



Law Council  
OF AUSTRALIA

# Commonwealth Integrity Commission: Proposed Reforms

Attorney-General's Department

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, its Privacy Law Committee of the Business Law Section, its National Integrity Working Group and the Law Society of South Australia in the preparation of this submission.

# Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Attorney General's Department in response to the Australian Government's Consultation Paper setting out the proposed model for establishing a new "Commonwealth Integrity Commission" (**the Consultation Paper**). It is a positive step that the Government has agreed to establish a federal statutory commission to address the issue of corruption within the administration of the Commonwealth Government in both its law enforcement and public sector agencies.
2. The Law Council strongly supports the establishment of a national integrity commission. It is well recognised by the Law Council that corruption has many corrosive effects on society. It serves to undermine democracy and the rule of law as well as being capable of distorting market forces. The proposed model clearly seeks to further address Australia's obligations as signatory of the United Nations Convention against Corruption (**UNCAC**)<sup>1</sup> to develop policies in relation to anti-corruption.<sup>2</sup>
3. The purpose of the Consultation Paper is to outline the current mechanisms in place to address issues of corruption, provide some detail on important aspects of the key reforms and to explain the rationale for the establishment and structure of the new "Commonwealth Integrity Commission" (**the Commission or the CIC**).
4. This submission comments on some of the key points raised in the Consultation Paper, namely:
  - the scope of jurisdiction of both divisions of the Commission;
  - the appropriateness of the coercive powers;
  - the protection to be given to the both legal professional privilege and the privilege against self-incrimination;
  - the appropriateness of private as opposed to public hearings;
  - whether the federal judiciary should be subject to the jurisdiction of the Commission;
  - the proposed amendments to the *Criminal Code Act 1995* (Cth) (**Criminal Code**) and *Crimes Act 1914* (Cth) (**Crimes Act**); and
  - whether the model should incorporate other features such as "whistle blower protection" measures and a Parliamentary Integrity Commissioner or Adviser.
5. Key recommendations of this submission include:
  - Aligning the powers and thresholds that apply to the proposed law enforcement division and public sector division of the Commission or simply having the one division;
  - Broadening the definition of corrupt conduct that can be investigated by the Commission;

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<sup>1</sup> General Assembly, *United Nations Convention Against Corruption*, GA Res 58/4, UN GAOR, 58<sup>th</sup> sess, Agenda Item 108, UN Doc A/RES/58/4 (31 October 2003).

<sup>2</sup> *Ibid*, art 5(1).

- Establishing a Federal Judicial Commission to investigate misconduct by members of the federal judiciary and to have an education role to assist and train members of the judiciary;
- Provision being made to determine claims of legal professional privilege and protection be given to material that is covered by that privilege;
- The privilege against self-incrimination should only be abrogated to the extent to which both a direct use and derivative use immunity apply in both civil and criminal proceedings;
- Hearings before the Commission to be generally conducted in private unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest;
- The Commissioner be required to provide reasons for findings that are made;
- A person appearing before the Commission having a right to legal representation;
- Establishing an Independent Parliamentary Integrity Adviser or Inspector General who is a retired judge to deal with complaints and to report to Parliament;
- In accordance with principles of procedural fairness, the Commission be required to provide reasons for its decisions;
- In relation to the offence provisions, the Crimes Act be amended so there be a requirement to take into account any breach of trust by a public official in sentencing criminally corrupt conduct, the new aggravated offences are not enacted, the new offence of failing to report corrupt conduct should have a clear mental element of the offence and offences by judicial officers not be included in the new division of offences concerning public sector officials; and
- Continuing to work towards establishing a comprehensive whistleblower regime.

## Scope of jurisdiction

6. The proposed new Commission would be established in order to detect, deter and investigate suspected corruption and work with federal agencies to increase their capacity to recognize and deal with corrupt misconduct.<sup>3</sup>
7. The Commission would be structured so as to be divided into two separate divisions. One would relate to “law enforcement integrity” and the other would deal with “public sector integrity”. Both of these divisions would be headed by a Deputy Commissioner who would then report to a single Commonwealth Integrity Commissioner who will head the Commission.

## Law enforcement division

8. The proposed “law enforcement division” will be responsible for addressing law enforcement integrity and would incorporate the existing structure and powers of the

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<sup>3</sup> Attorney General’s Department, Parliament of Australia, *A Commonwealth Integrity Commission- proposed reforms* (2018), 3 (“*A Commonwealth Integrity Commission*”).

current Australian Commission for Law Enforcement Integrity (**ACLEI**) as established under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**LEIC Act**).<sup>4</sup> The current agencies subject to the investigation and monitoring by ACLEI are the:

- Australian Criminal Intelligence Commission;
- Australian Federal Police (**AFP**);
- Department of Home Affairs;
- The former National Crime Authority;
- Immigration and Border Protection Department;
- Some aspects of the Department of Agriculture and Water Resources (**DAWR**);
- [Australian Transaction](#) Reports and Analysis Centre (**AUSTRAC**); and
- Any other Commonwealth government agency that has a law enforcement function as defined in section 5 of the LEIC Act and is prescribed by the regulations for this purpose.

9. However, it is proposed the jurisdiction of the law enforcement division would be expanded to cover additional public sector agencies that also have law enforcement functions such as the:

- Australian Competition and Consumer Commission (**ACCC**);
- Australian Prudential and Regulation Authority (**APRA**);
- Australian Securities and Investments Commission (**ASIC**); and
- Australian Taxation Office (**ATO**)

10. To avoid any confusion in relation to the DAWR that has previously existed it is proposed the CIC will also have jurisdiction over all functions and aspects of the Department.

11. The proposal is that government agencies with significant coercive powers and access to sensitive information will come within the ambit of “law enforcement” for the purpose of the new Commission. Based on those greater powers to investigate, regulate and initiate enforcement action, such agencies are seen as being of a greater risk of being targeted by criminal or other groups seeking to influence the administration of these agencies. The Consultation Paper notes that this in turn justifies a greater need for enhanced scrutiny and oversight of the discharge of the statutory functions of these particular law enforcement agencies as distinct from other agencies within the federal public sector.<sup>5</sup>

12. However, it is unclear whether security agencies will be captured within this division and this requires some consideration. While the Inspector-General of Intelligence and Security (**IGIS**) has the powers to oversee and investigate corrupt conduct within the security agencies<sup>6</sup>, consideration should be given for the IGIS to make referrals to the Commission to conduct an investigative hearing where the IGIS considers it to be appropriate to do so. This referral could occur after the IGIS has conducted a

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<sup>4</sup> See *Law Enforcement Integrity Commissioner Act 2006* (Cth) pts 9, 12. The Law Enforcement Integrity Commissioner (**LEI Commissioner**) will continue to have the powers conferred by those parts.

<sup>5</sup> *A Commonwealth Integrity Commission*, 4.

<sup>6</sup> *Inspector-General of Intelligence and Security Act 1986* (Cth). The security agencies within the scope of the Act are the Australian Security Intelligence Organisation (**ASIO**), Australian Secret Intelligence Service (**ASIS**), Australian Signals Directorate (**ASD**), Australian Geospatial-Intelligence Organisation (**AGO**), Defence Intelligence Organisation (**DIO**) and Office of National Assessments (**ONA**).

preliminary inquiry and the IGIS considers the matter to one that can appropriately be referred to the CIC.

13. The law enforcement division will be required to give priority to serious and systemic corruption, which is corrupt conduct that constitutes a criminal offence which has a penalty of at least 12 months imprisonment, or instances of corruption that reveal a pattern or corrupt conduct in an agency.
14. In principle, the Law Council acknowledges that corruption in agencies with more significant powers can have more far reaching consequences for the Australian Community. However, the separation between the two proposed divisions may be somewhat arbitrary given that there is scope for significant acts of corruption involving large amounts of money in the administration of contracts and the tendering process in other areas of the public sector, such as, the Department of Defence.

