Law Council
OF AUSTRALIA

Commonwealth Integrity Commission consultation draft

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
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- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges the contributions of the Law Society of Western Australia, the Law Society of New South Wales, the Queensland Law Society and the Law Council's Business Law Section and National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide this submission in response to the consultation draft of legislation provided by the Attorney-General's Department establishing a Commonwealth Integrity Commission (**CIC/Commission**).

2. The consultation draft bills (**draft legislation**) comprise the Commonwealth Integrity Commission Bill 2020 (**CIC Bill**) (which establishes the CIC) and the Integrity and Anti-Corruption Legislation Amendment (CIC Establishment and Other Measures) Bill 2020 (which makes consequential amendments to various Acts). Due to timing constraints, the Law Council has restricted its analysis to the CIC Bill.

3. The Law Council strongly supports the establishment of a CIC. Corruption has many corrosive effects on society and serves to undermine democracy and the rule of law. The proposed model clearly seeks to further address Australia's obligations as a signatory to the United Nations Convention against Corruption[1] to develop policies in relation to anti-corruption.[2]

4. It is pleasing to see that some of the issues raised by the Law Council in its submission in response to the Attorney-General's Department Consultation Paper 'A Commonwealth Integrity Commission – proposed reforms' (**Consultation Paper**) have been considered in the formulation of the draft legislation. In particular, the Law Council welcomes the continued exclusion of judicial officers from the scheme and the adoption of provisions aimed at ensuring legal representation for witnesses appearing before the CIC.

5. However, the Law Council considers that the draft legislation has significant shortcomings – both in the scope of the corruption it can investigate and in the unnecessary complexity of the mechanisms it requires the proposed CIC to engage in to pursue its functions. Many of the issues the Law Council identified in its submission on the Consultation Paper remain present in the CIC Bill.

6. The Law Council submits that the draft legislation should be substantively revised and amended before it is introduced into Parliament. To this end, the Law Council makes the following recommendations to significantly improve the effectiveness of the proposed CIC:

    - An objects clause should be inserted into the CIC Bill which sets out the purpose and aims of the legislation;
    - The proposed Parliamentary Joint Committee on the Commonwealth Integrity Commission (**PJCCIC**) should be provided with an advisory role in relation to the appointment of CIC officer holders and the Inspector-General of Commonwealth Integrity Commission (**Inspector-General**);
    - Clauses 212 and 244 of the CIC Bill should be amended to require the Minister to consult the PJCCIS before making a recommendation to appoint a CIC office holder or the Inspector-General;
    - The definition of 'corruption issue' for all other regulated entities should be harmonised with that of law enforcement agencies to capture the possibility that person may have engaged in corrupt conduct;

[1] General Assembly, *United Nations Convention Against Corruption,* GA Res 58/4, UN GAOR, 58th sess, Agenda Item 108, UN Doc A/RES/58/4 (31 October 2003).
[2] Ibid, art 5(1).

- Clause 16(1)(a)(iii), which captures in the definition of 'corruption issue' 'whether a staff member of a law enforcement agency will, or may at any time in the future, engage in corrupt conduct', should be removed from the CIC Bill;
- The differing definitions of 'engage in corrupt conduct' between law enforcement and other regulated entities should be merged and a broad definition should be adopted capturing all conduct described in subsection 6(1) of the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (**LEIC Act**) with the added proviso that the captured conduct must be either serious or systemic;
- If the requirement that an offence has been committed is to be retained in the definition of 'engages in corrupt conduct' for other regulated entities, the 'listed offences' in clause 18 should be expanded to include relevant state, territory and common law offences;
- Further clarity should be provided to assist with interpreting the 'catch-all' in the existing LEIC Act definition: 'corruption of any other kind';
- The federal judiciary should remain excluded from the operation of the proposed CIC;
- A separate Federal Judicial Commission (**FJC**) should be established to investigate judicial misconduct, including corrupt conduct, misuse of judicial authority and any abuse of power by members of the federal judiciary;
- The restriction preventing referrals of public sector corruption issues from members of the public should be removed and a broader referral regime should apply than the narrow referral powers that are proposed;
- The CIC should be allowed to deal with any (including public sector) corruption issue on the Commission's own initiative, provided the other relevant thresholds are met;
- Proposed Subdivision C of Division 1 of Part 4 (which provides for the notification of corruption issues relating to intelligence agencies) should be omitted and replaced with a simplified regime;
- The simplified regime should not make the Inspector-General of Intelligence and Security (**IGIS**) reliant on the permission of the Integrity Commissioner (**Commissioner**) to continue examining matters other than the corruption isse referred;
- The Attorney-General's power to block the disclosure of information to the CIC should be removed;
- The provisions of the CIC Bill restricting findings on corruption issues (and the evidence upon which they are based) and findings of corrupt conduct to members of law enforcement agencies, should be removed;
- The provisions in the CIC Bill preventing the Commissioner from including in their report any opinion, finding or recommendation relating to a parliamentarian, should be removed;
- Consideration should be given to establishing an independent third-party to determine claims made in relation to legal professional privilege;
- Subclause 96(4) (which requires a legal practitioner who claims privilege on behalf of a person to provide the name and address of the person) should be removed from the CIC Bill;
- The privilege against self-incrimination should only be abrogated to the extent that both a direct use and derivative use immunity apply in both civil and criminal proceedings;
- The CIC Bill should be amended to require the CIC to exhaust all other appropriate avenues obtain information before compelling a person to give

evidence in circumstances where the privilege against self-incrimination is abrogated;

- Clause 97(3) should be amended insert '(d) a disciplinary proceeding' as one to which a direct use immunity applies;
- Clause 97(5) (which potentially allows for information compelled from a person to be used against them in a disciplinary action) should be removed from the CIC Bill;
- The CIC Bill should be amended to remove the ability of the CIC to compel material in post-charge or post-confiscation questioning of a witness. The compulsory questioning of a witness should be deferred until the disposition of any charges;
- Hearings before the Commission should generally be conducted in private unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest;
- The Australian Government should continue to work towards a comprehensive whistleblower regime, which is essential to promote the exposure of corrupt conduct that can otherwise be difficult to detect and possibly trigger an appropriate investigation by the CIC;
- Imprisonment should be removed as a possible penalty for referring a vexatious complaint; or,
- The offence of referring a vexatious complaint should be amended to require proof that the person knew the report was false or intended to make the report vexatiously; and
- A provisional appropriation should be made to fund the establishment and initial operation of the CIC so that it can adequately perform its functions.

Background

7. On 13 December 2018, the Australian Government announced that it will establish a CIC to strengthen integrity arrangements across the federal public sector. Soon after, the Attorney-General's Department released a Consultation Paper which outlined the current mechanisms in place to address issues of corruption, provided detail on important aspects of the key reforms, explained the rationale for the establishment and structure of a CIC and set out a proposed model for establishing a CIC.[3]

8. A total of 78 submissions were received as part of this earlier consultation, many of which raised substantive issues with the proposed CIC model. Indeed, the Law Council's own submission to this consultation raised several key concerns with this preliminary proposal.[4]

9. In December 2020, the Government released draft legislation, including the draft Commonwealth Integrity Commission Bill 2020 (**CIC Bill**) establishing a CIC.[5]

Functions and operation of the proposed CIC

10. The functions of the Commissioner include the power to detect corrupt conduct, investigate and report on corruption issues, conduct corruption inquiries and make recommendations broadly aimed to reduce incidents of corruption.[6] The Law Enforcement and Public Sector functions are to assist the Integrity Commissioner in the corruption issues and agencies falling under their respective areas.[7] One or more Assistant Integrity Commissioners may also be appointed to assist the Commissioner in the performance of his or her functions.[8]

Objectives of the legislation

11. The Law Council recommends the inclusion of an 'objects' clause at the beginning of the CIC Bill which outlines its purpose or objectives.

12. While clause 3 provides a welcome simplified outline of the CIC Bill, an objects clause would set the tone for the legislation and outline a purpose, or purposes, that informs the other provisions in the legislation.

13. These types of provisions are fundamental, particularly when a new body and jurisdiction is being established. They enable the new Commission, and those who interact with it, to better interpret the operative provisions of the legislation.

14. Objects clauses may also assist the courts in interpreting the CIC Bill. Additionally, section 15AA of the *Acts Interpretation Act 1901* (Cth) promotes the interpretation of provisions in this manner:

> *In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose*

[3] Attorney-General's Department, 'A Commonwealth Integrity Commission – proposed reforms' (December 2018) ('Consultation Paper').
[4] Law Council of Australia, Submission to Attorney-General's Department, 'Commonwealth Integrity Commission: Proposed Reforms' (31 January 2019) ('Consultation Paper Submission').
[5] Draft Bill: Commonwealth Integrity Commission Bill 2020 (Cth) ('CIC Bill').
[6] See CIC Bill cl 25 for a full list of the Commissioner's functions.
[7] Ibid cl 28-29.
[8] Ibid cl 30.

or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Recommendation

- **An objects clause should be inserted into the CIC Bill which sets out the purpose and aims of the legislation.**

Appointment process and efficacy of the Commission

15. Part 11 of the CIC Bill sets out how the key roles of the Commission are to be appointed. A 'CIC office holder' is defined in the definitions section in clause 5 to mean:

    - the Integrity Commissioner; or
    - the Law Enforcement Integrity Commissioner; or
    - the Public Sector Integrity Commissioner; or
    - the Assistant Integrity Commissioner.

16. Clause 212 provides that a CIC office holder is to be appointed by the Governor-General by written instrument. However, the CIC Bill does not prescribe how the Governor-General's decision is to be informed.

17. In particular, there is no explicit requirement for consultation before these appointments are made. The Law Council considers this to be a fundamental design flaw of the scheme. It is contrary to how similar schemes in other jurisdictions have been established and are thus able to function with public confidence. The Law Council makes a similar observation with respect to the Minister's appointment of the Inspector-General pursuant to clause 244 of the CIC Bill.

18. The provision for appointment of CIC officers could be improved to ensure that process is rigorous and produces an independent appointment who engenders public confidence.

19. In Queensland, section 228 of the *Crime and Corruption Act 2001* (Qld) (which establishes the Crime and Corruption Commission (**CCC**)) provides that:

    The Minister may nominate a person for appointment to the office of chairperson, deputy chairperson, ordinary commissioner or the chief executive officer only if—

    (a) the Minister has consulted with—

    (i) the parliamentary committee; and

    (ii) except for an appointment as chairperson—the chairperson; and

    (b) the nomination is made with the bipartisan support of the parliamentary committee.

20. The presence of this section in the Queensland legislation has generally prevented the CCC from being utilised for political purposes because each side of politics has given support to the appointment of key roles.

21. In New South Wales, the *Independent Commission Against Corruption Act 1988* (NSW) provides the relevant committee with a power to veto the proposed appointment of a Commissioner or the Inspector:

> *(1) The Minister is to refer a proposal to appoint a person as a Commissioner or Inspector to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.*
>
> *(2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.*
>
> *(3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.*
>
> *(4) A referral or notification under this section is to be in writing.*[9]

22. The CIC Bill requires the appointment of a Parliamentary Joint Committee on the Commonwealth Integrity Commission (**PJCCIC**).[10] The functions of the PJCCIC include to monitor and review the performance of the Commissioner and the Inspector-General, report to both Houses of Parliament and examine trends and changes in corruption.[11] The Law Council supports the establishment of the PJCCIC and the provisions in the CIC Bill to ensure it is representative of the Parliamentary composition of the day.[12]

23. The Law Council considers that the PJCCIC should be provided with an advisory role in relation to the appointment of CIC office holders and the Inspector-General so as to lend bipartisan support to the appointment process.

