



THE LAW SOCIETY
OF NEW SOUTH WALES

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Senator the Hon Michaelia Cash
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Deputy Leader of the Government in the Senate
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Dear Attorney,

Draft Commonwealth Integrity Commission Bill 2020: “reasonable suspicion” thresholds

The Law Society of NSW ordinarily provides its comments on Commonwealth matters to the Law Council of Australia for inclusion in a submission, and did so in respect of the draft Commonwealth Integrity Commission Bill 2020 (**draft Bill**) as a whole. The Law Council of Australia separately considered and made a submission on the issue of the reasonable suspicion threshold in respect of discretionary referrals of a public sector corruption issue, and in respect of the Integrity Commissioner’s power to commence investigation.

The Law Society agrees with the Law Council that the threshold in respect of referrals to the Commonwealth Integrity Commission (CIC) should be removed. However, while we understand and appreciate the reasons that led to it, the Law Society’s view diverges from the Law Council’s position on the issue of whether a threshold should apply to prevent the CIC from taking further action on a corruption issue. As such, we write to provide our position on this discrete issue. Our submission is informed by the Law Society’s Public Law Committee, members of which have significant practice and regulatory expertise in respect of oversight and integrity bodies, and corruption matters.

Principles underpinning the Law Society’s position

In our view, in order to address corruption effectively, integrity commissions require relatively broad powers, given that “corruption is by its nature secretive and difficult to elicit. It is a crime of the powerful. It is consensual crime, with no obvious victim willing to complain.”¹ We note the view of the NSW Independent Commission Against Corruption (**NSW ICAC**) that:

The investigation and exposure of corruption is an especially difficult task. Secrecy is at the core of corrupt conduct, and the parties to corruption have a common interest in

¹ New South Wales, Parliamentary Debates, Legislative Assembly, 26 May 1988, (Nick Greiner, Premier).

maintaining that secrecy. Few paper trails are left and, occasionally, false paper trails are created. The persons likely to be involved are often experienced and astute in the avoidance of protocols designed to prevent corruption. Corrupt conduct is often the product of careful planning and considerable patience.²

Integrity commissions are generally investigative bodies, and not courts of law.³ The function of an integrity commission is not to adjudicate between citizens and the state, nor between citizens. We note that “reasonable suspicion” thresholds are common in the criminal law context. However, in our view, the policy settings that should apply in respect of preventing, investigating and reporting on corruption should necessarily be different from those settings that should apply in criminal prosecutions, including in the criminal prosecution of individuals alleged to have committed corruption related crimes. In our view, the effective protection of individual rights is contingent on a system founded on public confidence in the integrity of government and the proper administration of powers with which it is entrusted.

Public confidence in the various integrity mechanisms available is particularly important in the context of low public trust in government. We understand that a study commissioned by the Museum for Australian Democracy and the Institute for Governance and Policy Analysis and conducted by the University of Canberra in 2016 found that only 5% of Australians “usually” trust government.⁴

We consider that the approach taken by the NSW ICAC strikes an appropriate balance to address corruption. This includes the discretion to investigate specific instances of corruption, as well as to address systemic cultural issues that might enable corrupt behaviours through proactive audit and educative measures.

Specific remarks in respect of the proposed investigation threshold

Clause 48 of the draft Bill requires the Integrity Commissioner to take no further action if the issue is a public sector corruption issue and the Integrity Commissioner does not reasonably suspect that the offence to which the issue relates has been or is being committed.

The Law Society’s position is that clause 48 is neither necessary nor desirable, and should be removed from the draft Bill.

The reasonable suspicion threshold should be seen in the context of the other features of the draft Bill, including:

- Differential treatment of the law enforcement sector and the public sector,
- The narrow definition of corrupt conduct,
- The narrow class of people who are eligible to make referrals in respect of public sector corruption and the reasonable suspicion threshold in respect of those referrals,
- Limited own motion powers of investigation available to the Integrity Commissioner in respect of public sector corruption matters,
- The limited ability of the CIC to undertake any educative, systemic or preventative activities
- The lack of public hearings for public sector corruption matters,
- Proscription against the publication of public sector corruption findings in investigation reports.

² NSW ICAC, *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, ICAC Report July 2013, 12.

³ In this regard, it would assist if the draft Commonwealth Integrity Commission Bill 2020 (“draft Bill”) included clear provisions setting out the objectives of the Bill.

⁴ Mark Evans, Gary Stoker, Max Halupka, “Now for the big question: who do you trust to run the country?” *The Conversation*, 3 May 2016, <https://theconversation.com/now-for-the-big-question-who-do-you-trust-to-run-the-country-58723>.

