

## Above the law?

# The protection of parliamentarians under the CIC Bill

Briefing paper

November 2020

### Summary

The Government's recently-released exposure draft of the Commonwealth Integrity Commission Bill protects parliamentarians and their staff (who are, for relevant purposes, members of the "public sector") from scrutiny:

- It does not allow own motion investigations into public sector corruption
- It does not allow public hearings in relation to public sector corruption
- Secrecy provisions prohibit reporting on any evidence, findings or recommendations relating to parliamentarians and their staff

The bill creates a distinction – or, more accurately, a gulf – between public sector corruption and law enforcement corruption. Public sector corruption issues are treated with kid gloves, while law enforcement corruption issues (as can be seen, for example, in relation to own-motion investigations and hearings) are accorded something approaching rigour. The distinction is also manifest throughout the various reporting requirements, which single out parliamentarians and their offices for protection. Some protections go so far as to prohibit the publication of "any opinion or finding that is critical (either expressly or impliedly) of, or a recommendation about, a parliamentarian, or their office, or any staff members of their office": s 239(7).

### 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 have a very limited power to do this in relation to parliamentarians and their offices.

The Commissioner may of his/her own motion 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: s 61(3).

The problem with this provision becomes apparent upon comparison with the equivalent provision for law enforcement corruption issues. In these cases, 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 as s/he would normally deal with a corruption issue: s 61(1).

## **Public Hearings**

The ability to hold public hearings is fundamentally important if an integrity commission is to be effective. Public hearings allow the proper investigation and exposure of corrupt conduct.

The CIC bill requires that hearings into law enforcement corruption be held in public: s 99(8). By contrast, where a hearing is for the purpose of a corruption inquiry, or investigating a corruption issue, in relation to the public sector (including parliamentarians and their staff) it cannot be held in public: ss 99(5) and 99(9).

## **Reporting**

### ***Reports by the Integrity Commissioner***

The Integrity Commissioner is required to prepare a report on any investigation into a corruption issue relating to any entity (referred to in the Bill as a "regulated entity") or official under its jurisdiction, whether in the public or the law enforcement sector. Significantly, however, s/he must prepare separate reports about – amongst other things – any corruption issues the subject of the investigation that relate to offices of parliamentarians: s 178(2):

Section 178(4) requires that a report on a law enforcement corruption issue under s 178(1) must set out the Commissioner's findings, the relevant evidence, proposed actions or actions taken, and any recommendations. On the other hand, a report about a public sector corruption issue – which includes issues relating to parliamentarians and their offices – 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 the evidence upon which they were based.

Section 178(11) provides that 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*. In stark contrast, s 178(12) provides that, in every other case – including that of parliamentarians and their staff – a report must not include "an opinion or finding (a) about whether a particular person engaged in corrupt conduct; or (b) about corruption by, or the integrity of, a particular person."

The heading of s 184 is "Report on corruption inquiry". The section confers on the Integrity Commissioner a wide discretion to exclude information from the public portion of the report, and requires the exclusion of both the public and the supplementary (confidential) report of "any opinion or finding (a) about whether a particular person engaged in corrupt conduct; or (b) about corruption by, or the integrity of, a particular person": s 184(8). In particular, "[a] report prepared under this section 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": s 184(9).

### ***Reports by regulated entities***

Not all investigations conducted, and not all reports compiled, pursuant to the provisions of the Bill, are conducted or compiled by the Integrity Commissioner. Where a regulated entity investigates a corruption issue it must cause a report on the

investigations to be prepared: s 82(1). That report must not deal with any corruption issues that relate to parliamentarians or offices of parliamentarians: s 82(2). The Integrity Commissioner may comment on a final report or the investigation to which the report relates, but must not make a comment or recommendation relating to a parliamentarian or their office: ss 81(1) and 83(5).

### ***Reports by the Inspector-General***

Part 12 of the Bill establishes the office of the Inspector-General of the Commonwealth Integrity Commission, the function of which is to inquire into and report upon the performance of the CIC: s 230. Where an inquiry is completed under Part 12 of the Bill, the Inspector-General must produce a report: s 239(1). This report must not include any opinion or finding that is critical (either expressly or impliedly) of, or a recommendation about, a parliamentarian, or their office, or any staff members of their office: s 239(7).

Annual Reports and special reports prepared by the Inspector-General must also not include any opinion or finding that is critical (either expressly or impliedly) of, or a recommendation about, a parliamentarian, or their office, or any staff members of their office: s 256(5).

### ***Advising of the outcomes of investigations***

If a corruption issue investigated by the Integrity Commissioner is referred to the Commissioner by a Minister, the Integrity Commissioner is obliged, in the case of an ss 33 or 34 referral) to advise the Minister of the outcome of the investigation: ss 182(1). If, however, the reference concerned a law enforcement corruption issue (and therefore might have come from "any person", whereas references concerning a public sector corruption issue could only lawfully come from a restricted class of persons) the Commissioner has no such obligation – merely a discretion whether or not to advise the person making the reference of the outcome of the investigation.

However, where the corruption issue relates to the conduct of a person while a staff member of a parliamentarian's office, and information that may be prejudicial to the person's reputation is included in a report prepared under section 182, the Integrity Commissioner must not give to any person a copy of any part of the report that includes the prejudicial information: s 182(5).

## **Conclusion**

The public has a right to know of investigations and findings of corrupt conduct involving the public sector and parliamentarians. The extraordinary protection accorded to parliamentarians under the CIC bill will, however, only further undermine public trust.

The Government's Commonwealth Integrity Commission Bill should be amended to equalise treatment of law enforcement corruption and public sector corruption. The conduct of parliamentarians should not be given special treatment or protection from scrutiny. The secrecy provisions prohibiting reporting of investigations involving parliamentarians should be removed.

## **About The Centre for Public Integrity**

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at [www.publicintegrity.org.au](http://www.publicintegrity.org.au).