

GPO Box 3123
Brisbane QLD 4001

Level 2
North Tower Green Square
515 St Pauls Terrace
Fortitude Valley QLD 4006

Tel.: **07 3360 6060**
Toll-free: 1800 061 611
(in Queensland outside
Brisbane)

Fax: 07 3360 6333

mailbox@ccc.qld.gov.au
www.ccc.qld.gov.au

ABN 32 164 714 360



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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Sir/Madam

Bills relating to National Integrity Commission

Thank you for the opportunity to make a submission on the National Integrity Commission Bill 2018 (NIC Bill), the National Integrity Commission Bill 2018 (No.2) (NIC Bill No. 2) and the National Integrity (Parliamentary Standards) Bill 2018 (NIPS Bill).

Introduction

The focus of this submission is to make recommendations which may enhance the powers necessary for independent and impartial corrupt conduct investigations under the NIC Bill or NIC Bill No. 2 (the NIC Bills) to obtain all relevant information, documents and things that would not otherwise be expected to be provided in a voluntary or timely way. For convenience, unless otherwise stated, a reference to a provision of NIC Bills is taken to be a reference to the NIC Bill or a particular clause or part of that Bill.

The functions of the Law Enforcement Integrity Commissioner, the Whistleblower Protection Commissioner, the Commonwealth Integrity Coordination Committee, the Parliamentary Integrity Adviser and Parliamentary Standards Commissioner are generally outside the scope of this submission.

To assist the Committee, the Crime and Corruption Commission's (CCC) recommendations are highlighted in **bold** below.

The definition of corrupt conduct

The CCC understands that the NIC Bills are substantially the same. Each would be part of a package with the NIPS Bill. However, the NIC Bill No. 2 offers an alternative definition of corrupt conduct and limits investigations of corrupt conduct to the last ten years.

The key point of difference between the definitions of corrupt conduct in the NIC Bills is the element of impairment of public confidence associated with frauds against Commonwealth public administration. The Committee may wish to note that the Queensland Parliament recently passed amendments to the definition of corrupt

conduct under the *Crime and Corruption Act 2001* (Qld).¹ The amended Queensland definition is similar to that proposed for the definition of corrupt conduct found in the NIC Bill.

The CCC recommended these amendments to the *Crime and Corruption Act 2001* (Qld) which, when proclaimed, will extend the definition of corrupt conduct to capture the conduct of people outside the public sector that impairs or could impair public confidence in public administration by means of certain frauds and other dishonest acts which may result in loss of state revenue or improperly securing an appointment in the public sector. The amended definition is considered to be generally consistent with the law in New South Wales and Victoria and the enlarged definition of corrupt conduct is appropriate given the increasing degree of outsourcing and public-private partnerships in the delivery of government services.²

As to the investigation of historical allegations of corrupt conduct, the *Crime and Corruption Act 2001* (Qld) has never imposed any limit on the historical application of the definition of corrupt conduct.³ Under that Act, however, corrupt conduct investigations are essentially undertaken for serious or systemic corrupt conduct having regard to the purposes of the Act and the importance of protecting the public interest.⁴

The Australian National Integrity Commission

The NIC Bills establish an Australian National Integrity Commission (ANIC) comprised by the National Integrity Commissioner, the Law Enforcement Integrity Commissioner, the Whistleblower Protection Commissioner, and any Assistant Commissioners and any Assistant Law Enforcement Integrity Commissioners who each have discrete integrity functions.⁵

The NIC Bills provide a sound scheme for planning and collaboration at the Commonwealth level, promoting integrity and preventing corruption, including by introducing the capacity for inquiries, research and intelligence gathering and the establishment of a Commonwealth Integrity Coordination Committee.⁶

Functions of the National Integrity Commissioner

The NIC Bills provide the framework for the National Integrity Commissioner (NIC) to deal with corruption issues, conduct investigations and public inquiries, deal with evidence and information and to manage or oversee investigations referred to Commonwealth agencies.⁷

The NIC has appropriate functions to⁸ —

- investigate and conduct public inquiries into corruption issues involving a public official or Commonwealth agency and to report
- refer corruption issues, in appropriate circumstances, to appropriate government agencies for investigation
- manage, oversee or review, in appropriate circumstances, the investigation of corruption issues by Commonwealth agencies, and
- communicate to appropriate authorities and to the public the results of investigations and inquiries, including recommendations for action that should be or have been taken, or are being taken, in relation to those results.

¹ Section 5, *Crime and Corruption and Other Legislation Amendment Act 2018* which commences on a day to be fixed by proclamation.