## Public sector division

15. The second division to be established under the proposed model for the Commission will be the “public sector division”. This division of the Commission will have jurisdiction over all remaining the remaining public sector departments and agencies that are not covered by the law enforcement division. That is:
  - public service departments and agencies, parliamentary departments, statutory agencies, Commonwealth companies and Commonwealth corporations;
  - Commonwealth service providers as well as any subcontractors they engage; and
  - federal parliamentarians and their staff.
16. It is anticipated that this sector of the division would have the capacity to investigate any allegations of corrupt conduct be it by parliamentary staff and staff of the Commonwealth public service, and also by any members of public or private entities that receive and or deal with commonwealth funds. However, this is restricted to being concerned with a “public official’s suspected corrupt conduct”. The jurisdiction would not extend beyond that in relation to private individual sub-contractors. It is important that the scope of jurisdiction be clearly sufficient to be able to cover situations where there may be corrupt conduct in the context of Commonwealth providing funding to the states to then administer commonwealth funding to private entities for certain projects.

## Function of the Commission

17. The primary function of the Commission will be one of investigation of what is described in the Consultation Paper as “serious criminal conduct that represents corrupt conduct in the public sector”.<sup>7</sup> However, it appears there are to be two distinct tests to be applied to what constitutes the threshold for initiating an investigation by the Commission, depending on which division the alleged corrupt conduct occurs in as discussed below.
18. A further function of the Commission will be to contribute to corruption prevention by supporting government agencies to identify and manage corruption risks. It will achieve this by collating information and data in relation to the incidence and nature of

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<sup>7</sup> Ibid 5.

public sector corruption. It will also be responsible for providing training to government agencies in relation to issues pertaining to integrity and corruption. It will also play a role in developing anti-corruption legislation and policy. In this way it will be the single leading agency, charged with monitoring and promoting a culture of integrity within the public sector.<sup>8</sup>

19. For the “law enforcement division” the definition of the type of corrupt conduct that will be investigated will remain as defined in the current LEIC Act. In section 6 of the LEIC Act the definition of “engages in corrupt conduct” (which is said to apply to a “staff member” of either a “law enforcement agency” as defined, or a staff member of ACLEI) is:

(a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or

(b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or

(c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

20. However, for the public sector division there will be a different test to be applied as to what constitutes “corrupt conduct”. For an investigation to commence in that division the threshold will be not corruption *per se* or as defined in section 6 of the LEIC Act, but rather conduct that is serious criminal conduct that is “capable of constituting a nominated range of specific criminal offences”.<sup>9</sup> It will not be designed to investigate acts of corruption unless the Commissioner has a “reasonable suspicion” that the conduct in question is so serious as to amount to a criminal offence.<sup>10</sup> Therefore the definition of “corrupt conduct” in the public sector will be defined by reference to a “nominated range of specific new and existing criminal offences”.<sup>11</sup> This will result in a range of new offences being introduced and included in the Criminal Code that will define the jurisdictional basis for initiating an investigation by the Commissioner in the public sector division.

21. Should the threshold remain of requiring a criminal offence to trigger an investigation, the Law Council considers it to be appropriate that there be the threshold test of requiring a “reasonable suspicion” that an offence has been committed. However, the Commission may need an ability to conduct a preliminary investigation to determine whether the threshold of a reasonable suspicion is met. This will prevent the arbitrary use of investigation powers for subjective reasons. This should also ensure resources are used efficiently and where they are required most. A similar approach has been adopted in Victoria where the *Independent Broad-Based Anti-Corruption Commission (IBAC)*, can only conduct an investigation in accordance with its investigative functions, where the **IBAC** “suspects on reasonable grounds that the conduct constitutes corrupt conduct”.<sup>12</sup>

22. It is proposed that the AFP will have a role of investigating criminal corruption outside of the public sector, while the Commonwealth Integrity Commissioner will be

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<sup>8</sup> Ibid 2.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid, 7.

<sup>11</sup> Ibid.

<sup>12</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011 (Vic)* s 60(2). For the definition of “corrupt conduct” see section 4 of the Act.

responsible for investigating criminal conduct inside the public sector.<sup>13</sup> However, it is possible there may be referrals being made between both organisations for subsequent investigation.

23. While such a proposal does serve to ensure that it is only the courts that will make a public finding of corrupt conduct that is proven beyond a reasonable doubt to constitute a criminal offence, the Commission, in the public sector division, will not investigate or conduct any hearing, private or otherwise, into conduct, that while lacking in integrity or being such an abuse of power as to amount to “corrupt conduct”, is not corrupt conduct capable of constituting a criminal offence. In this sense it is a higher threshold than was put forward in proposed section 9 of the National Integrity Commission Bill 2018 (**the McGowan Bill**). In that Bill there was a very broad definition of “corrupt conduct” that included:
- a) any conduct of any person that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by the Parliament, a Commonwealth agency, any public official or any group or body of public officials;
  - b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions;
  - c) any conduct of an of a public official that involves a breach of public trust,
  - d) any conduct of a public official that is engaged in for the purpose of the public official abusing their office as a public official; and
  - e) any conduct of a public official that involves the misuse of information or material that he or she acquired in the course of his or her official functions.
24. The definition in the **McGowan Bill** also included reference to any conduct constituting an offence against section 142.2 of the Criminal Code, being offences relating to abuse of public office set out in that section.
25. The definition of corrupt conduct for the purpose of the public sector division of the Commission in being limited to conduct amounting to a criminal offence listed in the Criminal Code is setting a more restrictive definition than will apply to the “law enforcement division”. This may create a concern that what is proposed to be the “peak corruption oversight organisation for the public sector”<sup>14</sup> will be precluded from making any finding of corruption within its public sector division and rather be limited to investigation of certain limited prescribed criminal offences before referring a brief of evidence to the Commonwealth Director of Public Prosecutions (**CDPP**) to consider whether there should then be a criminal prosecution.
26. It is of course our criminal courts that decide whether the prosecution has proven each element of a criminal offence beyond a reasonable doubt, and sentence the offender accordingly if they are found guilty. The difficulty with the proposed model is that if the alleged criminal offence is not proven, it is unclear what sanctions would apply in response to any findings of corrupt conduct made by the Commission. This may have the effect that misconduct and maladministration that while amounting to “corruption” does not amount to a proven criminal offence, is not going to be addressed by the Commission or subject to any sanction. This may in turn erode public confidence in

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<sup>13</sup> Ibid 6.

<sup>14</sup> Ibid.

the Commissions capacity to achieve its purported purpose as being a body aimed at detecting and preventing official corruption by Commonwealth employees. In conflating “corruption” with criminal offending, it may restrict the efficacy of the Commission properly to investigate acts of maladministration and corruption. The proposal is that conduct that falls short of criminal offending can be dealt with by the entities within which the misconduct occurs as is presently the case with, for example investigation being conducted by the Commonwealth Ombudsman. However, this may mean there is not sufficient transparency as there will not be any real independent Commission to review or make finding in relation to such conduct that occurs within the public sector division. The Law Council considers that the Commission should be able to make findings of fact at the conclusion of a hearing, providing the principles concerning procedural fairness have been adhered to.

27. However, it would also be useful to clarify the function of the Commission and to define the boundary as to where the inquiry or hearing conducted by the Commission stops and the criminal proceedings begin. The legislation may need to be framed so that, for example, when the Commissioner forms a view that the evidence is both capable of satisfying a jury beyond a reasonable doubt that an offence has been committed and there is a reasonable prospect that a reasonable jury would be satisfied beyond a reasonable doubt that an offence has been committed, that the inquiry by the Commission needs to be terminated so that the criminal proceedings can be commenced and run their course, in accordance with the principles, protections and practice of the criminal law. At this stage the Commissioner would then be required to forward the depositions and evidence to the CDPP. This is the model adopted in the NSW Coroner’s Court jurisdiction for example, where section 78 of the *Coroners Act 2009* (NSW) stipulates how the Coroner should proceed with the inquest or fire inquiry when they form an opinion the evidence is “capable” of establishing that both an offence has been committed and that there is a “reasonable prospect” a jury would convict the person of an indictable offence. The wording used in section 78 of the *Coroners Act 2009* (NSW) adopts the traditional test used in committal proceedings in criminal matters for a Magistrate to determine whether the evidence at the committal stage of proceedings is sufficient to commit the person to trial in the higher Court. A similar test could be useful for the Commission to apply to determine when to refer findings of suspected criminal conduct to the CDPP.
28. Consideration should also be given for the definition of “corruption” or “corrupt conduct” to be given the same legal definition between the two divisions, as opposed to having a broader definition for the law enforcement division than for the public sector division. It may be beneficial to have one definition that encompasses both a range of criminal offences, as well as other conduct “that impairs, or that could impair, public confidence in public administration” as set out in the extensive definition of “corrupt conduct” in section 8 of the *Independent Commission Against Corruption Act 1988* (NSW), that is conduct that could amount to a criminal offence, a disciplinary offence, reasonable grounds for dismissal of a public official, or in the case of a Parliamentarian or Minister of the Crown, a substantial breach of the applicable code of conduct.<sup>15</sup>
29. In the South Australian Independent Commission Against Corruption, the Commission has the power to conduct investigations into serious or systemic maladministration and misconduct. Subsection 5(4) of the *Independent Commission Against Corruption Act 2012* (SA), defines maladministration in public administration as:

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<sup>15</sup> *Independent Commission Against Corruption Act 1988* (NSW) s 9.

