

## Commonwealth Integrity Commission Consultation: the Government is the only supporter of its CIC

Briefing paper

May 2021

The consultation process established by the federal Government in relation to its *Commonwealth Integrity Commission Bill 2020 Exposure Draft* has resulted in more than 300 submissions being made to the Attorney-General's Department.

To date, 218 of these submissions have been published, and The Centre for Public Integrity has analysed all those made by organisations in order to determine which deal with any of the following six key features of the Bill:

1. the proposed splitting of the Commission into two separate divisions (one dealing with law enforcement agencies, and the other with the public sector);
2. the narrow definition of corrupt conduct in respect of public sector corruption;
3. the limited ability of the Commission to undertake own motion investigations, and the restricted referral process, in respect of public sector corruption (including the preclusion of public and whistleblower complaints being investigated);
4. the 'reasonable suspicion' threshold in relation to public sector corruption;
5. the lack of power to hold public hearings in relation to public sector corruption; and
6. the lack of power to report publicly in relation to public sector corruption.

The organisations whose submissions deal directly with these points include:<sup>1</sup>

- the Accountability Round Table;
- the National Integrity Committee;
- Transparency International Australia;
- the Grattan Institute;
- the Law Council of Australia;
- the Australian Human Rights Commission;
- the Castan Centre for Human Rights Law and the Australian Centre for Justice Innovation;
- Civil Liberties Australia;
- the Human Rights Law Centre and Public Interest Law Advocacy Centre;
- the Australian Federal Police Association;
- the Police Federation of Australia;
- the Community and Public Sector Union (**CPSU**);
- Corrs Chambers Westgarth;
- Allens Linklaters;
- Australian Council of Trade Unions (**ACTU**);

---

<sup>1</sup> Attorney General's Department, "Submissions received for the CIC Integrity Commission Consultation Draft" <https://www.ag.gov.au/submissions-received-cic-integrity-commission-consultation-draft> accessed 17 May 2021).

- Governance Institute of Australia;
- the Institute of Public Affairs;
- the Vietnamese Australian Lawyers' Association;
- Voices of Indi; and
- the Uniting Church – Synod of Victoria and Tasmania.

Where these organisations specifically address the issues enumerated above, they are – with the exception of Allens Linklaters and the Institute of Public Affairs – united in their position that these represent deficiencies of the draft Bill and require rectification (see Table 1).

The virtual unanimity on these key issues means that if the federal Government wishes to be credible, it cannot proceed with the intransigence that has so far characterised its response to the Commonwealth Integrity Commission (**CIC**) consultation process: if its will is to create a Commission that is truly fit for purpose, its draft Bill requires substantial amendment.

**Table 1: Who supports key features of the Commonwealth Integrity Commission Draft Exposure Bill?<sup>2</sup>**

	<b>Support</b>	<b>Oppose</b>
<p><b>Two divisions with different powers</b>  <i>One division responsible for law enforcement corruption issues, and one responsible for public sector corruption issues (each with substantially different powers)</i></p>		<p>Accountability Round Table, National Integrity Committee, Transparency International Australia, Law Council of Australia, Australian Federal Police Association, Police Federation of Australia, Governance Institute of Australia, Vietnamese Australian Lawyers' Association, Uniting Church in Australia – Synod of Victoria and Tasmania</p>
<p><b>Definition of corrupt conduct</b>  <i>Narrow definition in respect of public sector corruption issues, including requirement for a listed criminal offence to have been committed</i></p>	<p>Institute of Public Affairs</p>	<p>Grattan Institute, National Integrity Committee, Accountability Round Table, Transparency International Australia, Corrs Chambers Westgarth, CPSU, Australian Human Rights Commission, ACTU, Law Council of Australia, Vietnamese Australian Lawyers' Association</p>
<p><b>Reasonable suspicion threshold</b>  <i>No power to investigate public sector corruption issues unless the Commissioner 'reasonably suspects' that corrupt conduct – requiring the commission of a listed criminal offence – has been engaged in</i></p>		<p>Accountability Round Table, Transparency International Australia, Castan Centre, Corrs Chambers, CPSU, National Integrity Committee.</p>
<p><b>Referral processes and own motion investigations</b>  <i>Limited ability to undertake own motion investigations and inability to investigate public (including whistleblower) complaints in respect of public sector corruption issues</i></p>		<p>Accountability Round Table, Australian Federal Police Association, Australian Human Rights Commission, Civil Liberties Australia, CPSU, Corrs Chambers Westgarth, Law Council of Australia, Castan Centre, National Integrity Committee, Transparency International Australia, ACTU, Governance Institute of Australia, Vietnamese Australian Lawyers' Association, Uniting Church in Australia – Synod of Victoria and Tasmania</p>
<p><b>Public hearings</b>  <i>No public hearings for public sector corruption issues</i></p>	<p>Allens Linklaters</p>	<p>Accountability Round Table, Australian Human Rights Commission, Civil Liberties Australia, CPSU, Corrs Chambers Westgarth, Transparency International Australia, Law Council of Australia, Castan Centre for Human Rights Law and Australian Centre for Justice Innovation, ACTU, Human Rights Law Centre and Public Interest Advocacy Centre, National Integrity Committee, Governance Institute of Australia, Vietnamese Australian Lawyers' Association, Voices for Indi, Uniting Church in Australia, Synod of Victoria and Tasmania</p>
<p><b>Public reporting</b>  <i>No public reporting for public sector corruption issues</i></p>	<p>Allens Linklaters</p>	<p>Accountability Round Table, Transparency International, Law Council of Australia, Grattan Institute, National Integrity Committee, Governance Institute of Australia, Uniting Church in Australia – Synod of Victoria and Tasmania</p>