24. The appointment processes for the CIC's lead roles are fundamental to the success of its functions. Should there be a lack of confidence in the CIC, there are likely to be fewer complaints and a lack of trust of the investigation and reporting processes.

25. The Law Council recommends that clauses 212 and 244 of the CIC Bill be amended to require the Minister to consult the PJCCIS before making a recommendation to appoint a CIC office holder or the Inspector-General.

Recommendations

- **The proposed PJCCIC should be provided with an advisory role in relation to the appointment of CIC officer holders and the Inspector-General; and,**
- **Clauses 212 and 244 of the CIC Bill should be amended to require the Minister to consult the PJCCIS before making a recommendation to appoint a CIC office holder or the Inspector-General.**

[9] *Independent Commission Against Corruption Act 1988* (NSW) s 64A
[10] CIC Bill cl 257.
[11] Ibid cl 260.
[12] Ibid cl 257-258.

Scope of jurisdiction

26. Alongside the lead Commissioner, the CIC Bill seeks to create two separate deputy Integrity Commissioners: a Law Enforcement Integrity Commissioner to oversee law enforcement agencies, and a Public Sector Integrity Commissioner to oversee the public sector, parliamentarians, higher education providers and research bodies.[13]

27. The principal distinction in the CIC Bill is between staff of a law enforcement agency on one hand, and on the other hand, staff of other public sector agencies, the office of a parliamentarian, a higher education provider; or a research body (**other regulated entities**). The definitions of 'corruption issue' or corrupt conduct will differ between members of law enforcement agencies and other regulated entities.[14] For the former, a broad range of corrupt issues and conduct are captured. For the latter, there must be a reasonable suspicion that a staff member of any other regulated entity committed an offence for a matter to proceed.

28. The Law Council has previously stated that consideration should be given to aligning the powers and thresholds that apply to both the law enforcement and public sector divisions and that a broad definition of 'corrupt conduct' should be applied.[15] The Law Council remains concerned about the different treatment proposed for law enforcement corruption issues as opposed to corruption issues that arise in other areas of the public service. The Law Council views the justification for that disparity as inadequate.

29. The Consultation Paper stated that the CIC would also be able to investigate members of the public or other private entities that receive or deal with Commonwealth funds (and might not otherwise be within jurisdiction). To the extent that their suspected corrupt conduct, intersects with a public official's suspected corrupt conduct, under the CIC Bill, the jurisdiction of the CIC is in fact more limited. The Bill limits the CIC to people and bodies receiving public funding.[16]

30. The definition of 'staff member' of a public sector agency extends to, relevantly, a contracted service provider (including their officers and employees) performing a contract being administered by the public sector agency.[17]

31. For instance, these limitations would exclude the CIC from investigating individuals and organisations that operate in the private sector who might improperly influence public decisions or persuade public servants or parliamentarians to engage in misconduct. Unless they are involved in a Commonwealth contract, they would not be subject to CIC investigation.

Definition of 'corruption issue'

32. A 'corruption issue' is defined in clause 16 of the CIC Bill as:

> *(a) an issue of whether a person who is a staff member of a law enforcement agency:*
>
> *(i) has, or may have, engaged in corrupt conduct; or*

[13] Ibid cl 28 & 29.
[14] Ibid cl 17.
[15] Consultation Paper Submission.
[16] CIC Bill cl 29.
[17] Ibid cl 12(e)

(ii) is, or may be, engaging in corrupt conduct; or

(iii) will, or may at any time in the future, engage in corrupt conduct; or

(b) an issue of whether a person who was a staff member of a law enforcement agency has, or may have, engaged in corrupt conduct; or

(c) an issue of whether a person who is a staff member of a public sector agency, of the office of a parliamentarian, of a higher education provider or of a research body, or who is a parliamentarian:

(i) has engaged in corrupt conduct; or

(ii) is engaging in corrupt conduct; or

(d) an issue of whether a person who was a staff member of a public sector agency, of the office of a parliamentarian, of a higher education provider or of a research body, or who was a parliamentarian, has engaged in corrupt conduct.

33. The definition is thus wider for staff members of a law enforcement agency as it includes the possibility that a person may have engaged in corrupt conduct.[18] This possibility criterion does not apply to staff of other regulated entities.[19]

34. However, the fact that a person may have engaged in corrupt conduct is a standard threshold in legislation conferring investigative powers on anti-corruption agencies, as an agency will often not have the certainty, at the start of an investigation, of knowing that a person has engaged in corrupt conduct. It is counterintuitive to suggest that degree of certainty is required at the time an allegation is made or referred. The effect of this requirement becomes apparent later in the CIC Bill when the referring and investigating of allegations is addressed. Accordingly, the possibility that any person 'may have' engaged in corrupt conduct should be caught by the definition and applied to staff members of other regulated entities.

35. However, the current definition goes further and captures an issue of whether a person who is a staff member of a law enforcement agency will, or may at any time in the future, engage in corrupt conduct. There are significant issues with both requiring someone to make that assessment and with someone being accused, investigated, and penalised for conduct they may undertake in the future. The Law Council considers that capturing the possibility of future conduct goes too far. Accordingly, this element of the definition should be removed.

Recommendations

- **The definition of 'corruption issue' for all other regulated entities should be harmonised with that of law enforcement agencies to capture the possibility that person may have engaged in corrupt conduct.**
- **Clause 16(1)(a)(iii), which captures in the definition of 'corruption issue' 'whether a staff member of a law enforcement agency will, or may at any time in the future, engage in corrupt conduct', should be removed from the CIC Bill.**

[18] Ibid cl 16(1)(a) & (b).
[19] Ibid cl 16(1)(c) & (d).

Definition of 'engages in corrupt conduct'

36. As noted above, the CIC Bill prescribes a higher threshold for deeming conduct to be corrupt for the staff of other regulated entities, than for staff members of law enforcement agencies.

37. For staff members of law enforcement agencies and staff of the CIC to be deemed to have engaged in corruption, they must have engaged in conduct that abuses their office, perverts the course of justice or is engaged in for the purpose of corruption of any kind.[20] That definition is consistent with the definition 'engages in corrupt conduct' in section 6 of the LEIC Act and captures:

    (a) conduct that involves, or that is engaged in for the purpose of, the staff member abusing his or her office as a staff member of the agency; or

    (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.

38. However, for staff members of all other regulated entities covered by the CIC Bill to be found to have engaged in corrupt conduct, their conduct must go further than the above and constitute a 'listed offence'.[21]

39. The policy considerations previously given for the differing divisions and, ostensibly, the differing definitions of corrupt conduct were that law enforcement agencies:

    - exercise the most significant coercive powers and therefore present a more significant corruption risk;
    - have access to sensitive and valuable information, such as taxpayer or company information and knowledge of tax and corporate regulatory systems, as well as their vulnerabilities; and
    - work closely with the corporate sector and those they regulate.[22]

40. As a consequence of the above factors, the policy argument was that law enforcement agencies present a heightened risk of corruption as they may be targeted by people or corporate entities or organised crime groups seeking to evade regulatory systems and enforcement action.[23] No further justification for this distinction has been provided with the release of the draft legislation.

41. In principle, the Law Council acknowledges that corruption in agencies with significant powers can have more far-reaching consequences for the Australian community. However, it appears arbitrary to lower the threshold for capturing law enforcement corruption given that there is scope for significant acts of corruption involving large amounts of money in the administration of contracts and the tendering process in many other areas of the public sector, such as the Department of Defence.

42. The threshold adopted for public sector agencies within the CIC Bill captures many offences which amount to corruption, however there is the possibility that corrupt

[20] Ibid cl 17(1) & 17(8).
[21] Ibid cl 17(2).
[22] Consultation Paper, 4.
[23] Ibid.

conduct may not amount to conduct that constitutes one of the listed offences, and would therefore be outside the scope of the CIC. This could unduly limit the capacity of the CIC to conduct investigations into significant integrity concerns that may arise within public sector agencies.

43. This drafting also puts the onus on the CIC (and the referrer in some instances) to determine if a listed offence has been committed. Requiring the CIC to undertake this exercise would detract from its core functions to investigate and report on corruption issues and to refer corruption issues, in appropriate circumstances, to regulated entities for investigation.[24] It also raises questions as to which standard of proof the CIC would apply in making this determination.

44. Furthermore, the list of 'listed offences' in clause 18 is narrow and excludes, inter alia, state and territory offences and common law offences such as misconduct in public office, an offence which has been used in New South Wales to successfully prosecute parliamentarians.[25] If the requirement that an offence has been committed is to be retained in the definition of 'engages in corrupt conduct' for other regulated entities, the 'listed offences' in clause 18 should be expanded to include relevant state, territory and common law offences.

45. The Law Council concurs with the position of other submitters that the CIC should restrict itself to corruption which is either serious or systemic. The ostensible purpose of the CIC is not to investigate all minor offences and misconduct by members of the public service. If that is the intention, the resourcing allocated to the CIC will be wholly inadequate. The investigation of corruption, which is neither serious nor systemic should, if it involves criminality, be investigated by the police. Non-criminal instances of isolated misconduct should be dealt with by internal disciplinary procedures.

46. It is acknowledged that clause 26 of the CIC Bill provides that, in respect of law enforcement corruption issues, the Commissioner must give priority to corrupt conduct that constitutes serious corruption or systemic corruption, however the Law Council considers that this restriction should be included in the definition of corrupt conduct.

47. The Law Council considers that the definition of 'engages in corrupt conduct' applying to law enforcement[26] (identical to subsection 6(1) of the LEIC Act) represents an appropriate starting point for a broad definition to apply to all regulated entities. However, the Law Council is concerned that the 'catch-all' provision in subclause (c) of this definition, particularly the phrase 'corruption of any other kind', is undefined and circular. The Law Council recommends adding clarity to this phase, perhaps by the inclusion of a non-exhaustive list of examples of corruption, including other serious cases of maladministration and serious misconduct that impairs/undermines, or that could impair/undermine public confidence in public administration.

48. Accordingly, the Law Council recommends that a broad definition of corrupt conduct should be adopted, which captures the conduct described in subsection 6(1) of the LEIC Act, provided that the conduct is either systematic or serious. All other conduct should be dealt with by an internal disciplinary mechanism or, if it is alleged that an offence has been committed, investigated by the appropriate law enforcement body.

[24] CIC Bill cl 25.
[25] See e.g., *R v Obeid (No 12)* [2016] NSWSC 1815, *R v Macdonald; R v Maitland* [2017] NSWSC 638.
[26] CIC Bill cl 17(1).

Recommendations

- **The differing definitions of 'engages in corrupt conduct' between law enforcement and other regulated entities should be merged and a broad definition should be adopted capturing all conduct described in subsection 6(1) of the LEIC Act with the added proviso that the captured conduct must be either serious or systemic.**
- **Further clarity should be provided to assist with interpreting the 'catch-all' in the existing LEIC Act definition: 'corruption of any other kind'.**
- **If the requirement that an offence has been committed is to be retained in the definition of 'engages in corrupt conduct' for other regulated entities, the 'listed offences' in clause 18 should be expanded to include relevant state, territory and common law offences.**

'Reasonable suspicion' thresholds

49. The clauses permitting the referral of information and complaints by the Attorney-General, relevant minster, and parliamentarians provide that they may only do so in relation to a public sector corruption issue when they have a 'reasonable suspicion' that an offence has been committed.[27]

50. In addition, the CIC Bill requires the Commissioner to take no further action if the issue is a public sector corruption issue and the Commissioner does not reasonably suspect that the offence to which the issue relates has been or is being committed.[28]

51. The Law Council intends to consult its Constituent Bodies, Sections and Advisory Committees further, before presenting a settled policy position on whether a 'reasonable suspicion' threshold should apply before a corruption issue can be referred to the CIC, or whether this threshold should prevent the Commissioner from taking further action on a corruption issue.