*Conduct of a public officer, or a practice, policy or procedure of a public authority, that results in irregular or unauthorised use of public money or substantial mismanagement of public resources; or conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and includes conduct resulting from impropriety, incompetence or negligence and is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.*

30. In order for the South Australian Independent Commission Against Corruption (ICAC) to investigate a matter concerning misconduct or maladministration, the matter must be serious or systemic<sup>16</sup> and be of such a significant nature that it would undermine public confidence in the relevant public authority or in public administration generally.<sup>17</sup>
31. The Law Council considers that there could be cases where the maladministration and misconduct can be so significant as to amount to corrupt conduct that poses a serious threat to the probity and integrity of agencies within the public sector. Empowering the Commission to investigate matters of serious or systematic maladministration or misconduct will help restore and maintain public confidence in public sector administration.

#### **Recommendations**

- **Consideration be given to aligning the powers and thresholds that apply for the proposed law enforcement division and public sector division of the proposed new Commission or simply having the one division.**
- **Consideration be given to having a broader definition of corrupt conduct that can be investigated by the new Commonwealth Integrity Commission that includes conduct amounting to a criminal offence under the *Criminal Code Act 1995 (Cth)* and other serious cases of maladministration and serious misconduct that impairs/undermines, or that could impair/undermine, public confidence in public administration.**

## The federal judiciary

32. While it is suggested in the Consultation Paper that consideration will be given as to whether the public sector division of the Commission could be given jurisdiction over members of the federal judiciary, the Law Council considers that the oversight of federal judicial officers should not be done by the Commonwealth Integrity Commission but rather by a separate Federal Judicial Commission established by a separate Act of Parliament and possibly based on the model operating in NSW which has an independent judicial commission. This NSW judicial commission is established pursuant to section 5 of NSW *Judicial Officers Act 1986 (NSW)* which can, *inter alia*, conduct an investigation into any complaint made by members of the public or otherwise into the conduct of any NSW judicial officer. If the complaint is found to be substantiated, a report is prepared which is sent to Parliament to consider or the matter can be referred to the appropriate agency.

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<sup>16</sup> *Independent Commissioner Against Corruption Act 2012 (SA)* s 4(2).

<sup>17</sup> *Ibid.*

33. In relation to members of the federal judiciary it is noted that there is already legislation in place to address “judicial misbehaviour” being the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) that provides for a commission to be established pursuant to section 9 of that Act by the Houses of Parliament to:

*investigate, and to report to them on, alleged misbehaviour or incapacity of a Commonwealth judicial officer, so they can be well-informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution.*<sup>18</sup>

34. This may be a more appropriate legislative basis to establish a commission of inquiry in relation to any allegation of judicial misconduct, including corrupt conduct.

35. The Law Council considers that to subject the judiciary to the regulation of the Commonwealth Integrity Commission could be open to constitutional challenge as it has the potential to infringe the separation of powers established in Constitution, which vests judicial power only in the judiciary as per section 71 of the Constitution.<sup>19</sup> Furthermore, section 72(ii) of the Constitution provides that it is for the two House of Parliament to investigate and decide and whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate.

36. A further issue is that there may be the need for judicial review of decisions made by the CIC. It is essential to the protection of the rule of law that there be a strong and independent judiciary, separate to, rather than subject to, review by the executive arm of government. This separation of judicial from executive power is of central significance in protecting the rights of all citizens from arbitrary, unlawful interference with their rights and must not be diluted by classifying the judiciary into the same category as other staff of the public service employed in the executive arm of government under the *Public Service Act 1999* (Cth) of which the judiciary are not (although it does apply to their staff).

37. A separate Federal Judicial Commission could also have an important education role to assist and train members of the federal judiciary in matters that would support the effective fulfilment of judicial functions.

#### Recommendation

- **A separate Federal Judicial Commission be established to: address judicial misconduct, including corrupt conduct, misuse of judicial authority and any abuse of power by members of the deferral judiciary; and to have an education role to assist and train members of the judiciary.**

## The appropriateness of coercive powers

38. The law enforcement division of the CIC will have access to the same coercive and investigative powers that ACLEI currently has. This means the extensive powers that currently apply to agencies currently defined as a “law enforcement agency”<sup>20</sup> will be

<sup>18</sup> *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.

<sup>19</sup> Judicial power is vest in the members of the judiciary as set out in the *Australian Constitution* ch III.

<sup>20</sup> See *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 5. This section defines the law enforcement agency to mean the Australian Federal Police, the Australian Crime Commission, the Immigration and Border Protection Department. ‘AUSTRAC’ means the Australian Transaction Reports and Analysis Centre, the

extended to apply to staff employed by ACCC, APRA, ASIC and the ATO. However, these extensive powers will not apply to agencies that come within the ambit of the “public sector division”. The rationale for this dichotomy of powers is that the consequences of corruption with public official have access to law enforcement and other coercive powers is more significant that for those agencies without such powers as discussed above.<sup>21</sup>

39. The powers that will continue to apply to the law enforcement division, as enacted in the LEIC Act will include the power to:

- Compel the production of documents;<sup>22</sup>
- Summons people to attend give evidence;<sup>23</sup>
- Hold both public and private hearings and inquires;<sup>24</sup>
- Issue warrants authorising the arrest of people and to enter and search premises and otherwise seize evidence;<sup>25</sup> and
- Require a witness to take an oath or affirmation.<sup>26</sup>

40. It is a criminal offence if the person fails to comply with a notice issued pursuant to section 75 of the LEIC Act that carries a maximum penalty of two years imprisonment.<sup>27</sup>

41. The Law Council notes the more limited powers that will be available to the CIC in relation to investigating matters within the public sector division. This would appear to acknowledge the need for some proportionality between the exercising of the coercive power in relation to the nature of the matter being investigated as has been previously recommended in Victoria during the Proust review into the Victorian anti-corruption system.<sup>28</sup> In relation to the public sector division the powers that are proposed will be limited to:

- Compelling the production of documents;
- Questioning people and conducting interviews;
- Conducting private hearings;
- Authorising the issue of warrants to enter and search premises.

42. The Law Council considers that in relation to hearings conducted within the public sector division of the Commission, the Commission should have the power to summons a witness to appear before the Commission. It should be clear on the Notice attached to the summons that if the person fails to appear in accordance with the summons such failure to comply with the summons constitutes a serious criminal offence punishable by imprisonment. These provisions would ensure that the powers that apply to the law enforcement division also apply with equal force in matters conducted within the public sector division. At present pursuant to section 83 of the LEIC Act the Commissioner may issue a summons for the attendance of a witness. If

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Agriculture Department, the former NCA or any other government agency that has a ‘law enforcement function’.

<sup>21</sup> *A Commonwealth Integrity Commission*, 7.

<sup>22</sup> *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 75.

<sup>23</sup> *Ibid* s 83.

<sup>24</sup> *Ibid* s 82.

<sup>25</sup> *Ibid* ss 100, 109.

<sup>26</sup> *Ibid* s 87.

<sup>27</sup> *Ibid* s 78.