² Hansard, *Crime and Corruption and Other Legislation Amendment Bill*, Second Reading, p 3228, 31 October 2018 at <https://www.parliament.qld.gov.au/work-of-assembly/sitting-dates/dates/2018/2018-10-31>

³ Section 16, *Crime and Corruption Act 2001* (Qld).

⁴ Sections 33, 34, 35, 46 and 57, *Crime and Corruption Act 2001* (Qld).

⁵ Clause 11, NIC Bill.

⁶ Part 3, NIC Bill.

⁷ Parts 4 – 8, NIC Bill.

⁸ Clause 12, NIC Bill.

The NIC Bills appropriately provide how the NIC may deal with corruption issues⁹ and the matters to which the NIC must have regard in deciding how to deal with a corruption issue and whether to take no further action in relation to a corruption issue.¹⁰ Notably the NIC may refer corruption issues to a Commonwealth agency including the Australian Federal Police,¹¹ but must give the head of the agency investigating the corruption issue, all information and documents in the possession or control of the NIC.¹²

The **CCC recommends** that the NIC Bills provide an appropriate mechanism for referral to an agency of corruption issues which do not warrant investigation by the NIC but may involve the head of a Commonwealth agency. The lack of a mechanism to refer such corruption issues independently of the head of the agency is problematic. Section 48A of the *Crime and Corruption Act 2001* was introduced for this purpose.

Powers of the National Integrity Commissioner

The Bill vests the NIC with power to —

- require people to give information or produce documents or things under notice¹³
- conduct hearings and compel evidence¹⁴
- seize things authorized by search warrant¹⁵
- appoint non-AFP authorised officers who have powers of arrest,¹⁶ and
- appoint authorised officers, including a member of the Australian Federal Police if the Commissioner of the AFP agrees.¹⁷

The Bill does not expressly vest the NIC with the array of law enforcement powers available under Commonwealth legislation including the *Crimes Act 1914*, *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*. The CCC understands that the NIC, in conducting its own corruption investigations may not have powers related to controlled operations and associated integrity testing and assumed identities, surveillance devices and telecommunications interception.

The **CCC recommends** that the NIC have access to these powers either expressly or by means of appointing authorised officers who hold these powers which may be used for the purposes of corruption investigations. The exercise of these powers is often essential to the investigation and detection of corruption offences.

Under the *Crime and Corruption Act 2001* (Qld), the CCC has surveillance device powers of limited extent¹⁸ and controlled operations/activity and assumed identity powers¹⁹ for corruption related offences. But police officers seconded to the CCC retain surveillance and controlled operations powers available to them under the *Police Powers and Responsibilities Act 2000*, without being limited to the performance of the CCC functions.²⁰

Further, seconded police officers exercising powers which are not available to them under the CC Act are nonetheless subject to direction of the chief executive officer and must record related enforcement

⁹ Clause 46, NIC Bill.

¹⁰ Clause 48, NIC Bill.

¹¹ Clause 46, NIC Bill.

¹² Clause 57, NIC Bill.

¹³ Part 6, Division 1, NIC Bill.

¹⁴ Part 6, Division 2, NIC Bill.

¹⁵ Part 6, Division 3, NIC Bill.

¹⁶ Part 6, Division 4, NIC Bill.

¹⁷ Part 6, Division 5, NIC Bill.

¹⁸ Chapter 3, Part 6, *Crime and Corruption Act 2001*.

¹⁹ Chapter 3, Part 6, *Crime and Corruption Act 2001*.

²⁰ Sections 174(2) and 255(5), *Crime and Corruption Act 2001*.

acts in the relevant CCC register rather than that kept by the QPS.²¹ Access to the register is limited to the chairperson, public interest monitor, parliamentary commissioner and CCC officers authorised by the Chairperson.²²

The CCC recommends that the NIC, like state anti-corruption agencies, have express powers of telecommunication interception and other related powers under the *Telecommunications (Interception and Access) Act 1979*. Depending on policy preference, the NIC (and its authorised officers) may also have express powers for controlled operations, integrity testing and assumed identifies under the *Crimes Act 1914* and surveillance powers under the *Surveillance Devices Act 2004*.