Jurisdiction over the federal judiciary

52. The Law Council supports the exclusion in the draft legislation of federal judges from the operation of the proposed CIC.

53. The Law Council notes that there is a mechanism in place to address 'judicial misbehaviour' under the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), which provides for a commission to be established pursuant to section 9 of that Act by the Houses of Parliament to:

> *investigate, and to report to them on, alleged misbehaviour or incapacity of a Commonwealth judicial officer, so they can be well-informed to consider whether to pray for his or her removal under paragraph 72(ii) of the Constitution.*[29]

54. The Law Council considers that to subject the judiciary to the regulation of the CIC could be open to constitutional challenge as it has the potential to infringe the separation of powers established in Constitution, which vests judicial power only in the

[27] Ibid cl 33, 34, 37, 42 & 46.
[28] Ibid cl 48.
[29] *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 3.

judiciary as per section 71 of the Constitution.[30] Furthermore, section 72(ii) of the Constitution provides that it is for the two Houses of Parliament to investigate and decide whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate.

55. A further issue is that there may be the need for judicial review of decisions made by the CIC. It is essential to the protection of the rule of law that there be a strong and independent judiciary, separate to, rather than subject to, review by the executive arm of government. This separation of the judiciary from the executive is of central significance in protecting the rights of all citizens from arbitrary, unlawful interference with their rights and must not be diluted by classifying the judiciary in the same category as staff of the public service employed by the executive arm of government (although it does apply to their staff – see discussion below).

Recommendation

- **The federal judiciary should remain excluded from the operation of the proposed CIC.**

Establishment of a separate Federal Judicial Commission

56. Further to the above, the Law Council submits that a separate Federal Judicial Commission (**FJC**) should be established by a separate Act of Parliament to investigate complaints of corrupt conduct by members of the federal judiciary. Such a commission would be consistent with maintaining the separation of powers and the independence of the judiciary.

57. As well as providing a fair mechanism to hear complaints against the judiciary, it would also ensure a fair process for judges who are the subject of allegations which might otherwise be aired in the media. It is also imperative that the FJC be funded to enable the provision of education, training and support, including pastoral care, for judicial officers.

58. The establishment of a FJC is also relevant in the context of the Australian Law Reform Commission's current Review of Judicial Impartiality, which will explore laws relating to impartiality and bias as they apply to the federal judiciary and inform the scope and role of a FJC in addressing such matters.[31]

59. On 27 June 2020 and closely following the publication of allegations of sexual harassment by former High Court Judge the Hon Dyson Heydon AC QC,[32] the Law Council resolved to take several actions as part of a long-term commitment to eliminating sexual harassment within the legal profession.[33] These included engaging in further advocacy towards the establishment of a FJC, with Law Council support contingent upon ensuring that the separation of powers is carefully maintained and that the federal judiciary is consulted and comfortable with any model proposed.

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[30] Judicial power is vested in the members of the judiciary as set out in the Ch. III of the *Australian Constitution*.
[31] Australian Law Reform Commission, 'Review of Judicial Impartiality' (Web Page, 11 September 2020) <https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/>.
[32] See, Law Council of Australia, 'Law Council President, Pauline Wright, statement regarding Hon Dyson Heydon, AC, QC' (Media Release, 22 June 2020) <https://www.lawcouncil.asn.au/media/media-releases/statement-on-the-hon-dyson-heydon-ac-qc>.
[33] Law Council of Australia, 'Law Council President, Pauline Wright, statement regarding sexual harassment in the legal profession' (Media Release, 27 June 2020) <https://www.lawcouncil.asn.au/media/media-releases/statement-regarding-sexual-harassment-in-the-legal-profession>.

60. To further this advocacy, the Law Council has developed a set of Principles that could underpin the establishment of a FJC (**the Principles**). The Principles were formally approved by the Law Council's Directors at their most recent meeting in December 2020 and have been provided to the federal courts (including the High Court of Australia) for comment. They were also provided to the Attorney-General, the Hon Christian Porter MP, who advised that he will continue to carefully consider the Law Council's recommendations, including those arising from the Principles. The Law Council welcomes the recent reports that the Attorney-General is seeking independent legal advice on the establishment of a FJC and looks forward to working with the Government on this proposal.

61. It is not clear whether the CIC Bill intends to capture quasi-judicial offers or members of Commonwealth tribunals (such as the Administrative Appeals Tribunal) in the scope of staff members of regulated entities. Further clarification on this point would assist the Law Council in formulating a policy response to this issue, including whether such officers should be covered by the jurisdiction of a FJC.

62. A copy of the Principles are attached to this submission as **Attachment A.**

Recommendation

- **A separate Federal Judicial Commission should be established to investigate judicial misconduct, including corrupt conduct, misuse of judicial authority and any abuse of power by members of the federal judiciary.**

Staff of federal courts

63. The Law Council is concerned by the extent to which staff of federal courts who perform judicial functions (such as Registrars) fall within the draft legislation.

64. For instance, individuals appointed or engaged as an officer or employee of the High Court under section 26 of the *High Court of Australia Act 1979* (Cth) are considered staff members of a regulated entity (the Registry of the High Court).[34] Furthermore, the Chief Executive and Principal Registrar of the High Court is a designated head of this agency, and so carries an obligation to notify the CIC of corruption issues they become aware of.[35]

65. The Chief Executive and Principal Registrar of the High Court performs quasi-judicial functions in some cases, including acting on behalf of, and assisting, the Justices in the administration of the affairs of the Court.[36]

66. The fact sheet accompanying the draft legislation notes that the public sector integrity division of the CIC would have jurisdiction over statutory agencies. The *Federal Court of Australia Act 1976* (Cth) provides that officers of the Federal Court (including Registrars and District Registrars) together constitute a statutory agency for the purpose of the *Public Service Act 1999* (Cth).[37] From this, it appears the intention and effect of the legislation is for these officers to fall with the jurisdiction of the CIC.

67. District Registrars of the Federal Court, Family Court and the Federal Circuit Court perform statutory functions including issuing process, taxing costs and settling appeal

[34] CIC Bill cl 12(2).
[35] Ibid cl 8 & cl 37.
[36] *High Court of Australia Act 1979* (Cth) s 19.
[37] *Federal Court of Australia Act 1976* (Cth) s 18ZE.

indexes.[38] They also exercise various powers delegated by judges under the *Bankruptcy Act 1966* (Cth)*, Corporations Act 2001* (Cth) and *Native Title Act 1993* (Cth).

68. Some of the powers exercised above may be considered to be judicial in nature, in that they exercise power to decide controversies between subjects, whether they relate to life, liberty or property.[39] Therefore the Law Council cautions the Government to ensure the coverage of staff of this nature, and oversight of decisions made by staff in the exercise of judicial power, will be consistent with the doctrine of separation of powers.

Referral of corruption issues

69. Any person may refer a law enforcement corruption issue to the Commissioner.[40] However, issues relating to corruption by the staff of other regulated entities (public sector corruption issues) may only be referred to the Commissioner by a limited class of persons – including the Attorney-General, the responsible minister or certain parliamentarians.[41] Heads of regulated entities have a positive obligation to notify the CIC of corruption issues relating to their entity, however, this excludes the offices of parliamentarians.[42]

70. Restricting referrals to the Commission in this way means, for example, that:

    (a) a parliamentarian cannot refer a legitimate or reasonable complaint or information to the Commission about corrupt conduct engaged in by a person in a government department or agency, or corrupt conduct engaged in by another parliamentarian;[43]

    (b) a minister cannot refer a complaint or information to the Commission about corrupt conduct engaged in by another minister, a person in another minister's department, or another parliamentarian;[44]

    (c) an individual, including someone working in the Government or a member of the public, cannot refer a complaint or information to the Commission about corrupt conduct engaged in by a parliamentarian; or a minister; or a person in the employ of, or contracted to, a public sector agency, apart from a law enforcement agency.[45]

71. These gaps in the Commission's purview will undermine its ability to be informed of corruption issues in the government and public sector and will reduce public confidence in the Commission to achieve its purpose and tackle corruption.

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[38] See e.g., *Federal Court Rules 2011* (Cth) r 3.01-3.05; *Federal Court (Bankruptcy) Rules 2016* (Cth), sch 1.
[39] See *Huddart, Parker & Co Pty Ltd v Moorehead* [1909] HCA 36, (1909) 8 CLR 330, 357.
[40] CIC Bill cl 44-45.
[41] Ibid cl 33-35.
[42] Ibid cl 37.
[43] Ibid cl 35 (a parliamentarian may only make a referral in respect of themselves, or their office and may only do so if only if the parliamentarian reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed).
[44] Ibid cl 35 (the responsible Minister for a regulated entity that is: a law enforcement agency, public sector agency, a higher education provider, a research body may refer to the Commissioner an allegation, or information, that raises a corruption issue that relates to the entity. However, unless the corruption issue is a law enforcement corruption issue, a responsible Minister may refer an allegation or information only if the responsible Minister reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed).
[45] Ibid cl 33-35.

72. The effect of these provisions is that a person who is not a minister/parliamentarian, the head of an agency or a Commonwealth integrity office holder cannot make a complaint directly to the Commission. In order for information about corrupt conduct to reach the Commission, in practice that person will first need to provide the information to someone with the power to make the complaint and request that the second person exercise their discretion to refer it.

73. This requirement to first refer allegations to an agency head (presumably through layers of bureaucracy) will add a layer of burden and delay to the process and may prejudice a subsequent investigation. It is also unclear what further options a person has if the person capable of making a referral does not do so in circumstances where they have this discretion.

74. Whilst it is inevitable, at least to some degree, that the Commission and its work will be the subject of politically-motivated commentary, confidence should be had that an independent and robust CIC has the capacity to deal with referrals from all sections of the community. While it may be appropriate to take reasonable measures to prevent the referral of vexatious complaints, including by creating a robust appointment process and providing the Commission with the appropriate discretion to dismiss vexatious complaints, the Law Council does not consider it is reasonable or justified to limit the Commission's effectiveness by restricting its ability to be informed and respond to relevant information.

75. The Law Council considers that the distinction between the Commission's power to receive referrals of law enforcement corruption issues from the public and public sector corruption issues from a more limited class of persons to be without justification.

76. An additional issue is that there may also be cases where corrupt conduct involves both the staff member of a law enforcement agency and one of the other regulated entities, in which case the limitations on referring the latter would become problematic. There should be no limit on what the CIC can investigate once a corruption issue is referred. It would be more practical to apply the same threshold to all issues which may be referred. In the Law Council's view, there is no apparent justification for having different thresholds for the referral of issues based on the employment of those involved.

77. Accordingly, the Law Council recommends that any person be able to make a report or referral about public sector corruption issues, to allow the Commissioner to independently investigate public complaints and tip-offs from whistle-blowers, whether or not made anonymously.

Recommendation

- **The restriction preventing referrals of public sector corruption issues from members of the public should be removed and a broader referral regime should apply than the narrow referral powers that are proposed.**

Own-motion powers

78. The CIC Bill at present allows the Commissioner to deal with law enforcement corruption issues on their own-motion where they become aware of an allegation or information.[46]

79. In contrast, the CIC may only deal with issues relating to corruption by the staff of other regulated entities (a public sector corruption issue) where it becomes aware of an allegation in the course of dealing with an existing investigation and reasonably suspects that an offence has been, or is being, committed,[47] or where it receives a referral from the class of persons noted above.