<sup>28</sup> State Services Authority, Parliament of Victoria, *Review of Victoria’s Integrity and Anti-corruption System* (2010), Recommendation 1.1.

the witness fails to comply with the summons, the person is committing an offence.<sup>29</sup> There is also provision for an application to be made to a Judge of the Federal Court or of the Supreme Court in the relevant State or Territory for the issue of a warrant to arrest a person who is, inter alia, avoiding service of a summons or has or is likely to abscond.<sup>30</sup> Such provisions would help to ensure the public sector division of the Commission has the powers it requires to be effective in being able to conduct a hearing into any alleged corrupt conduct.

43. However, if the CIC is essentially to have a role similar to that of an investigative police officer and gather evidence to be used in court to prosecute an accused person, then it is the position of the Law Council that the accused person should be afforded the same rights that apply to any person being accused of a criminal offence. This includes:

- a) the right to silence and the privilege against self-incrimination;
- b) the right to obtain independent legal advice and obtain legal representation at any hearing;
- c) that in the absence of any privilege against self-incrimination, the person is cautioned appropriately that any answers given may be used against them in subsequent criminal proceedings;
- d) that the safeguards built into the *Evidence Act 1995* (Cth) (**Evidence Act**) against unfair questioning are applied in any questioning conducted by investigators from the CIC as part of preparing the brief of evidence; and
- e) the protection afforded by legal professional privilege.

44. As the proposed model in relation to the law enforcement division will rely on the existing provisions of the existing LEIC Act, it is useful to address these provisions in the light of the Australian Law Reform Commissions (**ALRC**) report into the operation of the *Royal Commissions Act 1902* (Cth)<sup>31</sup> which contains a number of similar provisions to the proposed model, based around the LEIC Act. The ALRC made a number of recommendations which the Law Council considers are relevant to the proposed model of the CIC, particularly in the context of the use of coercive powers by the CIC. These include, but are not limited to, the development of procedures and guidelines in relation to principles of procedural fairness, access to legal assistance and funding for legal representation and witness expenses, privileges and issues of public interest immunity.

45. In relation to the exercise of these powers, the Law Council considers that it is appropriate that the safeguards that apply to the coercive powers that are listed in the LEIC Act and will, it is assumed continue to apply to the law enforcement division of the CIC, will also apply to the investigation of matters in the public sector division. It is important that there be a balance between robust powers to investigate corruption and the protection of individual rights of those being investigated in accordance with the rule of law principles. The use of coercive powers should be only used in good faith and in exceptional circumstances due to the intrusive nature of their operation, particularly when used in executive rather than judicial processes.

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<sup>29</sup> *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 93.

<sup>30</sup> *Ibid* s 99.

<sup>31</sup> Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report No 111 (2011) (*'Making Inquiries: A New Statutory Framework'*).

46. Some of the important safeguards that serve to balance the right of an individual against the arbitrary use of the coercive powers include:

- Protection for the principle of legal professional privilege. That is a legal practitioner is not required to give information, answer a question or produce a document that contains a privileged communication made by the legal practitioner in his or her capacity as a legal practitioner;<sup>32</sup> and
- That while a person is not excused from giving information or producing a document, the information given, or the document or thing produced, is not admissible in evidence against the person the person in criminal proceedings, a proceeding for the imposition or recovery of a penalty or confiscation proceedings;<sup>33</sup>

## Legal professional privilege

47. Legal professional privilege is a fundamental right that applies court, administrative and investigative proceedings.<sup>34</sup> The existence of legal professional privilege is derived from the right to privacy. In *Baker v Campbell* Wilson J noted that:

*... adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and privilege is an important element in that protection.*<sup>35</sup>

48. Legal professional privilege encourages full and frank disclosure between the client and the legal practitioner which in turn allows people to obtain accurate and comprehensive advice about their legal situation. This has the effect of facilitating greater compliance with the law and more effective and efficient resolution of legal disputes. As stated by Kirby J in *Esso Australia Resources v Commissioner of Taxation*<sup>36</sup> discussing the purpose of privilege:

*It arises out of 'a substantive general principle of the common law and not a mere rule of evidence'. Its objective is 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law'. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as 'a bulwark against tyranny and oppression' which is 'not to be sacrificed even to promote the search for justice or truth in the individual case'.*<sup>37</sup>

49. In relation to legal professional privilege, when considering the operation of the LEIC Act, legal professional privilege is not protected when the communication is between a person and a Commonwealth Government Agency.<sup>38</sup> The Law Council considers that legal professional privilege should not be abrogated by coercive information gathering powers in relation to cases involving communications to a Commonwealth Government Agency.

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<sup>32</sup> *Law Enforcement Integrity Commissioner Act 2006* (Cth) ss 79, 95.

<sup>33</sup> *Ibid* s 80(4).

<sup>34</sup> *Baker v Campbell* (1983) 153 CLR 52.

<sup>35</sup> *Ibid*.

<sup>36</sup> (1999) 201 CLR 49.

<sup>37</sup> *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [111] (Kirby J).

<sup>38</sup> *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 80(4).

50. The Law Council also considers there should be some provision for an independent third party to be able to make a determination into of any claim of privilege.<sup>39</sup> Once a determination is made in relation to the claim of privilege by the third party, an opportunity can then be given for either party to commence proceedings seeking declaratory orders from a superior court in relation to whether the material is privileged.<sup>40</sup>
51. The Law Council also considers that the Commission should be classified as an “enforcement” body as defined by section 6 of the *Privacy Act 1988* (Cth) which provides an exhaustive list of “enforcement bodies” for the purpose of that section. This is important because disclosures that are otherwise prohibited under the *Privacy Act 1988* (Cth), are permitted where such disclosures are made to “enforcement bodies”.<sup>41</sup> There are also exceptions to the rights of access under the *Privacy Act 1988* (Cth) where giving access would be likely to prejudice an enforcement related activity being conducted by or on behalf of an enforcement body.<sup>42</sup> Being classified as an “enforcement body” also provides for important dispensation from the mandatory breach reporting regime under Part IIIC of the *Privacy Act, 1988* (Cth)<sup>43</sup>

### Recommendations

- **Consideration should be given to an independent tribunal determining claims made in relation to legal professional privilege and the subsequent protection afforded to material covered by that finding of privilege.**
- **The Commission should be added to the list of enforcement bodies listed in section 6 of the *Privacy Act 1988* (Cth).**

## Admissions and the privilege against self-incrimination

52. The privilege against self-incrimination is recognised as a fundamental human right. Indeed Article 14(3) of the *International Covenant on Civil and Political Rights* provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.<sup>44</sup> The rule against self-incrimination is a substantive common law right<sup>45</sup> available to an accused

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<sup>39</sup>See *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 147. As can occur in the Victorian anticorruption body, the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) which provides for an application to be made pursuant to section 147 of the Act to the Supreme Court for a determination to be made in relation to any claim of privilege.

<sup>40</sup>Law Council of Australia, Submission to the Australian Greens, *National Integrity Commissioner Bill 2010* (4 February 2011) 17. See also Australian Law Reform Commission, *Review of Legal Professional Privilege and Federal Investigatory Bodies*, Report No 107, (2008), 329.

<sup>41</sup> For example *Privacy Act 1988* (Cth) sub ss 20E(d), 21H(d).

<sup>42</sup> Ibid sub ss 20R(1)(c), 21T.

<sup>43</sup> Ibid sub s 26WN.

<sup>44</sup>See also United Nations Human Rights Committee, *CCPR General Comment No 13 on Article 14* (Administration of Justice), 21<sup>st</sup> sess (13 April 1984). Article 14 of the ICCPR provides for a number of fundamental rights including the right to a fair and public hearing, the presumption of innocence, legal representation as well as the privilege against self-incrimination.