Hammond v The Commonwealth (1982) 152 CLR 188

Following the High Court decision in *Hammond v the Commonwealth*, it is important that the NIC have power to continue and complete investigations and other inquiries into corruption issues notwithstanding any pending trial, whether or not the informant or witness has been charged, and whether or not the investigations concern the subject matter of any charge against the witness. Section 331 of the *Crime and Corruption Act 2001* (Qld) is one example of a general provision of this kind which has proved effective.²³

However, the NIC Bills do not include any equivalent general provision giving overall protection against contempt proceedings for NIC investigations and other inquiries related to corruption issues. Rather, the Bills give protection to the exercise of particular powers of the NIC in issuing notices²⁴ or summoning witnesses to attend hearings.²⁵ But the protection provided to the NIC when exercising the power to issue notices is not equal to the protection provided when exercising the power to summons a witness to attend a hearing.

With respect to the issue of notices, the NIC may include a notation prohibiting publication of the notice to protect the fair trial of a person charged or to be charged with an offence.²⁶ Significantly, however, in the hearing context, the NIC has the express power to summons a witness to give evidence or produce documents or things related to the subject matter of any charge or imminent charge against the person summonsed.²⁷

The absence of express protection for investigations and inquiries generally and for notices in particular of a similar kind as provided for the issue of a summons to witness to give evidence concerning matters charged against them, may severely compromise the capacity of the NIC to conduct and complete effective investigations.

The CCC recommends the NIC Bills contain a general provision similar to section 331 of the *Crime and Corruption Act 2001* (Qld) which protects all investigations and inquiries into corruption issues to the same degree currently provided by the Bills concerning the issues to a summons to a person required to attend a hearing.

Notices

Subject to the preceding observations, the NIC has appropriate power to issue notices requiring the giving of information or production of documents or things,²⁸ and there is a general obligation for compliance with the notice.²⁹

²¹ Sections 361, 664, 666, 672, 678 and 680, *Police Powers and Responsibilities Act 2000*.

²² Sections 166 and 269, *Crime and Corruption Act 2001*.

²³ *NS v MJ Scott* [2017] QCA 237.

²⁴ Clauses 72 and 75, NIC Bill.

²⁵ Clauses 82 and 89, NIC Bill.

²⁶ Clause 75(3) and (4), NIC Bill.

²⁷ Clause 83(3), NIC Bill.

²⁸ Part 6 Division 1, NIC Bill.

²⁹ Clause 73, NIC Bill.

It is an offence to fail to comply with the notice,³⁰ subject to an express defence on the ground that it was not reasonably practicable to comply within the time specified by the notice or such further time allowed by the NIC.³¹ The offence does not speak of any other defence.

Generally speaking, there is no excuse for non-compliance even though disclosure might be contrary to the public interest.³² Importantly, self-incrimination privilege is not a ground of excuse for non-compliance with the notice.³³ However, communications do not have to be disclosed if protected by legal professional privilege³⁴ or if the information, documents or things are subject to statutory taxation or law enforcement secrecy provisions.³⁵ The notice powers and offence provision do not affect parliamentary privilege.³⁶

I turn to discuss some particular recommendations the Committee may wish to consider concerning notices.

While self-incrimination privilege is not a ground of excuse for non-compliance with the notice, the information, document or thing given is not generally admissible in evidence against the individual in any criminal proceedings or other proceedings for the imposition or recovery of a penalty. There are appropriate exceptions to this direct use immunity protection, including potential admissibility as evidence in disciplinary proceedings against the person if the person is an employee of a Commonwealth agency.

The **CCC recommends** that the issue of admissibility of derivative evidence be dealt with expressly.

For example, the *Crime and Corruption Act 2001* (Qld) has recently been amended to provide by section 197(7) that nothing prevents evidence obtained as a direct or indirect consequence of the individual giving under notice, the information, document or thing, from being admissible in evidence against the individual in a criminal, civil or administrative proceeding. While this is not strictly necessary,³⁷ express statements of this kind prevent unnecessary delay in investigations and leave issues about the ultimate admissibility of evidence obtained derivatively for appropriate determination by the courts and other relevant decision-making bodies.³⁸

With respect to permissible non-compliance on the ground of a *taxation secrecy provision* or *law enforcement secrecy provision*³⁹ it is noted that secrecy provisions may allow disclosure if it is necessary for certain purposes.

For example, the secrecy offence provisions under the *Surveillance Devices Act 2004* do not apply to disclosures outlined in s 45(4) of that Act. That Act permits discretionary disclosure of protected information for the purpose of investigating any *relevant offence* such as an offence against the law of the Commonwealth that is punishable by a maximum term of imprisonment of three years or more or for life.⁴⁰ However, the secrecy provisions continue to apply to the disclosed information until certain events take place.⁴¹ Similar issues also arise where the secrecy provisions of the *Telecommunications (Interception and Access) Act 1979* permit certain discretionary disclosures to appropriate agencies.

