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THE AUSTRALIAN SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

Inquiry into the National Integrity Commission Bill 2018 [Provisions], the National Integrity (Parliamentary Standards) Bill 2018 [Provisions], and the National Integrity Commission Bill 2018 (No. 2)

Submission of the National Integrity Committee of the Australia Institute on the National Integrity Bills 2018

This submission is made on behalf of the National Integrity Committee (the Integrity Committee). We are an independent group of retired judges who have been involved over the last 18 months in advocating the need for a Federal Integrity Commission. The Committee was formed with the assistance of The Australia Institute. However, we remain an entirely independent body acting in the public interest on a pro bono basis. Our representations have been made on a bipartisan level to the Coalition, the ALP and latterly to the Crossbench.

In this submission to the Legal and Constitutional Affairs Committee, we do not deal with the Government's Consultation Paper that is concerned with the proposed Commonwealth Integrity Commission (the CIC) as that Consultation Paper is not before the Senate. We deal separately with the Government's proposal for the establishment of the CIC in a separate submission made to the Government in that regard.

The Commission we envisage would fill a serious gap in Australia's capacity to minimise corruption. It would investigate with rigour and fairness, and expose without fear or favour, behaviour that deliberately impairs, or could impair, the honesty, impartiality or efficacy of official conduct wherever it occurs in the federal sphere. The case for such a commission is compelling, and much of our advocacy has been focussed accordingly. However, an ineffective commission is worse than no commission at all. We have therefore also been deeply involved in establishing the basic principles necessary to ensure that, once established, the commission will be successful and effective. In our opinion, those principles are as follows:

1. Both its independence and its financial and structural capacity (including the provision of skilled and experience personnel) to fulfil its responsibilities must be guaranteed.
2. Those responsibilities must be expressed in terms which are sufficiently wide to encompass all forms of serious or systemic corruption within or affecting any element of the public sector, including the Parliament, the executive and the judiciary. The Commission must have a broad jurisdiction. We submit that the corruption the Commission should be entitled to investigate is that which is set out in the definition of 'corrupt conduct' contained in Appendix A hereto, if the Commission deems such corrupt conduct to be serious or systemic.
3. The Commission must be granted the investigative powers of a Royal Commission to undertake its work, to be executed at the discretion of the Commissioner. These powers would include the power to initiate its own investigations, and the power to make arrests, to conduct searches, and to gather and hold evidence.

4. The Commission must have the power to hold a public inquiry provided it is satisfied that opening the inquiry to the public will make the investigation to which the inquiry relates more effective, and would be in the public interest. Subject to this proviso, the Integrity Committee notes that the power to hold public hearings is crucial. It is now generally accepted that it is difficult to uncover corruption without the aid of public hearings. Of course public hearings should be held sparingly and only where they are demanded by the public interest. The Integrity Committee has put the argument for public hearings in a paper entitled *Public hearings key to investigating and exposing corruption*.

5. The Commission should be governed by one Chief Commissioner appointed by the Governor–General and one or more Deputy Commissioners, appointed by Governor–General or the Minister on the recommendation of a bipartisan Parliamentary committee. (The Bill refers to Assistant Commissioners. This is an ambiguous description. For example, in NSW an Assistant Commissioner is a person appointed on a temporary basis to deal with a particular investigation in circumstances where the Commissioner is unable to act because of illness, conflict or apprehension of bias. In NSW the deputies are simply referred to as 'Commissioners'. For the purposes of our submission, we shall refer to 'a Chief Commissioner and one or more Deputy Commissioners'. In so doing, we are referring to full-time commissioners and not to those appointed on a temporary basis. Whatever phrase is ultimately selected in the legislation, it needs to be clearly defined to avoid any ambiguity of the kind we have mentioned.) The Chief Commissioner and each Deputy Commissioner must be a judge or a retired judge, or be qualified for appointment as a judge. However, just as appointments to judicial office must in reality meet requirements of experience, learning and character which extend well beyond the formal requirements for that office, so Commissioner appointees must be chosen only from those with the special qualities necessary if they are to meet the pressures of an office which is uniquely exposed to especially difficult challenges. The Bill should explicitly add a provision to meet this point. In addition, the preferred position of the Integrity Committee is that he or she be appointed for a fixed non-renewable five year term; the somewhat different provisions of the *National Integrity Commission Bill* (the Bill) are discussed later in this submission. It is essential that the roles and powers of the Deputy Commissioners be carefully considered. Such consideration is beyond the scope of this submission; but the Integrity Committee should not be taken as endorsing the provisions of the Bill in this respect.