<sup>2</sup> Nuances in respect of these positions are drawn out below.

## I. JURISDICTIONAL DEFICIENCIES

### a) Division of the proposed CIC into two jurisdictions with different powers

The draft Bill proposes to split the CIC into two separate divisions: one which deals with law enforcement, while the other deals with the public sector (which also includes parliamentarians and their staff). The two divisions have substantially different powers.

Amongst the organisations who address the proposed division of the CIC in their submissions, there is consensus that it is undesirable. Specifically, it is not supported by the Accountability Round Table, the National Integrity Committee, Transparency International Australia, the Law Council of Australia, the Australian Federal Police Association, the Police Federation of Australia, the Vietnamese Australian Lawyers' Association and the Uniting Church in Australia, Synod of Victoria and Tasmania.

The Accountability Round Table describes the proposition on which the proposed division rests – that law enforcement agents are more likely to be corrupt than politicians, their staff, and other public servants – as “highly contestable”.<sup>3</sup> Similarly, the Law Council of Australia has described the justification for the disparity in the treatment of law enforcement corruption issues and public sector corruption issues as “inadequate”,<sup>4</sup> and the Uniting Church in Australia – Synod of Victoria and Tasmania submits that Abuse of office and other forms of corruption in the public sector are capable of doing as much harm as abuse of office and other forms of corruption by law enforcement agencies”.<sup>5</sup> As Transparency International Australia points out, the Commission “must be fair and equitable in its treatment of all federal public officials irrespective of status or role, and entities involved in federally funded services and contracts.”<sup>6</sup>

The National Integrity Committee warns that the proposed division “is inevitably open to the inference that the absence of wide corruption investigatory powers in the public sector is deliberately designed to make corruption in this area more difficult to detect and intended to protect politicians and other public officers. Even if that is not its purpose, the absence of such powers will certainly bring about this result.”<sup>7</sup>

According to the Vietnamese Australian Lawyers' Association, “Dividing corruption conduct into different sectors and only permitting certain people or method of reporting corruption makes the process difficult and confusing and limits the platform of reporting”.<sup>8</sup>

***CPI recommendation: That the proposed splitting of the Commission into two separate divisions be abolished***

---

<sup>3</sup> Accountability Round Table submission, p 3.

<sup>4</sup> Law Council of Australia submission, p 11.

<sup>5</sup> Uniting Church in Australia – Synod of Victoria and Tasmania submission, p 3.

<sup>6</sup> Transparency International Australia submission, p 4.

<sup>7</sup> National Integrity Committee submission, p 3.

<sup>8</sup> Vietnamese Australian Lawyers' Association submission, p 3.

## b) The definition of 'corrupt conduct'

Under the proposed model, only conduct capable of constituting a criminal offence can be investigated by the Commission when it is investigating public sector corruption. No such requirement exists in respect of law enforcement agencies.

Divisions 1 and 2 of Part 4 of the Bill establish the Commissioner's jurisdiction to deal with "corruption issues". The definition of "corruption issues" contained at s 16(1) of the Bill captures certain circumstances where a person "engages in corrupt conduct";<sup>9</sup> under s 17(2)(b) of the Bill, which applies to entities in the public sector division, the meaning of "engages in corrupt conduct" captures only conduct which – amongst other things – constitutes a listed offence as defined by s 18.

