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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
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and

A/g Assistant Secretary Institutional Integrity Taskforce
Attorney-General's Department

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TRANSPARENCY INTERNATIONAL AUSTRALIA SUBMISSION TO:

1) THE SENATE LEGAL and CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO:

National Integrity Commission Bill 2018, and the National Integrity (Parliamentary Standards) Bill 2018.

And

2) THE ATTORNEY-GENERAL'S DEPARTMENT INSTITUTIONAL INTEGRITY TASKFORCE

Proposed Model for the establishment of a Commonwealth Integrity Commission

INTRODUCTION

Dear Committee Secretary and A/g Assistant Secretary Institutional Integrity Taskforce,

Transparency International Australia (TIA) is pleased to submit comments to both the Committee's Inquiry into the National Integrity Commission (NIC) Bill 2018, National Integrity Commission Bill 2018 (No. 2) and the provisions of the National Integrity (Parliamentary

Standards) Bill 2018, introduced to Parliament on the 29 November and 3 December respectively, and the Attorney-General's Department proposed model for a Commonwealth Integrity Commission (CIC) announced on the 13 December 2018. While we note the latter will not be dealt with by The Senate, there is merit in all parties considering this issue in totality.

TIA has welcomed the opportunity to engage with all parties and the crossbenchers to strengthen Australia's integrity and anti-corruption framework. The current multi-agency approach is inadequate and fails to provide a comprehensive and coordinated approach to preventing, detecting and investigating corruption, and to prevent, manage and resolve parliamentary integrity issues.

TIA was the first public interest group to advocate for a broad-based federal anti-corruption body, following the assessment of the first National Integrity System Assessment in 2005.

TIA's position remains that an independent, well-resourced broad-based federal anti-corruption agency is needed, to ensure a comprehensive approach to corruption risks beyond the criminal investigation system, and to ensure prevention, coordination and stronger parliamentary integrity.

Our work has included:

- *A National Integrity Systems Assessment* (December 2005)
- *A Ten-Point Integrity Plan for the Australian Government* (May 2012)
- *Best Practice National Integrity System Structures, Systems and Procedures* (August 2012)
- *Submission to the Senate Select Committee on a National Integrity Commission* (April 2016)
- *Submission to the Senate Select Committee on a National Integrity Commission (April 2017)*
- *A National Integrity Commission – Options for Australia* (August 2018)

TIA has continued to actively and constructively engage with all parties.

Trust and confidence in the integrity of Parliament, the public sector and the system of government, is at an all-time low. This is recognised by all parties and was again confirmed by our most recent Global Corruption Barometer Survey.

Now is the time, without delay and political wrangling, for the Parliament to come together and create a well-resourced, nationally coordinated pro-integrity framework, with an emphasis on prevention alongside strong investigative powers.

TIA supports the submission of Griffith University and its academic partners, which provides a strong evidence base from the Strengthening Australia's National Integrity System project, using Transparency International's methodology and in which TIA is a lead partner.

SUMMARY

TIA supports the package of bills introduced by Cathy McGowan AO, MP on behalf of the crossbenchers, namely the National Integrity Commission Bill 2018 and the National Integrity (Parliamentary Standards) Bill 2018.

The NIC Bills provide a more comprehensive and coordinated approach to addressing issues of parliamentary integrity and preventing, detecting, investigating and disclosing corruption than the proposed Commonwealth Integrity Commission (CIC) model.

They provide a model that better meets public expectations and is better placed to help restore trust and confidence in government, than any other previous or current Commonwealth Bills, commitments or proposals, including the CIC proposal.

It provides an integrity and anti-corruption framework, specifically designed to meet the needs of the Commonwealth, and to address existing gaps.

It provides a pro-integrity model with emphasis on prevention.

Following a considered examination of the two Bills and the CIC model, TIA draws your attention to the following key points:

Scope of an Integrity Commission

The Commission must be independent, and well-resourced. It must be granted the investigative powers of a Royal Commission, and 'own motion' powers of investigation. The Commission must have a broad jurisdiction, sufficient to cover all forms of serious or systemic corruption within or affecting any part of the public sector, the Parliament, parliamentarians and their staff, the executive and the judiciary.

The Commission must have the ability to receive complaints from the public, and to use its discretion as to how best to proceed.

The Commission needs to ensure there is adequate protection for whistleblowers and that a whistleblower protection authority is established as part of a coordinated and comprehensive integrity framework.