In this regard, we note that the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**) gives the NSW ICAC the discretion to decide whether or not it will conduct an investigation. This discretion applies to all information received, except matters referred by both Houses of the NSW Parliament, which the ICAC must investigate.⁵ We note also that “corrupt conduct” is defined by s 8 of the ICAC Act to capture a much broader range of conduct than would be captured by the draft Bill.

The NSW experience has shown that significant investigations and findings can be built on relatively inchoate information received. The investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others was prompted in 2011 by an allegation received by the NSW ICAC from a private individual that confidential information regarding a 2008 public tender for the awarding of a certain mining tenement, had been “leaked” to members of the Obeid family.⁶ While the investigation initially focused on one issue (that is, whether Mr Macdonald had improperly acted to benefit Edward Obeid Sr) and members of his family, as the investigation progressed, further facts led to new and different lines of investigation and the identification of more issues.⁷

Given the source of the referral, the nature of the corrupt conduct alleged and the relatively nebulous nature of the information received, it would appear that the CIC, as currently proposed, would not have been able to even commence a similar investigation at the federal level in similar circumstances. We note that the NSW ICAC’s investigations have now led to successful criminal prosecutions and convictions for conspiracy to commit misconduct in public office.

Further, in our view, the NSW experience has also demonstrated that, following the 2017 legislative amendments,⁸ concerns in respect of potential harms such as undue effect on privacy and reputation have been significantly reduced. Other safeguards can be included in the investigation process. These include procedural fairness guidelines, similar to those adopted by the NSW ICAC,⁹ and clear criteria and procedures applicable to public hearings.¹⁰

In our view, one of the single most effective ways to ensure the CIC’s resources are properly directed to appropriate investigations would be to appoint an Integrity Commissioner with the skills to identify and dismiss vexatious, baseless or improper referrals. We suggest that ensuring a fair and transparent appointment process (with clear and relevant selection criteria),

⁵ Even from a law enforcement perspective, police do not require a reasonable suspicion to begin an investigation. Many inquiries can be made prior to agencies using more coercive powers such as arrest (which does require a reasonable suspicion that an offence has been committed).

⁶ See Note 2 above.

⁷ See Note 2 above.

⁸ The *Independent Commission Against Corruption Amendment Act 2016*, which commenced in 2017, included the following changes:

- the power to conduct a public inquiry must be authorised by the Chief Commissioner and at least one other Commissioner;
- a requirement to issue public inquiry guidelines to ICAC staff and Counsel Assisting the Commission to ensure procedural fairness during public inquiries; and
- a requirement to give a person an opportunity to respond before including an adverse finding or opinion about the person in an investigation report, and to include in the report a summary of the substance of any response if requested to do so.

⁹ The procedural guidelines, known as the Section 31B guidelines, are available online <<https://www.icac.nsw.gov.au/investigations/information-for-people-involved-in-investigations>>.

¹⁰ See information available on public hearings held by the NSW ICAC here <<https://www.icac.nsw.gov.au/investigations/investigation-process/public-inquiries-and-compulsory-examinations>> and the *Standard ICAC directions for public inquiries* available online <<https://www.icac.nsw.gov.au/investigations/information-for-people-involved-in-investigations>>.

for the Integrity Commissioner would be a more effective safeguard against such referrals than thresholds for commencing investigation.

Finally, we note that the inclusion of a threshold for commencing an investigation creates a jurisdictional fact and exposes the CIC to judicial review before it has had the opportunity to examine all the evidence.

Clause 17(2)(b) of the draft Bill defines corrupt conduct by reference to a list of offences in clause 18. The Integrity Commissioner would need to consider each element of the offence before investigating. The Criminal Code offences listed, for example, require that the relevant property be Commonwealth property. Assessing reasonable suspicion of a listed offence would be a highly technical exercise.

At this early stage in the process, a Minister or affected party could seek a writ of prohibition to prevent the investigation progressing, claiming that the Integrity Commissioner proceeded without jurisdiction. In our view, given the nature of corruption and the relative power of individuals involved, this feature of the draft Bill is likely to significantly hobble, and may be fatal to, the prospect of any investigation even commencing. Additionally, such litigation is likely to have significant resourcing implications for the CIC. In our view, if the public perceives that the Integrity Commissioner, in practice, lacks the requisite power to even commence investigations, this will have significant implications for public confidence in the CIC to meet its role as an effective anti-corruption body, which is likely to have larger detrimental impacts on public confidence in the integrity of government.

The Law Society of NSW thanks you for the opportunity to provide these views. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'JRW', followed by a horizontal line extending to the right.

Juliana Warner
President