AUSTRALIA SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT CONSULTATION PROCESS TO ESTABLISH A COMMONWEALTH INTEGRITY COMMISSION

Dear Attorney-General,

Transparency International Australia (TIA) is pleased to again engage with you and your Department staff in the consultation process to establish a Commonwealth Integrity Commission (CIC).

TIA has been calling for the establishment of a well-resourced, fit-for-purpose, national anti-corruption and integrity commission since 2004.

We are pleased to see that momentum has built and been maintained, and there is now agreement across all political parties and independent MPs, of the need to establish such a Commission, filling the single biggest institutional gap in the nation's integrity system.

We welcome this consultation process to contribute to ensuring the CIC will deliver the system that the community needs and expects.

This is a landmark opportunity for Australia to ensure the CIC makes a substantial and positive impact, nationally and globally, and is established to protect the public interest as its primary and overriding function.

A well-designed CIC will assist in overcoming difficulties in anti-corruption enforcement not only in Australia but internationally. This includes the need for:

- Scope to adapt to address changing forms of corruption, integrity risk and public concern about abuse of entrusted power
- Strong, systematic and enforced prevention measures for promoting integrity; and



- Best practice investigation and enforcement powers, aimed at securing remedies.

The way these issues are addressed will impact the effectiveness and credibility of the national integrity commission with the wider public.

The following comments are in response to the draft Commonwealth Integrity Commission Bill 2020 (CIC) that was announced in November 2020.

This submission is to be read in conjunction with the:

1. Transparency International Australia and Griffith University report [Australia's National Integrity System: The Blueprint for Reform](#) which was launched at parliament House in November 2020;
2. Transparency International Australia Position Paper, [A Fit For Purpose National Integrity Commission](#), published in August 2020; and
3. [The Beechworth Principles](#), which TIA supports.

These provide clear direction as to the design of a national integrity commission, criteria against which an integrity commission model can be assessed, and the underlying principles upon which an such an agency should be based.

Our comments in this submission relate specifically to:

- Scope, referrals and the two divisions
- Public hearings
- Reporting and accountability
- Defined prevention role
- Independence and oversight

The primary function of an effective national integrity commission is to is to protect the public interest and to expose and investigate corruption in all its forms. This goes hand-in-hand with promoting public trust in the integrity of the federal parliament, the Commonwealth public sector and our system of government.

Transparency International Australia prefaces this submission with the following key points:

- The proposed CIC model does not yet meet the necessary criteria to render it effective and credible. The two-division model is a fundamental flaw that predicates other significant shortcomings.
- An effective national integrity commission must be an independent, well-resourced statutory agency, with a broad jurisdiction, strong investigative powers with scope to cover all types of corruption, a broad referral process including from the public, the ability to hold public hearings, and a corruption prevention mandate.



- The commission must be fair and equitable in its treatment of all federal public officials irrespective of status or role, and entities involved in federally funded services and contracts. The two sets of rules and standards for the two divisions does not achieve that.
- The Commission must ultimately be accountable to the public. It needs full capacity to receive and act on corruption information from any person and to make findings of fact and report publicly.
- The ability to hold public hearings in certain circumstances is essential. The CIC would be a retrograde step as it winds back existing (ACLEI) powers to hold public hearings in respect of the bulk of the agency's operations (under the proposed public sector division).

## TRANSPARENCY INTERNATIONAL AUSTRALIA

TI Australia (TIA) is part of a global coalition to fight corruption and promote transparency, integrity and accountability at all levels and across all sectors of society, including in government. TIA was launched in March 1995 to raise awareness of corruption in Australia and to initiate moves to combat it. TIA believes that corruption is one of the greatest challenges of the contemporary world. Corruption undermines good government, distorts public policy, leads to the misallocation of resources, harms private and public sector development, threatens democracy, and particularly hurts the poor. It drives economic inequality and is a major barrier in poverty eradication. Tackling corruption is only possible with the cooperation of a wide range of stakeholders. We engage with the private sector, government and civil society to build *coalitions against corruption*. Coalitions against corruption will help shape a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

TI Australia is the national chapter of [Transparency International \(TI\)](#), the global coalition against corruption, with a presence in over 100 countries.