<sup>45</sup> *Reid v Howard* (1995) 184 CLR 1, [8] (Toohey, Gaudron, McHugh and Gummow JJ). See [15] in relation to persons being questioned in civil proceedings.

in criminal proceedings as well as persons suspected of crime.<sup>46</sup> The privilege against self-incrimination is based on the desire to protect personal freedom and dignity.<sup>47</sup>

53. However, it is noted that section 96 of the LEIC Act does not excuse a person from answering questions on the grounds of self-incrimination. The section does provide for direct use immunity in subsequent criminal proceedings as set out in paragraph 96(4)(a), with the exception of the proceedings listed in subsection (4A).<sup>48</sup> This provision provides some privilege against self-incrimination which may encourage witnesses to co-operate with examiners on the basis that they can answer questions that may incriminate them. Conversely a witness that is compelled to answer a question without any privilege against self-incrimination may be more likely to be untruthful.<sup>49</sup> While there is some benefit in being able to compel a witness to answer a question to illicit information to assist in the investigation, the Law Council considers that the privilege against self-incrimination should not be abrogated to the extent the privilege does not apply to direct use and derivative use of the answers given in related criminal and civil proceedings.
54. It is still of particular concern to the Law Council that LEIC Act (and presumably the proposed new provisions in relation to the public sector division of the CIC) do not provide for protection against “derivative use” immunity. That is, information gathered as a result of answers provided in response to questioning conducted under the coercive powers, is able to be referred to the CDPP to be used in evidence against the person in subsequent criminal or civil proceedings. This is of particular concern where the primary purpose of the public sector division of the CIC will be to prepare a brief of evidence to be used in a subsequent criminal prosecution.
55. As noted by the Law Council in its submission on the 2010 National Integrity Commissioner Bill,<sup>50</sup> the Law Council is of the view that witnesses appearing before any anti-corruption commission should be able to refuse to answer a question or provide information to a Commissioner on the grounds that such information may incriminate the person. To do otherwise would undermine some of the fundamental principles of the criminal justice system, namely the presumption of innocence and the onus of proof always being on the prosecution, and as an essential element of these principles, the right to silence. In *Cornwall v The Queen* Kirby J stated:

*Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrongdoing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.*<sup>51</sup>

56. In criminal proceedings the use of material derived from answers given where the privilege against self-incrimination is removed would potentially raise questions of

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<sup>46</sup> *Petty & Maiden v R* (1991) 173 CLR 95.

<sup>47</sup> *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR, [7] (Murphy J).

<sup>48</sup> *Criminal Code Act 1995* (Cth) ss 137.1-137.2. Relating to ‘confiscation proceedings’, proceedings for an offence against sections 137.1 or 137.2 of the *Criminal Code* about false or misleading information relating to the LEIC Act, proceedings concerning contempt in relation to the ACLEI.

<sup>49</sup> *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR, [118], [127]. See also report of Australian Law Reform Commission, “Evidence” Interim Report 26, [852], [855], [861].

<sup>50</sup> Law Council of Australia, Submission to the Australian Greens, *National Integrity Commissioner Bill 2010* (4 February 2011) 18.

<sup>51</sup> *Cornwall v R* (2007) 231 CLR 260, [176].

admissibility of any such admissions. Such evidence would arguably come within the ambit of Part 3.4 of the Evidence Act and in particular paragraph 85(1)(a) dealing with questioning conducted by an “investigating official who was at the time performing functions in connection with the investigation of the commission, or possible commission, of an offence; or (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued” which is what the public sector division of the CIC will be doing.

57. The Law Council considers that any questioning by an “investigating official” of either division of the CIC, where there is statutory protection against self-incrimination, would, in a subsequent criminal trial, be subject to the provisions of the Evidence Act. Further in a trial it would not be appropriate for any answers given in response to “coercive questioning” be allowed to be adduced into evidence nor would any evidence of silence or refusal to answer questions be allowed to be use in subsequent criminal proceedings.<sup>52</sup>
58. The Law Council considers that a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of coercive powers by an agency of the Government. Such an approach enables useful information to be obtained, indeed encouraging witnesses to provide full and frank disclosure to the head of inquiry, while preserving the rights of witnesses to be treated the same as any other witness when it comes to protecting their right to a fair trial.

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<sup>52</sup> See *Evidence Act 1995* (Cth) s 89 in relation to not being allowed to draw any adverse inferences from a person’s “silence” and refusal to answer any questions by an “investigating official”.

## Recommendation

- **The privilege against self-incrimination should only be abrogated to the extent to which both a direct use and derivative use immunity apply in both civil and criminal proceedings.**

## Public and private hearings

59. The proposed model will only allow for public hearings in relation to investigations conducted within the law enforcement division of the CIC but hearings within the public sector division of the CIC will be conducted in private. In relation to the LEIC Act, at present the Minister who has general responsibility for the particular agency may request that the Integrity Commissioner conduct a public inquiry<sup>53</sup> or the Integrity Commissioner may of their own volition decide to conduct the whole or part of a hearing in relation to the investigation of a corruption issue either in public or in private.<sup>54</sup> In deciding whether to conduct the hearing either in private or in public (or partly in private and partly in public), subsection 82(4) of the LEIC Act states that the Integrity Commissioner must have regard to:

(a) whether evidence that may be given, or a matter that may arise, during the hearing (or that part of the hearing) is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence;

(b) any unfair prejudice to a person's reputation that would be likely to be caused if the hearing (or that part of the hearing) took place in public;

(c) whether it is in the public interest that the hearing (or that part of the hearing) take place in public;

(d) any other relevant matter.

60. In any public hearing, a witness may still request that his or her evidence be given in private as per section 89 of the LEIC Act. While a "public inquiry" must be held in public, there is a discretion for the Integrity Commissioner to conduct part of the "inquiry" in private.<sup>55</sup> The Law Council considers that it is important that the person appearing before the inquiry to be able to make an application to the Commission for a suppression order to be made in relation to their evidence in appropriate circumstances. Consideration could be given to having a provision similar to section 69A of the *Evidence Act 1929* (SA) that enables a court to make a suppression order to prevent prejudice to the proper administration of justice or to prevent undue hardship to a witness.

61. In relation to hearings conducted by the public sector division of the CIC, it is proposed that these hearing all be conducted in private. The advantage of conducting hearings in private is that it serves to protect the reputation of those persons concerned. This is a valid concern, particularly where allegations are aired in public without the

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<sup>53</sup> *Law Enforcement Integrity Commissioner Act 2006* (Cth) s 71.

<sup>54</sup> *Ibid* s 82(3).

<sup>55</sup> *Ibid* s 82(5).

protection afforded by the rigours of the criminal justice system in terms of the rules of evidence, the availability of legal representation and the presumption of innocence in the course of what is going to be an investigation only.

62. The Law Council considers that it has been a valid criticism that public hearings conducted by state anti-corruption bodies such as ICAC in NSW can take on the flavour of a “show trial” and attract an undue amount of media attention in a forum where the concerned person has limited means of defending themselves against prejudicial material.
63. In the NSW jurisdiction the ICAC may, “if it is satisfied it is in the interests of justice to do so”, conduct a public inquiry, pursuant to section 31 of the *Independent Commission Against Corruption Act 1988* (NSW). That section sets out the criteria that is required to be taken into account when decision to conduct a public inquiry including the following:
- a) the benefit of exposing to the public, and making it aware, or corrupt conduct,
  - b) the seriousness of the allegation or complaint being investigated,
  - c) any risk of undue prejudice to a person’s reputation (including prejudice that might arise from not holding an inquiry); and
  - d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the person concerned.
64. In relation to the Queensland model, there is a presumption against a hearing being public as subsection 177(1) of the *Crime and Corruption Act 2001* (Qld) provides that “Generally, a hearing is not open to the public”. Under the Queensland model the commission may only open a “crime investigation hearing” to the public if it considers that the opening of the hearing to the public will make the investigation to which the hearing relates more effective and that it “would not be unfair to a person or contrary to the public interest”.<sup>56</sup> A similar test is applied to a “witness protection function hearing” while for any other type of hearing the commission may open the hearing to the public if it considers that “closing the hearing to the public would be unfair to a person or contrary to the public interest”.<sup>57</sup>
65. In the Victorian *Independent Broad-Based Anti-Corruption Commission* there is also a statutory presumption that examinations conducted by the Commission be conducted in private. In the Victorian jurisdiction an examination is not open to the public unless the Commissioner considers on reasonable grounds that there are “exceptional circumstances” that justify a public hearing and it is in the public interest to hold a public examination and further that the public examination can be held without causing unreasonable damage to a person’s reputation, safety or wellbeing.<sup>58</sup>
66. In South Australia, all corruption inquiries by the ICAC must be carried out in private.<sup>59</sup> In that jurisdiction, as will be the case in the public sector division of the CIC, the power of ICAC to investigate corruption is limited to obtaining evidence in relation to the conduct under investigation for referral to the DPP to consider pursuing a criminal prosecution.

