

10 December 2020

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
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By email: murray.hawkins@lawcouncil.asn.au

Dear Mr Tidball

COMMONWEALTH INTEGRITY COMMISSION EXPOSURE DRAFT

Thank you for the opportunity to comment on this important matter. The Law Society of Western Australia is a strong advocate for the establishment of a powerful Commonwealth Integrity Commission (CIC).

Please see below some comments to incorporate into your submission on the *Commonwealth Integrity Commission Bill 2020* (draft Bill).

Definition of Corruption

The definition of 'engages in corrupt conduct' for public sector employees in clause 17 of the draft Bill ties corruption to a list of offences in clause 18. This is because of the use of 'and' in cl 17(2)(a)(ii):

Staff members of public sector agencies

- (2) For the purposes of this Act, a staff member of a public sector agency **engages in corrupt conduct** if:
- (a) the staff member, while a staff member of the agency, engages in any of the following conduct:
 - (i) conduct that involves, or that is engaged in for the purpose of, the staff member abusing the staff member's office as a staff member of the agency;
 - (ii) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; and
 - (b) the conduct constitutes a listed offence (see section 18).

This approach captures many offences which amount to corruption, however there is the possibility that corrupt conduct may not amount to conduct that constitutes one of the listed offences. This could unduly limit the capacity of the CIC to conduct investigations.

This drafting also puts the onus on the CIC to determine if a listed offence has been committed. The functions of the CIC are to form opinions, make findings and

recommendations, and this approach raises questions as to which burden of proof the CIC would apply.

The Law Society suggests that the 'and' in cl.17(2)(a)(ii) be omitted so that 'abuse of office' or 'perverting the course of justice' is sufficient to meeting the definition of 'engages in corrupt conduct'.

Furthermore, rather than listing the offences, it may be apposite to promulgate offences by regulation to provide for the addition of further offences in the future as they are created.

Jurisdiction

The CIC is limited in what people and bodies it can investigate to, broadly speaking, publicly funded bodies¹. There are no such limitations in equivalent state-based legislation.² The limitations exclude the CIC from investigation of relevant individuals and organisations that operate in the private sector, even though they might improperly influence public decisions.

The CIC also has the power to investigate parliamentarians for engaging in corrupt conduct, however it is unclear how this will work in practice. At various points throughout the Bill, the Commissioner cannot comment on the conduct of parliamentarians.

For example, at clause 82(2) a report of the findings and recommendations of the Commissioner must not include information relating to a parliamentarian. Does this mean the Commissioner cannot make findings or recommendations concerning a parliamentarian, or does it mean that these simply cannot be published?

Also, if the CIC also preserves the powers, privileges, and immunities of members of parliament (in clause 283) then there will be significant issues with undertaking any investigation which may impinge on those preserved powers, privileges and immunities. This may make the intended function (clause 25(c)) to detect corrupt conduct by parliamentarians redundant.

Some clarity over whether the CIC will investigate corrupt parliamentarians is needed.

Public Hearings

The Law Society notes clause 99(5) of the draft Bill prevents the CIC from holding public hearings on public sector corruption issues, unlike, inter alia, the Western Australian Corruption and Crime Commission or the New South Wales Independent Commissioner Against Corruption (ICAC).

The Law Society considers the inconsistency between State and Territory anti-corruption and the Federal CIC in holding public hearings inappropriate and that federal parliamentarians and public servants should be subject to the same investigative powers as their counterparts on the sub-national level. Openness and transparency will be crucial for public confidence in the Commonwealth public service and elected officials. Importantly, 'prevention inquiries' which look at systemic failings should be public, and a function of the CIC should be to prevent corruption in public institutions.

The Law Society considers that the starting point should be that the CIC has the option for all hearings to be public, if it has established sufficient facts to enable it to identify the party or parties responsible for the corrupt conduct, and the subject of the investigation may apply

¹ *Commonwealth Integrity Commission Bill 2020* Cl. 29

² For example, *Corruption, Crime and Misconduct Act 2003* (WA)

for a private hearing on the grounds of national interest (for example, if a public hearing would prejudice sensitive intelligence work).

Referral Powers

The Law Society considers that the CIC should have the power to conduct own motion investigations.

Further, under Part 4 of the exposure draft, referrals to commence corruption inquiries can be made by the A-G, parliamentarians and various regulated agency heads. The only exception is under section 44, where any person can make a referral in relation to law enforcement corruption, i.e. something that will never touch elected officials or most Commonwealth office holders.

The Law Society supports a proposed additional submission that any person can make a report or referral about corruption issues, to allow the Commissioner to investigate public complaints and tip-offs from whistle-blowers, whether or not made anonymously

Vexatious complainants

The Law Society has concerns in regard to clause 70 of the draft Bill to prevent the politicisation of the CIC through spurious complaints, intended to cause a detriment to a person.

The penalty of 12 months imprisonment for unwarranted complaints may be too strong a response to the issue and may deter legitimate whistle-blowers from approaching the CIC. However, the Law Society notes the analogous offence of 'malicious disclosure of false allegation of misconduct' in the *Corruption, Crime and Misconduct Act 2003* (WA) imposes a penalty of imprisonment for 3 years and a fine of \$60,000 or summary conviction \$10,000.³

The 'intention to cause a detriment' element in clause 70 could be met by a whistle-blower simply making a report, given there may be detrimental workplace and reputational consequences following from this. However, the Law Society notes that there is an extra 'pub test' element in that there must be 'no basis on which a reasonable person could suspect that the offence to which the issue relates has been, or is being, committed'.

The Law Society suggests that the penalty for commission of the offence be reduced (such as to a fine only), or reframing the offence to include an element that a person knows a report is false or makes it maliciously.⁴

The Law Society supports an offence in the Bill, if included, should target allegations that are known to be false, rather than allegations that the CIC does not progress and have caused a detriment.

Federal Judicial Commission

The Law Society of Western Australia has previously suggested that the proposed Federal Judicial Commission (FCJ) and the CIC share resources, due to the foreseeably small

³ Ibid, s.25(5)

⁴ Ibid

number of matters that an FCJ might investigate and the large amount of resources dedicated to the CIC.⁵

Thank you for the opportunity to comment on this matter. If you have any queries please contact Mary Woodford, General Manager Advocacy on (08) 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Nicholas van Hattem
President

⁵ \$147 million: <https://www.attorneygeneral.gov.au/media/media-releases/release-commonwealth-integrity-commission-consultation-draft-2-november-2020#:~:text=The%20Morrison%20Government%20has%20committed,enforcement%20at%20a%20federal%20level.>