

National Integrity Commissioner Bill 2012

- 1.1 The National Integrity Commissioner Bill 2012 (the Integrity Bill) is a private Member's bill introduced into the House of Representatives on 28 May 2012 by Mr Adam Bandt MP of the Australian Greens.

Scope of the bill

- 1.2 The Integrity Bill proposes the establishment of a National Integrity Commission as an independent statutory federal agency, comprising a new National Integrity Commissioner, a Law Enforcement Integrity Commissioner, and an Independent Parliamentary Advisor.
- 1.3 These three positions would be responsible for, respectively:
- the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff;
 - the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and
 - the provision of independent advice to ministers, parliamentarians and former parliamentarians on conduct, ethics and matters of proprietary.
- 1.4 The bill proposes the establishment of a Parliamentary Joint Committee on the National Integrity Commission to oversee, monitor and review the Commission. This new joint committee would subsume the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.
- 1.5 The Integrity Bill is near-identical to the National Integrity Commissioner Bill 2010 (the 2010 Brown Bill), which was introduced into the Senate on 23 June 2010 and re-introduced on 30 September 2010 by then Senator Bob Brown. The Integrity Bill has an extra amendment in Schedule 1 for the

Law Enforcement Integrity Commissioner Act 2006 (Cth) (the LEIC Act), proposing that Item 1 from Subsection 197(1) be omitted, which states that the staff of the Australian Commission for Law Enforcement Integrity are to be persons appointed or employed under the *Public Service Act 1999 (Cth)*.¹

Referral

1.6 On 31 May 2012 the House of Representatives Selection Committee referred the Integrity Bill to the House of Representatives Social Policy and Legal Affairs Committee for inquiry and report.

1.7 The Selection Committee provided the following reasons for referral:

In accordance with the Speaker's ruling on 2 June 2011, this bill is in fact an appropriation bill contravening standing orders 179 and 180 and therefore cannot proceed in its current form. Further, the proposed powers are very wide-ranging and need further investigation.²

Senate Scrutiny of Bills Committee

1.8 The Senate Scrutiny of Bills Committee examined the Integrity Bill. Noting that the Integrity Bill was introduced without a statement of compatibility, as required by the *Parliamentary Scrutiny (Human Rights) Act 2011 (Cth)*, the Committee expressed concerns about the following issues of possible undue trespass on personal rights and liberties:

- rights to a fair hearing and representation;
- revocation of legal professional privilege;
- protection against self-incrimination;
- broad definition of 'authorised officer'; and
- inadequate explanation for increased search powers.³

1.9 These concerns are identical to the Senate Scrutiny of Bills Committee's comments on the 2010 Brown Bill.

1 *Law Enforcement Integrity Commissioner Act 2006 (Cth)*.

2 House of Representatives Selection Committee, 'Report 55', 31 May 2012.

3 Senate Standing Committee for the Scrutiny of Bills, 'Alert Digest No. 6 of 2012', 20 June 2012, pp. 63-69.

Question of appropriation

- 1.10 The Selection Committee suggests that the Integrity Bill may be an appropriation bill and therefore subject to House of Representatives Standing Orders 179 and 180. These standing orders limit the introduction of bills that increase or extend the scope of a tax or charge to Ministers only, and require that appropriation proposals be recommended to the House by the Governor-General prior in accordance with section 56 of the Constitution.
- 1.11 As noted by the Selection Committee, the Speaker made a ruling on 2 June 2011 that the Abolition of Age Limit on Payment of the Superannuation Guarantee Charge Bill 2011 could not proceed as it was 'caught by the provisions of standing order 179(a) and standing order 180(c)'.⁴
- 1.12 It is the role of the Speaker of the House to make a ruling on whether a bill is an appropriations bill and unable to be introduced by a private Member. Standing Order 3(e) states that:
- The Speaker (or other Member presiding) is responsible for ruling whenever any question arises as to the interpretation or application of a standing order and for deciding cases not otherwise provided for. In all cases the Speaker shall have regard to previous rulings of Speakers of the House and to established practices of the House.⁵
- 1.13 This Committee does not have the authority to make such a ruling, or to comment on the likelihood of the Integrity Bill being found to be an appropriations bill.

