

Commonwealth Integrity Commission Bill

Briefing paper

November 2020

Summary

After a two-year wait, the Government has today released its Draft Commonwealth Integrity Commission Bill. While it has promised an organisation “with greater powers than a Royal Commission”, the reality is that what is has proposed is an organisation that is not fit for purpose.

Many of the problems with the proposal stem from the distinction the Bill creates between law enforcement corruption issues¹ and public sector corruption issues² - a distinction that is both unfortunate and unwarranted.

Specifically, the following aspects of the Bill need to be remedied if the government's statements about creating an organisation with greater powers than a Royal Commission are to be more than mere rhetoric:

- No public hearings may be held in respect of public sector corruption;
- The definition of corrupt conduct is too narrow. It excludes anyone outside the public sector who dishonestly or improperly influences or attempts to influence the probity and efficacy of public decision-making. This is not the case in most state jurisdictions;
- The threshold for a referral is too high. Public sector corruption can be investigated only where there is a reasonable suspicion that at least one of a number of listed offences has been or is being committed;
- In the case of the public sector and parliamentarians, the making of referrals is significantly circumscribed;
- The Commission can only investigate on its own motion in the case of law enforcement corruption;
- The Bill would not operate retrospectively;
- There may be no findings of corrupt conduct for parliamentarians or public servants in any final report; and
- There is provision under s 270 for a certification process which may prevent the Integrity Commissioner and Inspector General from accessing certain information certified by the Attorney-General. This may cover an extremely broad category of information.

We look forward to seeing the Bill modified as required over the next six months so that the objective of creating a serious Commonwealth Integrity Commission can be achieved.

¹ Which include corruption issues relating to law enforcement agencies: s 5.

² Which include corruption issues relating to a public sector agency, the office of a parliamentarian, a parliamentarian, a higher education provider or a research body: s 5.

Corrupt conduct

The Bill includes various definitions of "engages in corrupt conduct".

Staff members of law enforcement agencies and the proposed Integrity Commission are treated similarly, insofar as there is no requirement that the conduct in which they engaged constituted a listed offence as defined by s 18: ss 17(1) and 17(8).

In contrast, staff members of public sector agencies, offices of parliamentarians, higher education providers and research bodies, as well as Parliamentarians, will only have engaged in corrupt conduct where their conduct constitutes a listed offence (defined by s 18 as an offence under specific other legislative provisions: ss 17(2)-(7)).

Referrals

The ways in which referrals can be made appear to have been carefully circumscribed under Division 1 of Part 4.

Not only is the threshold which must be met before a referral can be made too high – the referrer must "reasonably suspect that the offence to which the corruption issue relates has been, or is being, committed" – only the Attorney-General, responsible Minister of certain bodies, and parliamentarians in respect of themselves and their own offices, may make referrals.

Under s 33, the Attorney-General may refer an allegation or information raising a corruption issue relating to a regulated entity other than the office of a parliamentarian, if s/he reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed.

Under s 34, the responsible Minister for a regulated entity that is a law enforcement agency, a public sector agency, a higher education provider or a research body may refer an allegation or information raising a corruption issue. If the issue is not a law enforcement corruption issue, the Minister can make the referral only if s/he reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed.

Under s 35, any parliamentarian can refer an allegation or information raising a corruption issue in relation to themselves or their office, if they reasonably suspect that the offence to which the corruption issue relates has been, or is being, committed.

There is, for example, no way for a public servant or other whistleblower to make a referral of a corruption issue (with the exception of corruption issues relating to law enforcement, which can be referred by any person under s 44).

Own-motion investigations

The power to commence own-motion investigations is a critically important power for an effective Integrity Commission. The Commonwealth's proposed Integrity Commission would only have this power in respect of a law enforcement corruption issue.

Under s 61(1), if the Integrity Commissioner becomes aware of an allegation, or information, that raises a law enforcement corruption issue, the Integrity Commissioner

may on her/his own initiative deal with the corruption issue in one of the ways referred to in subsection 49(1) or 52(7).

In contrast, under s 61(3) the Commissioner may decide to deal with a public sector corruption issue only where s/he is investigating an issue or inquiry and in the course of doing so, becomes aware of an allegation, or information, that raises a public sector corruption issue and s/he reasonably suspects that the offence to which the new corruption issue relates has been, or is being, committed.

Hearings

The ability to hold public hearings is a fundamental power of effective integrity commissions.

