ONE RULE FOR ALL

Submission to the Attorney General's Department - Consultation on the proposed Commonwealth Integrity Commission.

12 February 2021

Ms Esther Bogaart
Assistant Secretary
Fraud Prevention and Anti-Corruption Branch
Attorney-General's Department

By email only: cic.consultation@ag.gov.au

Dear Ms Bogaart,

COMMONWEALTH INTEGRITY COMMISSION CONSULTATION

The AFPA unequivocally supports the establishment of a federal integrity commission. As individuals who have dedicated their lives and careers to law enforcement, our members are steadfast in their opposition to corruption and support the introduction of a body to investigate and prevent such corruption. Our members have worked under the oversight of the Australian Commission for Law Enforcement Integrity ("**ACLEI**") since 2006. They are used to the intense public scrutiny that ensures they perform their duties with integrity and in accordance with community expectations. We are heartened that the Government and Parliament have come to recognise that parliamentarians and public service employees are not immune from corruption and hence require appropriate independent oversight.

The establishment of this body is long overdue; however, the Government's proposed model contains some serious deficiencies which need to be addressed prior to the Bill's introduction to Parliament.

The AFPA believe that the Commonwealth Integrity Commission should:

1. ensure the definition of "*engages in corrupt conduct*" is uniform across both the public sector division and law enforcement division;
2. grant the public sector division the same powers as those available to the law enforcement division;
3. ensure private hearings are the default mechanism for investigations, except in cases where the Integrity Commissioner can justify that a public hearing is in the public interest;

4. allow the public sector division to conduct public hearings where the Integrity Commissioner has determined that it is in the public interest;
5. ensure adequate safeguards are in place to protect the identity of witnesses, whistle-blowers and persons accused of corruption;
6. allow direct referrals from the public for the public sector division, including parliamentarians;
7. allow the public sector division to commence own-motion investigations;
8. ensure there is a mechanism to manage conflicts of interest relating to the Attorney-General's certificates about release of information in instances where the Attorney-General or a member of their party is the subject of investigation;
9. be properly staffed, funded and resourced; and,
10. ensure there are additional funding and staffing for the AFP and other agencies who will be required to assist with the Commission's functions.
11. clarify that Deputy Commissioners of the AFP are included in the definition of "staff member of law enforcement agency".
12. amend section 70 so these protections are extended to staff members of law enforcement agencies.
13. amend section 26 to remove specific references to law enforcement agencies.

We ***enclose*** our submission to the exposure draft of the Bill. Likewise, we also ***enclose*** a registration of interest regarding consultation sessions.

We would welcome the opportunity to meet with the Department to discuss our submission and appear before any parliamentary inquiry relating to this Bill.

Yours sincerely,

Alex Caruana
President

Australian Federal Police Association
A Level 3/53 Blackall Street, Barton ACT 2600
PO BOX 4576, Kingston ACT 2604
P 02 6285 1677
ABN 95 799 543 741
E afpa@afpa.org.au
www.afpa.org.au

Inconsistencies between the Law Enforcement Division and Public Sector Division

The AFPA hold concerns with the inequities between the powers available to the law enforcement division and the public sector division under the proposed legislation.

The government's justification for the two-tiered system is predicated on the argument that the "combination of access to powers, information and influence presents a heightened risk and a need for enhanced scrutiny and integrity oversight arrangements."[1] This broad law enforcement remit includes the power to:

- undertake investigations;
- compel the production of documents;
- enter premises;
- access stored telecommunications; and
- access sensitive personal information.

The AFPA agrees with the government that law enforcement agencies are afforded significant powers, and therefore require integrity frameworks to ensure that those powers are not abused. The AFP is already guided and directed by the strictest Code of Conduct within the public sector, AFP Professional Standards, the Commonwealth Ombudsman and ACLEI. There are also proposals that ACT Policing officers should also be brought within the remit of the newly formed ACT Integrity Commission.[2]

Compare this to parliamentarians who are not bound by a Code of Conduct or any real oversight body, despite being equipped with different but no less extraordinary powers as those held by members of law enforcement agencies.

The AFPA believes it is necessary to highlight the equally significant powers available to parliamentarians, particularly Ministers. Parliamentary privilege, Cabinet confidentiality and freedom of information laws afford parliamentarians significant protection from public scrutiny. Ministers of the Crown have additional decision-making powers conferred upon them by the Constitution.

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[1] Attorney General's Department (December 2018) *Consultation Paper: A Commonwealth Integrity Commission – proposed reforms.* p4. Retrieved from https://www.ag.gov.au/integrity/publications/consultation-paper-commonwealth-integrity-commission-proposed-reforms

[2] See for instance the *Australian Capital Territory (Self-Government) Amendment (ACT Integrity Commission Powers) Bill 2020*, which sought to amend the *Australian Capital Territory (Self-Government) Act 1988* to give power to the ACT Legislative Assembly to make laws with respect to the investigation of integrity and corruption in relation to the provision of services by the AFP within the ACT.