80. The Law Council considers that the CIC should have the power to commence an investigation of its own-motion whenever it becomes aware of an allegation or information of corruption in any regulated entity, not just law enforcement corruption issues. There is no merit in the distinction between law enforcement and other public sector agencies on this issue.

Recommendation

- **The CIC should be allowed to deal with any (including public sector) corruption issue on the Commission's own initiative, provided the other relevant thresholds are met.**

Referral of intelligence corruption issues by IGIS

81. The Law Council notes that the Government has sought to implement its recommendation that the IGIS be given power to make referrals to the CIC to conduct an investigative hearing where the IGIS considers it to be appropriate to do so.[48] Once the head of an intelligence agency has notified the IGIS of a corruption issue relating to their agency, the CIC Bill allows the IGIS to decide how to deal with the issue, including by conducting an inquiry under the under the *Inspector-General of Intelligence and Security Act 1986* (Cth) (**IGIS Act**) or by notifying the Commissioner of the corruption issue.[49]

82. However, the proposed statutory framework in Subdivision C of Division 1 of Part 4 of the CIC Bill is highly complex and prescriptive, running to nearly 10 pages, plus certain requirements to be set down in determinations made by the Commissioner. The Law Council does not support this approach to the referral regime. Lengthy, highly prescriptive and complex provisions governing such notifications and referrals create a substantial risk of diverting the resources of intelligence agencies, the IGIS and the Commissioner into technical compliance with their rigid requirements, and away from examining the substantive corruption issues that have been identified. Moreover, if a referral to the CIC by the IGIS has not strictly complied with the provisions of proposed Subdivision C, the legality of any subsequent investigation by the CIC may be called into question, further diverting valuable investigative resources. The complexity of the proposed referral regime is also difficult to reconcile with the Government's legislative design policy on clearer Commonwealth laws.[50]

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[46] Ibid cl 61(1).
[47] Ibid cl 61(3).
[48] Consultation Paper Submission, [12].
[49] CIC Bill cl 40-42.
[50] Australian Government Attorney-General's Department, Reducing the complexity of legislation: principles for clearer laws, <https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>.

83. In addition, proposed subsections 43(3) and (7) would make the IGIS reliant on the permission of the Commissioner to continue taking action under the IGIS Act into any matter which 'relates to' an intelligence agency corruption issue that has been referred to the CIC. The ambulatory expression 'relates to' is capable of a wide construction, which could extend beyond the specific corruption issue that has been referred to the CIC. This has the potential to undermine the independence of the IGIS to independently examine issues which have a nexus with a matter under consideration by the CIC, but would not in any way duplicate or conflict with extant investigations by the CIC. It would be entirely at the discretion of the Commissioner to grant permission for the IGIS to inquire into such a matter, and the IGIS would be prohibited from doing so unless and until such permission was granted. Rather than empowering one independent integrity agency to effectively direct another independent integrity agency in the performance of its functions, it would be far preferable for matters of jurisdiction and deconfliction with the functions of other agencies to be settled administratively between those agencies, on a cooperative basis, in the circumstances of individual cases. This approach would better acknowledge and preserve the independence of both the CIC and the IGIS, including from each other.

84. Accordingly, the Law Council submits that the proposed referral regime in new Subdivision C of Division 1 of Part 4 requires wholesale redesign, to fundamentally simplify its provisions (primarily by removing procedural prescriptions) and remove the encroachments on the independence of the IGIS. Unless this occurs, the proposed referral regime should not proceed. No formal referral regime would be preferable to the model proposed in the CIC Bill. In this event, the CIC should simply be conferred with the power to inquire into corruption issues referred directly by the heads of intelligence agencies. In particular, it should be funded and equipped to handle information of a high classification, with the appropriate security-cleared personnel, and information and physical security arrangements. It should also be empowered to share information with the IGIS, for the purpose of the two agencies cooperatively managing issues of joint or concurrent jurisdiction.

85. Such a cooperative approach is already proposed in the Intelligence Oversight Legislation Amendment (Integrity Measures) Bill 2020, to enable the IGIS and other Commonwealth integrity agencies (such as the Ombudsman, Australian Commission for Law Enforcement Integrity (**ACLEI**) and the Information Commissioner) managing their concurrent oversight jurisdiction over certain Commonwealth agencies. The Law Council submits that this approach is vastly preferable to the prescriptive, directive and complex model proposed in the Bill.

Recommendations

- **Proposed Subdivision C of Division 1 of Part 4 (which provides for the notification of corruption issues relating to intelligence agencies) should be omitted and replaced with a simplified regime.**
- **The simplified regime should not make the IGIS reliant on the permission of the Commissioner to continue examining matters other than the corruption issue referred.**

Dealing with corruption allegations

Release of information to the Integrity Commissioner

86. There are a number of provisions in the CIC Bill which will allow the CIC, or an entity investigating at the request of the CIC, to release information, other updates and

reports about an investigation to certain people, including individuals who have made a referral about a law enforcement agency.[51]

87. Generally, the clauses that deal with providing or releasing information contain exceptions to doing so, including where the release of the information would jeopardise the investigation or any action arising from it.[52] Many of these exceptions are usual and reasonable.

88. However, it is concerning that some further provisions expressly prohibit the release of information to the Commissioner where the Attorney-General has certified information to that effect.[53] Clause 270 of the CIC Bill provides the Attorney-General with a broad set of grounds for certifying that the disclosure of information would be contrary to the public interest – including that the disclosure would reveal a confidential source of information in relation to the enforcement of a criminal law or civil penalty provision.

89. Clause 270 is almost identical to existing section 149 of the LEIC Act but adds a provision deeming where a disclosure ***contravenes*** a certificate. The provisions[54] which are triggered as a consequence are also substantially similar.

90. It is readily conceivable that the activities of all law enforcement agencies covered by the scheme, as well as the activities of a large number of the public servants, will, by their very nature, involve the creation and use of highly classified information. Consequently, there is the potential for the certification power in clause 270 to have a wide application at the discretion of the Attorney-General.

91. The potential for the certification power to apply to a broad category of information that might be provided to the CIC raises an unacceptable risk that the power could be exercised in a manner which interferes with the independence of the Commissioner in determining whether to investigate a matter – as well as the focus and manner of conduct of any such investigation.

92. As was evident in a recent decision of the AAT under the *Freedom of Information Act 1982* (Cth), concerning access to information that the Attorney-General redacted from a report of the Auditor-General prior to its public dissemination, there may be scope for a considerable divergence of views between the Attorney-General and an independent trier of fact on the question of whether withholding certain information would be prejudicial to Australia's national security.[55]

93. It is antithetical to the independence of oversight and anti-corruption bodies to determine what information they require to perform their functions. In circumstances where most hearings will be conducted in private, the Law Council considers that the Attorney-General's certification power is not justified. If the Government's concern is the appropriate protection of classified information, the preferable approach would be to bolster the skills and resources of the CIC (including security cleared personnel and physical and information security arrangements) to handle information to the highest classification that the agencies which are subject to its jurisdiction typically deal in.

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[51] CIC Bill cl 75 & 81 – which permit the Commissioner or regulated investigating entity to keep a person who referred a law enforcement corruption issues under cl 44 updated on the investigations.
[52] Ibid cl 75(5) & 81(5).
[53] Ibid cl 270-272.
[54] Ibid.
[55] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2020] AATA 4964 (9 December 2020, Britten DP) at [63]-[65].

Recommendation

- **The Attorney-General's power to block the disclosure of information to the CIC should be removed.**

Reporting on corrupt conduct

94. Part 9, Division 2 of the CIC Bill deals with reporting at the end of an investigation into a corruption issue relating to a regulated entity, whilst Division 3 relates to reporting by the Commissioner at the end of a corruption inquiry. For both investigations and inquiries, restrictions are placed on the content of those reports.

95. Investigation reports must set out the CIC's findings on a law enforcement corruption issue, and the evidence and other material on which those findings are based. However, the CIC is not expressly required to set out the same material in its reports concerning public sector corruption issues arising in other regulated entities.[56] While it is arguable that the provisions do not preclude the CIC from putting such material in an investigation report into a public sector corruption issue,[57] there is no justification offered for the distinction in treatment between the two groups.

96. Further, the Commissioner may only include opinions or findings about whether a member of a law enforcement agency engaged in corrupt conduct in an investigation report.[58]

97. In relation to inquiries, the Commissioner is further precluded from reporting an opinion or finding about whether a staff member of any regulated entity engaged in corrupt conduct, including members of law enforcement agencies.[59]

98. 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, merely because of that staff member's employment. The Law Council submits that there should be no distinction in the opinions or findings which the CIC can make in its reports based on employment.

99. Furthermore, the CIC has the power to investigate parliamentarians for engaging in corrupt conduct, however it is unclear how this will work in practice.

100. At various points throughout the CIC Bill, it says that the Commissioner cannot comment on the conduct of parliamentarians. For example, subclause 184(9) prohibits an inquiry report from including any opinion, finding or recommendation relating to a parliamentarian.

101. The CIC Bill also preserves the powers, privileges, and immunities of members of parliament.[60] This may cause significant issues with undertaking any investigation which may impinge on those preserved powers, privileges and immunities. This may restrict the CIC's intended function to detect corrupt conduct by parliamentarians.[61]

102. Rule of law principles dictate that the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds.

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[56] CIC Bill cl 178(4) & (5).
[57] See the omission in cl 178(5) of subclauses mirroring cl 178(4)(a) & (b).
[58] Ibid cl 178(11) & (12).
[59] Ibid cl 184(8).
[60] Ibid cl 283.
[61] Ibid cl 25(c).

Pertinently, where the law distinguishes between classes of persons, there should be a demonstrable and rational basis for that differentiation.[62] Parliamentarians are conferred with special privileges and immunities (e.g. regarding defamation), however the issue of corruption has to do with the proper exercise of those powers and privileges. No justification has been provided for explicitly preventing the CIC from commenting on the conduct of a parliamentarian, including any inappropriate use of the privileges and immunities conferred on them.

Recommendations

- **The provisions of the CIC Bill restricting findings on corruption issues (and the evidence upon which they are based) and findings of corrupt conduct to members of law enforcement agencies, should be removed.**
- **The provisions in the CIC Bill preventing the Commissioner from including in their report any opinion, finding or recommendation relating to a parliamentarian, should be removed.**

Legal protections

Client legal privilege

103. Clause 96 of the CIC Bill provides some provision to enable a legal practitioner appearing before the CIC to protect information they hold that may be the subject of client legal privilege, however an exception to this protection in subclause (4) states:

> *(4) If the legal practitioner refuses:*
>
> *(a) to give the information; or*
>
> *(b) to produce the document or thing;*
>
> *the legal practitioner must, if required by the Integrity Commissioner, give the Integrity Commissioner the name and address of the person to whom the communication was made (or by whom the communication was made).*

104. The requirement to provide the name and address of the person to whom or by the communication was made clearly intends to abrogate client legal privilege[63] in circumstances presently protected by common law. *Commissioner of Taxation v Coombes* (**Coombes**)[64] provided that there are some circumstances where client legal privilege may attach to details of a client's identity[65]— reasoning endorsed in subsequent cases including *Z v New South Wales Crime Commission*[66] and the more recent decision of *John Bridgeman Limited v Dreamscape Networks FZ-LLC.*[67] There are important public policy reasons for the maintenance of the *Coombes* common law

[62] Law Council of Australia, Policy Statement, *Rule of Law Principles* (March 2011), 2.
[63] Per *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002)* 213 CLR 534.
[64] (1999) 92 FCR 240.
[65] *Commissioner of Taxation v Coombes* [1999] FCA 842 [31]:
> Some of the cases support an exception to this general rule when so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication. This will be the case when the client's identity is so intertwined with the confidential communication that to disclose the identity would be to disclose the communication.