Recommendation 1

- 1.14 **The Committee recommends that the House Selection Committee request a ruling from the Speaker of the House on the status of the National Integrity Commissioner Bill 2012 prior to its debate.**

4 Mr Harry Jenkins, Speaker of the House, *House of Representatives Hansard*, 2 June 2011, p. 5699.

5 Australian Parliament House of Representatives, 'Standing and Sessional Orders', 20 October 2010, p. 11.

Wider scrutiny

- 1.15 The Committee decided not to conduct an inquiry into the Integrity Bill as there are a number of threshold issues that need to be addressed before launching an inquiry. These issues are discussed below.
- 1.16 Accordingly, the Committee did not call for submissions or hold public hearings. However, the Committee accepted a submission made by the Law Council of Australia (LCA). The submission is similar to the LCA's February 2011 submission to the Australian Greens on the near-identical 2010 Brown Bill.⁶ The LCA's views on the 2010 Brown Bill as expressed in that submission are considered by this Committee to be the same for the Integrity Bill.

Wide-ranging powers

- 1.17 The Selection Committee's second reason for referral is that the Integrity Bill proposes wide-ranging powers that require further investigation. The Senate Scrutiny of Bills Committee, as mentioned above, noted that the Integrity Bill proposes to widen search powers and authorise commissioners to undertake measures that may breach personal rights to due justice.
- 1.18 The LCA expressed similar concerns in its submission on the 2010 Brown Bill.

Coercive powers

- 1.19 The LCA notes that the Integrity Bill contains coercive information-gathering powers and offences, similar to those in the LEIC Act and the *Royal Commissions Act 1902* (Cth) (the Royal Commissions Act). The LCA considers that these powers should be used only in exceptional circumstances, and be subject to best-practice principles as outlined in the Administrative Law Council's *Coercive Information-Gathering Powers of Government Agencies*.⁷ The LCA added that 'additional safeguards may be needed to temper the considerable coercive and discretionary powers'.⁸
- 1.20 Further, the LCA argues that these coercive powers should not abrogate client legal privilege.⁹ The LCA claims that the provisions in the Integrity

6 Law Council of Australia, 'National Integrity Commissioner Bill 2010', 4 February 2011 <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=9E1C777B-9A46-DD1E-A09F-BDF668BA1501&siteName=lca> viewed 6 August 2012.

7 Law Council of Australia, pp. 14, 15.

8 Law Council of Australia, p. 3.

9 Law Council of Australia, pp. 16-17.

Bill regarding client legal privilege are unclear, having been based on the LEIC Act and the Royal Commissions Act.

1.21 The Senate Scrutiny of Bills Committee advised that:

The Committee has long taken the view that legal professional privilege is a fundamental principle of the common law, and will closely examine legislation which removes or diminishes this right. Unfortunately, the explanatory memorandum ... is silent on the issues of the extent to which the legislation is intended to modify the applicable common law principles, the justification for these modifications, and whether the penalties for offences relating to claims for legal professional privilege are justified.¹⁰

1.22 The LCA states that privilege against self-incrimination is a fundamental human right.¹¹ The LCA's submission advises that coercive powers may affect an individual's right to protection against self-incrimination or immunity from evidence obtained.

Procedural fairness

1.23 The LCA states that:

The rules of procedural fairness require a decision-maker to give a person, whose interests may be adversely affected by a decision, an opportunity to present his or her case. This is absolutely essential in the context of a public inquiry, as it guards against a person being unfairly discredited without any right of reply or avenue of review.¹²

1.24 The Integrity Bill contains a clause that removes a person's right to a reasonable opportunity to appear and make a submission in relation to a finding against them if the Commissioner is satisfied that the person may have:

- (i) committed a criminal offence; or
- (ii) contravened a civil penalty provision; or
- (iii) engaged in conduct that could be the subject of disciplinary proceedings; or
- (iv) engaged in conduct that could be grounds for terminating the person's appointment or employment; ...

or that such action:

10 Senate Standing Committee for the Scrutiny of Bills, 'Alert Digest No. 6 of 2012', 20 June 2012, p. 66.

11 Law Council of Australia, p. 18.

12 Law Council of Australia, p. 19.

would compromise the effectiveness of:

