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*Submission on the Commonwealth Integrity
Commission Bill*

Prepared by

Dr Yee-Fui Ng - Senior Lecturer, Monash Faculty of Law, Deputy
Director, Australian Centre for Justice Innovation (ACJI)

Dr Maria O'Sullivan - Senior Lecturer, Monash Faculty of Law,
Member, Castan Centre for Human Rights Law.

With research assistance provided by Andrea Olivares Jones - Policy
Manager, Castan Centre for Human Rights Law

On behalf of the Castan Centre for Human Rights Law and the
Australian and the Australian Centre for Justice Innovation (ACJI)

Faculty of Law, Monash University

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The Castan Centre for Human Rights Law and Australian Centre for Justice Innovation welcome the opportunity to make a submission in response to the Attorney-General's Department's Commonwealth Integrity Commission's Consultation Draft Bill.

We note that we have targeted our submission to selected issues based on the relative areas of expertise by the drafting team.

Threshold of Investigation

We would argue that the bar for investigation of the CIC is too high, requiring a reasonable suspicion of corruption amounting to a criminal offence before an investigation can even begin. This is a difficult hurdle to clear.

Lessons from the state anti-corruption commissions show evidence of corruption is typically unveiled through investigations themselves (based on credible allegations), rather than before an investigation begins.¹

An unduly high threshold will mean that the CIC would fail to achieve its main aim of exposing corruption in the public sector.

We recommend that the threshold for investigation be modelled upon that of the New South Wales Independent Commission Against Corruption (ICAC), i.e. to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or conduct connected with corrupt conduct, may have occurred, may be occurring or may be about to occur.²

¹ < <https://theconversation.com/as-the-government-drags-its-heels-a-better-model-for-a-federal-integrity-commission-has-emerged-148796>>.

² *Independent Commission Against Corruption Act 1988* (NSW) s 13.

Public Hearings

The proposed CIC will not have the power to hold public hearings for 80% of the public sector, as the CIC's powers in the public sector integrity division are tightly circumscribed.³

This is a far more limited jurisdiction compared to its equivalent state counterparts, such as the NSW ICAC, which has the ability to conduct public hearings and make findings of corruption in the public sector.

Public hearings ensure proceedings are not cloaked in secrecy and will increase public trust in the institutional processes of the CIC.

We note that open justice is a long-standing and central principle of both Australian and international law:

- (i) Under Australian law, the provision of open justice is a core principle of the common law, originating from UK. It is part of the rule of law⁴ and is specifically reflected in public law in Australia via the doctrine of natural justice/procedural which is a recognised judicial review ground under administrative law.

Under those fundamental principles, a hearing will normally only be closed if there are cogent and significant reasons of public interest to do so – for instance, if a public hearing would endanger national security, compromise sensitive law enforcement information or where there are overriding considerations requiring confidentiality (for instance, hearings for refugee applications in the AAT are not open to the public to preserve the anonymity of applicants).⁵

The recognition of the importance of open access to hearings to public confidence in the administration of justice can be seen in the efforts being made by Australian courts to increase that access (via the live streaming of certain trials, communication of judgements via social media etc).

- (ii) The CIC should be informed by due process and human rights principles to ensure it fully gives effect to its aims. In this context, Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) which provides for the right to a fair hearing (Article 14). Article 14(1) provides that the press and public may be

³ See <https://www.griffith.edu.au/__data/assets/pdf_file/0028/726247/Governing-for-Integrity-Australia-2nd-NIS-Assessment-DRAFT-REPORT-April2019.pdf>.

⁴ For instance, Joseph Raz, a leading UK expert on the rule of law notes that the rule of law requires law to be 'open and clear' and that the principles of natural justice (open and fair hearings and absence of bias) must be observed in the administration of the law: see discussion in L Crawford et al, *Public Law and Statutory Interpretation: Principles and Practice* (Federation Press, 2017), pp 11.

⁵ See discussion by French CJ in *Hogan v Hinch* (2011) 243 CLR 506 at para 21: 'It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice'.

excluded from all or part of a trial but only in exceptional circumstances, that is, for reasons of morals, public order, national security, the privacy of the parties, or when publicity should prejudice the interests of justice.

These domestic and international doctrines reflect the core principle that justice should not only be done, but be seen to be done, by subjecting legal proceedings to public scrutiny. Indeed, notable inquiries in Australia have exposed major corruption through public hearings. This includes the Fitzgerald inquiry that revealed widespread corruption in the Queensland police force, leading to the resignations and imprisonments of various former ministers and officials.⁶

We note that there are legitimate issues about damage to individual reputations where a person subject to a public hearing has their reputation tarnished in the media, but is ultimately found not guilty by the courts. This can be ameliorated by having the option of public and private hearings.