Public Hearings

The Commission must have discretionary and coercive powers to hold public hearings if sufficient evidence is not obtained, if a prosecution becomes unlikely, if it is in the public interest, and if it will be more efficient, to uncover what occurred.

The Commission must have the ability to make findings of fact and to make those public.

Public hearings should provide the same treatment of legal professional privilege and rights against self-incrimination as exist in ICAC/IBAC.

Definition of Corrupt Conduct

The proposals show that the Commonwealth is well placed to develop a new, simpler definition of corrupt conduct for the purposes of defining the jurisdiction. The NIC Bill provides a very broad definition, based on the cumbersome NSW precedent, including breach of any code of conduct (however minor) by any public official, if involving partial or dishonest conduct or favouritism. This is to be preferred over a limitation simply to criminal offences, even an expanded range, as proposed in the CIC. However, a better approach again would be a simpler version of the NSW and Queensland definitions which make clearer which forms of either criminal or non-criminal official misconduct (and associated non-official behaviour by private sector actors) fall within jurisdiction for prevention, investigation, findings of fact and recommendations.

Resources

A poorly designed and inadequately funded integrity framework will not meet community expectations or best practice. ACLEI, AUSTRAC and other enforcement agencies have repeatedly flagged resource constraints as a barrier to some aspects of their work. The National Integrity Commission- Options for Australia paper sets out a full set of reforms including investigation, prevention and coordination functions, oversight mechanisms, parliamentary standards and a whistleblower protection authority. This is estimated to cost the Commonwealth additional expenditure of $93.7 million per year.

The comprehensive NIC Bills, which prioritise prevention and coordination alongside investigation of corrupt conduct, incorporate these costings.

The CIC model, which has a narrow scope, has estimated the CIC will cost approximately $100-$125 million over the forward estimates, or an operating budget of approximately $30 million per year.

By comparison, The Australian Labour Party previously indicated they would, if elected, allocate $15 million per year. This is clearly inadequate, and only marginally more than the current ACLEI annual budget of $11.5 million.

TIA recommends both the Senate Committee and the Attorney-General's Department give significant consideration to ensuring adequate resources for an independent anti-corruption and integrity framework.

What's missing from what has been proposed?

Lobbying, post-separation of employment, political finance, funding, donations and campaign regulation.

An effective national integrity framework must address the current weaknesses with regard to lobbying, revolving doors and political donations.

The NIC Bills are superior as they explicitly provide for further inquiries and reviews to address these weaknesses. However, to design and implement the best anti-corruption and integrity framework, these issues must be addressed and incorporated in the design of any framework, sooner rather than later.

There is a need to revise and update the Australian Government Lobbying Code of Conduct and policies, rules and standards for the post-separation employment (revolving doors) of Commonwealth public officials to meet national and international best practice.

The administration and enforcement of the Lobbying Code of Conduct, Register of Lobbyists and policies, rules and standards for the post-separation employment of Commonwealth public officials be given a statutory basis.

There is a need to revise and update Commonwealth legislation and enforcement for transparency, integrity and accountability in political campaign finance and campaign regulation to meet national and international best practice.

There is a need for enhanced administration and enforcement of Commonwealth rules and processes for political campaign finance and campaign regulation.

The current inadequate regulation of political donations and lobbyists, the movement of staff between government and industry (revolving doors), is resulting in undue and inappropriate influence, and runs the risk of political and policy capture.

This must be addressed if the community is to have confidence in an integrity and anti-corruption framework, and to provide assurance that parliamentary standards and codes of conduct will cover these issues.

TRANSPARENCY INTERNATIONAL AUSTRALIA

TIA is the national chapter of Transparency International (TI), the global coalition against corruption, with a presence in over 100 countries. TIA fully supports TI's Vision, Objectives and Guiding Principles and Mission and Strategy.

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 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.

TIA is registered with the Australian Charities and Not-for-profits Commission (ACNC).

TIA POSITION

TIA supports the package of bills introduced by Cathy McGowan AO, MP on behalf of the crossbenchers, namely the National Integrity Commission Bill 2018 and the National Integrity (Parliamentary Standards) Bill 2018. Of any proposals or commitments to date, they go closest to implementing option 3 of the TIA and Griffith University options paper, *A National Integrity Commission- Options for Australia,* from the project Strengthening Australia's National Integrity System: Priorities for Reform.