Parliamentary Powers

The Legislature and Executive branches of Government are afforded sweeping powers, not only in relation to the making of laws, but also over the appropriation and expenditure of public finances. In the case of the Executive, extensive powers are vested by virtue of s. 61 of the Constitution on the Governor-General, who acts on advice from Ministers. Considerable discretion and autonomy are afforded to those in such positions in the exercise of such powers.

Powers of parliamentarians are also extended to other matters by the nature of the position they occupy. Parliamentarians are afforded access to highly sensitive information and briefings. Such information is, in and of itself, a valuable asset which opens the potential for corrupt or nefarious conduct. Access to such information is not subject to any qualification for Members and Senators, as compared to members of the public service and law enforcement agencies under the Australian Protective Security Policy Framework, which requires specific clearances for certain kinds of information. Obtaining such clearances can be very rigorous, and are so for significant reasons. The need for appropriate safe-guards around the protection of sensitive information has been met with resistance by the Parliament, noting Senator Patrick's attempts to introduce the *Ministers of State (Checks for Security Purposes) Bill 2019*.

Parliamentarians are also afforded significant protection from liability, the most significant of which is parliamentary privilege.

Parliamentary privilege has two primary limbs; to provide legal immunity to the Houses of Parliament, and to empower both Houses to conduct inquiries and punish those found in contempt of Parliament.

Parliamentary Privilege: Immunity

Since the enactment of the *Bill of Rights 1688* in the United Kingdom, parliamentary privilege has been a cornerstone of democracies operating under the Westminster model. It is widely considered essential to the proper functioning of Parliament and, by extension, democracy. However, it has also raised questions about the potential for abuse, by using privilege to shield wrongdoing from the public.

Article 9 of the *Bill of Rights 1688* grants legal immunities to parliamentarians, parliamentary witnesses and others who participate in parliamentary proceedings. This convention was transferred to Australian parliaments upon the establishment of colonial parliaments. It was enshrined in s. 49 of the Australian Constitution and, later, in the *Parliamentary Privileges Act 1987.*

It ensures participants in the parliamentary process cannot be sued or prosecuted for anything they say or do as part of parliamentary proceedings. This allows lawmakers to debate, legislate and inquire without fear of interference freely. The immunity is wide-ranging and has been held to extend to protect members of Parliament from statements made being used against them for the purposes of supporting a criminal charge[3] or utilised in civil claims against a member of parliament.[4]

Historically, the immunity conferred upon Parliament has complicated investigations into misconduct, corruption and criminality. The 1992 Report on the *Royal Commission into Commercial Activities of Government and Other Matters*, otherwise known as the "WA Inc Royal Commission", stated that "the present construction of [freedom of speech] in Article 9 of the Bill of Rights is fundamentally inconsistent with the right of all citizens to subject their parliamentary representatives to scrutiny, and to be governed in an open and accountable manner."[5]

In 2019, Ian Burnett, Lord Chief Justice of the United Kingdom, gave a speech to the 21st Commonwealth Law Conference in Livingstone, Zambia. His speech highlighted how parliamentary privilege is open to abuse, and that such abuse can undermine the rule of law in the Westminster system. Particularly, he spoke of the difficulty faced by courts in determining what falls within the scope of privilege. Lord Burnett warns that "if [courts] give too wide an interpretation of what falls within the ambit of privilege they could provide the basis for parliamentarians to engage in criminality with impunity. It could form the basis for parliamentarian corruption continuing unrestrained and undeterred."[6]

In 2020, a South Australian Independent Commissioner Against Corruption ("**SA ICAC**") investigation into the misappropriation of a parliamentary allowance raised questions about the use of parliamentary privilege to hinder corruption investigations. On 21 August 2020, then-Commissioner of the SA ICAC, Bruce Lander QC, released a statement accusing parliamentarians of refusing to cooperate with the investigation under the guise of parliamentary privilege – but accepted it was Parliament's decision as to whether privilege could be exercised[7].

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[3] *R v Jackson* (1987) 8 NSWLR 116
[4] *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223
[5] Western Australia (1992), *Report of the Royal Commission into Commercial Activities of Government and Other Matters,* Part II, para 5.8.7.
[6] Lord Burnett of Maldon, Lord Chief Justice of England and Wales (April 2019) *Parliamentary Privilege – Liberty and Due Limitation.* April 2019, p12, para 21, retrieved from https://www.judiciary.uk/wp-content/uploads/2019/04/20190405-Parliamentary-Privilege-for-publication-2-1.pdf
[7] The Hon. Bruce Lander QC, Independent Commissioner Against Corruption (August 2020), *ICAC Public Statement – Country Members Accommodation Allowance,* retrieved from https://icac.sa.gov.au/public-statement/21aug2020

This prompted Premier Steven Marshall to publicly state that "whilst I respect parliamentary privilege, it cannot be used as a blanket for delaying or impeding an inquiry."[8]