[66] Z v *New South Wales Crime Commission* [2007] HCA 7 [12].
[67] *John Bridgeman Limited v Dreamscape Networks FZ-LLC* (24 August 2018)[2018] FCA 1279 [31].

protection. Client legal privilege is a fundamental right that applies to court, administrative and investigative proceedings.[68] In *Baker v Campbell* Wilson J noted that:

> *…adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and privilege is an important element in that protection.*[69]

105. Client legal privilege protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or professional legal services or for use in current or anticipated litigation. The rationale for client legal privilege is to enhance the administration of justice and the proper conduct of cases by promoting the full and frank disclosure between the client and the legal practitioner, which allows people to obtain accurate and comprehensive advice about their legal situation. This has the effect of facilitating greater compliance with the law and more effective and efficient resolution of legal disputes. As stated by Kirby J in *Esso Australia Resources v Commissioner of Taxation* [70] discussing the purpose of privilege:

> *It arises out of 'a substantive general principle of the common law and not a mere rule of evidence'. Its objective is 'of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law'. It defends the right to consult a lawyer and to have a completely candid exchange with him or her. It is in this sense alone that the facility is described as 'a bulwark against tyranny and oppression' which is 'not to be sacrificed even to promote the search for justice or truth in the individual case'.*[71]

106. A foreseeable effect of subclause 96(4) is that it will discourage clients from obtaining legal advice in circumstances where the preservation of their identity is intertwined with the provision of legal advice and/or in respect of CIC proceedings. This may include advice facilitating better compliance with the CIC. There is also the potential for adverse inferences being drawn about the legal practitioner's client for having sought legal advice from a practitioner with a known particular speciality.

107. An alternative and preferable approach would be a provision for a court to be able to determine any disputed claim of privilege.[72] This will necessarily include questions of whether a client's identity is privileged information, per *Coombes*. Such an approach would preserve the public policy benefits of a *Coombes* common law protection where appropriate, while also guarding against its potential abuse.

108. Further, such an approach would also guard against clause 96(4) being used for fishing exercises to confirm the identity and details of persons not otherwise known to the CIC.

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[68] *Baker v Campbell* (1983) 153 CLR 52.
[69] Ibid.
[70] (1999) 201 CLR 49.
[71] *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [111] (Kirby J).
[72] See *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 147. As can occur in the Victorian anticorruption body, the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) which provides for an application to be made pursuant to section 147 of the Act to the Supreme Court for a determination to be made in relation to any claim of privilege.

Recommendations

- **Consideration should be given to establishing an independent third-party to determine claims made in relation to client legal privilege.**
- **Subclause 96(4) (which requires a legal practitioner who claims privilege on behalf of a person to provide the name and address of the person) should be removed from the CIC Bill.**

Admissions and the privilege against self-incrimination

109. Clause 97 deals with self-incrimination, essentially stating that a person is not excused from giving information or producing a document or thing on the ground that doing so would tend to incriminate them or expose them to a penalty. The subclauses relating to self-incrimination[73] (as opposed to public interest grounds) are largely the same as their equivalent in the LEIC Act.

110. The right to claim privilege against self-incrimination is a fundamental legal right. Indeed, article 14(3) of the *International Covenant on Civil and Political Rights* provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.[74] The rule against self-incrimination is a substantive common law right[75] available to an accused in criminal proceedings as well as persons suspected of crime.[76] The privilege against self-incrimination is based on the desire to protect personal freedom and dignity.[77] Consequently, any breach of this right should only occur as a last resort. Fundamental rights of this nature underpin the rule the law and the justice system as a whole.

111. While there may be circumstances where compelling the provision of certain information is justified, the CIC Bill should be amended to require the CIC to exhaust all other appropriate avenues to obtain information before compelling a person to give evidence in circumstances where the privilege against self-incrimination is abrogated.

Direct use immunity

112. As in the LEIC Act, the CIC Bill does provide for direct use immunity in subsequent proceedings as set out in subclause 97(3). This provision provides that the information given, or the document or thing produced (as a result of the Commission using its powers to compel the production of information), is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition or recovery of a penalty; or

(c) a confiscation proceeding.

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[73] CIC Bill cl 97(1)-(5)
[74] See also United Nations Human Rights Committee, *CCPR General Comment No 13 on Article 14* (Administration of Justice), 21st sess (13 April 1984). Article 14 of the ICCPR provides for a number of fundamental rights including the right to a fair and public hearing, the presumption of innocence, legal representation as well as the privilege against self-incrimination.
[75] *Reid v Howard* (1995) 184 CLR 1, [8] (Toohey, Gaudron, McHugh and Gummow JJ). See [15] in relation to persons being questioned in civil proceedings.
[76] *Petty & Maiden v R* (1991) 173 CLR 95.
[77] *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR, [7] (Murphy J).

113. This provision does provide some immunity which may encourage witnesses to co-operate with examiners on the basis that they can answer questions that may incriminate them. In its absence, a witness who is compelled to answer a question without any privilege against self-incrimination may be more likely to be untruthful.[78]

114. However, there are some exceptions to this direct use immunity in subclause 97(4), which permit the use of compelled information in:

(a) a confiscation proceeding, if the information was given, or the document or thing was produced, at a time when the proceeding had not commenced and was not imminent; or

(b) a proceeding for an offence against clause 94 or 95 (about disclosure or failure to comply with a notice); or

(c) a proceeding for an offence against section 137.1 or 137.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) (about false or misleading information or documents) that relates to this Act; or

(d) a proceeding for an offence against section 149.1 of the Criminal Code (about obstruction of Commonwealth public officials) that relates to this Act; or

(e) a disciplinary proceeding against the person if the person is a staff member of a regulated entity.

115. Subclause 97(5) states that subclause 97(4) does not affect the admissibility or relevance of the information, document or thing for any other purpose. In relation to subclause 97(4)(e) it should be noted that the term 'disciplinary proceeding' is defined broadly in clause 5. Therefore, there is potential for information obtained under compulsion from a person to be used against them in a disciplinary action or other setting.

116. The Law Council does not consider that there is appropriate justification for allowing information obtained under compulsion from a person (particularly when the person's right to claim privilege has been abrogated) to be used as evidence in any action, including a disciplinary proceeding, where that exception to the privilege against self-incrimination is not explicitly referred to in clause 97(4) or one not allowed by the CIC, for example under clause 176(1)(b)(ii). Disciplinary proceedings should be subject to direct use immunity.

Lack of derivative use immunity

117. It is of particular concern to the Law Council that the proposed provisions still do not provide for protection against the 'derivative use' of compelled information. That is, information gathered as a result of answers provided in response to questioning conducted under the coercive powers, which is able to be referred to the CDPP to be used as evidence against the person in subsequent criminal or civil proceedings. This is of particular concern where the primary purpose of investigating a public sector corruption issue will be to prepare a brief of evidence to be used in a subsequent criminal prosecution.

[78] *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR, [118], [127]. See also report of Australian Law Reform Commission, "Evidence" Interim Report 26, [852], [855], [861].

118. As noted in its submissions in response to the 2010 National Integrity Commissioner Bill,[79] and the Consultation Paper,[80] the Law Council is of the view that witnesses appearing before any anti-corruption commission should be able to refuse to answer a question or provide information to a Commissioner on the grounds that such information may incriminate the person. To do otherwise would undermine some of the fundamental principles of the criminal justice system, namely the presumption of innocence and the onus of proof always being on the prosecution, and as an essential element of these principles, the right to silence. In *Cornwall v The Queen,* Kirby J stated:

> *Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.*[81]

119. In criminal proceedings, the use of material derived from answers given where the privilege against self-incrimination is removed raises the admissibility of such admissions. Such evidence arguably comes within the ambit of Part 3.4 and in particular subsection 85(1) of the *Evidence Act 1995* (Cth), which governs the admissibility of evidence of an admission made by a defendant: (a) to an investigating official who was at the time performing functions in connection with the investigation of the commission, or possible commission, of an offence; or, (b) as a result of an act of another person who was, and who the defendant knew or reasonably believed to be, capable of influencing the decision whether a prosecution of the defendant should be brought or should be continued – which is what the CIC will be doing.

120. The Law Council considers that any questioning by an 'investigating official' of the CIC, where there is statutory protection against self-incrimination, would, in a subsequent criminal trial, be subject to the provisions of the Evidence Act. Further, in a trial it would not be appropriate for any answers given in response to 'coercive questioning' be allowed to be adduced into evidence nor would any evidence of silence or refusal to answer questions be allowed to be used in subsequent criminal proceedings.[82]

121. While there is some benefit in being able to compel a witness to answer a question to obtain information to assist in the investigation, the Law Council considers that the privilege against self-incrimination should not abrogated to the extent the privilege does not apply to direct use and derivative use of the answers given in related criminal and civil proceedings.

122. The Law Council considers that a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of coercive powers by an agency of the Government. Such an approach enables useful information to be obtained, indeed encouraging witnesses to provide full and frank disclosure to the head of inquiry, while preserving

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[79] Law Council of Australia, Submission to the Australian Greens, *National Integrity Commissioner Bill* 2010 (4 February 2011) 18.
[80] Consultation Paper Submission, [55].
[81] *Cornwall v R* (2007) 231 CLR 260, [176].
[82] See *Evidence Act 1995* (Cth) s 89 in relation to not being allowed to draw any adverse inferences from a person's "silence" and refusal to answer any questions by an "investigating official".

the rights of witnesses to be treated the same as any other witness when it comes to protecting their right to a fair trial.

Recommendations

- **The privilege against self-incrimination should only be abrogated to the extent that both a direct use and derivative use immunity apply in both civil and criminal proceedings.**
- **The CIC Bill should be amended to require the CIC to exhaust all other appropriate avenues obtain information before compelling a person to give evidence in circumstances where the privilege against self-incrimination is abrogated.**
- **Clause 97(3) should be amended to insert '(d) a disciplinary proceeding' as one to which a direct use immunity applies.**
- **Clause 97(5) (which potentially allows for information compelled from a person to be used against them in a disciplinary action) should be removed from the CIC Bill.**

Post-charge questioning

123. The CIC Bill proposes to expressly authorise the Commission to summons a witness to give evidence and produce documents and for that material to be obtained from the witness despite the witness being presently charged with a related offence, meaning that charge is imminent or yet to be resolved.[83] Clause 114 of the CIC Bill also authorises the use or disclosure of post-charge material for the purpose of obtaining derivative material.

124. Post-charge material and derivative material may also be disclosed to prosecutors of the witness under an order made by a Court, if the Court is satisfied that this disclosure is in the interests of justice and despite any direction given that the material must not be used or disclosed.[84] However, subclause 117(4) provides that a person's trial for an offence is not unfair merely because the person has been a witness. The unfairness proviso applies whether the person became a witness before or after being charged with the offence or before or after such a charge was imminent.

125. However, High Court decisions flowing from compulsory examination in confiscation cases have effectively held that such proceedings inevitably prejudice a fair trial.[85] The High Court has commented critically on such deeming provisions in other contexts and has granted a stay of the compulsory examination notwithstanding the confiscation legislation's provisions limiting stays pending the criminal trial and the direct use immunity.[86] A conclusion that a trial in those circumstances was unfair might not necessarily follow.[87] However, such a trial would overturn both the privilege against self-incrimination and the principle that the prosecution has to prove its case without the assistance of the defendant and indeed could compel the defendant to prove the case against him or herself. These provisions are disproportionate.