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<sup>56</sup> *Crime and Corruption Act 2001* (Qld) s 177(2)(i).

<sup>57</sup> *Ibid* s 177(2)(c)(1).

<sup>58</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 117(1).

<sup>59</sup> *Independent Commission Against Corruption Act 2012* (SA) s 55.

67. Under the proposed model for the public sector division of the CIC if the Commissioner makes a recommendation that the conduct is of such a criminal nature that it warrants prosecution in the criminal courts then it is proposed at that point the finding of the CIC be made public and that the public can then be kept informed of the progress of the subsequent trial in accordance with the normal principles of open justice (subject to the Court making any suppression or non-publication orders). As stated in the Consultation Paper, "Findings of corruption will be a matter for the courts to determine, according to the relevant criminal offence".<sup>60</sup> However, the hearing of the investigation will not be conducted in public. This is consistent with other investigations conducted by law enforcement agencies such as the police who routinely conduct their investigations in private.
68. The Law Council considers that an appropriate approach is that any hearing involved in the investigative process of corrupt conduct amounting to potential criminal conduct should be conducted in private. The Law Council also considers that it is appropriate that it should be left to the courts and the judicial process to make findings as to what constitutes criminal corrupt conduct. In this regard the Law Council considers that the approach in Queensland, which enables the CCC to conduct hearings in private with the exceptions as outlined above, should be the model adopted in proceedings.
69. If there is to be a broader definition of what constitutes "corrupt conduct" applicable to the public sector division of the CIC, it should be possible for the CIC to both refer conduct amounting to a criminal offence to the CDPP for prosecution, and that the CIC will also be able to make public any finding of corruption, if the conduct is such, that it is in the public interest for such a finding to be made public. In this way the reputation of the person concerned is protected by conducting the hearing in private. However, upon a positive finding being made that there has been corrupt conduct the public interest at that point requires there be some reporting by the CIC as to its findings of corrupt conduct unless it would not be in the public interest for the CIC to do so. This approach would serve to balance the need for promoting transparency and open justice but also respecting the rights and reputation of individuals.

#### Recommendation

- **Hearings before the Commission to be generally conducted in private unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest. In circumstances where a private hearing is conducted, the Commissioner should have discretion to release the report and transcript if findings of corruption are made and it is in the public interest to do so.**

## Procedural fairness

70. In the case of both private and public inquiries, it is of vital importance that there are safeguards in place to ensure there is procedural fairness to enable an affected individual the opportunity to properly defend their interests and reputation. If this is not done the person may be unfairly discredited without any right of reply or avenue of review. In this regard it is noted that by virtue of the operation of section 51 of the LEIC

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<sup>60</sup> A *Commonwealth Integrity Commission*, 5.

Act, 2006, that while this provides for an “Opportunity to be heard”, this opportunity is not to be given if the Integrity Commission is of the view that the affected person may have:

- Committed a criminal offence;
- Contravened a civil penalty provision;
- Engaged in conduct that could be the subject of disciplinary proceedings; or
- Engaged in conduct that may amount to grounds for dismissal; and the providing of reasons for the making of any finding by the Commission or giving the opportunity to be heard in reply to the finding, would compromise the investigation of the corruption issue or another corruption issue.

71. The Law Council considers that in all cases where an adverse finding is made against a person, particularly, in every case where there is a public inquiry, the findings should not be made until the interested person has been given details of the proposed findings, the reasons for those findings, including the evidence relied on to substantiate the findings, and the reasonable opportunity for the person to respond to those findings.

72. This position is in part based on the recommendation 15-1 made by the Australian Law Reform Commission (**ALRC**) in its report regarding procedural fairness in the context of Royal Commissions established pursuant to the *Royal Commissions Act 1902* (Cth).<sup>61</sup> It is important that procedural fairness principles be central to the conduct of hearings and inquiries conducted by the CIC so as to be consistent with the central principles relevant to the rule of the law and ensuring the decision making process is robust and not arbitrary. In enabling a departure from this principle because it may “compromise” the investigation is too broad and general a test to depart from established principle and may lead to not providing “the opportunity to be heard” because it is either too onerous, time consuming or inconvenient for the Commission to do so.

**Recommendation:**

- **There should be a statutory presumption in favour of the provision of findings made by the CIC and the opportunity for reply by the interested party, unless there are “reasonable grounds” to establish that to do so would have prejudicial consequences for a corruption investigation or further proceedings.**

## Legal representation

73. The Law Council considers that there should be some provision for legal representation in relation to inquiries conducted by the CIC in order to protect the rights and liberties of people of who are affected by investigations or public inquiries.

74. It follows from this principle that the funding of representation for a person who may be subject to adverse finding and is not in a position to pay for legal representation may

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<sup>61</sup> Australian Law Reform Commission, *Making Inquiries: A new Statutory Framework*, Report No 111 (2010).

be necessary to support the requirements of natural justice, procedural fairness and access to justice.

75. In this regard, it is noted that the LEIC Act does provide that a person giving evidence at a hearing may be represented by a legal practitioner<sup>62</sup> and the Law Council considers that a similar provision should apply to all hearings and inquiries conducted within both divisions of the CIC.

76. The provision of legal representation may be of particular importance in any application for judicial review of a decision made by the CIC pursuant to the *Administrative Decisions (Judicial Review) Act 1977 (Cth)* and consideration could be given for the funding of such representation subject to an appropriate merit and means test that could apply as is usually applicable in relation to a grant of Legal Aid by any state and territory based Legal Aid Commission.

#### Recommendation

- **A person giving evidence at a hearing relating to either division of the proposed Commission should be permitted to be represented by a legal practitioner and consideration should be given for the funding of such representation subject to an appropriate merit and means test that could apply as is usually applicable in relation to a grant of Legal Aid by any state and territory based Legal Aid Commission.**

## Referral mechanisms

77. In relation to the law enforcement division, the system and law relating to referrals will replicate the existing arrangements that are presently set out in the LEIC Act. This means a referral can come from:

- an Agency head within jurisdiction, as they are obliged to do under the present legislation;
- the Attorney-General;
- any staff member or member of the public; or
- the Commonwealth Ombudsman.

78. In relation to the public sector division it is proposed that a mandatory referral obligation be introduced to compel heads of departments, agencies and Commonwealth companies to report suspected corruption issues that are capable of constituting a criminal offence. It may also receive referrals from the Commonwealth Ombudsman or other Commonwealth Integrity Agencies such as ASIC if the conduct can constitute a criminal offence and is outside the jurisdiction of the referring agency.

79. Members of the public will not be permitted to make direct complaints to the public sector division of the CIC, but rather will be expected to complain through existing mechanisms such as the Ombudsman or the AFP who can then make the referral to the CIC.

80. In relation to parliamentarians and their staff, a referral could be made by the Independent Parliamentary Expenses Authority, the Australian Electoral Commission

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<sup>62</sup> *Law Enforcement Integrity Commissioner Act 2006 (Cth)* s 85.

or the AFP if they were reporting corrupt conduct that they reasonably suspected was capable of constituting a criminal offence.