- (i) the investigation of the corruption issue or another corruption investigation; or
- (ii) any action taken as a result of an investigation referred to in subparagraph (i).¹³

- 1.25 The Senate Scrutiny of Bills Committee expressed concern 'as to whether there are sufficient protections in place to protect an individual who is not afforded a right to be heard'.¹⁴

Legal representation

- 1.26 Noting that the Integrity Bill stipulates that a person 'may, with the National Integrity Commissioner's approval, be represented by another person', the Scrutiny of Bills Committee stated:

Given the nature of the interests and rights at stake and the potential complexity of the issues which may be raised, there may be circumstances where a fair hearing will be compromised if a person is refused permission to be represented.¹⁵

- 1.27 The LCA's concern is that the threshold for legal and financial assistance eligibility is too high.¹⁶

Duplication of authorities and legislation

- 1.28 The LCA notes that there is not yet a federal statutory authority dedicated to investigating misconduct and corruption within the Australian Parliament and all Commonwealth agencies.¹⁷ However, such a body should:

... be considered alongside related reforms which are similarly aimed at greater accountability and integrity in the public sector.¹⁸

- 1.29 There is insufficient clarity regarding how the provisions of the Integrity Bill intersect with and complement existing legislation and other bodies of integrity oversight.
- 1.30 There are other statutory agencies and mechanisms that address claims of misconduct in the public sector. For example, the Commonwealth

13 Clause 31(2), National Integrity Commission Bill 2012.

14 Senate Standing Committee for the Scrutiny of Bills, 'Alert Digest No. 6 of 2012', 20 June 2012, p. 65.

15 Senate Standing Committee for the Scrutiny of Bills, 'Alert Digest No. 6 of 2012', 20 June 2012, p. 65.

16 Law Council of Australia, p. 23.

17 Law Council of Australia, p. 8.

18 Law Council of Australia, p. 3.

Ombudsman, the Australian Public Service Commission and the Australian National Audit Office all deal with complaints of fraud, misconduct or corruption by Commonwealth public servants. The Australian Parliament can also establish a parliamentary inquiry or Royal Commission to investigate allegations.

- 1.31 The Australian Government announced in 2011 that it would develop a National Anti-Corruption Plan.¹⁹ The Attorney-General's Department held a public forum in 2011 and invited submissions to the Anti-Corruption Discussion Paper earlier this year.
- 1.32 Moreover, there exist pieces of enacted and proposed legislation that overlap with the aims of the Integrity Bill. The LCA notes that the Integrity Bill is similar in some respects to the Royal Commissions Act.²⁰ The Australian Law Reform Commission (ALRC) conducted an inquiry into the provisions of the Royal Commissions Act in October 2009. The resulting report recommended a new framework for inquiries and made recommendations relating to information-gathering powers, procedural fairness, legal assistance and privileges.²¹
- 1.33 The LCA advised that:
- ... if the Government were to adopt the ALRC's recommendations, it is likely that this would have implications for the powers and procedures outlined in the [Integrity] Bill.²²
- 1.34 More recently, the Australian Government announced a new Public Interest Disclosure Bill (PID Bill), due to be introduced for debate in the spring sittings of 2012. The PID Bill provides enhanced protections for federal whistleblowers and an integrity and oversight function for investigations of disclosure.²³ Although the focus of the PID Bill differs from that of the Integrity Bill, the LCA points out that the aims of both bills, to promote public integrity, coincide.²⁴

19 Attorney-General's Department, 'National Anti-Corruption Plan' <<http://www.ag.gov.au/anticorruptionplan>> viewed 14 August 2012.