On 8 September 2020, Treasurer of South Australia Rob Lucas moved a motion in the Legislative Council that in part stated that "all current members have publicly indicated that they will cooperate with the ICAC investigation, and in respect of the three members the subject of the Commissioner's public statement published on 7 September 2020, those members have not and will not be claiming parliamentary privilege in respect of the requests now made of them by the Commissioner."[9]

During the debate which followed, Mr Lucas said that "(i)f members of parliament have committed criminal offences, then the view of most people in the court of public opinion – and certainly the government's view would be the same – is that a criminal prosecution against a member should not be able to be prevented by the claim of parliamentary privilege. We are seeking the support of opposition members and crossbenchers to what we think is a statement of principle… That is, a criminal prosecution should be able to continue or be proceeded with against a member of parliament, and the claim of parliamentary privilege should not be able to stymie that particular investigation or prevent due process in relation to potential criminal prosecution."[10] The motion was put to a vote and passed with minor amendments.

It is accepted as a general rule that "whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise."[11] While in this instance, the South Australian Parliament acted honourably and cooperated with the SA ICAC, it raises concerns about the potential abuse of a parliamentary majority to hamper investigations. For example, if a senior influential government minister were the subject of an investigation and his/her party sought to avoid any associated political damage, they could use their majority to claim parliamentary privilege and cover up any wrongdoing.

Parliamentary Privilege: Power to conduct inquiries

The other primary aspect of parliamentary privilege is the power to conduct inquiries. The power to conduct inquiries grants Parliament the power to compel the production of documents, mandate the attendance of witnesses and take evidence under oath. If a person does not comply with a

[8] Martin, Patrick (2 September 2020), *Steven Marshall says parliamentary privilege not a "blanket shield" against ICAC inquiry,* ABC News, retrieved from https://www.abc.net.au/news/2020-09-02/privilege-no-shield-against-icac-investigation-steven-marshall/12622882

[9] South Australia Hansard, *Motions – Members, Accommodation Allowances,* Legislative Council, 8 September 2020 (Rob Lucas, Treasurer), retrieved from http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-30679

[10] Ibid.

[11] *Egan v Willis* (SCNSW, unreported 29 November 1996) at 3 (per Gleeson CJ), at 18 (per Mahoney P)

direction of Parliament (or acts in "contempt" of Parliament), either House of Parliament can punish the person or entity in accordance with the *Parliamentary Privileges Act 1987*. The current penalty for contempt of Parliament is a fine of up to $5000 for an individual or $25,000 for a corporation. Either House of Parliament may also order the imprisonment of a person for up to six months.

These are extraordinary powers which carry the same potential for abuse as the powers of law enforcement agencies. In fact, the powers available to Parliament are comparable to those available to law enforcement, in terms of the scope and reach of said powers. As stated in the Government's consultation paper, it is the "access to significant coercive powers and highly sensitive information" that justifies additional oversight for law enforcement agencies.

Specifically, the paper lists the ability of law enforcement to undertake investigations, compel the production of documents, enter premises, access stored telecommunications and access sensitive personal information, as the reasons for the disparity between the public sector division and law enforcement division. However, parliament can also undertake investigations and compel the production of documents. Parliament does not have direct access to stored telecommunications and sensitive personal information, however, can compel the production of this information if required.

Despite this, a mechanism to be able to remove a parliamentarian does not exist. Section 8 of the *Parliamentary Privileges Act 1987* provides that a House of Parliament does not have the power to expel a member from membership of a House on any grounds. Disqualification from Parliament is limited to the grounds contained within s. 44 of the Constitution, which does not necessarily include conduct of a kind that would be regarded as corrupt. This situation is a stark difference to the kinds of powers retained by agency heads as employers, who can summarily dismiss employees for serious misconduct.

Position and Influence of Parliamentarians

None of this is to say that parliamentary privilege should be watered down or compromised. The AFPA recognises its importance in allowing parliamentarians to perform their duties freely. We are simply seeking to highlight that parliamentarians hold powers that are, at the very least, of a kind comparable to law enforcement, albeit much different.

Furthermore, the influence wielded by any individual parliamentarian far exceeds that held by any individual police officer. Unlike police officers and public servants, who derive their power and influence from the office in which they hold, parliamentarians continue to retain significant influence and standing even following the cessation of their parliamentary career.

Police may enforce laws, but parliamentarians *create* them. This law-making process includes extensive consultation with the community and special-interest groups, parliamentary debate, and eventually a vote in the parliamentarians' respective chamber. These votes are valuable and can potentially enact or veto changes to public policy, often to the benefit of one group in society over another. There is great potential during this lobbying process for people, both inside and outside parliament, to exert undue influence over parliamentarians (including, but not limited to, bribery and blackmail). Backbenchers (especially in parliaments where the government holds a small majority in the House) and crossbenchers are particularly vulnerable to this sort of influence. If none of the parties involved were willing to report on this misconduct, there would be no scope for the Commission to investigate due to the protections of parliamentary privilege and the inability for parliamentarians to be referred by anyone but themselves or other parliamentarians.