Under s 99(8), a hearing for the purpose of a corruption inquiry must be held in public unless it deals with corruption in – or the integrity of staff members in – public sector agencies, higher education providers, or research bodies.

Under s 99(5) of the Commonwealth's proposed legislation, a hearing for the purpose of investigating a corruption issue must be held in private to the extent that the hearing is dealing with a public sector corruption issue. Section 106(1)(d) requires evidence at a hearing held in public to be given in private if giving the evidence would disclose information that relates to a public sector corruption issue.

Under s 99(10), a part of a hearing for the purpose of conducting a corruption inquiry may also be held in private if the Integrity Commissioner so directs.

Section 270 certifications

Section 270(1) empowers the Attorney-General to certify that disclosure of certain information would be contrary to the public interest on one or more of the grounds set out at s 270(2) (which include – amongst other things – that the disclosure would prejudice the Commonwealth's security, defence or international relations; disclose the deliberations or decisions of the Cabinet or one of its Committees, or the deliberations or advice of the Executive Council; or prejudice the fair trial of any person or the impartial adjudication of a matter).

Under ss 271 and 272, the Integrity Commissioner and Inspector-General respectively are prevented from accessing information or documents containing section 270 certified information. There is nothing to prevent the Attorney-General taking a very broad view of information that can be excluded under s 270(2). Indeed, a similar power exists at s 37 of the *Auditor-General Act* and in 2018 the Auditor-General expressed concern that "in its first use of section 37, the Executive [had] adopted an unexpectedly broad interpretation of this provision".³

Reports

Section 178 establishes requirements in respect of reports on investigations into corruption issues relating to regulated entities.

³ 4 October 2018 letter from Grant Hehir to Senator Dean Smith.

The Integrity Commissioner is required to prepare a report on any investigation (s 178(1)), but s/he must prepare separate reports about:

- (a) any law enforcement corruption issues that are the subject of an investigation;
- (b) any corruption issues that are the subject of the investigation that relate to public sector agencies, higher education providers or research bodies; and
- (c) any corruption issues that are the subject of an investigation that relate to the offices of parliamentarians.

Section 178(4) provides that a report on a law enforcement issue under s 178(1) must set out the Commissioner's findings, evidence, proposed actions or actions taken, and any recommendations. In contrast, a report about a public sector corruption issue must set out only proposed actions or actions taken, and any recommendations: s 178(5). That is, it must not include the Commissioner's findings or evidence upon which they were based.

Information must be excluded from a report not only where an s 270 certification applies, but also where the Commissioner is satisfied that "it is desirable in the circumstances to exclude the information from the report": s 178(8). Section 178(9) provides that in deciding whether to exclude information under s 178(8), the Integrity Commissioner must seek to achieve an appropriate balance between:

- (a) the public interest that would be served by including the information in the .. material sent; and
- (b) the prejudicial consequences that might result from including the information . in the material sent.

Section 178(11) a report may include an opinion or finding about whether a person engaged in corrupt conduct *while a staff member of a law enforcement agency*. Otherwise, a report must not include an opinion or finding about whether a particular person engaged in corrupt conduct; or about corruption by, or the integrity of, a particular person.

Section 184 establishes requirements in respect of the preparation of reports on corruption inquiries. A report on a corruption inquiry prepared in accordance with s 184 must exclude any opinion, finding or recommendation about an individual: s 184(3). The point is reiterated at s 184(8), which requires that a report prepared under s 184(1) and supplementary report prepared under s 184(7) must not include any opinion or finding about whether a person engaged in corrupt conduct, or about corruption by or the integrity of a person. Section 184(9) makes explicit that a report under s 184(1) must not include any opinion, finding or recommendation about a parliamentarian, the office of a parliamentarian or a staff member of the office of a parliamentarian.

Section 188 provides for the release of reports about certain law enforcement corruption issues and corruption inquiries. Section 188(1) provides that where the Integrity Commissioner gives the Minister a report prepared under s 178(1) about a law enforcement corruption issue, and at least one public hearing was held in the course of the investigation, a copy of a report must be tabled in both Houses of the Parliament. The tabling requirement also applies where the Integrity Commissioner gives the Minister a report prepared under s 184(1).

Section 188(2) requires that the Minister must remove information from the report if s/he is "of the view that its inclusion may [...] prejudice proceedings brought as a result of a corruption investigation or corruption inquiry", amongst other things.