TI Australia is registered with the Australian Charities and Not-for-Profits Commission (ACNC).

## RECOMMENDATIONS

Transparency International Australia recommends that the proposed CIC model be substantially and significantly amended to ensure that:

1. The CIC two-division model is removed, and the scope and functions currently attributed to the law enforcement division be applied to the entire federal public sector



- parliamentarians and their staff and Commonwealth funded entities and their subcontractors;
2. The CIC has wide scope and jurisdiction to investigate any conduct: criminal or non-criminal, with or without evidence of criminal conduct, including the abuse of office, and relating to integrity in procurement across all federal entities, and which undermines confidence in the integrity of public decision-making;
  3. The CIC has full capacity to directly receive and act on corruption information from any person and have scope to initiate its own investigations;
  4. The CIC has full powers to hold compulsory hearings (in private or public) and conduct public inquiries. These powers be applicable to the entire federal public sector, wherever this is in the public interest;
  5. The CIC make findings of fact and these be publicly reported. The CIC should reveal that the referral has been made, because of an adverse finding, and a report made public once an inquiry is complete;
  6. The CIC has comprehensive mandatory reporting requirements, for all public officials and agency heads, to centrally report suspected corruption and integrity failures; and
  7. The CIC is adequately resourced and required to fulfil a clear prevention mandate and coordinate prevention-focused activities, with strong, systematic, and enforceable measures.

## SUMMARY OF TI AUSTRALIA POSITION

TIA welcomes the broad political support for the establishment of a national integrity commission. We have an opportunity to design a commission that will strengthen public trust in government through independent assurance that whatever their politics, governments and public office holders are acting honestly and accountably and fulfilling their public duties with integrity.

To achieve this, Australia's national integrity commission must be an independent and well-resourced statutory agency, with a broad jurisdiction, strong investigative powers to investigate all types of corruption, a broad referral process including from the public, and the ability to hold public hearings, will help promote public trust in the integrity of the federal parliament, the Commonwealth public sector and our system of government.

The proposed CIC model does not yet meet the necessary criteria to render it effective and credible.



We need a national integrity commission that is consistent, wide in scope and mandate, that applies equally and fairly across the entire federal public sector.

The proposed two division model, with its two sets of rules and scope, which leaves most of the public sector, including parliamentarians and their staff outside of the net of investigation (criminal matters only) is the most significant and fundamental flaw in the CIC. From this division other problems stem.

In short, scrutiny of the bulk of the public sector, including parliamentarians and their staff, is restricted at every turn under this model – the threshold of reasonable suspicion, criminal matters only, a narrow referral mechanism, no scope for the public to raise concerns, no public hearings, no findings of fact or reporting of criticism.

Despite the significant flaws in the CIC model, a good result is still possible if there are significant and substantial amendments to bring it to best practice, or failing that, the Australia Federal Integrity Commission Bill 2020 (AFIC), introduced by Helen Haines, and which is already before Parliament, would be a far better starting point for the government.

Establishing an independent national anticorruption commission with broad powers to investigate all types of corruption and misconduct will help promote public trust in the integrity of the federal parliament, the Commonwealth public sector and our system of government.

Anti-Corruption agencies are a vital part of Australia's national integrity system, relied on by the public and government to expose official corruption, head off emergent corruption risks, and ensure action to build confidence in Australia's corruption resilience.

The proposed CIC model is welcome in that we now have a model to critique, debate and improve on, noting the AFIC Bill is already before parliament and ready for debate. This consultation provides an opportunity for the government to respond to community support for an independent and effective national integrity and anti-corruption agency.

It is encouraging that the model builds on the best of ACLEI and in particular, ACLEI's strong powers, noting those powers are not broadly applicable and extended to everyone.