The bills reflect this evaluation[1] that a custom-built National Integrity Commission is:

- the best approach and will be most effective in preserving or maximising key existing strengths and attributes of the Commonwealth integrity system;
- the best approach to address major gaps and weaknesses in the Commonwealth integrity system; and
- best placed to address the key priorities identified by the Senate Select Committee on a National Integrity Commission.

The NIC Bills provide a more comprehensive and coordinated approach to addressing issues of parliamentary integrity and preventing, detecting, investigating and disclosing corruption than the Commonwealth Integrity Commission (CIC) model as currently proposed by the Attorney-General, The Hon. Christian Porter MP.

We reach this conclusion after considering the strengths and weaknesses in both. This submission assesses those strengths and weaknesses with the intent of ensuring Australia establishes the very best, and adequately resourced, anti-corruption and integrity framework.

[1] *A National Integrity Commission- Options for Australia* (August 2018), see Tables 5-7, p.62-63

A poorly designed and inadequately funded integrity framework will not meet community expectations or best practice. ACLEI, AUSTRAC and other enforcement agencies have repeatedly flagged resource constraints as a barrier to some aspects of their work. The National Integrity Commission- Options for Australia paper sets out a full set of reforms including investigation, prevention and coordination functions, oversight mechanisms, parliamentary standards and a whistleblower protection authority.

The comprehensive NIC Bills, which prioritise prevention and coordination alongside investigation of corrupt conduct, is estimated to cost the Commonwealth additional expenditure of $93.7 million per year.

The CIC model, which has a narrow scope, has estimated the CIC will cost approximately $100-$125 million over the forward estimates, or an operating budget of approximately $30 million per year.

By comparison, The Australian Labour Party, previously indicated they would, if elected, allocate $15 million per year. This is clearly inadequate, and only marginally more than the current ACLEI annual budget of $11.5 million.

National Integrity Commission Bill 2018

The NIC Bills provide a comprehensive and coordinated approach to addressing issues of parliamentary integrity and preventing, detecting, investigating and disclosing corruption.

The model goes a long way to meeting public expectations and will help to restore trust and confidence in government. It provides a pro-integrity model with emphasis on prevention alongside investigation.

The Bills, while not all encompassing, are more comprehensive than any other previous or current Commonwealth Bills, commitments or proposals, including the CIC proposal.

The key strengths and weaknesses are outlined below.

Strengths

- Comprehensive and coordinated approach to preventing, detecting, and investigating corruption through the establishment of an independent, broad-based anti-corruption commission at a national level
- Strong investigative powers – the power of a royal commission to investigate corruption issues involving or affecting the Federal Government
- Models the investigative functions of the Australian Commission for Law Enforcement Integrity (ACLEI), but needs to go further to determine when public hearings are appropriate

- Fundamental powers to hold public inquiry and public hearings when in the public interest and to make findings of fact
- Referrals to the NIC can be made by anybody who identifies a corruption issue and provides the commission with discretion to manage referrals
- Mandatory reporting requirement for public officials and Commonwealth agency heads
- Commissioner is empowered to make findings of fact to then be referred to the Director of Public Prosecution, or relevant enforcement agency for consideration
- Empowered to make findings of fact related to non-criminal corruption issues, prevention and integrity, including by way of public reporting. Disclosure is essential to regain the public's trust and confidence and to demonstrate a pro-integrity agenda
- Strong coordination function which will enable collaboration with existing Commonwealth and state-based integrity and law enforcement agencies, with provisions for referrals, joint investigations and joint projects
- Corruption prevention by tackling the functions of different agencies, not just the institutions, and thereby addressing cross-jurisdictional challenges including responsible business conduct
- A pro-integrity approach with a strong and embedded corruption prevention program. Specifically, it will lead the development of a rolling national integrity and anti-corruption action plan, with wide participation and coordination across all sectors and jurisdictions
- Establishment of a Whistleblower Protection Commissioner for the Commonwealth public sector and Commonwealth regulated private and not-for-profit agencies
- Strong accountability mechanisms to monitor the activities and administration of the NIC through the establishment of the Parliamentary Joint Committee on the Australian National Integrity Commission, and the Parliamentary Inspector of the Australian National Integrity Commission. This will help to ensure that it always acts with absolute impartiality and fairness, and within its charter; and
- Complements and supports Australia's international commitments and obligations, including the UN Convention against Corruption, the OECD Convention on Foreign Bribery, the OECD Guidelines for Multinational Enterprises and the Open Government Partnership.

