



Law Council  
OF AUSTRALIA

Office of the President

30 June 2021

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Deputy Leader of the Government in the  
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CC: Ms Esther Bogaart, Assistant Secretary, Fraud Prevention and Anti-Corruption  
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Dear Attorney-General and Assistant Minister

### Commonwealth Integrity Commission: 'Reasonable suspicion' thresholds

I refer to our previous meetings and correspondence regarding the consultation draft of legislation provided by the Attorney General's Department establishing a Commonwealth Integrity Commission (**CIC**), in particular, the Commonwealth Integrity Commission Bill 2020 (**CIC Bill**).

In its submission to the Attorney-General's Department, the Law Council noted that it intended to consult its Constituent Bodies, Sections and Advisory Committees further, before presenting a settled policy position on:

- whether a 'reasonable suspicion' threshold should apply before a corruption issue can be referred to the CIC, or
- whether an inability to satisfy this threshold should prevent the Integrity Commissioner (**Commissioner**) from taking further action on a corruption issue.

That consultation has now concluded, and the Law Council's position is presented below.

'Reasonable suspicion' is a common threshold for the state of mind required before a judicial officer may issue a warrant authorising the use of coercive or intrusive powers to gather evidence. The common law on this test is reasonably well settled. "[I]t must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist".<sup>1</sup> "It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce

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<sup>1</sup> *George v Rockett* (1990) 170 CLR 104, 112.

that state of mind”.<sup>2</sup> In this way, reasonable suspicion incorporates both a subjective and objective assessment of that state of mind.

While the Law Council’s position on the presence and standard of the threshold at various stages of a corruption issue being managed are presented below, these recommendations should be read in conjunction with the Law Council’s recommendations in its primary submission; particularly those relating to the scope of CIC’s jurisdiction<sup>3</sup> and the breadth of those persons able to refer corruption issues to it.<sup>4</sup>

### **Law Council position**

The Law Council is concerned that subjecting public sector corruption issues to the ‘reasonable suspicion’ threshold at two stages (the decision to refer and the decision to deal with) before they are investigated by the CIC will unduly prevent allegations of corruption from being investigated. This will significantly hamper the CIC’s effectiveness.

To mitigate this concern, the Law Council submits that a broad pathway to refer matters to the CIC is necessary. This would maximise the amount of information the CIC is able to receive and consider from discretionary referrals while maintaining the safeguard of ensuring that the CIC only investigates those issues where the requisite ‘reasonable suspicion’ exists.

### **Discretion to refer corruption issues by Ministers and other parliamentarians**

As previously noted, the clauses allowing the discretionary referral of a public sector corruption issue by the Attorney General, relevant Ministers, and parliamentarians mean that such referrals are only permitted if the person reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed.<sup>5</sup> The Law Council is concerned that this threshold creates an additional and unnecessary barrier to corruption issues even reaching the CIC. The Law Council has a number of concerns about the threshold applying in this instance, including:

- These issues are subjected to the threshold twice at present, as the CIC is subsequently required to be satisfied that the threshold is overcome before investigating.
- The person deciding whether the threshold has been overcome (and therefore whether an issue should be referred) may not be impartial. This may lead to occasions where a person decides not to refer an issue so that the person and/or their office is shielded from reputational or other damage.
- There may be a resourcing impact on the person making the referral arising from the need to consider the threshold.

On this basis the Law Council submits that the referral threshold should be removed or lowered, so that a wider range of referrals can be made to the CIC.

Removing the threshold to refer corruption issues would better align the threshold with those applying to law enforcement corruption issues, and in doing so, prioritise the referral of issues over matters of reputational integrity etc., at this initial stage. Matters of reputational integrity will be preserved by safeguards arising from Law Council’s

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<sup>2</sup> Ibid 113.

<sup>3</sup> Law Council of Australia, Submission to the Attorney-General’s Department, *Commonwealth Integrity Commission consultation draft* (18 February 2021), [26]-[48].

<sup>4</sup> Ibid [69]-[77].

<sup>5</sup> Draft Bill: Commonwealth Integrity Commission Bill 2020 (Cth) (‘CIC Bill’) cls 33(2), 34(2), 35(2).

recommendation that hearings be heard in private unless that would be unfair to the person or contrary to the public interest.<sup>6</sup>

Removing the threshold at this point would also remove doubt in the mind of discretionary referrers that they may be covered by the protections provided in the CIC Bill<sup>7</sup> – a doubt which might otherwise discourage them from coming forward.

If removing the threshold for referrals is not to be accepted, the Law Council considers that lowering the threshold would go some way to addressing the Law Council's concerns.

At present, the referrer is required to hold the requisite state of mind (reasonable suspicion), that an offence was, or is being committed. That is, if the referrer does not suspect (to the objectively assessable standard of reasonableness) that the elements of a listed offence have been, or are in the process of being, satisfied, then he/she cannot make the referral.

This should be contrasted with the test applicable to mandatory referrals to the Queensland Crime and Corruption Commission (QCCC) under the *Crime and Corruption Act 2001* (Qld). That legislation also uses the 'reasonable suspicion' threshold, but the subject matter available to satisfy the threshold is more broad.<sup>8</sup> Whilst the CCC places no threshold on discretionary referrals (called 'complaints') from any person,<sup>9</sup> a public official must notify the CCC if the public official "reasonably suspects that a complaint... involves, or may involve, corrupt conduct".<sup>10</sup> That is, while the referrer must still hold the state of mind to the objectively assessable standard of reasonableness, that state of mind does not need to extend to satisfaction that a complaint involves corrupt conduct – only that it may.