It is also encouraging that the proposed CIC would have jurisdiction over Commonwealth service providers and any subcontractors they engage. Regrettably this potential strength would not be realised with the proposed two-division model, placing them under the jurisdiction of the public sector division which has narrow scope, must be a criminal offence, has no opportunity for public hearings and will not accept referrals from the public.

The allocation of \$106.7 million in new funding to establish the CIC in the 2019-20 budget is a welcome starting point. It could be considered in proportion with the proposed functions and scope, however, TIA's strong view is that the CIC functions and scope must be widened, and additional resources are required. The TIA Blueprint for Reform, [Focus Area A – A Connected National Integrity Plan](#), makes clear the need for greater financial and legal



independence for all core integrity agencies based on 4-year, direct budget allocations by parliament, in order to guarantee their roles.

## Scope, referrals and the two divisions

### Scope and definition of corruption

**TIA does not support the proposed two divisions, the law enforcement integrity division and the public sector integrity division.**

The model would see only nine agencies (21 percent of federal public sector officials and 8 percent of Commonwealth procurement), subject to a wide definition of 'corruption issues', giving rise to full oversight and investigations by the Commission. For the other 79 percent of public sector officials, and 92 percent of Commonwealth procurement and contracting, scrutiny would only flow if there was already clear evidence to suspect a criminal offence.

An effective integrity and anti-corruption agency must apply the same scope and rules to all agencies and individuals. This includes all forms of corruption and misconduct to be investigated, a consistent approach to referrals, including from the public at large, and an ability to hold public hearings.

We need a national integrity commission that is consistent, wide in scope and mandate, and that applies equally across the entire federal public sector.

The suggestion that law enforcement agencies are at greater risk of corrupt conduct than others in the public sector, including parliamentarians, is not evidence based and has been contested.

The CIC proposal indicates all forms of corruption, including abuse of office, will be investigated only in those agencies named under the jurisdiction of the law enforcement division, with priority given to serious and systemic corruption. This broad scope is welcome and must be applied to the entire federal public sector, including parliamentarians and their staff. The proposed public sector division which would only investigate criminal offences and not make findings of corruption at large, is not fit for purpose.

The TIA Blueprint for Reform: [Focus Area B](#) makes clear that an effective Commission needs wide scope and jurisdiction and must be able to investigate any conduct— criminal or non-criminal ('grey area' corruption) – which undermines confidence in the integrity of public decision-making. Prioritising serious or systemic matters is important but must be extended to any misconduct involving real or perceived conflicts of interest or undue influence.

Already, most Australian anti-corruption bodies, including ACLEI, operate with wide definitions of corruption. The CIC model will effectively wind back the current scope and definition of corruption and exclude 79 per cent of the federal public sector from



the wider approach, and 92 percent of Commonwealth procurement and contracting.

The proposed scope of the CIC would leave out a vast bulk of substantial non-criminal, “grey area” corruption risks, including defence<sup>1</sup> purchasing and most other government contracting. To be effective, a national integrity commission should be free to act on any questions relating to integrity in procurement, with or without evidence of criminal conduct, and across all federal entities and purchasing.

We need common minimum standards for all federal public officials irrespective of status or role, and private individuals and entities involved in federally funded services and projects and full capacity to receive and act on corruption information from any person.

International experience shows a wide scope is central to the ability of anti-corruption agencies to adapt quickly to changing forms of corruption, integrity risk and public concern about abuse of entrusted power.

Transparency International’s Global Corruption Barometer research shows that for Australian citizens, corruption does not only include criminal offences like theft and bribery. Rather, most citizens identify corruption as beginning with conflicts of interest, undue influence, favouritism, nepotism, cronyism and delayed forms of quid pro quo that go easily undetected or unsanctioned.

The CIC threshold of ‘reasonable suspicion’ is too high. That can only be realistically met following some form of investigation, but as proposed, that investigation could not be done by the CIC. If scrutiny is limited to cases that will support criminal charges and convictions beyond reasonable doubt, the CIC will not be effective or credible.;

#### Referrals

There must be a consistent approach to referrals. TIA cannot support the proposal which gives broad referral powers to the law enforcement division, including referrals from a staff member, whistleblowers or members of the public, but a very narrow referral mechanism to the public sector division.