We would therefore recommend that public hearings should be used only when it is in the public interest, balanced with considerations of individual reputation. This is consistent with the proposal of the Haine Bill,⁷ where the proposed integrity commission would have the power to conduct public hearings if it believes it is in the public interest, balancing the seriousness of allegations with any unfair prejudice to a person's reputation or unfair exposure of a person's private life. This is a proportionate model that enhances public trust through public hearings, but also takes into account legitimate concerns about damage to an individual's reputation.

Own Motion Investigations

The proposed CIC will be unable to initiate investigations itself and to receive complaints directly from the public. It can only investigate after a referral from the public sector, or if the CIC is conducting an investigation and discovers additional corrupt conduct in a different department. This is a significant limitation. Other comparable investigative bodies have "own motion" powers to investigate issues based on public complaints.⁸ For instance, the Ombudsman offices at the federal, state and territory level can undertake 'own motion' investigations into possible maladministration.⁹

We would recommend that the CIC be given similar "own motion" powers comparable to other integrity bodies such as the Commonwealth Ombudsman and Auditor-General.

⁶ See <<https://www.ccc.qld.gov.au/about-us/our-history/fitzgerald-inquiry>>.

⁷ Available at

<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6597>.

⁸ < <https://theconversation.com/governments-commonwealth-integrity-commission-will-not-stamp-out-public-sector-corruption-heres-why-127502>>.

⁹ See eg discussion of the Queensland Ombudsman at <www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/public-interest-disclosure-resources/the-ombudsmans-role-in-a-public-interest-disclosure> and the ACT Ombudsman at

<www.ombudsman.act.gov.au/publications/reports/annual-reports/annual-report-2004-05/chapter_1a.html> .

Corruption Prevention Division

Although it is envisaged that the CIC will play a role in preventing corruption, this model lacks a dedicated corruption prevention division. This is a pro-integrity function that monitors major corruption risks across all sectors.

We would recommend that a corruption prevention division be included in the CIC model.

Other considerations – International practice and principles

Given the globalised nature of integrity issues and the importance of international law in relation to corruption,¹⁰ we recommend considering international practice and principles as a means of informing the establishment of the Australian CIC.¹¹ Additionally, we highlight the fact that Australia is a member of the Human Rights Council and a party to the primary international human rights law treaties. As such, human rights should be part of the framework in which the CIC is assessed. To this end, we note that there is a strong connection between integrity principles (participation, transparency, access to information, accountability) and the scope of human rights (freedom of expression and of the media, access to information and non-discrimination).¹²

Conclusion

We commend the government for taking action in the crucial area of political integrity. The need for a federal integrity commission is just as important as ever, with the government plagued by multiple scandals involving the misuse of federal funds, such as the Western Sydney airport deal,¹³ the ASIC chair's tax advice bill,¹⁴ the Angus Taylor water buyback scheme¹⁵ and the "sports rorts" affair.¹⁶ A strong — and independent — integrity commission would be able to investigate such issues thoroughly.

¹⁰ For instance, Australia is a party to the United Nations Convention against Corruption (UNCAC).

¹¹ See eg the Jakarta Statement on Principles for Anti-Corruption Agencies (2012), Jakarta, 26–27 November 2012

<www.unodc.org/eastasiaandpacific/en/2012/12/corruption-kpkl/story.html> and the principles of leading, well-respected international civil society organisations such as Transparency International.

¹² This is discussed in UN High Commissioner for Human Rights, 'Best Practices to counter the negative impact of corruption on the enjoyment of all human rights', Report to the UN Human Rights Council, UN Doc A/HRC/32/22, 15 April 2016.

¹³ <<https://www.theguardian.com/australia-news/2020/oct/19/senator-i-agree-30m-western-sydney-airport-land-deal-looks-like-a-cover-up-says-infrastructure-chief>>.

¹⁴ <<https://www.abc.net.au/news/2020-10-23/investigation-asic-launched-chair-james-shipton-stepping-aside/12807278>>.

¹⁵ <<https://www.theguardian.com/australia-news/2019/oct/31/not-a-drop-of-water-after-government-spends-80m-on-rights-from-agribusiness>>.

¹⁶ <<https://theconversation.com/the-sports-rorts-affair-shows-the-need-for-a-proper-federal-icac-with-teeth-122800>>.

Although the proposed model is an improvement on the status quo of patchwork regulation, it does not go far enough to properly investigate corruption in federal government. We would suggest that the Bill be amended to create a more robust CIC towards enhancing political integrity in government.