The Grattan Institute, the National Integrity Committee, the Accountability Round Table, Transparency, Corrs Chambers Westgarth, the CPSU, the Australian Human Rights Commission and the Law Council of Australia all consider that the definition of "corrupt conduct" should be revised; indeed, with the exception of the Law Council, all of these groups explicitly advocate for the criminal offence requirement to be abandoned.

The National Integrity Committee describes the criminal offences limitation as a "fundamental flaw" of the Bill, and proposes that the definition of "corrupt conduct" be broad and capable of capturing "any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration".<sup>10</sup> The Australian Human Rights Commission also considers that for the Commission to be effective, a broad definition of "corrupt conduct" is required so that serious misconduct which damages the integrity of public administration or public confidence in it, but may not constitute a criminal offence, is captured.<sup>11</sup> Transparency International Australia advocates for a similarly broad definition, as does the Accountability Round Table, which describes the current definition as "unreasonable".<sup>12</sup>

Each of these organisations points out that not all serious corrupt conduct constitutes a crime;<sup>13</sup> the CPSU warns that a consequence of this is that forms of corruption that are "insidious and damaging to the public sector" are excluded,<sup>14</sup> and the Law Council notes that the definition in its current form could "unduly limit" the capacity of the Commission to conduct investigations.<sup>15</sup>

Corrs Chambers Westgarth points out that the proposed model would prevent the Commission from investigating the kinds of alleged misconduct that State-based agencies are able to investigate, and that a consistent approach would be "more likely to help align compliance standards and assist in the fight against corruption."<sup>16</sup>

***CPI recommendation: That the definition of 'corrupt conduct' not be tied to the commission of a criminal offence, and be sufficiently broad as to capture any conduct of any person, whether or not they are a public official, that affects the honesty or impartiality of public administration***

---

<sup>9</sup> This definition is located in Division 3 of Part 2.

<sup>10</sup> National Integrity Committee submission p 4.

<sup>11</sup> Australian Human Rights Commission submission, p 7.

<sup>12</sup> Transparency International Australia submission, p 5.

<sup>13</sup> Accountability Round Table submission, p 6; Grattan Institute submission, p 5.

<sup>14</sup> Law Council of Australia submission, pp 13-14.

<sup>15</sup> Law Council of Australia submission, pp 13-14.

<sup>16</sup> Corrs Chambers Westgarth submission, p 4.

### c) 'Reasonable suspicion' threshold

Under s 48(3) of the Bill, a public sector corruption issue can be investigated only where there is a "reasonable suspicion" that at least one of the listed offences at s 18 has been, or is being, committed. There is no such requirement in respect of law enforcement corruption issues.

This threshold requirement also appears at other parts of the Bill – for example, in relation to the referral processes set out at Division 1 of Part 4.

The "reasonable suspicion" threshold is not supported by the Accountability Round Table, Transparency International Australia, the Castan Centre, Corrs Chambers, the CPSU or the National Integrity Committee.

Both Transparency International Australia and the Castan Centre describe it as too high a threshold, and the National Integrity Committee describes it as unreasonable.<sup>17</sup> The Castan Centre warns that it would mean the CIC would fail to achieve its objective of exposing public sector corruption,<sup>18</sup> Transparency International Australia cautions that it would result in a Commission that is not effective or credible, and Corrs Chambers warns that it may have unintended consequences.<sup>19</sup>

The Accountability Round Table advocates for the threshold in relation to the public sector being no higher than the threshold for complaints against a law enforcement officer or agency.<sup>20</sup>

#### ***CPI recommendation: That the reasonable suspicion threshold be eliminated***

##### **a) Power to commence own motion investigations and deal with public complaints directly**

As a consequence of the way in which the referral processes to the Commission are strictly circumscribed by Divisions 1 and 2 of Part 4 of the Bill, the proposed Commission would have a limited ability to commence own motion investigations, and would not be able to investigate public or whistleblower complaints, in respect of public sector corruption issues. These restrictions do not exist in relation to law enforcement corruption issues.

#### *Own motion powers*

Under s 61(1) of the draft Bill, if the Integrity Commissioner becomes aware of an allegation or information raising a law enforcement corruption issue, the Commissioner may, on their own initiative, deal with the corruption issue in one of the ways referred to in subsection 49(1) or 52(7).

In contrast, s 61(3) provides that the Commissioner may decide to deal with a public sector corruption issue only where they are investigating an issue or inquiry and in the course of doing so, they become aware of an allegation or information raising a public

---

<sup>17</sup> National Integrity Committee, p 5.