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

7. The Commission must be subject to the oversight necessary to ensure that it always acts with absolute impartiality and fairness, and within its charter.

In the opinion of the Integrity Committee, the Commission – and the other governance arrangements – sought to be established by the Bill should be judged against the Bill's conformity with these principles. This submission reflects the attempt of the Integrity Committee to make that judgment within the limited time available before 22 January 2019, when submissions are due.

The objects of the Bill

Before turning to an examination of the extent to which the principles outlined above are reflected in the provisions of the Bill, it is appropriate to refer briefly to its objects. These are set out in cl.4, beginning with: *to promote and improve the integrity and accountability of Commonwealth public administration*. In the opinion of the Integrity Committee, however, the first object should be expressed with a force which is commensurate with the importance which the Commission is to assume in Australian public life. For this reason the Integrity Committee submits that the first and most important object of any national anti-corruption legislation ought to be: *to facilitate the detection, exposure and investigation of any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration.* The Integrity Committee therefore submits that the Bill be amended to include this object as the first of its objects. The remaining objects as set out in the clause are, in the opinion of the Integrity Committee, appropriate.

The independence of the Commission

The independence of the Commission is vital. It can only be secured if certain conditions are met and, having been met, are honoured. First, those with the rank of Commissioner or Deputy Commissioner must be persons of such quality and reputation as would enable them to resist the pressure, which they will surely encounter, to act otherwise than in accordance with their duty. Secondly, they must have a limited period of tenure of office, with no prospect of re-appointment following the expiration of that period, but with security of tenure until such expiration. Thirdly, their remuneration must not be diminished following their appointment. Fourthly, the Commission must be guaranteed sufficient funding, and adequately experienced and skilled staff, to enable the well-managed exercise of all its functions. Fifthly, there must be no interference with the Commission's operational or administrative arrangements other than by the courts in accordance with law.

If the members of the Commission are to meet the selection criteria of merit and reputation, their appointments must have bipartisan support. Clause 187 of the Bill provides for the appointment of the Commissioner. This is to be made by the Governor–General, and the appointee must be a judge or former judge of the Federal Court or a State or Territory Supreme Court, or a person qualified to hold such an office. The clause also provides for prospective appointees to be referred to the (bi-partisan) Parliamentary Joint Committee on the Australian National Integrity Commission – an issue to which this submission will return. The Committee may, following such reference, veto a proposed appointment. Subject to the important qualification expressed in principle 5 above, it is the opinion of the Integrity Committee that cl.187 facilitates the appointment, with bi-partisan support, of an appropriately qualified Commissioner.

A Deputy Commissioner is to be appointed: cl.206. He or she may be removed from office: cl.212. These two provisions mirror, but of necessity do not replicate in every detail, those applicable to the Commissioner. An important difference is that the Minister must consult the Commissioner before a Deputy Commissioner is appointed.

In the opinion of the Integrity Committee, the clauses of the Bill which cover the Commissioner's term of appointment (cl.188) and removal from office (cl.193) are consistent with the principle that the independence of the Commission must be established from the outset and preserved thereafter. Clause 188 provides that the National Integrity Commissioner's term shall be of five years, with the

possibility of no more than one five year extension. Clause 193 provides that the Governor-General *may* remove the Commissioner if each House of Parliament, in the same session, prays for such removal on the grounds of misbehaviour or mental or physical incapacity. By contrast, the Governor-General *must* remove the Commissioner if he or she becomes bankrupt, or seeks other financial accommodation under the bankruptcy laws, or is absent without leave for a prescribed period, or engages in outside employment without the Minister's approval, or fails without reasonable excuse to make certain prescribed disclosures. Subjective assessment of misbehaviour or incapacity is therefore the preserve of Parliament, while the power of removal for other cause is limited to objectively ascertainable circumstances; and these, once objectively established, would in the opinion of the Integrity Committee warrant removal.