Ministers of the Crown, who have additional responsibilities and powers conferred upon them by the Constitution, could also be at risk of this kind of undue influence. Ministers have the power to make and alter legislative instruments (i.e. regulations, statutory rules, by-laws, orders, ordinances, instruments, determinations, etc.) without a vote of the parliament. Ministers also play a bigger role than the average Parliamentarian in setting the direction of government and negotiating with other parties, such as foreign governments and private companies. They have responsibility for, and delegation to appropriate, large sums of public money.

We do not seek to suggest that such abuses of power are common in a nation with a relatively low corruption perception index such as Australia. However, this does not mean it does not occur or does not have the potential to occur. The question remains – if it *were* occurring, how would the public know?

Definitions of corruption

One of the AFPA's primary concerns with the proposed legislation is the two-tiered definition of corruption. Section 17 of the proposed Act provide the definitions for "*engages in corrupt conduct*"[12].

The definition of "*engages in corrupt conduct*" for staff members of law enforcement agencies reads as follows:

1) For the purposes of this Act, a staff member of a law enforcement agency ***engages in corrupt conduct*** if the staff member, while a staff member of the agency, engages in any of the following conduct:
    (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing the staff member's office as a staff member of the agency;
    (b) conduct that perverts, or that is engaged in for the purpose of perverting, the course of justice; or,
    (c) conduct that, having regard to the duties and powers of the staff member as a staff member of the agency, involves, or is engaged in for the purpose of, corruption of any other kind.

This definition is largely similar to the definition currently contained within the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**"the LEIC Act**").[13]

This definition for "*engages in corrupt conduct*", with respect to members of law enforcement agencies, in the proposed Bill is a considerably lower threshold for corruption than that which applies to all other cohorts covered by this Bill. Public servants, parliamentary staffers and parliamentarians must either abuse their office or pervert the course of justice **and** commit a prescribed criminal offence (or "*listed offence*") listed in section 18 of the Act.

These "*listed offences*" include:

- obstructing or hindering the performance of services;
- bribery of foreign public officials;
- the proper administration of Government;
- money laundering;
- computer offences;

[12] *Commonwealth Integrity Commission Bill 2020 (Cth)*, s.17, p38, retrieved from https://www.ag.gov.au/system/files/2020-11/cic-bill-exposure-draft.pdf
[13] See *Law Enforcement Integrity Commissioner Act 2006* (Cth), s. 6

- false dealing with accounting records;
- contravening restraining orders;
- dealings with forfeited property; or
- an offence against any of the following Acts:
    - the *Autonomous Sanctions Act 2011;*
    - the *Biosecurity Act 2015;*
    - the *Charter of the United Nations Act 1945;*
    - the *Defence Trade Controls Act 2012;*
    - the *Foreign Influence Transparency Scheme Act 2018;*
    - the *Public Interest Disclosure Act 2013;* or
    - the proposed *Commonwealth Integrity Commission Act*.

The implication of this definitional inconsistency is that a parliamentarian or public sector employee can only engage in corrupt conduct in circumstances where they have committed a criminal offence, while an employee of law enforcement can be investigated for "corruption of any kind". This includes "corruption" as minor as accepting a 10% discount from a food outlet on First Responders' Day, which we have seen in the past being referred to ACLEI for consideration of it being corrupt conduct.

If a parliamentarian or public servant has committed a listed offence, a process already exists to deal with those circumstances. The individual or entity can be investigated by the Australian Federal Police (AFP), referred to the Director of Public Prosecutions for prosecution with a potential resultant hearing by the courts.

Any national integrity commission needs to have the authority to investigate "grey" forms of corruption, which do not necessarily meet the thresholds for criminality but are still an abuse of office for personal or political gain. "Grey" corruption is alleged misconduct often considered "minor" or "borderline". Such issues have previously been raised in the context of the parliamentary inquiry into the LEIC Act in 2006.[14] Common examples include favourable treatment of friends and relatives by public officials, receipt of gifts, excessive expenditure and pork barrelling, influence peddling through donations, lies, and false promises.[15]

Over the last thirty years, there have been two high-profile political scandals of note which involved ministers allegedly misappropriating government sporting grants for the electoral benefit of their

[14] See paragraph 3.15, Legal and Constitutional Legislation Committee, May 2006
[15] Prenzler, T. (2020), "Grey corruption issues in the public sector", *Journal of Criminological Research, Policy and Practice*, Vol. ahead-of-print, No. ahead-of-print.

political party. This first occurred under the Keating Labor government during the 1993 election and eventually led to the then-Sports Minister Ros Kelly's resignation from Parliament in 1994[16]. A similar incident occurred under the Morrison Coalition government during the 2020 federal election and led to then-Sports Minister Bridget McKenzie's resignation from her ministerial posts[17] after it was revealed she administered funds to a sporting club with which she held membership.