81. The Law Council considers that there should be some aligning of the referral mechanisms between the law enforcement division and public sector division of the Commission. This would enable a member of the public to make a complaint in relation to an agency within the public sector division directly to the Commission. While the proposed arrangements are designed to ensure there is “not duplication with existing agencies”<sup>63</sup> it should be possible for the Commission to refer the complaint to another, agency to deal with the complaint if they consider it more appropriate for that agency to investigate the complaint. Further, in the absence of any whistleblower regime (as discussed below), it is important that a member of the public should be able to make a complaint to the CIC in relation to conduct covered by both divisions of the Commission.
82. The discussion about referral mechanisms is also informed by the definition of the type of corrupt conduct that will be investigated by the public sector division of the CIC. The proposal is that the public sector division will only receive referrals from other government agencies where the corrupt conduct relates to matters that are considered to constitute serious or systemic criminal offending. This would serve to probably reduce the referrals made to the CIC.
83. In relation to referrals being made by the AFP, the Consultation Paper provides an example where the AFP received a complaint from a member of the public regarding public sector corruption that amounted to suspected criminal conduct. In these circumstances it is envisaged that where the AFP considers that it was more appropriately dealt with by the CIC, it could seek advice from the CIC, refer it on to the CIC or potentially begin a joint investigation with the CIC.<sup>64</sup>

## Amendments to the Criminal Code

84. In order to consolidate all the “public sector” corruption offences in one division of the Criminal Code, and to refine and establish some additional “public sector corruption offences”, it is proposed that a new division be added to chapter 7 of the Criminal Code to deal with all the “public sector corruption offences”.
85. It is noted that most of the offences listed in this division apply to any natural or legal person and do not require as an element of the offence that the offences are committed by a Commonwealth official, with the exception of sections 139.2, 142.1(3) and 148.2 of the Criminal Code that are directed at offences committed by a Commonwealth Official.
86. What is intended is that the new division of the Criminal Code will bring together all offences, both existing and new, that are only capable of being committed by Commonwealth public officials. This is an important step as the jurisdiction for the threshold for investigation by the CIC in its public sector division will be contingent on whether the alleged corrupt conduct is capable of constituting one of the new or existing offences to be listed in the new division in chapter 7 of the Criminal Code.

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<sup>63</sup> *A Commonwealth Integrity Commission*, 9.

<sup>64</sup> *Ibid.*

87. It is also proposed that a number of offences that are currently listed in the Crimes Act will be transferred to the new Criminal Code division, including some offences that relate to oppressive conduct by a Magistrate or Judge.<sup>65</sup>
88. While there is some merit in consolidating a number of offences relating to corrupt conduct within the same division of the Criminal Code, the Law Council considers that offences relating to members of the judiciary should remain separate and distinct from other offences committed by employees within the public sector on the basis that there should be a separate and distinct Federal Judicial Commission to deal with issues relating to judicial corruption as discussed above. If a judicial officer has been found to have committed a criminal offence the Federal Judicial Commission can then refer the matter to the AFP to prepare a brief of evidence to be referred to the CDPP for prosecution.
89. The Law Council notes that it is proposed that two new “aggravated” offences be added to the list of offences to be listed in the public sector division of chapter 7 of the Criminal Code. The first will be an offence of “repeated public sector corruption” designed to target offenders who are repeatedly committing corruption related offences. This new offence will apply when a person has committed three or more offences as listed in the Criminal Code, including committing the same offence three or more times. In these circumstances what is proposed is that the maximum penalty for the aggravated offence will be five years greater than the maximum penalty that could apply if the underlying offences were prosecuted and sentenced as separate charges.
90. It appears that the addition of five years is to be added to the cumulated maximum penalties for each individual offence. In the example provided in the Consultation Paper where a person commits two offences each with a maximum penalty of ten years, and a further offence with a maximum of five years, the person has committed a new “aggregated offence” of “repeated public sector corruption” and the applicable maximum penalty will be thirty years imprisonment.
91. The Law Council considers that it is not necessary to create new aggravated offences for incidents of repeat offending. Such an approach may artificially increase the maximum penalty to one that is disproportionate to the conduct. In the example given in the Consultation Paper<sup>66</sup> an offence with a five-year maximum penalty is converted (albeit with the other offences) into an offence with a thirty year maximum penalty.
92. The Law Council considers that such an approach may lead to confusion in sentencing in assessing the level of objective seriousness for each individual offence and that a better approach to deal with an offender who commits a series of criminal offences is to allow the sentencing court to impose an appropriate penalty for each individual offence, having regard to the maximum penalty for each offence. The court can then decide to either accumulate the sentences, or partially accumulate the sentences (or indeed even run them concurrently) so as to take into account the principle of totality in sentencing as established by the High Court in the decision of *Mill v The Queen*<sup>67</sup> so that the overall, aggregate sentence, reflects the total criminality of the offender.
93. The Law Council notes that the court at present is required to have regard to the fact that where an offence “forms part of a course of conduct consisting of a series of

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<sup>65</sup> *Crimes Act 1914* (Cth) s 34.

<sup>66</sup> *A Commonwealth Integrity Commission*, 11.

<sup>67</sup> (1988) 166 CLR 59. See also *Postiglione v The Queen* (1997) 189 CLR 295, [308].

criminal acts of the same or similar character – that course of conduct”.<sup>68</sup> In these circumstances, the Law Council submits it is unnecessary and unduly confusing to create a new aggravated offence to address situations where an offender commits three or more corruption type offences.

94. The second “aggravated offence” that is proposed will be created is an offence of “Corrupt conduct by a senior official”. This offence will apply where a person is:
- a) A member of the Senior Executive Service (or equivalent position in a public sector agency where employees are not employed under the Public Service Act); and
  - b) Uses their position, influence, resources or knowledge as a member of the SES or as an agency head to commit an offence (the substantive offence) against a law of the Commonwealth.
95. It is proposed that this new aggravated offence will again attract a maximum penalty that is five years longer than the prescribed maximum penalty for the substantive offence that has been committed. Again, the provision may artificially elevate the maximum penalty to beyond that which is appropriate.
96. In principle the Law Council recognizes that there is a higher level of moral culpability for offender’s who breach a position of trust and responsibility such as offences committed by those who are in the higher echelons of the public sector which is what this provision is seeking to target.
97. However, rather than increasing the maximum penalty for the offences, an alternative way to acknowledge this breach of trust as an aggravating feature of the offending is to amend section 16A of the Crimes Act to include the use of position, influence, resources and knowledge as a factor the sentencing court is required to take into account when sentencing an offender who commits a corrupt conduct offence. This way for all offences consideration must be given to the breach of trust. It could be argued by the prosecution that the higher level of the position of the offender increases the trust that has been breached, thus elevating the objective seriousness of the offence. However, a breach of trust by anybody employed in the public sector would be covered by such an amendment, and not just those in the Senior Executive Service.
98. A further proposal in relation to amending the Commonwealth Code is to create a new offence of “Failure to report a public sector corruption offence”. It is proposed that for the purpose of this new offence “public sector corruption” will be defined, as consistent with the previous definition of “corruption” within the public sector division of the Commission, to be conduct which constitutes “any of the offences in the new public sector division of the Criminal Code” as discussed above.<sup>69</sup> The elements of the proposed new offence are:
- The person is a senior public service official;
  - The person knows of information that would lead a reasonable person to believe that an employee or agent of the agency has engaged in conduct;
  - That the conduct they know of would constitute one or more of the offences in the public sector division of the Criminal Code; and

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<sup>68</sup> *Crimes Act 1914* (Cth) s16A(2)(c).

<sup>69</sup> *A Commonwealth Integrity Commission*, 12.

- The person did not take reasonable steps for the conduct to be reported to law enforcement or another appropriate authority such as the Commonwealth Integrity Commission.

99. While the Law Council recognizes the need to promote and indeed mandate the reporting of “corrupt conduct” as defined for the purpose of the public sector division of the CIC, the Law Council considers that to subject people to possible criminal prosecution on the basis they knew of some “information” that may be unreliable, although capable of leading a reasonable person to believe an offence, and failed to report it, would not be an appropriate test. It is submitted that for a criminal offence to be committed the knowledge required by the offender must be capable of establishing a knowledge on behalf of the person that an offence has been committed and the person, knowing that, still refuses to take any step to report it

100. As the new proposed offence carries a maximum penalty of three years imprisonment, it is not to be imposed lightly. The mental element of the offence needs to be very clear. The proposed offence contained a subjective mental element that is conflated with an objective test, that is the offender must know what a “reasonable person would believe” which may be somewhat unclear as what is “reasonable” may vary from person to person. Such a provision may not sit well with the definition of “knowledge” set out in s.5.3 of the Criminal Code which defines knowledge as:

*A person has knowledge of a circumstance of a circumstance or result if he or she is aware that it exists or will exist in the ordinary course of events.*

101. In this regard, it would be advisable that the “fault element” for this particular offence, as required by Division 5, of the Criminal Code should be “intention” as defined by section 5.2<sup>70</sup> as opposed to either “recklessness” or “negligence”.<sup>71</sup> The knowledge required to establish the mental element of the offence should be confined to what the accused person knew in relation to the concerned person engaging in the alleged criminal conduct and then not taking appropriate action.