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[83] CIC Bill cl 5 (the definition of ***post-charge***), cl 99 (authorising a post-charge hearing), cl 100(d) (authorising the issuing of a post-charge, or post-confiscation, summons)
[84] Ibid cl 115, 116.
[85] *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, (2015) 255 CLR 46; *Lee v New South Wales Crime Commission* [2013] HCA 39; *Lee v The Queen* [2014] HCA 20.
[86] Ibid.
[87] Cf *Lee v The Queen* [2014] HCA 20 where there was a prohibition on information sharing, whereas here ASIO can share compulsory questioning material if approved by a court.

126. The Law Council has long opposed proposals to explicitly permit 'post-charge' and 'imminent charge' questioning. These proposals carry an unacceptably high degree of risk to both the constitutional validity of the scheme and the erosion of the privilege against self-incrimination and the rights of an accused person to a fair trial.[88]

127. The Law Council's position remains as expressed in its evidence to the Committee in its 2017-18 review of ASIO's questioning and detention powers, to the second INSLM in his 2016 review of those powers, and to the Senate Legal and Constitutional Affairs Committee inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (which was passed in 2015 and enacted the post-charge questioning powers in the Australian Crime Commission Act and LEIC Act).[89]

128. In short, the Law Council is concerned that, despite various purported safeguards, post-charge questioning overturns the privilege against self-incrimination and creates an overwhelming risk that a person who is compulsorily questioned, in detail, as to the circumstances of an alleged offence, is very likely to prejudice their own defence. An accused person should not be forced to divulge their position prior to trial or to assist law enforcement officers in gathering supplementary evidence to aid in a prosecution.

129. Accordingly, the Law Council recommends the removal of the power to compulsorily question charged persons, or persons against whom charges are imminent, about the subject matter of those charges. That is, the compulsory questioning of a witness should be deferred until the disposition of any charges the witness is facing.

Recommendation

- **The CIC Bill should be amended to remove the ability of the CIC to compel material in post-charge or post-confiscation questioning of a witness. The compulsory questioning of a witness should be deferred until the disposition of any charges.**

Public and private hearings

130. The draft legislation proposes that hearings relating to public sector corruption issues are to be held in private, while there is the potential for public hearings relating to law enforcement corruption issues.99

Law enforcement corruption issues

131. The CIC may decide whether a hearing (or a part of a hearing) for the purpose of investigating a law enforcement corruption issue is to be held in public or in private, having regard to the same factors enumerated in subsection 82(4) of the LEIC Act at present.[90] By default, hearings for the purpose of conducting a law enforcement corruption inquiry are held in public.[91] This model is similar to the status quo under the

[88] See also: PJCHR, *Scrutiny Report 7 of 2020*, (June 2020), 54-56 at [2.73]-[2.78]; and Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2020* (June 2020), 5-6 at [1.20]-[1.23].

[89] Law Council of Australia, *Submission to the PJCIS Review of ASIO's questioning and detention powers*, (April 2017), 11-13; Law Council of Australia, Submission to the INSLM Review of Questioning and Detention Powers, (June 2016), 21 at [66]-[69] and 28-32 at [100]-[177]; and Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015*, (June 2015), 8-19.

[90] CIC Bill cl 99(7).

[91] Ibid cl 99(8).

LEIC Act.[92] Notably, however, the draft legislation appears to omit the existing provision in the LEIC Act which allows the Minister with general responsibility for the particular agency to request that the Commissioner conduct a public inquiry.[93]

132. In the case of a public hearing, a person may apply to give their evidence in private.[94] The Law Council has also previously noted that it is important that the person appearing before the inquiry be able to make an application to the Commission for an order that their evidence be suppressed in appropriate circumstances. While the draft Bill allows the Commissioner to direct that hearing material must not be used or disclosed or only used by or disclosed to specified persons in specified ways or on specified conditions, no factors are provided to have regard to in exercising this discretion. To this end, the Law Council suggests that consideration could be given to adopting a test similar to the tests considered by courts when determining whether to make a suppression order to prevent prejudice to the proper administration of justice or to prevent undue hardship to a witness.[95]

Public sector corruption issues

133. The power to hold hearings in the CIC Bill provides that a hearing for the purpose of investigating or holding a hearing into a corruption issue must be held in private to the extent that the hearing is dealing with a public sector corruption issue or dealing with corruption in, or the integrity of staff members of public sector agencies.[96]

134. The Law Council has previously acknowledged the advantage of conducting hearings in private to protect the reputation of those persons concerned. This is a valid concern, particularly where allegations are aired in public without the protection afforded by the rigours of the criminal justice system – including the rules of evidence, the availability of legal representation and the presumption of innocence in the course of what is only going to be an investigation.

135. The Law Council has also acknowledged that it has been a valid criticism that public hearings conducted by state anti-corruption bodies such as the New South Wales Independent Commission Against Corruption (**NSW ICAC**) can take on the flavour of a 'show trial' and attract an undue amount of media attention in a forum where the concerned person has limited means of defending themselves against prejudicial material.

136. However, public hearings, in proper circumstances, are essential to the effective and transparent operation of an anti-corruption agency. They can play an important deterrent role, and can also hold the CIC to account in respect of the integrity of the investigation itself. In New South Wales, they are seen by many as critical to maintaining public confidence in the integrity of government.

137. Open justice is a fundamental tenet of our justice system and this should be promoted except in appropriate cases where there are concerns about safety and security. It may be that the rationale for these clauses is to negate the politicisation of a hearing's progress and outcome. However, such a concern does not necessarily outweigh the principles of open justice including that proceedings should be subjected

[92] LEIC Act s 82(4) & 89.
[93] Ibid s 71.
[94] CIC Bill cl 106.
[95] For instance, section 69A of the *Evidence Act 1929* (SA).
[96] CIC Bill cl 99(5) & cl 99(8)&(9).

to public and professional scrutiny.[97] The right balance must be struck between ensuring the CIC is able to operate effectively, without inappropriately protecting political sensitivities.

138. The Law Council has previously canvassed the thresholds for the conduct of a public hearing by anti-corruption bodies in New South Wales, Victoria, Queensland and South Australia.[98]

139. Inconsistency between the ability of State and Territory anti-corruption bodies and the CIC to hold public hearings is undesirable and, ideally, federal parliamentarians and public servants should be subject to the same investigative powers and processes as their counterparts on the sub-national level. As all existing anti-corruption bodies at the state and territory level (except the South Australian Independent Commissioner Against Corruption) have some power to hold public hearings, the Law Council submits that the CIC should have this discretion in some form for all of its inquiry hearings.

140. The Law Council considers that hearings before the CIC should generally be conducted in private unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest.

Recommendation

- **Hearings before the CIC should generally be conducted in private unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest.**

Whistleblower protections

141. While clause 279 and 284 provide some protection from liability for whistleblowers who report a corruption allegation as a staff member of a regulated entity, these protections do not apply to those who are not staff of a regulated entity – for instance, members of the public who refer law enforcement corruption issues.

142. The Law Council also notes that the draft legislation does not currently address several of the issues for a comprehensive whistleblower regime, as identified by the Parliamentary Joint Committee on Corporations and Financial Services *Whistleblower Protections Report*.[99] These include for example the recommendations relating to:

(a) the creation of a single Whistleblower Protection Act covering all areas of Commonwealth regulation beyond the Bill's corporate financial service and tax entities;

(b) access to non-judicial remedies (e.g., through the Fair Work Commission under the *Public Interest Disclosure Act 2013* (Cth));

(c) an agency empowered to implement the regime such as a Whistleblower Protection Authority; and

[97] Australian Law Reform Commission, 'Traditional Rights and Freedoms—Encroachments by Commonwealth Laws' (ALRC Report 129), [8.53 - 8.59].
[98] Consultation Paper Submission, [63-66].
[99] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (13 September 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report>.

(d) appropriate resourcing for effective implementation.

143. The Law Council therefore encourages the Australian Government and the Treasury to continue to work towards a comprehensive whistleblower regime, which is essential to promote the exposure of corrupt conduct that can otherwise be difficult to detect.

144. A statutory framework for whistleblower protection will also provide an avenue for members of the public and employees in the Commonwealth government agencies to be able to obtain independent, anonymous advice about issues that relate to disclosure and reporting of suspected corrupt conduct which is not presently available. This itself may assist in promoting the reporting of suspected corrupt conduct.

145. The Law Council considers there is some public benefit to having provision for anonymous reporting of corrupt conduct to a Whistleblower Protection Commissioner. It may serve to encourage the reporting and detection of corrupt conduct particularly where people are fearful of reporting suspected corrupt conduct due to fear of recriminations being made against them or their family. It may also assist in facilitating another means of referral to the CIC, which in the proposed model is not able to respond to direct complaints by members of the public.

Recommendation

- **The Australian Government should continue to work towards a comprehensive whistleblower regime, which is essential to promote the exposure of corrupt conduct that can otherwise be difficult to detect and possibly trigger an appropriate investigation by the CIC.**

Offences

Referring a vexatious complaint

146. Clause 70 of the CIC Bill makes it an offence to refer or notify a public sector corruption issue with an intention to cause detriment and without a 'reasonable suspicion' that an offence has been, or is being, committed.

147. The Law Council notes this offence would be better justified if the provisions permitting referrals were not so restrictive. However, as noted above, the Law Council is still considering the appropriateness of the 'reasonable suspicion' thresholds at first instance.

148. Regardless, as the CIC Bill is currently drafted, the persons permitted to make referrals, outside of those related to a law enforcement corruption issue, will be either the Attorney-General, a minister, a parliamentarian, the head of an agency (regulated entity or intelligence agency) or a Commonwealth integrity office holder[100] and will be doing so in their capacity as persons appointed or elected to these roles.

149. Accordingly, there will already be consequences, depending on the circumstances, for making a false referral with the intent of causing detriment, including potentially under clause 278 of the CIC Bill and under existing, similar offences under other

[100] CIC Bill cl 20(1)).

statutes.[101] There may also be disciplinary action taken or the potential for private or public rebuke by superiors or colleagues (including political leaders and influencers).

150. Any offence should, and clause 70 does, require an element of intent. The Law Council notes the requirement that there be 'no basis on which a reasonable person could suspect that the offence to which the issue relates has been, or is being, committed'.

151. However, there remains concern that such an offence may be used to deter a person from making a referral. A person could be pressured by someone not wanting the referral to be made, using the offence (including the potential penalty of a term of imprisonment) to persuade someone not to proceed. For example, the issue could concern someone that the potential complainant does not have a good relationship with, raising the prospect that paragraph (1)(e) could be established even if the person considers there to be corrupt conduct. With the risk to a person's career and therefore livelihood from making a referral (in some circumstances, irrespective of whether it is progressed or dismissed), the added risk of a term of imprisonment could significantly stifle referrals.

152. The Commission should actively encourage referrals and publicly reassure complainants that their complaints will be examined without any adverse consequences for them, unless the complaints are vexatious. In these cases, there will need to be a determination about whether a decision not to pursue a complaint is sufficient and this decision may need to be balanced against the need to ensure that complainants are not deterred from making legitimate referrals.

153. Additionally, under proposed Division 4 of Part 4, a vexatious complainant (declared so by the Commission) is someone who makes repeated allegations. This appears at odds with clause 70 where an offence could be committed based on one referral. Again, the appropriate balance is needed to ensure vexatious complaints are identified, while at the same time encouraging appropriate referrals.

154. A further concern is that the penalty of 12 months imprisonment for unwarranted complaints may be too strong a response to the issue and may deter legitimate whistle-blowers from approaching the CIC.

155. The Law Council submits that these offences should generally be made conceptually consistent with the policy basis underpinning protections given to disclosing persons under whistleblower legislation (for example, only where a complaint is made vexatiously).