<sup>18</sup> Castan Centre submission, p 2.

<sup>19</sup> Transparency International Australia submission, p 8; Corrs Chambers Westgarth submission, p 2.

<sup>20</sup> Accountability Round Table submission, p 11.

sector corruption issue and they reasonably suspect that the offence to which the new corruption issue relates has been, or is being, committed.

The Accountability Round Table, the Australian Federal Police Association, the Australian Human Rights Commission, Civil Liberties Australia, the CPSU, Corrs Chambers, the Law Council of Australia, the Castan Centre, the National Integrity Committee and Transparency International all support the proposed CIC having the power to commence own motion investigations.

The Accountability Round Table and the National Integrity Committee both describe the power to commence own motion investigations as "critically important".<sup>21</sup> The Australian Human Rights Commission notes that "there does not appear to be any evidence based-justification for limiting the scope of the Integrity Commissioner's power to conduct an own motion investigation within the public sector division";<sup>22</sup> Corrs Chambers similarly notes that the rationale for limiting the Commission's powers in respect of own motion investigations is unclear.<sup>23</sup>

The Australian Federal Police Association also advocates for the extension of the power to hold own motion investigations to the public sector, as does the Law Council of Australia, which describes the distinction between law enforcement and other public sector agencies on this issue as lacking merit.<sup>24</sup>

The Castan Centre recommends that the CIC be given similar "own motion" powers comparable to other integrity bodies such as the Commonwealth Ombudsman and Auditor-General.<sup>25</sup>

### *Public complaints*

While s 44 provides that law enforcement corruption issues may be referred by any person, the referral of public sector corruption issues is restricted to the referral processes set out by ss 33 – 42.

This restriction is not supported by the Grattan Institute, Transparency International Australia, the Australian Human Rights Commission, Civil Liberties Australia, the Law Council of Australia, the Accountability Round Table, the National Integrity Committee, Corrs Chambers Westgarth, the Vietnamese Australian Lawyers' Association, or the Uniting Church in Australia, Synod of Victoria and Tasmania.

The Accountability Round Table describes this restriction as putting parliamentarians and the public sector "in an immune and protected position for which there is no acceptable basis".<sup>26</sup> The National Integrity Commission identifies it as a measure "designed to stifle whistleblower complaints".<sup>27</sup>

The Australian Human Rights Commission and the Grattan Institute point out that for an anti-corruption agency to be effective it must be able to receive public complaints directly.<sup>28</sup> Corrs Chambers Westgarth notes that the justification for preventing the

---

<sup>21</sup> Accountability Round Table submission, p viii; National Integrity Committee submission, 13.

<sup>22</sup> Australian Human Rights Commission submission, p 13.

<sup>23</sup> Corrs Chambers Westgarth submission, p 5.

<sup>24</sup> Law Council of Australia submission, p 20.

<sup>25</sup> Castan Centre submission, p 4.

<sup>26</sup> Accountability Round Table submission, p 12.

<sup>27</sup> National Integrity Committee submission, p 5.

<sup>28</sup> Australian Human Rights Commission submission, p 13; Grattan Institute submission, pp 1.4.

Commission from investigating tip offs from the public or public sector employees is unclear,<sup>29</sup> and the Vietnamese Australian Lawyers' Association suggests that any person should be able to refer or report corrupt conduct to the Commission.<sup>30</sup>

***CPI recommendation: That the Commission be empowered to conduct own motion investigations and begin investigations based on a broad range of referral processes which include complaints from the public and whistleblowers, without the restrictions currently imposed in respect of public sector corruption issues.***

## II. POWER DEFICIENCIES

### a) Power to hold public hearings

The draft Bill prevents the Commission from holding public hearings in relation to public sector corruption issues.

Under s 99, 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.<sup>31</sup> Section 99(5) requires that 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.