In the opinion of the Integrity Committee, the independence of the Commission would be further enhanced by the appointment of at least two Deputy Commissioners with the same attributes of character and qualifications as the Commissioner and who with the Commissioner would be the members of the senior management team. In the context of the Commission's independence, the particular benefit of having at least three persons of commissioner rank is that all could be involved in the decision-making process when politically controversial decisions had to be made. Having Deputy Commissioners with particular expertise and responsibilities would also be a benefit. Against that, an experienced and wise Chief Commissioner must not be inhibited in the making of correct decisions by the intervention of less experienced and perhaps less wise deputies. The Integrity Committee has yet to fully consider the best means striking the right balance. However, as presently advised we favour a situation where the Chief Commissioner is required to consult with his deputies on matters of importance but, after so doing, the Chief Commissioner is to make the final determination. The Chief Commissioner's decision in the event of any inconsistent view is to prevail.

The Bill does not preclude the diminution of the Commissioner's, or of any Deputy Commissioner's, remuneration following appointment. This is a defect in the Bill which in the opinion of the Integrity Committee must be rectified.

The financial and structural capacity to fulfil the Commission's responsibilities.

Independence in the sense discussed above is essential but not sufficient. He who pays the piper will seek, but ought not to have the capacity, to choose the pitch and power of the piper's integrity tune. Capacity gives rise to temptation, and temptation is often irresistible. Moral and ethical barriers present no insurmountable impediment to corrupt politicians and their powerful friends who fear investigation. Much more than a call to ethics and morality is required if politicians and those close to them wish to curtail or prevent a National Integrity Commission investigation of their behaviour. Depriving the Commission of the funds to conduct adequate investigations is a tempting means of avoiding embarrassment, or worse. Enacting legislation which confers appropriate responsibilities, and the legal power to discharge them, is an exercise in futility (and, it may be, cynical public relations) if the agency in question is deprived of the funds necessary to meet those responsibilities.

In the opinion of the Integrity Committee, the legislation ought to provide that the Commissioner have the right to address Parliament about the financial needs of the Commission. Such an opportunity should be made available at least annually, and at an appropriate time before the Treasurer's federal budget speech. By like reasoning, the government should be required to give a public explanation for any failure to meet the Commission's request for funds. The Commission should then be provided with a one-line budget sufficient to enable it to discharge to the full all its statutory functions.

The responsibilities of the Commission

The Commission's responsibilities will in a large part be determined by the definition of the corruption which it will be required to combat. The legislative definition of 'corruption' is therefore central to the efficacy of the entire anti-corruption regime which the Bill seeks to presage.

The Integrity Committee is of the opinion that the definition of corruption should include any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official. As is submitted above, the definition of corrupt conduct should be that set out in Appendix A.

The powers of the Commission

The National Integrity Commissioner's powers to conduct investigations and public inquiries are contained in Part 6 of the Bill. By Division 1 of this part, the Commission may require the giving of information or the production of a document or thing. By Division 2, the Commissioner may hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry. Division 3 deals with applications for, and the issue of, search warrants. Powers of arrest are the subject of Division 4. The provisions of Part 6 are detailed and beyond the scope of this submission. But their importance is such that close attention should be given to them before they become law.

The findings of the Commission

A majority of the Integrity Committee came to the preliminary view that it would be inappropriate for an integrity commission to reach final conclusions about the existence of corruption. (There can of course be no power to make findings of criminality).

The reasoning in support of this approach includes the following:

a) Such a commission is a branch of the Executive, and is not a court.

b) Its proceedings are inquisitorial rather than adversarial. At commission level, the standard of proof never reaches that which applies in criminal proceedings: beyond reasonable doubt. Rather, it operates on the civil standard: the balance of probabilities.

c) For the very reason that serious and systemic corruption is seriously inimical to the proper functioning of society, findings of corruption where a criminal offence is involved must be made only after very careful and independent assessment of the evidence, and by a tribunal such as a court which is independent of the Commission.

d) And, of particular importance to politicians who are wary of an integrity commission over reaching itself, an integrity commission without the power to make findings of corruption will of necessity have a commensurately limited capacity to affect reputations adversely.