156. The Law Council suggests that that the penalty for commission of the offence be reduced (perhaps to a monetary penalty), or the offence have an element added to require proof that the person knew the report was false or intended to make the report maliciously.

[101] For instance, section 137.1 of the *Criminal Code Act 1995* (Cth) makes it an offence to give false or misleading information to, or omit a matter which therefore misleads, a Commonwealth entity. The offence carries a penalty of imprisonment of 12 months.

Recommendations

- **Imprisonment should be removed as a possible penalty for referring a vexatious complaint; or,**
- **The offence should be amended to require proof that the person knew the report was false or intended to make the report vexatiously.**

Prevention and education

157. One of the functions of the Commissioner is to prevent and detect corrupt conduct[102] and the CIC can make recommendations in its reports in relation to adopting measures to remedy deficiencies in policy or practice for the purpose of preventing, detecting, disrupting or combatting corrupt conduct.

158. However, the Law Council is concerned that CIC Bill does not appear to provide an adequate statutory basis for its corruption prevention and anti-corruption education activities, unlike the *Independent Commission Against Corruption Act* (NSW) and the *Law Enforcement Conduct Commission Act* (NSW).

Oversight and audit

159. Part 12 of the CIC Bill provides for the establishment of an Inspector-General of the Commonwealth Integrity Commission (**IGCIC**), including the power to conduct inquiries into the performance of functions, or exercise of powers, by the Commissioner or any other staff member of the CIC, require a person to provide information or documents for that purpose,[103] require follow-up action on its report,[104] and publish public reports.

160. However, the IGCIC is subjected to the same restrictions on receiving information where disclosure is certified by the Attorney-General to be contrary to the public interest.

161. Additionally, the CIC Bill does not appear to include a proactive audit function, unlike the audit function of the New South Wales inspectors of its ICAC and Law Enforcement Conduct Commission (**LECC**).[105] Such audit functions are aimed at preventing the types of conduct that led to complaints about both the ICAC and LECC and are aimed at identifying potential areas of misconduct and/or maladministration in those agencies. In contrast, the functions of the IGCIC appear to be limited to inquiring into the performance of functions, or exercise of powers, by the Commissioner, or any other staff member of the CIC.[106] The Law Council is of the view that these functions are too limited to have systemic anti-corruption effects.

Resourcing

162. The 2019-20 Budget had set aside $104.5 million (including $10.0 million in capital funding over four years from 2019-20) for a Commonwealth Integrity Commission.

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[102] CIC Bill cl 25(b) and (c).
[103] Ibid cl 237.
[104] Ibid cl 242
[105] See s 57B(1)(a) and (d) of the *Independent Commission Against Corruption Act 1988* (NSW) and s 122(2)(a) and (c) of the *Law Enforcement Conduct Commission Act 2016* (NSW).
[106] CIC Bill cl 230.

The 2020-21 Budget does not contain any new announcements in relation to the establishment of a Commonwealth Integrity Commission.

163. The fact sheet released with the draft legislation states that a total of $106.7 million in new funding was allocated to establish the CIC in the 2019-20 Budget over the forward estimates (a four-year period), including $2.2 million allocated to ACLEI for CIC implementation activities. This funding is said to be in addition to the $40.7 million in existing ACLEI funding for that period that will be absorbed by the CIC upon its commencement. For the 2020-21 period the CIC's budget would have been $22.0 million.[107]

164. In contrast, the combined 2020-21 budget for the NSW ICAC and LECC is $54.5 million[108] – more than double that allocated to the proposed CIC.

165. Similar to the approach taken with the Australian Marriage Law Postal Survey, a provision could be made in the next annual Appropriation Act to allow the establishment and initial operation of the CIC.

Recommendation

- **A provisional appropriation should be made to fund the establishment and initial operation of the CIC so that it can adequately perform its functions.**

[107] Commonwealth Budget Measures 2019-20 — Part 2: Expense Measures, 50.
[108] NSW Budget Paper No. 4 Agency Financial Statements 2020-21, 5-1 ($30.9m for the ICAC & $23.6 for the Law Enforcement Conduct Commission).

Law Council of Australia

Principles underpinning a Federal Judicial Commission

Policy Statement

5 December 2020

Law Council
OF AUSTRALIA

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1. The need for a Federal Judicial Commission

It is essential to the promotion of the rule of law and the Australian constitutional system that there be a strong, independent, and transparent judiciary. Consistent with this aspiration, a means of fairly and punctually addressing complaints directed to the judiciary in an independent, structured manner is essential.

A Federal Judicial Commission (**Commission**) would assist to provide a clear and structured framework for responding to such complaints, and if established appropriately, will serve to promote public trust and integrity in the complaint-handling process. It will be essential for the Commission to be underpinned by four key features, namely independence, coherence, accessibility and transparency.

It is envisaged that a Commission will address many of the perceived difficulties with current mechanisms in place for complaints made in relation to federal judicial officers. These perceived difficulties include:

- The existing complaints mechanisms may be overly discretionary and informal. Complaints are generally first referred to the relevant head of jurisdiction, typically a colleague of the subject of the complaint, to be dealt with largely according to their discretion. For example, a head of jurisdiction may decide without following a formal process that a complaint should not be dealt with.[1] While there must always be some level of discretion and flexibility as to the manner in which complaints are dealt with, such discretion ought be vested in an independent body.

- There is a lack of clarity around how a complaint relating to misbehaviour or incapacity of judicial officers in the federal system should be resolved where it is not sufficiently serious to be referred to Parliament for consideration of the removal of the judicial officer.[2] There is no disciplining mechanism, and participation by judges in the complaints handling process is voluntary.[3]

- The existing legislative framework for managing complaints about the judiciary[4] is not supported by permanent administrative structures. Rather, complaints are addressed on a discretionary basis through the existing internal structures and

[1] See, *Courts Legislation Amendment (Judicial Complaints) Act 2012 (*Cth); section 15 and 6(1) of the *Federal Court of Australia Act 1976* (Cth); section 12, of the *Federal Circuit Court of Australia Act 1999* (Cth); and section 21B of the *Family Law Act 1975* (Cth). See, also, Explanatory Memorandum, Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Cth). This states that the complaints management framework is intended to be 'largely non-legislative…broad and flexible'.

[2] See, *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) ss 3, 9. See, also, Federal Court of Australia, 'Judicial Complaints Procedure' (3 May 2013); Federal Circuit Court of Australia, 'Judicial Complaints Procedures'; and Family Court of Australia, 'Judicial Complaints Procedure'. Note, the Judicial Complaints Procedure states that it 'does not, and cannot, provide a mechanism for disciplining a judge…For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its [judges] and presents opportunities to explain the nature of its work, correct misunderstandings where they have occurred, and, where appropriate, to improve the performance of the Court.'

[3] Ibid.

[4] See, the *Courts Legislation Amendment (Judicial Complaints) Act 2012 (*Cth) and the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), under which a head of jurisdiction and the Parliament can, variously, establish a Conduct Committee or Parliamentary Commission to deal with complaints. Such a body is only established under these Acts on an ad hoc basis after resolutions have been passed by both Houses of the Parliament in relation to a specific allegation. This is an unrealistic option in, for example, the resolution of complaints concerning matters of sexual harassment or bullying by judicial officers towards other persons.

resources of the relevant court.[5] The existence of permanent, more visible structures would enhance public confidence in the independence of the judiciary.

- There is no formal or written informal mechanism for addressing complaints about misbehaviour or misconduct by a judge of the High Court of Australia (**High Court**), beyond those which may be serious enough to warrant removal.

- There is no framework for handling otherwise relevant complaints in relation to the past conduct of people when they held a judicial office.

To respond to the above perceptions, a Commission should be established by an Act of Parliament, separately to any Commonwealth Integrity Commission, and in close consultation with (and with the endorsement of) the federal judiciary. For both prospective institutions, it is imperative that adequate resourcing be provided to ensure they can carry out their respective functions appropriately.

The Commission would provide a separate, stand-alone mechanism to deal with any allegation of lack of competency, serious misconduct or corruption in the High Court, federal courts and possibly, tribunals. It would maintain for the two Houses of Parliament the power to investigate and decide whether a judicial officer has engaged in misbehaviour and to then remove that officer if appropriate, a power sanctified by section 72(ii) of the Constitution. Recognising this, the question of constitutionality may warrant further review, given the proposed scope of the Commission (as set out below) arguably extends to discipline.[6]

2. The role of a Federal Judicial Commission

The Commission should be separate to and independent from the Executive. The role of the Commission should be to:

- Fairly and impartially investigate and determine complaints by any person, including a member of the legal profession or judicial officer, in relation to misconduct (including corrupt conduct, misuse of authority and any abuse of power), incompetency and/or incapacity of a judicial officer, in the manner set out at Section 6 below.

- Provide a fair opportunity for judicial officers to explain their actions should they come under scrutiny.

- Provide a readily accessible and well-explained complaints mechanism, with information easily available to the public and to members of the judiciary, including online and by phone.

[5] This can be contrasted with existing State and Territory models involving a permanent administrative structure, such as the Judicial Commission of New South Wales.

[6] Note, some perceived constitutional concerns have been raised in opposition to a Federal Judicial Commission. One concern is that in reserving to the Legislature the power to remove judges on the basis of proved misbehaviour or incapacity, section 72(ii) of the Constitution is inconsistent with a power to deal otherwise with complaints, thereby preventing the establishment of any other regime. However, section 72(ii) deals only with the removal of judges and does not prescribe a detailed process for complaint handling, or address complaints which do not warrant removal. There is reason to doubt that the Constitution prevents the establishment of a body which does not have power to remove or discipline judges, such as that proposed. Nonetheless, a challenge to the constitutional validity of a Federal Judicial Commission may be inevitable.

- Provide sentencing assistance and monitoring to and for judicial officers, in conjunction with the other relevant stakeholders in this area.[7]

- Provide training, support and education to the judiciary, including based upon advisory guidelines setting out acceptable standards of judicial conduct.[8] This should recognise that that in some cases, conduct issues may be symptomatic of wellbeing issues. The drivers of these behaviours must be addressed, where appropriate, from a protective as well as punitive perspective.

- Protect the judiciary from unwarranted intrusions into their judicial independence.

3. The scope of a Federal Judicial Commission

Which 'judicial officers' are covered?

To the extent the term 'judicial officer' is used in the legislation establishing the Commission, it should be defined to encompass all persons invested with and exercising a judicial function pursuant to Commonwealth law, including:[9]

- Judges (and those exercising a judicial function) within the Federal Courts (the Family Court of Australia, the Federal Circuit Court of Australia and the Federal Court of Australia) and the High Court, including Chief Justices; and

- to the extent they are not covered by any Commonwealth Integrity Commission, Members/Presidents of the Federal Tribunals and quasi-judicial Federal bodies, namely the Fair Work Commission, Administrative Appeals Tribunal, Remuneration Tribunal, Australian Competition Tribunal, Copyright Tribunal of Australia, National Native Title Tribunal, Pharmaceutical Benefits Remuneration Tribunal and Defence Force Discipline Appeals Tribunal.

The Law Council recognises there may be objections to including High Court judicial officers within the scope of the Commission, given the prospect of the High Court being required to adjudicate on an issue in relation to one of its own judges (for example, an application for judicial review of a decision of the Commission).[10] This is not an

[7] For the statutory basis of the equivalent role for the Judicial Commission of New South Wales, see, *Judicial Officers Act 1986* (NSW) s 8. The Law Council understands that equivalent role as undertaken by the Judicial Commission of New South Wales has clearly contributed to its acceptance by and credibility within the judiciary in NSW. See, the survey of judicial officers in G Appleby, S Le Mire, 'Judicial Conduct: Crafting a system that enhances institutional integrity' [2014] *MelbULawRev* 9, [IV]; the Senate Legal and Constitutional Affairs Committee, *Inquiry into Australia's judicial system and the role of judges* (Report, 2009) [7.13], [7.27]; and remarks of Spigelman CJ in *From controversy to credibility: 20 years of the Judicial Commission of New South Wales* (2008).