20 Law Council of Australia, p. 13.

21 Australian Law Reform Commission, 'Making Inquiries: A new statutory framework', Report no. 111, October 2009.

22 Law Council of Australia, p. 13.

23 Law Council of Australia, p. 10.

24 Law Council of Australia, p. 10.

1.35 The LCA further notes that:

Clarification of the Bill's intended intersection with the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and individuals' entitlement under that Act, would be useful.²⁵

1.36 The LCA asserted that 'the threshold issue of the desirability of a federal anti-corruption body should be considered by Parliament'.²⁶

Resources and capability

1.37 Another consideration is the cost of establishing a new federal body with two Commissioners and an Advisor. The LCA stated that:

Unless an investigatory body such as the proposed Commission has some long term security of adequate funding and tenure, there is a serious risk that its independence will be compromised.²⁷

1.38 The LCA notes that the Australian Commission for Law Enforcement Integrity is funded at a far lower level than its state equivalents in Queensland and Western Australia, and that the Independent National Security Legislation Monitor is underfunded.²⁸

1.39 Moreover, the LCA noted that 'it is crucial that the [joint] Committee established by the Bill can effectively perform its role'.²⁹

1.40 The joint committee would require timely access to requested information in order to monitor and review the new Commission as required without its capability being compromised. The LCA noted that a lack of timely access to information has hampered oversight committees in the past such as the former Joint Committee on the Australian Crime Commission.³⁰

Committee comment

1.41 The Committee agrees with the Selection Committee and the LCA that the Integrity Bill should be subject to greater scrutiny prior to its debate in Parliament. However, the Committee considers that a joint parliamentary inquiry is necessary given the scope, size and considerations of the Integrity Bill. Moreover, an inquiry later in the year would be more timely

25 Law Council of Australia, p. 4.

26 Law Council of Australia, p. 3.

27 Law Council of Australia, p. 29.

28 Law Council of Australia, pp. 29–30.

29 Law Council of Australia, p. 26.

30 Law Council of Australia, p. 26.

as certainty is achieved around intersecting legislation and the explanatory memorandum is clarified.

- 1.42 It is important that a collaborative approach is taken between the House and the Senate, as the Integrity Bill will have an impact on both houses. The proposed National Integrity Commissioner would be responsible for investigating and preventing corruption and misconduct among all federal parliamentarians – Members and Senators – and their staff. The Committee is of the strong view that an inquiry into the Integrity Bill should be conducted collaboratively with the scrutiny of both houses.
- 1.43 In addition to setting up a framework for the investigation of parliamentarians' behaviour, the Integrity Bill replaces the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity with a Parliamentary Joint Committee on the National Integrity Commission. Again, the Committee does not consider it appropriate for an inquiry to be undertaken without the collaborative input of both houses.
- 1.44 A joint select committee inquiry would be a more appropriate mechanism for scrutiny of the Integrity Bill. Further, it is the view of the Committee that the Integrity Bill requires detailed scrutiny given the lack of prior consultation and three major issues regarding its scope.
- 1.45 First, the Integrity Bill grants extensive powers to the new National Integrity Commission. This Committee does not currently have the resources or expertise to devote to an in-depth inquiry into the ramifications of these powers and the potential for the right to due justice to be trespassed.
- 1.46 Although the Committee does not deny the benefits of a federal anti-corruption body for the public sector, the Committee agrees with the LCA's view that Parliament should consider the threshold issue of the need for such a body in more detail. In particular, Parliament should consider if the proposed National Integrity Commission is the most suitable model for a federal anti-corruption body.
- 1.47 Second, the Committee is concerned that the Integrity Bill overlaps considerably with other anti-corruption legislation and agencies. Inquiry into this bill should take into account the results of the current discussion around the PID Bill, the ongoing review of the Royal Commission Act, the Attorney-General's consultation process on the National Anti-Corruption Plan, and the recent United Nations report on Australia's compliance with the Convention against Corruption.
- 1.48 Third, the Committee considers that the resourcing of the proposed National Integrity Commission should be carefully regarded so that it is able to achieve the functions it is set up to do. The explanatory

memorandum of the Integrity Bill does not mention the anticipated cost of running the National Integrity Commission.

Recommendation 2

1.49 **The Committee recommends that the National Integrity Commissioner Bill 2012 not proceed prior to the establishment of a Parliamentary Joint Select Committee to investigate the feasibility and cost of establishing a National Integrity Commission, taking into account the following matters:**

- **the threshold issue of desirability of such a commission;**
- **the extent of the powers granted to the Commissioners; and**
- **related reforms such as the review of the *Royal Commissions Act 1902*, the report on Australia's compliance with the United Nations Convention against Corruption, the results of public consultation on the National Anti-Corruption Plan, and the outcome of debate on the Public Interest Disclosure Bill 2012.**