The fact that the power to hold public hearings is essential for the proposed Commission to be effective is recognised by the Accountability Round Table, the Australian Human Rights Commission, Civil Liberties Australia, the CPSU, Corrs Chambers Westgarth, Transparency International, the Law Council of Australia, the Castan Centre for Human Rights Law and Australian Centre for Justice Innovation, the Human Rights Law Centre and Public Interest Advocacy Centre, the National Integrity Committee, the Vietnamese Australian Lawyers' Association, Voices for Indi and the Uniting Church in Australia, Synod of Victoria and Tasmania.<sup>32</sup>

The Accountability Round Table describes public hearings as "a critical element of a rigorous process of investigation".<sup>33</sup> The Australian Human Rights Commission and Law Council of Australia consider that the power to hold public hearings is essential for the proposed Commission to be effective.<sup>34</sup> Corrs Chambers Westgarth and the Castan Centre both point out that public hearings promote transparency and can enhance public trust and confidence in the Commission,<sup>35</sup> and the Vietnamese Australian Lawyers' Association has warned that "The establishment of the CIC is nothing more than a sham process and exists to protect the public sector's interest if corruption issues are dealt in secrecy".<sup>36</sup>

---

<sup>29</sup> Corrs Chambers Westgarth submission, p 5.

<sup>30</sup> Vietnamese Australian Lawyers' Association submission, p 3.

<sup>31</sup> Under s 100, 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.

<sup>32</sup> We note that some of these organisations propose that hearings be public unless it is determined not to be in the public interest, while others propose that hearings be private unless it is in the public interest. Regardless, all advocate for there to be a power to hold public hearings.

<sup>33</sup> Accountability Round Table submission, p 14.

<sup>34</sup> Australian Human Rights Commission submission, p 11; National Integrity Committee, p 6.

<sup>35</sup> Corrs Chambers Westgarth submission, pp 5-6; Castan Centre submission, p 3.

<sup>36</sup> Vietnamese Australian Lawyers' Association, p 4.

***CPI recommendation: That the Commission have the power to hold public hearings in respect of any kind of corruption issue***

**b) Power to report publicly**

The proposed Commission would not be able to report its findings – or the evidence upon which they are based – in relation to public sector corruption issues. It would not be able in any report on a corruption inquiry to 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 178(4) provides that a report on a law enforcement corruption issue under s 178(1) must set out the Commissioner's findings, evidence upon which they are based, 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. Sections 184 and 188 contain further specifications with respect to reporting.

The Accountability Round Table,<sup>37</sup> Transparency International Australia, the Law Council of Australia, the Grattan Institute, the National Integrity Committee and the Uniting Church in Australia, Synod of Victoria and Tasmania are in agreement that the CIC needs to be able to report publicly on its investigations not only in respect of law enforcement corruption issues, but also in respect of public sector corruption issues (though there is some divergence of opinion about whether this should be limited to findings of fact, or include findings of corrupt conduct [nb. none of the organisations suggests that the Commission should be able to make findings of criminal guilt]).<sup>38</sup>

The Law Council reports that "There appears to be no justification for limiting the reporting of findings and evidence relating to corruption issues or a finding of corrupt conduct to staff a law enforcement agency in the report of an investigation [sic], merely because of that staff member's employment".<sup>39</sup>

Transparency International Australia posits that the Commission "must ultimately be accountable to the public. It needs full capacity to receive and act on corruption information from any person and to make findings of fact and report publicly".<sup>40</sup>

The Australian Federal Police Association is also critical of the provisions in the draft Bill preventing the Commissioner from reporting any opinion, finding or recommendation in relation to parliamentarians.<sup>41</sup>

***CPI recommendation: That the Commission must have the power to report publicly in respect of public inquiries, via the tabling of reports in both Houses of Parliament. Reports on private inquiries should be made available to those involved in the investigation.***

---

<sup>37</sup> Accountability Round Table submission, p 18.

<sup>38</sup> Grattan Institute submission, p 2.

<sup>39</sup> Law Council of Australia submission, p 23.

<sup>40</sup> Transparency International Australia submission, p 4.

<sup>41</sup> Law Council of Australia submission, p 24.

## **Key findings**

It is evident from this analysis that many of the major defects of the Bill regarding the Commission's jurisdiction and powers could be remedied by abolishing the unwarranted splitting of the CIC into two divisions with different powers, and instead creating one body with the powers currently proposed to be the exclusive domain of the law enforcement division. This would ensure that the Commission has appropriately broad jurisdiction – by expanding the concept of 'corrupt conduct', removing the 'reasonable suspicion' threshold, and ensuring it can undertake own motion investigations and act upon referrals from the public and whistleblowers – as well as the power to conduct public hearings as appropriate, and report publicly on its findings.

There are, of course, many more important recommendations made by submissions to the Government's CIC consultation process. This process represents a real opportunity for the Government to genuinely engage with stakeholders: the Centre for Public Integrity urges the Government to give genuine consideration to their submissions and amend its present, flawed model in order to create a Commission that is truly fit for purpose.

## **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, the 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).