The public sector division would not receive referrals from members of the public or whistleblowers. Individuals would have to approach the commission through another government agency first, and have the matter referred, based on a threshold of ‘reasonable suspicion’ that a listed criminal offence has been committed, before it could

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<sup>1</sup> The 92% of Commonwealth procurement left out of the full scope includes the biggest spender by far – the Department of Defence, whose procurement program of **\$38 billion** in 2018- 19 was two-thirds of all federal contracting. In June 2020, the Commonwealth also committed another massive **\$270 billion** to defence spending in the next 10 years.



investigate.

For an effective integrity and anti-corruption system, none of these other agencies need or should act as a gatekeeper – or filter – against corruption concerns reaching the federal integrity commission.

The commission needs full capacity to directly receive and act on corruption information from any person, something which is especially important for citizens or businesses who may not trust agencies to refer their complaint, or whistleblowers seeking confidentiality and protection from reprisal.

There is no valid reason as to why members of the public should be denied the opportunity to refer a case of corruption and misconduct to the CIC, regardless of who it is about.

The CIC must also have scope to initiate its own investigations.

Reference to parliamentarians self-referring to the CIC is unrealistic. Circumstance when a parliamentarian or member of the public service and service providers and contractors would admit they have, or may have, committed a criminal offence and would like the CIC to investigate and potentially refer them to the CDPD would be rare.

It may occur if the individual considers it a better option than the matter being exposed through public hearings, and with the added security and assurance that the CIC model would offer no findings of fact or reporting of criticism against a parliamentarian or their office, as outlined in S239 (7) *A report under this section must not include any opinion or finding that is critical (either expressly or impliedly) of, or a recommendation about:*

- (a) *a parliamentarian; or*
- (b) *the office of a parliamentarian; or*
- (c) *a staff member of the office of a parliamentarian.*

In short, scrutiny of the bulk of the public sector, including parliamentarians and their staff is restricted to an unworkable degree at every turn under this model – the threshold of reasonable suspicion, criminal matters only, a narrow referral mechanism, no scope for the public to raise concerns, no public hearings, no findings of fact or reporting of criticism.

## Public hearings

An effective national integrity commission requires full powers to hold compulsory hearings (in private or public), conduct public inquiries and make public reports, wherever this is in the public interest.

