

Designing the National Integrity Commission

Critical design details

June 2022

Summary

The Centre for Public Integrity welcomes the Government's commitment to legislating a genuine National Integrity Commission before Christmas 2022. The essential elements of an a fit-for-purpose Commission include:

- a broad jurisdiction;
- strong investigative powers;
- the ability to hold public hearings and report publicly;
- guaranteed independence; and
- appropriate oversight

Jurisdiction

The jurisdiction of a National Integrity Commission must capture broadly-defined corrupt conduct.

Corrupt conduct definition

Corrupt conduct, broadly defined, is:

- a) any conduct of any person that has the potential to involve or induce the placing by a public official of private interests, over the public good in public office;
- b) any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official;
- c) any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration;
- d) any conduct of a public official or former public official that constitutes or involves a breach of public trust;
- e) any conduct of a public official or former public official that involves the improper use of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person; or
- f) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions.

provided that such conduct could constitute or involve:

- a criminal offence or conduct giving rise to a civil liability; or
- a disciplinary offence; or

- reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official; or
- a substantial breach of an applicable code of conduct.

The "efficacy or probity" element is important to include as a consequence of the High Court's decision in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

For clarity, we note that the definition of "corrupt conduct" must not be tied to the commission of a criminal offence. The definition of "corrupt conduct" must not be limited to public officials and must specifically capture any conduct of any person (that meets the requirements specified above), noting that the Commission's jurisdiction will not extend to anyone who falls within the remit of a state or territory body, and the Commission requires power to refer matters to a state or territory body (and vice versa).

Investigation triggers

The Chief Commissioner must be empowered to begin investigations based on:

- referrals from other agencies;
- complaints from the public, which may be anonymous and in any form; or
- the Commission's own initiative.

The Chief Commissioner must have the discretion and authority to begin investigations.

Application

The legislation must apply to past and future conduct

Investigative powers

A National Integrity Commission requires the full investigative powers of a Royal Commission including:

- a) search and surveillance powers, with the ability for the Chief Commissioner to authorise the search of public premises (NB: without a judicially-issued warrant)
- b) coercive powers to compel witnesses and documents;
- c) power to exercise arrest warrants;
- d) the ability to hold both private and public hearings;
- e) the absence of legal professional privilege except when applied to communication between a lawyer and a client in relation to Commission hearings;
- f) the ability to immunise witnesses on terms, and provide protection to witnesses that anything said or disclosed may not be used against them in criminal proceedings; and
- g) measures for enforcing the above powers through the offences relating to the Commission for withholding evidence, giving false or misleading evidence, misleading witnesses, bribing witnesses, acting in contempt of the Commission etc.

Public hearings

The Commission must have the ability to hold public hearings when it is satisfied that it is in the public interest to do so.

Without limiting the factors that the Commission may take into account in determining whether or not it is in the public interest to conduct a public inquiry, it may consider the following:

- a) the benefit of exposing to the public, and making it aware of, corrupt conduct;
- b) the seriousness of the allegation or complaint being investigated;
- c) whether conducting a public inquiry will make the investigation to which it relates more effective;
- d) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); and
- e) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Reporting

The legislation must provide for a transparent reporting regime for Annual Reports and investigation reports, with reports on public inquiries being tabled in both Houses of Parliament (within specific timeframes), and reports on private inquiries being made available to those involved in the investigation.

Independence of Commission: establishment, appointments, tenure and resourcing

The independence of the Commission must be guaranteed by:

- its establishment as an independent statutory agency;
- robust appointment processes;
- secure tenure of Commissioners; and
- secure resourcing

Independent statutory agency

The Commission must be established as an independent statutory agency

Appointments

There must be established a cross-party joint parliamentary committee on which the government does not have a majority. This committee must have responsibility for nominating the appointment of one Chief Commissioner and two Assistant Commissioners.

Only persons with the qualifications necessary to be appointed a judge in a Supreme Court or a Federal Court are eligible for appointment as Commissioner or Assistant Commissioner.

The committee must be satisfied that the proposed appointee/s meet publicly available merits criteria.

Tenure

Commissioners and Assistant Commissioners are to be appointed for 5 year terms. There must be flexibility inbuilt into the legislation to ensure that the terms of all Commissioners do not expire at the same time, and that terms may be extended if terms expire during an investigation

The circumstances in which the Commissioners may be removed from office during their terms should be limited to grounds of physical or mental incapacity, or misbehaviour. A proposal to remove a Commissioner would be initially investigated by

the cross-party joint parliamentary committee, with both Houses to pass a resolution to approve it.

Resourcing

The Commission's resourcing must be secure and independent of political interference.

This requires funding to be allocated on a multi-year (for example, triennial) basis. It also requires either:

- the establishment of an Independent Funding Tribunal responsible for making binding decisions or non-binding recommendations in respect of the Committee's funding; or
- empowering the cross-party joint parliamentary committee referred to above to make non-binding funding recommendations.

In the case of a model under which non-binding funding recommendations are made, the relevant Minister should be required to table in both Houses of Parliament a statement of reasons if they propose to deviate from the recommended funding.

Oversight

The following oversight mechanisms, additional to the measures set out above, must be in place to provide safeguards against the risk of misuse of investigative powers:

- the appointment of an Inspector to ensure legal compliance of the Commission's activities and to receive and process complaints;
- a cross-party parliamentary oversight committee (the same committee responsible for appointments and potentially funding arrangements);
- the necessity for procedural fairness to be followed in all hearings; and
- the availability of judicial review.

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 Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham, Geoffrey Watson SC and Professor Gabrielle Appleby. More information at www.publicintegrity.org.au.