By contrast, the reasoning behind the minority view on this point includes the following:

a) The benefit of the ability to make corrupt conduct findings is that the public know precisely what has been found as do those who have been found to have acted corruptly. Such a finding is likely to have maximum and immediate impact as a deterrent and guide to those minded to act in a similar manner.

b) Conversely, a finding that a person has not been guilty of corrupt conduct will firmly protect reputation.

c) In a complex investigation, a lengthy statement of detailed factual findings may leave the public uncertain as to what precisely the ultimate findings demonstrate. A main point of a public hearing will be lost.

d) Experience has shown that prosecutors move slowly and cautiously in relation to the launch of proposed criminal proceedings. The community is entitled to know the outcome of a corruption investigation expeditiously.

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

The oversight of the Commission

Major corruption is today usually carried out by rich and powerful persons and groups from various parts of the world who have all the means now available, especially those involving the latest electronic technology and means of communication, to conceal their nefarious conduct. Thus, if an integrity commission is successfully to combat corruption it must have very wide powers. It cannot of itself guarantee that those powers will never be exercised improperly, if for no other reason than that prosecutorial judgments are sometimes clouded by a too willing suspension of belief in innocence. The appointment of suitably qualified, wise and careful Commissioners and Deputy Commissioners should ensure that that trap is avoided. The Integrity Committee is nevertheless of the opinion that the proposed National Integrity Commission must be subjected to appropriate scrutiny.

The Bill tackles this necessary element in any properly constructed national anti-corruption scheme, in cl.244 by providing for the creation of the Parliamentary Joint Committee on the Australian National Integrity Commission. Each House is to provide six members of the Committee. Of these, five must be members of the government, and five members of the opposition, while the remaining two must be from neither the government nor opposition. This is impeccably even-handed, provided that independents continue to be elected. The Bill should provide for the possibility that this may not be so.

The Committee is required by cl.246 of the Bill to consider, among other things, the proposed recommendation for an appointment to the position of Commissioner; to monitor and review the Commissioner's performance of national integrity commissioner functions; and to examine the Commission's annual reports.

In addition to the supervisory role of the Parliamentary Joint Committee, the Bill provides by cl.253 for the appointment of an independent officer of the Parliament to be known as the Parliamentary Inspector of the National Integrity Commission. It is the Inspector's duty, when required, to inspect the records of the Commission and other relevant documentation for the purpose of forming an opinion whether the Commission has exercised power in an appropriate way; whether the required authorisations for the exercise of power have been obtained; and whether practice and procedural guidelines are adequate and, if adequate, complied with. The Inspector is also required to investigate complaints made against, or concerns expressed about, the conduct or activities of the Commission: cl.254.

The Inspector should have no power to interfere in any way with decisions to investigate, to hold any inquiry, whether private or public, or any executive decisions made in relation to ongoing investigations.

In the opinion of the Integrity Committee, these provisions are an important and appropriate element in the overall national integrity landscape.

Some particular points

As mentioned above, the necessity for the Commission to have the power to hold public hearings has been explained in a paper published by the Integrity Committee and entitled *Public hearings key to investigating and exposing corruption.* The arguments there expounded are well understood. The Bill contemplates that the Commission should have this power (cl.81); but before convening a public hearing, cl.81(4) requires that the Commission have regard to four specified matters, together with any other "relevant matter": cl.81(4)(e).

The form of cl.81(4) will make it possible to challenge in court the Commission's decision to convene a public hearing. In order to meet any such challenge, the Commission will be obliged to expose its hand in order to demonstrate the seriousness of the corruption issue and so as to enable a comparison between that seriousness and the risk that reputations may be damaged. Not only that, but the challenge will result in delay, during which a person under investigation for corruption will have the opportunity to destroy or conceal evidence. In the submission of the Integrity Committee, therefore, cl.81(4) must be re-drafted to avoid this difficulty – one which has bedevilled other anti-corruption investigations in Australia, to the considerable detriment of the aim of bringing the corrupt to justice.

The discovery, exposure and eradication of corruption are of the highest importance; and corruption, by its very nature, is hidden and difficult to detect. In these circumstances, the abrogation of legal professional privilege is eminently justifiable as providing invaluable assistance in obtaining information critical to the discovery and exposure of corruption. The Bill, however, permits the retention of this privilege (cl.78 and cl.99), since even if the Commission rejects a claim for it, a person affected may appeal to the court. By contrast, the ICAC legislation has abolished legal professional privilege, save only where the claim is made for the purpose of providing or receiving legal professional services in relation to the appearance, or reasonably anticipated appearance, of a person at a compulsory examination or public inquiry before the Commission. The experience of ICAC is that the abrogation of the privilege has on many occasions proved to be essential to a successful investigation.