It is not alleged that either Minister or political party broke the law in these instances; indeed, they were acting within their wide Ministerial authority. However, such politically motivated misuse of public funds was not in line with community expectations and, we would argue, fall within the kinds of behaviour that the public does not expect from elected officials. While these Ministers were held accountable thanks to the investigative reporting of the media, the official investigations into these incidents were opaque and unsatisfactory. Questions remain unanswered as to whether Ministers were acting of their own volition, or in accordance with directions from their Prime Ministers or unelected members of their party's campaign apparatus.

If the Commission were not empowered to investigate incidents such as this, it would be unlikely that the Commission could reinforce the public's trust within our government and political institutions.

Recommendations

1. Amend the definition of "*engages in corrupt conduct*" for the public sector division to match the definition of "*engages in corrupt conduct*" for the law enforcement division.

[16] No author cited (1 March 1994), *Ros Kelly quits over "sports rorts" affair,* Sydney Morning Herald, retrieved from https://www.smh.com.au/politics/federal/from-the-archives-1994-ros-kelly-quits-over-sports-rorts-affair-20200116-p53rxw.html

[17] McKenzie, Bridget (2 February 2020), *Media statement,* retrieved from https://www.bridgetmckenzie.com.au/media-releases/media-statement/

Commonwealth Integrity Commission Powers

The law enforcement division of the CIC would retain the same coercive and investigatory powers available to ACLEI, which include the power to:

- compel the production of documents;
- question people;
- hold public and private hearings;
- arrest;
- enter/search premises;
- seize evidence;
- undertake controlled operations and assumed identities; and
- undertake integrity testing.

The powers available to the public sector division of the CIC would be considerably weaker than those held by the law enforcement division. These include the power to:

- compel the production of documents;
- question people;
- hold private hearings; and
- enter/search premises.

The public sector division would not be able to exercise arrest warrants, hold public hearings or make findings of corruption, criminal conduct or misconduct at large.

Recommendations

1. Empower the public sector division with the same powers available to the law enforcement division.

Public Hearings

The Bill proposes that the Commission have the power to conduct public hearings in respect to law enforcement corruption issues. However, the Bill expressly precludes public hearings for parliamentarians and public sector employees. Additionally, the Bill prohibits any evidence from being aired publicly, which may expose a public sector corruption issue.

Section 99(5) of the exposure draft for the *Commonwealth Integrity Commission Bill* states:

> 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.

Furthermore, section 106(1)(d) states:

> A person giving evidence at a hearing held in public must give particular evidence in private if giving the evidence would disclose information that relates to a public sector corruption issue.

The government has offered no rationale as to why public hearings are acceptable for law enforcement officers, but not for others covered by the proposed Bill. The Bill seeks to protect the reputations of parliamentarians and public servants, regardless of the extent and seriousness of the alleged wrongdoing, while simultaneously opening the floodgates to destroy the reputation and careers of police officers, potentially for minor matters.

Policing is a high-risk public-facing profession. It requires regular interaction with the public, often in a hostile and confrontational environment. Police are sometimes required to assume identities to infiltrate criminal networks. Through virtue of their profession alone, many police officers are targeted by those who feel aggrieved by policing decisions, particularly with anti-police sentiment growing online (notably due to events in the United States of America). As such, many of our members go to great lengths to conceal the nature of their employment from neighbours, acquaintances and the general public when not on duty.

The AFPA recommends that consideration is given to providing protections for law enforcement employees who appear at public hearings as either a witness or respondent, to ensure they are not susceptible to revenge attacks by aggrieved criminals or parties with anti-police sentiments.

Public hearings have the potential to damage reputations and careers, even when no adverse finding is recorded. Policing is a specialised profession, and the skills of a police officer are most readily transferrable to other public sector agencies with investigatory functions. The chances of suitable

reemployment after dismissal from a law enforcement role would be significantly reduced after appearing as a respondent at such a hearing.

Recommendations

1. Public hearings should be available to the public sector division in circumstances where the Commissioner has determined it is in the public interest.
2. Private hearings should be the default mechanism, unless the Commissioner can justify that a public hearing would be in the public interest.
3. Protections should be afforded to law enforcement employees who are required to appear before a public hearing as either a witness or respondent, particularly those determined to be high-risk by their employer.

Referrals

Division 1 of Part 4 of the Bill provides the circumstances in which certain officers or entities can make referrals to the Commonwealth Integrity Commission.

The arrangements currently in the proposed Bill for referrals are outlined in the table below:

	Law enforcement	Public sector	Higher education provider	Research body	Parliamentarian
Attorney-General	Yes	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	No
Minister responsible for regulated entity	Yes	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	No
Parliamentarian	No	No	No	No	Parliamentarians can refer themselves for investigation or can be referred by another integrity agency
Head of regulated entity	Yes	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	Yes (only if reasonably suspects a listed offence has been committed)	No
Public	Yes	No	No	No	No

The arrangements for those who fall within law enforcement is clear.[18] Law enforcement corruption issues can be referred by any Australian citizen wishing to make a complaint. It is likely, noting that

[18] *Commonwealth Integrity Commission Bill 2020 (Cth)*, s.44

there is no clear definition of a "member of the public", that complaints may be made against a law enforcement member by people internationally.