Even if the Government determines that the threshold must be retained in some form, the Law Council submits that to hold a reasonable suspicion as to the commission of a past offence, or an offence being committed, is an unduly high one to prevent the mere referral of corruption issues to the CIC. It would be foreseeably difficult for a person to make this assessment prior to any investigation being undertaken. If any investigation is attempted other than by the CIC, it may compromise a later investigation.

If the Law Council's primary recommendation is not accepted, the Law Council supports the adoption of a test similar to that applicable to mandatory referrals to the QCCC, and recommends that the relevant clauses which apply the 'reasonable suspicion' threshold to discretionary referrals should be expanded to include a reasonable suspicion that the offence *may* have been committed or *may* be being committed.

#### Recommendations

- **Primarily, clauses 33(2), 34(2) and 35(2) (which contain the 'reasonable suspicion' threshold) should be removed.**
- **Alternatively, following the QCCC model, clauses 33(2), 34(2) and 35(2) should be expanded to include a reasonable suspicion that the offence may have been committed or may be being committed.**

<sup>6</sup> Law Council of Australia, Submission to the Attorney-General's Department, *Commonwealth Integrity Commission consultation draft* (18 February 2021), [130-140].

<sup>7</sup> See e.g., CIC Bill cls 276, 279.

<sup>8</sup> *Crime and Corruption Act 2001* s 38(1).

<sup>9</sup> *Ibid* s 36.

<sup>10</sup> *Ibid* s 38(1).

### **Mandatory requirement for heads of certain regulated entities to notify corruption issues relating to their entities**

The Government's current proposed CIC model imposes a statutory obligation on the heads of certain regulated entities to notify the Commissioner of corruption issues related to their entity.<sup>11</sup> This obligation only operates if the entity head reasonably suspects (having had regard to the matters specified in any CIC determinations) that the offence to which the corruption issue relates has been, or is being, committed.

This provision is distinguished from those in clauses 33(2), 34(2) & 35(2) of the CIC Bill, in that it imposes a positive requirement on certain heads of regulated entities to notify corruption issues, rather than conferring a mere discretion to refer those issues. Both referral pathways are presently tempered by the 'reasonable suspicion' threshold which narrows the discretion or requirement in each case.

The Law Council supports 'reasonable suspicion' as the threshold for mandatory notification of public sector corruption issues by agency heads, in view of the imposition of a statutory requirement to notify (breach of which may expose them to legal liability or disciplinary action) as distinct from a discretion to refer conferred on any other person.

Where a positive obligation such as this requirement is imposed, the Law Council recognises that compliance with the obligation must be capable of assessment by reference to a known standard. As noted above, the 'reasonable suspicion' threshold serves as an important safeguard from an entity head being captured by the requirement to notify in borderline cases and being exposed to legal liability or disciplinary action.

To that end, and in recognition of the notoriety of the 'reasonable suspicion' threshold, the Law Council supports maintaining the threshold in the requirement imposed under clause 37(2).

### **Dealing with corruption issues**

In relation to dealing with these corruption issues, the CIC Bill requires the Commissioner to take no further action if the issue is a public sector corruption issue and the Commissioner does not reasonably suspect that the offence to which the issue relates has been or is being committed.<sup>12</sup>

The Law Council recognises that the CIC will not be able to investigate all allegations of corruption, and the model needs to strike the necessary balance between effectiveness and the appropriate use of public resources. The CIC needs to employ a well-known standard to ensure that its resources are only used to investigate corruption issues that have merit, and appropriately fall within its jurisdiction. For this reason, and those below, the Law Council supports maintaining the 'reasonable suspicion' threshold for the CIC deciding whether to deal with a corruption issue.

As noted above, an advantage of relaxing the referral threshold while retaining the 'reasonable suspicion' threshold for dealing with corruption issues would be the creation of a mechanism by which the CIC has access to a wide range of referrals and is then responsible for applying the 'reasonable suspicion' threshold to ensure effectiveness in investigations.

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<sup>11</sup> CIC Bill cl 37(2).

<sup>12</sup> Ibid cl 48(3).

A further advantage of maintaining a requirement that the Commissioner then take no further action if he/she does not reasonably suspect that an offence has been committed is that it will preserve a right of recourse to review if the Commissioner decides to proceed with an arguably unmeritorious investigation – most relevantly to subjects of an investigation who believe that the threshold is not met.

The CIC Bill excludes decisions in connection with a corruption investigation or public inquiry from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>13</sup> However, there remains an ability to collaterally challenge (via judicial review under the original jurisdiction of the High Court and the Federal Court of Australia) the jurisdiction of the CIC and the decision to commence an investigation if the person believes that the investigative threshold has not been met. The ground of review would be jurisdictional error and the remedy would be a prerogative writ of prohibition to terminate the inquiry.

I understand that the Law Society of New South Wales will separately write to you regarding its view on these issues.

The Law Council looks forward to continuing to work with you and your Government on the development of the CIC.

Thank you for your consideration. If you would like to discuss this matter further, please do not hesitate to contact me directly on 0438 301 956 or at [Jacoba.Brasch@lawcouncil.asn.au](mailto:Jacoba.Brasch@lawcouncil.asn.au).

The responsible officer within the Law Council Secretariat, Dr Natasha Molt, Director of Policy, is also available to assist the Department or your office on (02) 6246 3754 or at [Natasha.Molt@lawcouncil.asn.au](mailto:Natasha.Molt@lawcouncil.asn.au)

Yours faithfully



**Dr Jacoba Brasch QC**  
**President**

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<sup>13</sup> Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill 2020 (Cth) sch 3 pt 2 items 2, 3.