The establishment of an effective National Integrity Commission necessarily carries with it the ability to investigate, in appropriate cases, the activities of virtually all Commonwealth public servants and officials, including parliamentarians. The corrupt among those being investigated will seek shelter wherever they can find it, including under claims of public interest immunity, or parliamentary privilege, or claims of commercial confidentiality. Unrestricted access to such shelters would prevent corruption being exposed.

To an extent, the Bill avoids this pitfall. It provides, by cl.102(5), a limited abrogation of the public interest immunity. But the doctrine has a much wider application. Claims of public interest immunity are made frequently in relation to cabinet deliberations, negotiations between governments, the activities of organisations such as ASIO and ASIS, covert police operations, and police informers. The Bill does not presently cover any of these potential exclusions from disclosure. Depending upon the circumstances, these exclusions may in the particular case be justified. Equally, to the extent that they are made in order to conceal corrupt conduct, they may not. If the Commission is to follow the trail of corruption wherever it may lead, it must have the ability to test those claims. The Integrity Committee submits that claims for public immunity privilege or parliamentary privilege, or of

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

There is doubt as to the ability of Commonwealth legislation to enable appropriate investigation of Federal judges. Clearly, Federal judges and their staff should not be immune from investigation in appropriate cases. There already exists the *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act 2012,* which makes provision for a commission to investigate a Federal judge, and to do so by public hearings. But there should be legislation, either by establishment of a Commonwealth Judicial Commission, or under this Bill, to enable preliminary investigation of an allegation concerning a judge or the judge's staff, which could decide whether there was sufficient evidence to justify proceeding under the *Judicial Misbehaviour and Incapacity (Parliamentary Commission) Act*.

The Bill could, but presently does not, deal with the authorisation of telephone intercepts and the like. Any such legislation should make appropriate provision for the existence of a Public Interest Monitor, to protect the interest of those whose communications may be affected by such legislation.

Conclusion

The National Integrity Committee has published a series of briefing papers regarding the design of a National Integrity Commission. These can be found at http://tai.org.au/content/national-integrity-commission-papers

If you require any further information or would like to clarify any of the issues raised in this submission please contact , at The Australia Institute at or .

Yours sincerely,

The Hon Anthony Whealy QC
The Hon David Ipp AO QC
The Hon David Harper AM QC
The Hon Stephen Charles AO QC
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National Integrity Committee

Attachments

Appendix A: Definition of Corrupt Conduct

Appendix A

National Integrity Committee – the definition of corrupt conduct

General nature of corrupt conduct:

1) Corrupt conduct is conduct of the kind set out in subsections 2) and 3) below, provided that such conduct would, if proven in criminal proceedings, be a criminal offence, a disciplinary offence, reasonable grounds for dismissal, or a breach of an applicable code of conduct.

2) Subject to subsection 1), corrupt conduct is:

    a. Any conduct of any person that has the potential to involve or induce the placing by a public official of private interests over the public good in public office; or

    b. Any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official; or

    c. any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration; or

    d. any conduct of a public official or former public official that constitutes or involves a breach of public trust; or

    e. any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

3) Without limiting subsection 2), and subject to subsection 1), conduct that involves any of the following is capable of being corrupt conduct:

    a. official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition);

    b. bribery;

    c. blackmail;

    d. obtaining or offering secret commissions;

    e. theft;

    f. perverting the course of justice;

    g. embezzlement;

    h. election bribery;

    i. breaches of lobbying codes of conduct or electoral funding laws;

    j. election fraud;

    k. tax evasion;

    l. revenue evasion;

    m. illegal drug dealings;

    n. illegal gambling;

o. obtaining financial benefit by vice engaged in by others;

p. bankruptcy and company violations;

q. collusive tendering;

r. impropriety in government procurement and tender processes;

s. fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources;

t. dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage;

u. defrauding the public revenue;

v. fraudulently obtaining or retaining employment or appointment as a public official.

4) Conduct may amount to corrupt conduct under subsections 2) or 3) even though it occurred before the commencement of that subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.