Meanwhile, public servants, higher education providers and research bodies can only be referred by a very select group of three people – the Attorney-General, the Minister responsible for their entity, or the head of the entity for which they work.

Who can and cannot refer becomes much more confusing and blurred in relation to Parliamentarians.[19] The only section which specifically deals with the referral of Parliamentarians in the Bill is section 35. That provision provides that Parliamentarians can only, as we understand it, be referred to the CIC by themselves. We note the explanatory material provides that another integrity agency, such as the AFP or the Independent Parliamentary Expenses Authority, may also refer an issue regarding a Parliamentarian. However, from a review of the legislation is not abundantly clear that this is the case, although it is potentially captured by section 46(1). Again, the issue is that the referral mechanism is not abundantly clear for Parliamentarians and, comparatively to law enforcement, limited.

The difficulties with the proposed referral mechanisms for Parliamentarians in the proposed Bill does little to strengthen the existing integrity framework, potentially allowing parliamentarians to engage in corrupt conduct unimpeded.

Furthermore, the Attorney-General, the responsible Minister, the entity head or other parliamentarians can *only* report corruption issues where they reasonably suspect a listed offence has been committed.

It is pertinent to note that it is unlikely that the corrupt actions of NSW Labor MP Eddie Obeid would have been uncovered, had it not been for an anonymous phone call from a member of the public to the NSW ICAC.[20]

[19] See for instance s. 33 which provides the Attorney-General may refer to the Integrity Commissioner any allegation regarding a regulated entity (other than the office of a parliamentarian). It is not clear whether the parliamentarian themselves may be referred by the Attorney-General, or whether they fall within the exception provided for by s. 33. Section 34 provides a Minister may refer an allegation regarding a public sector agency. However, the definition of public sector agency in s. 8does not include a parliamentarian (compared with s. 9).

[20] Whitbourn, M., McClymont, K., Nicholls, S. (15 December 2016), *Eddie Obeid jailed after "single telephone call" brings him undone,* Sydney Morning Herald, retrieved from https://www.smh.com.au/national/nsw/eddie-obeid-jailed-after-single-telephone-call-brings-him-undone-20161215-gtc35h.html

There is no justifiable reason for this level of inequity in who is permitted to make a referral. It enables a wide scope for misconduct and non-criminal corruption which cannot be reported. This is particularly true for parliamentarians, who unlike law enforcement and public sector entities, are not bound by a Code of Conduct.

Recommendations

1. Public referrals should be made available to the public sector division.

Priorities

Section 26 of the proposed Bill provides that the Integrity Commission gives priority to law enforcement corruption issues, which constitute serious or systemic corruption. Noting the AFPA's agitation that there be no differentiation between staff members of law enforcement agencies and the other divisions covered by the Integrity Commission, including Parliamentarians, that section 26 should be amended to remove specific reference to law enforcement. The provision should, instead, give priority to dealing with serious corruption or systemic corruption for any person covered by the proposed Bill.

Recommendations

1. Remove specific reference to law enforcement in section 26.

Own motion investigations

Section 61 empowers the Integrity Commissioner to deal with a law enforcement corruption issue at their own undertaking. Once again, the Bill expressly prohibits the Commissioner from doing the same with public sector corruption issues.

Once again, we do not believe this inequity is adequately justified and should be rectified.

Recommendations

2. Section 61 should be amended to empower the Integrity Commissioner to commence investigations into public sector corruption issues on their own initiative.

Attorney-General's certificates about release of information

Part 15 of the Bill allows the Attorney-General to prohibit the release of certain information into the public domain. Subsection 270(2) lists the reasons the Attorney-General may issue such a certificate. The AFPA believes this section is reasonable, however, holds concerns about its misuse.

The AFPA believes new provisions should be added to deal with conflicts-of-interest in circumstances where corruption allegations relating to the Attorney-General or members of their party. We do not suggest the current or future Attorneys-General would abuse their office for partisan reasons. However, the current provisions allow for this potential abuse, particularly if certificates were not subject to judicial review to verify the validity of the Attorney-General's justification.

Recommendations

1. Create a new provision within Part 15 to manage conflicts of interest in circumstances where investigations relate to the Attorney-General or a parliamentarian in the Attorney-General's political party.

Funding, resourcing and staffing

Based on our members' experience with ACLEI, the AFPA believes any integrity commission should be adequately funded, resourced and staffed.

The government has proposed a funding model of:

- $106.7 million of new funding for the establishment of the CIC;
- $2.2 million of new funding to ACLEI for CIC implementation activities, in addition to the pre-existing $40.7 million of ACLEI funding; and
- A total staff of 172 when at full capacity.