³⁰ Clause 77(1), NIC Bill.

³¹ Clause 77(2), NIC Bill.

³² Clause 79(4), NIC Bill. There is no ground excusing the disclosure of legal advice given to a Minister or Commonwealth agency, a communication between an officer of a Commonwealth agency and another person or body subject to legal professional privilege; breach of a secrecy provision (other than a taxation secrecy provision or a law enforcement secrecy provision); or information/document or thing would be otherwise contrary to the public interest.

³³ Clause 79(1)-(3), NIC Bill.

³⁴ Clause 78, NIC Bill. The legal practitioner may disclose if the holder of the privilege agrees to the disclosure.

³⁵ Clause 79(4), NIC Bill.

³⁶ Clause 5, NIC Bill.

³⁷ *Strickland v Commonwealth DPP* [2018] HCA 53; per Gageler J at [132]; per Keane J at [188] and [190]; and per Gordon J at [221] – [224] and [229].

³⁸ *NS v MJ Scott* [2017] QCA 237, per Holmes CJ at [39], citing *X7 v Australian Crime Commission* (2013) 248 CLR 92, per French CJ and Crennan J; and *R v Sellar* (2013) 273 FLR 155, per Bathurst CJ.

³⁹ Clause 79(4)(d), NIC Bill.

⁴⁰ Section 6, *Surveillance Devices Act 2004*.

⁴¹ Part 6, *Surveillance Devices Act 2004*.

The **CCC recommends** that the Committee consider whether the NIC is an appropriate entity for disclosure of information otherwise protected by taxation or law enforcement secrecy provisions if the information is relevant to the investigation of corruption issues and the use of disclosed information may be constrained to protect the integrity of the relevant taxation or law enforcement investigation and prosecution/civil penalty proceedings. If the Committee is satisfied that the NIC is such an appropriate entity, the Committee may wish to consider further refinement to the grounds of permissible non-compliance with a notice so as to require disclosure to the NIC subject to appropriate use constraints.

Hearings

The NIC has appropriate hearing powers for the purpose of investigating a corruption issue and conducting a public inquiry.⁴² The hearings powers protect valid claims of legal professional privilege.⁴³ Further a witness is not excused from answering questions or producing a document or thing on the ground of self-incrimination privilege.⁴⁴

A valid claim of self-incrimination privilege invokes a direct use immunity against the admissibility of evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty⁴⁵ subject to certain appropriate exceptions similar to those discussed earlier concerning notices. Generally speaking there is no excuse for non-compliance based on most claims that compliance would be contrary to the public interest.⁴⁶ However, a person is excused from compliance if to do so would breach a taxation secrecy provision or a law enforcement secrecy provision. The hearing powers and related offence provisions do not affect parliamentary privilege.⁴⁷

The **CCC adopts each of its recommendations** made in the context of NIC notice powers as may be appropriately adapted to the context of NIC hearing powers.

Information disclosure and an integrated national integrity framework

The focus given by the NIC Bills to Commonwealth cooperation and coordination to improve integrity and prevent corruption⁴⁸ and for the NIC to lead and support cooperation among government agencies including State, Territory and international agencies⁴⁹ is commendable.

In our view, the establishment of independent, accountable and adequately resourced national anti-corruption agencies will promote public confidence in Commonwealth institutions and advance a national whole of government approach to the reduction of public sector corruption.

The **CCC recommends** that the statutory obligations of the NIC and other Commonwealth, State and Territory agencies, such as the obligation of the CCC to work cooperatively to achieve optimal use of available resources,⁵⁰ be accompanied by the express power to give intelligence information or other information to any entity they consider appropriate, including state anti-corruption and law enforcement agencies.⁵¹

Conclusion

I thank the Committee for the opportunity to make this submission.

⁴² Part 6, Division 2, NIC Bill.

⁴³ Clauses 99 – 101, NIC Bill .

⁴⁴ Clause 102, NIC Bill.

⁴⁵ Clause 102, NIC Bill.

⁴⁶ Clause 102(5), NIC Bill.

⁴⁷ Clause 5, NIC Bill.

⁴⁸ Part 3, NIC Bill.

⁴⁹ Clause 18(1)(g), NIC Bill.

⁵⁰ Section 59, *Crime and Corruption Act 2001* (Qld).

⁵¹ Section 60(2), *Crime and Corruption Act 2001* (Qld).

I thank the Committee for the opportunity to make this submission. If you require further information, please contact my office directly.

Yours sincerely

A J MacSporran QC
Chairperson