[8] These could be modelled upon guidelines issued pursuant to section 10 of the *Judicial Officers Act 1986* (NSW), which have been held to be merely advisory (and not to constitute mandatory considerations which, if not addressed, will result in error of law). This is because the section refers to the formulation of guidelines "to assist" in the exercise of Commission's functions. See, *AB v Judicial Commission of NSW*, supra, at [49].

[9]

[10] As occurred in *Bruce v Cole* (1998) 45 NSWLR 163; *Maloney v The Honourable Michael Campbell QC & Ors* [2011] NSWSC 470; and *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264; see generally, Prof. Enid Campbell, 'Judicial Review of Proceedings for Removal of Judges from Office' [1999] *UNSWLawJl* 1.

unprecedented situation,[11] and it is anticipated that the High Court would be capable of managing it in practice.

Another issue that may be raised against the coverage of High Court judicial officers is that their conduct should not be subject to scrutiny by a judge of a lower court. However, the Commission's role would be to investigate and recommend, whereas the powers to discipline or remove a judicial officer would remain with the head of jurisdiction and Parliament, respectively.

Finally, in the instances where there is a public interest in doing so, the Commission should have the ability to conduct investigations into the conduct of past judicial officers in relation to their time serving in that capacity (with further consideration to be given as to whether some retrospective limitation period should apply).

What conduct is covered?

The jurisdiction of the Commission should explicitly extend to the private actions of judicial officers where these give rise to a matter otherwise within the Commission's remit (set out at Principle 4 below). In other words, the conduct in question need not relate to judicial work.

4. Matters within the remit of a Federal Judicial Commission

Applicable matters

The Commission should be legislatively enabled to handle complaints made about a judicial officer by any person or referred to the Commission by a person or body (e.g., the Attorney-General), or to handle matters on its own motion or following an informal 'tip off', in circumstances where it appears that:

- the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office; or
- the matter may affect or may have affected the performance of judicial or official duties by the judicial officer;[12] or
- the matter may not satisfy the above criteria but could, if substantiated, reasonably be expected to affect public confidence in the administration of justice.[13]

[11] See, for example, *Murphy v Lush* [1986] HCA 37; 60 ALJR 523, when the High Court considered an interlocutory injunction brought by Murray J against the Parliamentary Committee investigating his conduct; or *In re Pinochet*; *Reg v Bow Street Magistrate, Ex parte Pinochet Ugarte (No 2)* [1999] UKHL 1; [2000] 1 AC 119, when the House of Lords was required to reconsider its own decision on the basis that there was an apprehension of bias by one its members, Lord Hoffman.

[12] For the statutory basis of the equivalent role for the NSW JC, see, *Judicial Officers Act 1986* (NSW) s 15(2)(b).

[13] Note, for example, that there may be an argument that a certain allegation of a single instance of sexual harassment may not, depending on the circumstances, necessarily justify parliamentary consideration of the removal of the judicial officer from office. Similarly, it may be argued that such conduct does not affect the performance of judicial duties. However, conduct of that nature may still affect public confidence in the administration of justice and therefore necessitates an investigation and, if substantiated, a response. Other examples of such conduct are: alleged offensive, insulting or rude conduct of the judicial officer in court, or inordinate or undue delay in delivering a decision, or conduct, in or out of court, calculated to give an apprehension of bias for or against a litigant appearing before the judicial officer.

Interaction with other legal processes

The Commission should be empowered to investigate a matter even though the matter constitutes or may constitute a criminal offence. Its investigation must, however, avoid interfering with the criminal process and at the same time maintain the Commission's protective function.

Where an investigation reveals that criminal conduct may have occurred, the matter must be referred to the appropriate law enforcement body. Close consideration must be given to the timing and process of such referral, noting that where further investigation by the Commission would interfere with the criminal process, it may in some instances be appropriate to suspend the Commission's investigation pending the outcome of the law enforcement body's investigation. Consideration must also be given to situations where the matter has been referred to a forum by the relevant regulator, or where the judicial officer is involved in related compensation and employment law claims. This includes in relation to information sharing and the derivative use of evidence.

Care must also be taken that the ambit of the Commission avoids interference with existing court processes, in particular appeals. For example, any complaints requiring review of a case of judicial error, mistake or other legal ground would fall under the ambit of the appellate courts.

There may be instances where a complaint about a matter which is (or could be) subject to appeal in a court process also falls properly within the above scope of applicable matters within the Commission's remit. This includes where a judicial officer has entirely disregarded arguments presented to him or her, or where there has been undue delay in delivering a decision. The Commission should deal with such matters in accordance with these Principles, provided there are steps available to avoid interference with existing court processes, and it takes these steps.

5. Governance and membership of a Federal Judicial Commission

The membership and governance processes of the Commission should be set out in legislation, to ensure transparency and public confidence. It should be comprised of the heads of jurisdictions, in addition to a majority of (non-judicial) community members of high standing who should be appointed by the Governor-General on nomination by the Attorney-General.[14]

Appointed members should include representatives from the legal profession, and community members of high standing who do not currently hold and have not held any form of elected office.

To achieve genuine representation within the governance and membership of the Commission, consideration should be given as to proactively appointing and employing people from significantly underrepresented groups. This should include First Nations people and people with disability, amongst others.

The Commission should appoint a Conduct Panel to investigate complaints that it does not summarily dismiss or refer to a head of jurisdiction. The Conduct Panel should be comprised of two judicial officers and one non-judicial community member of high standing.

[14] Note, the majority of non-judicial members is necessary as public confidence is best promoted by assessment to public standards.

To preserve independence, a member of the Commission and/or Conduct Panel should be precluded from any involvement with a complaint concerning a member of their Court.

6. Process for managing complaints

The Commission should observe a complaints management process that is robust, fair and transparent, as set out below. The process should prioritise safe and respectful management of the complainant's privacy and dignity, including processes that effectively and sensitively manage all communications with the complainant. All identifying matters the subject of the complaint and enquiries about it should be kept strictly confidential, subject to the below section, 'Outcomes to be made public'.

The Commission should use its investigative powers in a targeted fashion, including, where applicable, by making inquiries with other judicial officers or the head of jurisdiction in the relevant court or tribunal regarding the particular jurisdiction (for example, what constituted an 'undue' delay in the experience of a person working in that court or tribunal).

Critical to the success of the Commission will be the ability to demonstrate that it upholds natural justice and procedural fairness throughout the entire complaints management process, from triage to resolution. This is vital to ensure that all parties (including the public) have confidence in the process. The use of a clear and transparent agreed process will also result in outcomes which are more consistent and fairer than those which a head of jurisdiction might reach in a discretionary and secret assessment of any complaint.

Consideration is needed as to the appropriate standard of proof where facts are disputed. This should recognise the seriousness of complaints about judicial conduct in terms of the personal and professional impact on the judicial officer on the one hand, as well as the need for public confidence in the administration of justice on the other.

Triage

Upon receiving a complaint, the Commission should conduct a preliminary examination as far as practicable in private. It should initiate such factual inquiries as it thinks appropriate to determine whether the complaint falls within the scope of matters the Commission can handle, including by assessing whether the complaint is vexatious, and (where appropriate) by giving the judicial officer the subject of the complaint an opportunity to address the allegations made in a confidential setting.

Whilst conducting the preliminary examination, the Commission may suspend the judicial officer for any length of time if this is considered necessary. Recognising the gravity of this step, consideration should be given to preparing a set of guiding factors for when suspension will be appropriate. These factors may include consideration of whether there are no other, less restrictive steps which can reasonably be taken to ensure the public's confidence in the administration of justice and/or that the public is protected from the conduct or behaviour; and the practical consequences of suspension, as well as how they may be mitigated.

Where a complaint is made against a judicial officer who is currently presiding over a case, the Commission must also take steps to avoid potentially compromising the proceeding.

The Commission's powers to inquire and investigate (and those of the Conduct Panel, if applicable) should include the ability to subpoena people and documents.[15]

Following the preliminary examination, the Commission should summarily dismiss the complaint unless:

- the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office, including by Parliament; or
- the matter warrants further examination on the ground that it may affect or may have affected the performance of judicial or official duties by the officer; or
- the matter, if substantiated, could reasonably be expected to affect public confidence in the administration of justice.

Referral to head of jurisdiction

If the Commission has not summarily dismissed the complaint but forms the view that the complaint is not sufficiently serious to justify the Conduct Panel's attention, it should refer the complaint to the relevant head of jurisdiction to be addressed at their discretion, with reference to guidelines the Commission will publish on this subject.

Referral to Conduct Panel

If the Commission has not summarily dismissed a complaint and it considers that the matter justifies the attention of the Conduct Panel, the Commission should refer the complaint to the Conduct Panel and the following process should be followed:

- the Conduct Panel should investigate complaints that have been referred to it in line with legislated processes based on those set out at section 24 of the *Judicial Officers Act 1986* (NSW), as well as any guidelines that the Commission may formulate on the manner in which the Conduct Panel should conduct its investigation; and
- the Commission should provide the Conduct Panel's report to the Attorney-General.

If the Conduct Panel's report concludes that:

- the behaviour or physical or mental capacity of a current judicial officer justifies parliamentary consideration of their removal from office, the Attorney-General should present a copy of the report to both Houses of Parliament, or to the appropriate body (noting not all judicial officers are subject to the sanction or parliamentary removal);
- the above does not apply but the behaviour or physical or mental capacity of the judicial officer (or past judicial officer) falls below a professional standard or has the potential to bring the judiciary into disrepute, the Attorney-General should provide the report to the relevant head of jurisdiction for the complaint to be addressed at his or her discretion. The head of jurisdiction should refer to the guidelines which the Commission will publish on this subject (as set out above), as well as to recommendations by the Conduct Panel as to steps that might be taken to deal with the complaint. Consideration should be given to developing a non-exhaustive list of

[15] Note, the rationale behind this principle is that it provide more incentive for witnesses and/or victims to tell their story without fear of consequences for their career. That is, some witnesses will be encouraged to speak by the ability to say they were subpoenaed to do so.

factors (such as the gravity, duration and any repetition of the conduct, whether punishment or protection is required, the extent of the judicial officer's cooperation in the investigation and acknowledgement of any wrongdoing, etc) that may guide the Conduct Panel in deciding what steps to recommend; or

- no further action is required, the complaint should be dismissed.

Outcomes to be made public

It is essential for public confidence in the Commission, and for the practice (as well as appearance) of transparency, that any outcomes, findings and recommendations resulting from the above processes be made public where possible. A formal reporting mechanism should be set out in legislation. This includes, first, consulting with implicated stakeholders and considering any submissions they make on publication. Secondly, subject to whether these submissions engage the caveats set out in the below paragraph, it involves publishing all completed reports (for example by the Conduct Panel) as soon as possible after they are finalised. Publication of a report should not be contingent upon the response it evokes from the Attorney-General or head of jurisdiction, for example.

However, there may be some circumstances where confidentiality considerations or the potential for unintended consequences weigh against publication. In such instances the outcome of a case should be published in de-identified form, in an anonymous case study database to be managed by the Commission. Further, where a complaint about a judicial officer has been dismissed, publication of that dismissal may inadvertently damage the judicial officer's reputation. As such, were a judicial officer is exonerated, de-identified publication of the outcome of an investigation should be a matter for that judicial officer.