Weaknesses

- The NIC Bill provides a very broad definition, based on the cumbersome NSW precedent, including breach of any code of conduct (however minor) by any public official, if involving partial or dishonest conduct or favouritism. This is to be preferred over a limitation simply to criminal offences, even an expanded range, as proposed in the CIC. However, a better approach again would be a simpler version of the NSW and Queensland definitions which make clearer which forms of either criminal or non-criminal official misconduct (and associated non-official behaviour by private sector actors) fall within jurisdiction for prevention, investigation, findings of fact and recommendations.

- The NIC Bill is based on ACLEI investigative powers, which are strong, however greater clarity is needed on when public hearings are appropriate. A more sophisticated test could be introduced which retains a broad discretion to hold public hearings. It could be made clearer that where there is evidence of a criminal offence and a reasonable prospect of prosecution, then that particular matter (but not necessarily the wider issues) should normally cease to be the subject of public hearings or the use of coercive powers - which override normal criminal law principle in favour of investigation in private with the aim of a criminal trial. Only if sufficient evidence is not obtained or a prosecution becomes unlikely, if it is in the public interest, and if it will be more efficient, does it revert to coercive powers and public hearings, if warranted, to uncover what occurred.

National Integrity (Parliamentary Standards) Bill 2018

The National Integrity (Parliamentary Standards) Bill 2018, makes a significant contribution to promoting trust and confidence in the integrity of parliament, the public sector and our system of government.

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

The Bill has strengths and weaknesses, outlined below.

Strengths

- Establishes a Code of Conduct for parliamentarians and their staff
- Establishes an independent **Parliamentary Standards Commissioner** with scope to, among other functions, investigate alleged or suspected contraventions of the Act or any applicable code of conduct, including the proposed parliamentary code of conduct and the ministerial code of conduct, and to investigate and report on matters related to ethical and integrity standards among parliamentarians or their staff
- Establishes a **Parliamentary Integrity Adviser** to provide, among other functions, independent and confidential advice to departments to implement a pro-integrity approach, comply with the Code of Conduct and values, consider integrity and ethical issues and to develop better practice guides and fact sheets; and
- Requirement for both the Commissioner and Adviser to produce an annual report of activities.

Weaknesses

- While recognising issues relating to **lobbying** and **post-separation of employment**, commonly referred to as revolving doors, must be addressed, the NIC refers this for a future review and update the Australian Government Lobbying Code of Conduct and associated policies, rules and standards for the post-separation employment of Commonwealth public officials
- This must be considered now, as part of the design of the coordinated national integrity framework, to ensure it meets community expectations and national and international best practice
- Similarly, urgent attention is needed now, not down the track, to ensure the administration and enforcement of the Lobbying Code of Conduct, Register of Lobbyists and policies, rules and standards for the post-separation employment of Commonwealth public officials to be given a statutory basis; and enhanced administration and enforcement of the Australian Government's lobbying and post-separation employment regimes by the Independent Parliamentary Standards Authority and Australian National Integrity Commission
- While recognising issues relating to **political finance, funding, donations and campaign regulation**, must be addressed, the NIC refers this to a future review and update of Commonwealth legislation and enforcement for transparency, integrity and accountability in political campaign finance and campaign regulation meet national and international best practice
- As with lobbying and revolving doors, this must be considered now, and as part of the design of the coordinated national integrity framework, to ensure it meets community expectations and national and international best practice
- Further, the recognition in the NIC of the need for enhanced administration and enforcement of Commonwealth rules and processes for political campaign finance and campaign regulation by the Parliamentary Standards Commissioner, Independent Parliamentary Standards Authority, Australian National Integrity Commission and Australian Electoral Commission, needs to get under way now, while the integrity framework is being designed, and not deferred to an unknown future date
- To design and implement the best anti-corruption and integrity framework, these issues must be addressed and incorporated in the design of any framework, sooner rather than later
- This is currently a significant gap in Australia's integrity framework. The TI Global Corruption Barometer survey, reported 56 percent of respondents stating they had personally witnessed or suspected an official or politician of making a decision in favour of a business or individual who gave them political donations of support
- This jumped to 67 percent among respondents who had worked in Federal Government
- The TIA research into Corruption Risks in Mining Approvals provides further evidence of undue influence in resource sector development as a corruption risk. The risk concerns

the unregulated opportunity for industry to influence both the policy and political agenda of government in the development of major resource projects and coordinated projects