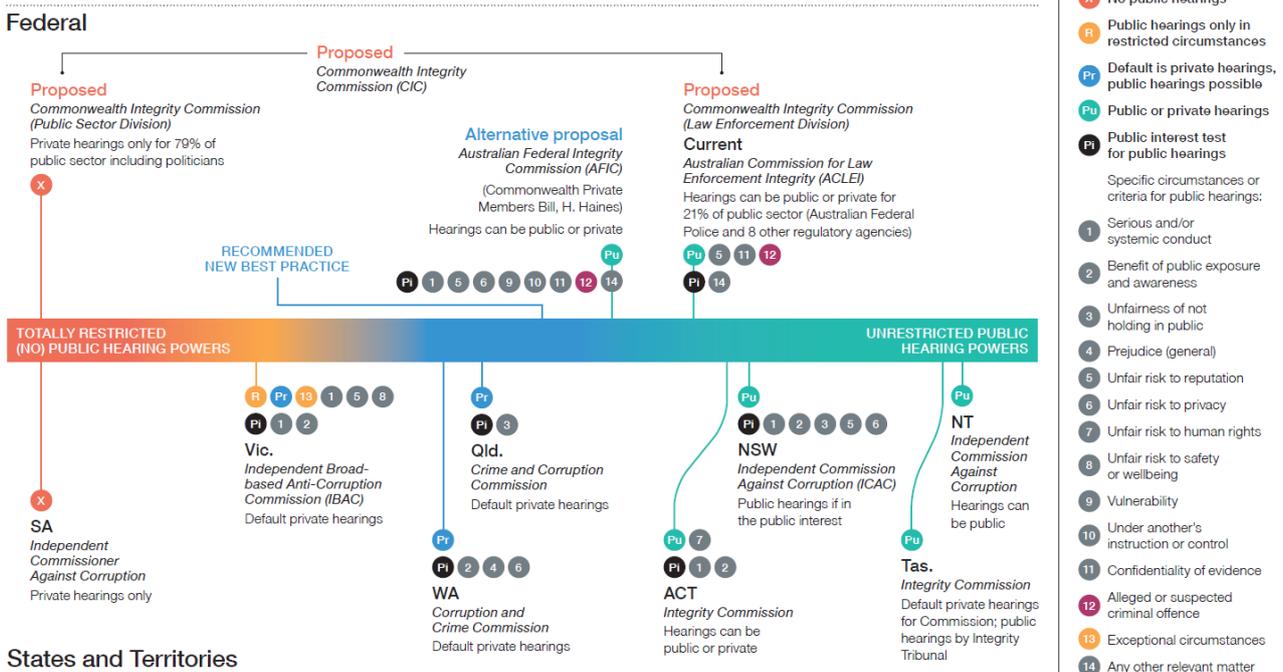


Even where public hearing powers are available, widely accepted practice<sup>2</sup> in most jurisdictions is for investigations to be conducted privately, as much as possible, with resort to the use of public hearings only where this is necessary or serves valid purposes. Given that this also applies to ACLEI under its present powers to hold public hearings, it would be a retrograde step if, as proposed, ACLEI’s replacement by the CIC means winding back these powers to hold public hearings in respect of the bulk of the agency’s operations (under the proposed public sector division).

Legislative standards for public hearings do vary widely around Australia and no current laws provide a full guide to best practice.

The TIA Blueprint for Reform: [Focus Area B](#) outlines Legislated public hearing powers of anti-corruption commissions – current, proposed and recommended. See figure 2.3, Annex 1 to this submission.

Fig 2.3: Legislated public hearing powers of anti-corruption commissions – current, proposed and recommended.



In line with the report, TIA’s position is that a strong national integrity commission requires full powers to hold compulsory hearings (in private or public), conduct public inquiries and make public reports, wherever this is in the public interest. We have carefully considered both the benefits and risks of holding public hearings<sup>3</sup>, and Royal Commissions have shown public hearings can be more effective than closed investigations.

<sup>2</sup> See the TIA Blueprint for Reform: [Focus Area B](#), pages 12-15.

<sup>3</sup> See the TIA Blueprint for Reform: [Focus Area B](#), page 13.



Clearly it is important to ensure any individual's reputation is not unfairly tarnished by a public hearing, but these risks can be managed, and the benefits, in some circumstances, outweigh the risks. The CIC model is incoherent in its suggestion that it is acceptable to confront and manage these risks in the law enforcement division, but not acceptable to confront and manage them for the bulk of the public sector and for parliamentarians.

Contrary to some beliefs, the choices are not simply the 'NSW ICAC approach' of recent years versus a 'no public hearings' approach as proposed for public sector division. It is possible to tread with care – to better balance the risks of reputational damage and the public's right to know, in the event that the Commonwealth is genuinely committed to leading with a best practice model.

TIA's position is these risks can be managed by identifying, and legislating, more consistent safeguards for the exercise of discretion to hold compulsory hearings - especially public ones – so that factors, including best practice criteria for public hearings, assessment of the feasibility, merit of prosecution and potential implications are agreed, understood and applied.

### Reporting and accountability

Comprehensive mandatory reporting requirements, for all public officials and agency heads to centrally (i.e., to an integrity and anti-corruption commission) report suspected corruption and integrity failures is a key aspect of an effective and credible commission.

Further, the reporting of what the CIC finds is integral to the integrity of the commission itself. If an adverse finding triggers a referral to the CDPP, then integrity commission findings of fact should be publicly reported, so it is clear why a decision was made to make a referral to the CDPP in the criminal matters, and the rationale for all decisions and recommendations by the Commission in non-criminal matters including the abuse of power.