While we appreciate this increase in government expenditure for the CIC, we do not believe 172 staff would be adequate, noting the numerous functions to be undertaken by the Integrity Commissioner.[21]

Our members' careers and lives can suffer significant adverse effects as a result of an ACLEI investigation. As investigators, our members appreciate that thorough investigations take time. However, ACLEI investigations often blow out far beyond what anybody could consider reasonable. In one extreme case, one of our members was investigated for over five years. This member was suspended from duty for the majority of those five years. Eventually, ACLEI returned a "Not

[21] Section 25 of the Bill

Established" finding, and the member was able to return to the workplace. This investigation and consequent suspension had severe adverse effects on our member's mental health, their family life, their career progression, their professional development and their professional relationships.

Any new Commission must be properly resourced to ensure these instances do not recur in the future, particularly in cases where the defendant has not acted in a corrupt manner.

Additionally, as the AFP will be required to lend resources to assist in CIC investigations, the AFP should receive additional funding and staffing to ensure AFP operations are not impacted by the implementation of the CIC.

AFP reputational damage

Any integrity body must be structured in such a way that protects the AFP from the reputational damage associated in its involvement in politically sensitive investigations.

Trust in a police force is fundamental to the healthy functioning of a liberal democracy. Whenever the AFP is dragged into a political stoush, its independence and reputation amongst the community is compromised.

Due to the lack of a parliamentary code of conduct or integrity body with meaningful oversight of Parliamentarians, the AFP is generally used by both sides of politics as a weapon with which to damage their political opponents. A recent high-profile is the alleged forgery of Sydney City Council documents by Minister for Energy and Emissions Reduction Angus Taylor or his office.

The Australian Labor Party referred the incident to the AFP for investigation. The AFP could not find evidence of criminality, so the investigation was closed. However, an absence of criminality does not equate to an absence of corruption or misconduct. There are many unanswered questions relating to this case that an Integrity Commission should be equipped to investigate if similar events occur in the future. If Mr Taylor's office did not alter the documents and there is no proof that multiple versions of the Sydney City Council's annual report exist on their website, the public has a right to know how the false documents were created and circulated.

Using (and allegedly creating) doctored official documents for political gain may not have amounted to a crime in this instance, but it raises questions about the integrity of the Minister and his staff.

The groundswell of public support for an integrity commission was not because they believed police required extra oversight. The public know there are sufficient bodies and processes in place to ensure our police forces perform their duties with integrity. This is illustrated by polls which regularly demonstrate that police are one of the most trusted institutions in Australian society[22][23][24], while politicians are regularly ranked as one of the least trusted with some polls showing trust of only 10% and distrust of 64%[25].

The widespread public support for establishing an integrity commission is because there have been too many incidents where politicians appear to act in a manner that would not be acceptable in any other workplaces in Australia.

Definition issues

Section 12 of the proposed Bill defines the meaning of staff member for the purposes of regulated entities. Sub-section (1) deals with the meaning of staff members for the purposes of law enforcement agencies. What is regarded as a law enforcement agency for the purposes of the proposed Bill is set out in section 7, and includes, for the purposes of our impacted members, the AFP and the Australian Criminal Intelligence Commission (ACIC). Section 7 also lists out a number of other agencies in the Commonwealth, most of which engage their employees pursuant to the *Public Service Act 1999* (Cth). For instance, our members within ACIC are engaged under the *Public Service Act 1999*.[26]

Police officers and law enforcement officers are unique with respect to their rights and status under employment law. Under common law, police officers have not traditionally been regarded as

[22] Roy Morgan (7 June 2017), *Health professionals continue domination with Nurses most highly regarded again; followed by Doctors and Pharmacists,* Roy Morgan Image of Professions Survey 2017, retrieved from http://www.roymorgan.com/findings/7244-roy-morgan-image-of-professions-may-2017-201706051543

[23] Hanrahan, Catherine (27 November 2019), *Australia Talks: The most and least trusted professions revealed*, ABC News, retrieved from https://www.abc.net.au/news/2019-11-27/the-professions-australians-trust-the-most/11725448

[24] Essential Research (21 April 2020), *Trust in Institutions*, The Essential Report – 21 April 2020, retrieved from https://essentialvision.com.au/trust-in-institutions-13

[25] Ipsos (18 September 2019), *It's a fact… scientists are the most trusted people in the world,* Ipsos Global Trust in Professions Survey, retrieved from https://www.ipsos.com/en-au/its-fact-scientists-are-most-trusted-people-world

[26] *Australian Crime Commission Act 2002* (Cth), s. 47(1)

"employees".[27] However, by operation of the AFP Act, the Commissioner of the AFP is afforded all the rights, duties and powers of an employer and can engage persons as employees.[28]

Whilst there is no concern that an employee engaged under section 24 of the *Australian Federal Police Act 1979* ("**the AFP Act**") will be regarded as a staff member of a law enforcement agency for the purposes of section 12(1)(c)(i), there are issues as to whether others within the AFP will be covered by the proposed definition in sub-section 12(1). In particular, we note that a Deputy Commissioner of the AFP is not an employee, as well as not being regarded as an "agency head".[29] Section 17(1) of the AFP Act provides that a Deputy Commissioner is to be appointed by the Governor-General. Therefore, a Deputy Commissioner is not engaged by the Commissioner pursuant to section 24 of the AFP Act as an employee, and is therefore not an "employee" of the agency.