- This research noted the inadequate regulation of political donations and lobbyists, the movement of staff between government and industry (revolving doors), and the 'culture of mateship' as significant factors that have enabled inappropriate influence
- As of September 2016, of the 538 lobbyists then registered by the Department of Prime Minister and Cabinet, 191 were former government representatives. In addition, industry associations are not required to register as lobbyists
- Further, The Grattan Institute report, Who's in the room? Access and Influence in Australian Politics, found that powerful and well-resourced business groups, unions and not-for-profits are influencing policy in Australia to serve their interests, sometimes at the expense of the public interest; and
- The current political donation system has systemic loopholes, inconsistency across jurisdictions, and lacks transparency, including the capacity for donations to be made through 'associated entities' thereby hiding the source of the funds.

Commonwealth Integrity Commission model

TIA welcomes the work done by the Attorney-General's Department to assess the current integrity arrangements in the existing multi-agency approach. We have valued the department's willingness to engage and discuss this with us over an extended period of time.

We welcome the acknowledgement that a federal integrity agency is needed, and that the current framework has systemic gaps.

The proposed model for a Commonwealth Integrity Commission (CIC) goes some way to addressing those gaps, but fails to provide a comprehensive and coordinated approach to preventing, detecting and investigating matters of corruption and integrity misconduct within the public sector, specifically with regard to public hearings, and parliamentary standards – and notably that the proposed Public Sector division will only investigate criminal offences, and will not make findings of corruption at large.

The following is a summary of the strengths and weaknesses of the proposed CIC model, which encompasses two key divisions: a 'law enforcement integrity division', and a proposed new 'public sector integrity division'.

Strengths

- Establishment of a Commonwealth Integrity Commissioner
- Recognition of the existing powers and functions of ACLEI, but with an expanded jurisdiction to cover additional public sector agencies with a law enforcement remit, and recognising the existing 'coverage gaps' such as the whole of DAWR, among others

- Current coersive and investigative powers of ACLEI, including the power to hold public hearings is retained in respect of law enforcement agencies (only), however in the current form these do not provide the clarity needed on when public hearings be held
- Recognition that adequate resources are required, albeit for a very narrow scope of the proposed CIC
- Consideration as to whether the proposed CIC be given jurisdiction over members of the federal judiciary; and
- Expansion of public sector corruption offences to be included in the Criminal Code.

Weaknesses

- Lack of detail as to how the proposed CIC model with two divisions (law enforcement and public sector) would really work, the functions, collaboration and oversight
- Absence of any reference to developing a national anti-corruption action plan
- Narrow definition of corruption – only investigating criminal offences, and not making findings of corruption at large
- CIC will not investigate direct complaints about Ministers, Members of Parliament or their staff received from individual public servants (unless referred by their agency head), whistleblowers in business or overseas, or the public at large. This will not address the public concerns and low levels of trust in the conduct of parliamentarians and their staff
- Focus on 'criminal threshold', and investigation only of serious or systemic corrupt and criminal conduct in the public sector, without addressing non-criminal corruption issues, such as high-risk misconduct or non-compliance under various codes of conduct – this means that agencies are left to investigate themselves, and the mandatory referral obligation in the proposed public sector division is constrained to matters that meet the requisite threshold
- Proposed powers for the public sector division are inadequate, namely, not being able to hold public hearings, or make findings of corruption, criminal conduct or misconduct
- Narrow scope for the proposed public sector division of the CIC to focus on matters that are considered to constitute serious or systemic criminal offending that represents corrupt conduct in the public sector.
- Failure to progress parliamentary standards, as opposed to the substantial Parliamentary Standards outlined in the NIC (Parliamentary Standards) Bill 2018
- Lacks a coordinated approach to prevent, detect and investigate and respond to internal public sector misconduct and integrity issues - leaving this to the departments concerned to investigate themselves; and
- Corruption prevention and integrity strengthening functions lack detail and do not include reference to a much-needed whistleblower protection authority.

CONCLUSION

TIA strongly supports the establishment of a well-resourced independent national integrity body with broad jurisdiction and powers to investigate corruption. Restoring the confidence of the public in our public institutions will begin with the creation of an effective Commission and continue as the Commission is seen to work closely to protect whistleblowers, cooperate with State anti-corruption bodies, and when it is appropriate to do so, hold public hearings.

We trust that this submission will assist the important work of the Senate Committee and are of course happy to assist further.

Serena Lillywhite

CEO, Transparency International Australia