The opacity of the trigger for referral of adverse findings, places the decision maker and the public at a real disadvantage. The CIC should be in a position to reveal that the referral has been made, as a result of an adverse finding. That provides some transparency, without which there would not be any report of any kind relating to the referral.

At very least there must be a public report once an inquiry is complete. The report must include findings of fact, which in itself would limit random speculation. Confidence in the credibility and legitimacy of the integrity commission is directly linked to a mandate to make findings of fact. Without this the response would likely be "the issue raises serious concerns and has been referred", effectively opening a 'black hole of referral'. As in any effective complaints mechanism it is important that there be an element of predictability.



Further, the reporting of findings will help to minimise reputational risks in circumstances where there was no adverse finding.

### Defined prevention role

A national integrity commission can only be effective if properly resourced and required to fulfil a clear prevention mandate and coordinate prevention-focused activities<sup>4</sup>.

Strong, systematic, and enforceable measures are needed for promoting and sustaining integrity and preventing corruption – in addition to broad scope to investigate and report on all forms of corruption.

The proposed CIC model does not adequately recognise or provide for corruption prevention and a pro-integrity approach.

A corruption prevention mandate addresses both situational and systemic corruption risks and has an enforceable prevention approach, rather than relying on only training, awareness and education. This would extend to all public and contracted entities to implement prevention frameworks, with active central monitoring and compliance to ensure this occurs.

### Independence and oversight

**Independence of the commission is essential to ensure it is effective, credible and has the trust of the Australian public**, given its primary function is to protect the public interest and to expose and investigate corruption in all its forms.

The establishment of a Joint Parliamentary Committee for the CIC is an important oversight mechanism. However, the draft CIC appears to limit the Commission's access to and use of certified information at various points in time, including during investigations, hearings, and when the Commission issues reports.

Under Section 270, the Attorney-General may issue a certificate declaring disclosure of certain information to be contrary to the public interest. Certificates may be issued on very broad grounds, including if the information would harm Australia's defence, prejudice relations between the Commonwealth and states and territories, harm national security, prejudice a fair trial or the impartial adjudication of a matter, disclose the deliberations or decisions of Cabinet or one of its committees.

Independence of the Commission is compromised if the Attorney General can determine what information they require to perform their functions. Similarly, parliamentarians at risk of

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<sup>4</sup> See the TIA Blueprint for Reform: [Focus Area B](#), pages 10 -11, for the essential elements of a cohesive corruption prevention framework.



investigation could relatively easily link their activities to Cabinet or committee discussions and seek to have a certificate issued, and investigation prevented.

The better approach is to 'up skill' and resource the oversight body to handle information of the highest classification the agencies subject to oversight typically deal in, rather than letting a minister intervene to block the flow of individual pieces of information.

## CONCLUSION

**Transparency International Australia is pleased to offer its evidence-based expertise and knowledge to the design of an effective and credible national integrity commission.**

This is a landmark opportunity for Australia to ensure the CIC makes a substantial and positive impact, nationally and globally, and is established to protect the public interest as its primary and overriding function.

I would welcome the opportunity, as always, to discuss our position with you.

Yours sincerely.

Serena Lillywhite

CEO, Transparency International Australia



# ANNEX 1

- KEY TO PUBLIC HEARING POWERS**
- X** No public hearings
  - R** Public hearings only in restricted circumstances
  - Pr** Default is private hearings, public hearings possible
  - Pu** Public or private hearings
  - Pi** Public interest test for public hearings
- Specific circumstances or criteria for public hearings:
- 1 Serious and/or systemic conduct
  - 2 Benefit of public exposure and awareness
  - 3 Unfairness of not holding in public
  - 4 Prejudice (general)
  - 5 Unfair risk to reputation
  - 6 Unfair risk to privacy
  - 7 Unfair risk to human rights
  - 8 Unfair risk to safety or wellbeing
  - 9 Vulnerability
  - 10 Under another's instruction or control
  - 11 Confidentiality of evidence
  - 12 Alleged or suspected criminal offence
  - 13 Exceptional circumstances
  - 14 Any other relevant matter