It also appears to be the case that a Deputy Commissioner would not fall within any of the other provisions in section 12(1). We note that it could be arguable that a Deputy Commissioner is an "official" for the purposes of sub-section 12(1)(b). However, there appears to be two major issues with this:

> (1) It does not appear that the AFP is an agency that is regarded as a Commonwealth entity and only "officials" within those entities are regarded as staff members for the purposes of section 12;[30] and
>
> (2) Under the AFP Act, a Deputy Commissioner is regarded as an official only for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth).[31]

Any uncertainty in who 'is' and 'is not' captured by the proposed Bill needs to be immediately rectified.

Recommendations

1. The definition of staff member of law enforcement agency should be clarified to include Deputy Commissioners of the AFP.

[27] See Giuseppe Carabetta, 'Employment Status of the Police in Australia' (2003) 27(1) Melbourne Law Review 1.
[28] Ibid, s. 24(1)
[29] See Column 2 of the table in section 7 of the Bill.
[30] See Column 1 of the table in section 8 of the Bill.
[31] *Australian Federal Police Act 1979* (Cth), sub-s 6(2)(c)

Offence – referring/notifying with intent to cause detriment

Section 70 of the proposed Bill makes provision for an offence for a person to refer or notify the Integrity Commissioner regarding a public sector corruption issues with there being no reasonable basis and with the intent of causing detriment to another person. We welcome the introduction of such an offence. However, we believe that this should be extended to all referrals or notifications to the Integrity Commissioner.

Law enforcement employees are at no less a risk of vexatious and baseless complaints being made with the intent of harming a person. Unlike public sector employees and parliamentarians, by the very nature of the work done by police, they are exposed to individuals who find themselves on the wrong side of the law. This can often result in attempts at retribution, including allegations of corruption which serve nothing more than to cause harm or damage to the police officer or law enforcement employee.

Recommendations

1. The proposed offence in section 70 be extended to staff members of law enforcement agencies.

Other Issues

Unsworn AFP staff members

The Government has justified the inequitable treatment of law enforcement agencies by referring to the powers they hold. However, in the case of the AFP, these powers are only available to sworn Police Officers. Protective Service Officers have some, but not all of the powers available to Police Officers. Many unsworn professional staff members of the AFP have none of the powers mentioned by the Attorney-General.

A junior administrative officer in the AFP has no more power than an average public servant in any other non-law enforcement agency. To suggest an officer of this type has more power, influence, or is more susceptible to corruption than a Cabinet Minister is ludicrous. Yet under the proposed laws, an 18-year-old school leaver working as a Band 2 administrative officer for the AFP is more deserving of intense public scrutiny than Parliamentarians.

Investigative Standard of Proof

Under the current ACLEI framework, the Law Enforcement Integrity Commissioner makes findings on corrupt conduct based on the balance of probabilities. This means the Commissioner only needs to

be "reasonably satisfied" that corruption has occurred, based on the relevant facts. The Bill is silent on this issue; however, it is presumed that this standard of proof will continue to apply to the law enforcement division.

Meanwhile, the public sector division will be subject to a criminal standard of proof, which requires decision-makers to be "beyond reasonable doubt" that corruption has occurred. Furthermore, subsection 184(9) prevents an Integrity Commissioner report from including "any opinion, finding or recommendation about a parliamentarian, the office of a parliamentarian or a staff member of the office of a parliamentarian."

This could lead to the bizarre situation where a law enforcement officer and Parliamentarian or public sector officer are investigated for the same incident. The law enforcement officer could have an adverse finding recorded because it can be proven on the balance of probabilities. Meanwhile, the public sector officer and Parliamentarian are not even investigated because it does not equate to a listed offence, and the evidence cannot be proven "beyond reasonable doubt".

This potential outcome would not be in line with community expectations and needs to be prevented.

Integrity Testing

The AFPA submit that the current integrity testing framework should not be modified. Targeted testing, rather than random, should remain the preferred method for integrity testing and should only be utilised in extraordinary circumstances with strict CIC and Commonwealth Ombudsman oversight.

Keeping subject of investigation informed

A common criticism of the current ACLEI framework relates to the lack of ongoing communication between the investigating agency and the person subject to investigation. The AFPA appreciate that a certain degree of secrecy is required during the evidence-gathering phase of an investigation to ensure persons under investigation does not attempt to pervert the course of justice. However, to ensure procedural fairness, there should be a positive obligation upon the CIC or investigating agency to inform subjects of the existence of an investigation at some stage. This is particularly necessary for staff members of law enforcement agencies due to the law enforcement division's power to make findings and recommendations in relation to the non-criminal conduct of staff members.

Australian Federal Police Association
A Level 3/53 Blackall Street, Barton ACT 2600
PO BOX 4576, Kingston ACT 2604
P 02 6285 1677
ABN 95 799 543 741
E afpa@afpa.org.au
www.afpa.org.au