### Recommendations

- **In relation to the proposed new offence of failure to report a public sector corruption offence, the second element of the offence should be that the “person knows that an employee has engaged in conduct that constitutes a criminal offence” as opposed to “the person knows of conduct that would lead a reasonable person to believe than an employee has engaged in conduct”;**
- **The proposed new aggravated offences not proceed;**
- **That where an offence involves a breach of trust by a public official, the breach of trust be included in the factors to be taken into account in sentencing as set out in section 16A of the *Crimes Act 1914 (Cth)*; and**
- **That offences relating to members of the judiciary should not be included in the new public sector division in the Criminal Code.**

<sup>70</sup>See *Criminal Code Act 1995 (Cth)* s 5.2. Intention is defined as either:

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

<sup>71</sup> See *Criminal Code Act 1995 (Cth)* s 5.4 and 5.5

## Other matters

### Parliamentary Integrity Inspector

102. The Law Council has previously made a submission in relation to the Australian Greens in relation to the National Integrity Commissioner Bill of 2010 that was introduced into the Senate in 2010 by Senator Bob Brown, then leader of the Australian Greens.<sup>72</sup> The same Bill was introduced to the House of Representatives on 28 May 2012 by the Hon Adam Bandt MP of the Australian Greens. In that Bill there was a reference to the establishment of an Independent Parliamentary Adviser, who was able to provide advice to parliamentarians in relation to matters relating to the relevant code of conduct. The Independent Parliamentary Adviser was also to have the function of promoting better practices in relation to the conduct, propriety and ethics for ministers and parliamentarians.<sup>73</sup>
103. There is no provision for a body similar to the “Independent Parliamentary Adviser” in the Consultation Paper. Rather the CIC will only investigate suspected criminal corrupt conduct as that is what is required to trigger the investigation threshold in its public sector division. As stated previously, corrupt conduct that does not amount to one of the new or existing offences to be listed in the Criminal Code, would not be investigated or reported on by the public sector division of the CIC. The proposal in the Consultation Paper is that “misconduct” not amounting to a criminal offence is considered “more appropriately dealt with by the entities where the misconduct occurs: public sector agencies for public servants; House of Parliament for parliamentarians; the Prime Minister for Ministers; the Special Minister of State for ministerial staff”.<sup>74</sup>
104. The Law Council is of the view that the public would have more confidence in an independent body dealing with issues of misconduct by parliamentarians and their staff. It would reduce the perception that there is incentive and scope to dismiss misconduct when it is dealt with “internally” rather than by an independent entity such as the CIC. The Law Council also considers there may be some benefit in establishing an independent parliamentary adviser type role to at least be able to promote appropriate codes of conduct and proactively address issues relating to the ethics and overall propriety of parliamentarians, ministers and their staff. A retired judge should be appointed as Inspector General or adviser to deal with complaints and to report to Parliament.

#### Recommendations

- **An independent parliamentary integrity adviser/inspector general should be established to promote appropriate codes of conduct and proactively address issues relating to the ethics and overall propriety of parliamentarians, ministers and their staff.**
- **A retired judge should be appointed as Inspector General or adviser to deal with complaints and to report to Parliament.**

<sup>72</sup> Law Council of Australia, Submission to the Australian Greens, *National Integrity Commissioner Bill 2010* (4 February 2011).

<sup>73</sup> National Integrity Commission Bill 2012 (Cth) cl 123.

<sup>74</sup> *A Commonwealth Integrity Commission*, 7.

## Whistleblower protection authority

105. The Law Council notes that the Consultation Paper does not currently address several of the issues for a comprehensive whistleblower regime, as identified by the Parliamentary Joint Committee on Corporations and Financial Services (**the Committee**) *Whistleblower Protections Report* (September 2017) (**the Report**).<sup>75</sup> These include for example the Committee's recommendations relating to:

- (a) the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation beyond the Bill's corporate financial service and tax entities;
- (b) access to non-judicial remedies (e.g. through the Fair Work Commission under the *Public Interest Disclosure Act 2013* (Cth));
- (c) an agency empowered to implement the regime such as a whistleblower protection authority; and
- (d) appropriate resourcing for effective implementation.

106. The Law Council therefore encourages the Australian Government and the Treasury to continue to work towards a comprehensive whistleblower regime, which is essential to promote the exposure of corrupt conduct which can otherwise be difficult to detect.

107. In this regard, the Law Council notes that there is provision to establish a Whistleblower Protection Authority in the McGowan Bill. Part 9 of that Bill seeks to establish a Whistleblower Protection Commissioner (**WPC**) who has a range of powers and responsibilities in relation to the provision of whistleblower protection that would apply to a disclosure or request for information made by anybody in relation to a "disclosure of wrong doing" or any request for information in relation to a "whistleblower protection issue".<sup>76</sup>

108. In establishing a WPC, the McGowan Bill provides for the establishment of a statutory authority to whom a person can report either known or suspected wrongdoing anonymously<sup>77</sup> and the person can also seek confidential advice from the WPC in relation to any issue in relation to whistleblower protection.

109. The proposed Bill defines a disclosure of wrongdoing to include information or an allegation that raises "a corruption issue".<sup>78</sup> Another provision of the Bill would place a statutory obligation on a public official to refer an allegation or information pertaining to a whistleblower protection issue to the WPC, or in the case of a public official who is an employee of a Commonwealth agency, either the WPC or the head of the relevant agency.<sup>79</sup>

110. The WPC is able to provide general information, advice, guidance and assistance. However, in determining the nature of advice and information to be given, the WPC

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<sup>75</sup> Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (13 September 2017) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/WistleblowerProtections/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WistleblowerProtections/Report)>.

<sup>76</sup> National Integrity Commission Bill 2018 (cth) cl 160(1).

<sup>77</sup> *Ibid* cl 160(2)(b).

<sup>78</sup> *Ibid* cl 160(6).

<sup>79</sup> *Ibid* cl 162.

must consult with the National Integrity Commissioner, Commonwealth Ombudsman and the various other bodies listed in proposed subsection 164(2) of the McGowan Bill.

111. When the WPC receives disclosures of wrong doing, it is able to deal with that disclosure by either referring the disclosure to the relevant agency for investigation where it relates to that particular agency or within the powers of the particular agency to investigate. Where the allegation relates to a “corruption issue” the allegation must, unless it relates directly to the National Integrity Commissioner, be referred to the National Integrity Commissioner.<sup>80</sup> The WPC can then monitor the way the agency deals with the subsequent investigation and disclosure of information, provide ongoing advice and feedback to the person who made the initial disclosure and provide advice, guidance and assistance to the agency who is conducting the investigation.
112. The Law Council considers that there is some utility in establishing such a statutory framework for whistleblower protection. The advantage of such a model is that it should promote the exposure of corrupt conduct which can otherwise be difficult to detect and it may assist in triggering an investigation by the Commission. It also provides an avenue for members of the public and employees in the Commonwealth government agencies to be able to obtain independent, anonymous advice about issues that relate to disclosure and reporting of suspected corrupt conduct which is not presently available. This in itself may assist in promoting the reporting of suspected corrupt conduct.
113. The Council considers there is some public benefit to have some provision for anonymous reporting of corrupt conduct to the WPC. It may serve to encourage the reporting and detection of corrupt conduct particularly where people are fearful of reporting suspected corrupt conduct due to fear of recriminations being made against them or their family. It may also assist in facilitating another means of referral to the CIC, which in the proposed model is not able to respond to direct complaints by members of the public.

#### **Recommendation**

- **The Australian Government should continue to work towards a comprehensive whistleblower regime, which is essential to promote the exposure of corrupt conduct which can otherwise be difficult to detect and possibly trigger an appropriate investigation by the Commonwealth Integrity Commission.**

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<sup>80</sup> Ibid cl 165(2).