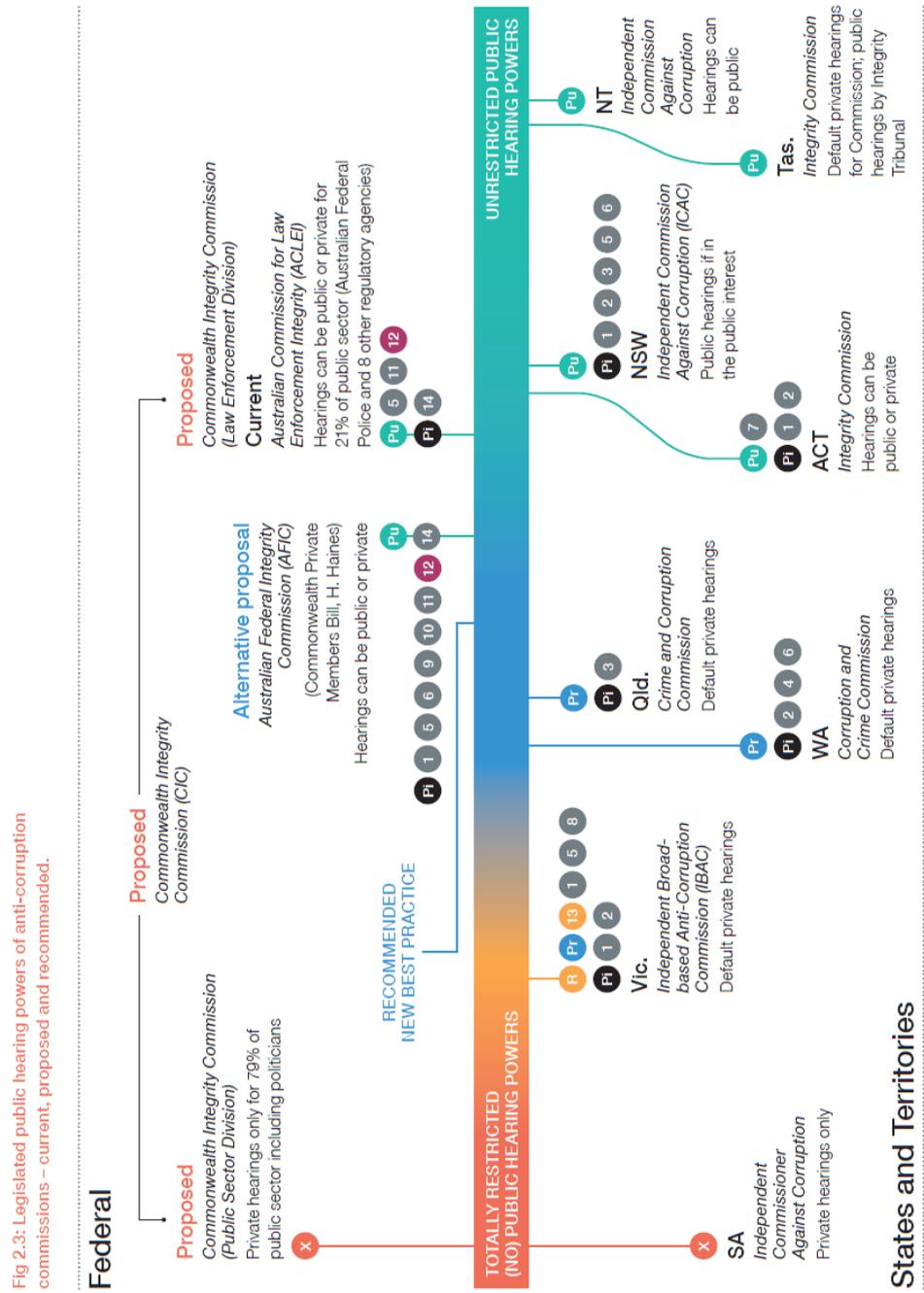


Fig 2.3: Legislated public hearing powers of anti-corruption commissions – current, proposed and recommended.

## States and Territories