



# An Independent National Integrity Commission for Australia

Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *National Integrity Commission Bill 2018*, *National Integrity (Parliamentary Standards) Bill 2018*, and *National Integrity Commission Bill 2018 (No.2)*

ACTU Submission, 23 January 2019  
ACTU D No. 01/2019

## Contents

Background .....	2
The Reform Proposals .....	3
Ensuring the Commission’s Independence.....	4
ACTU Recommendations .....	7
Appointment Process.....	8

## Background

1. The Australian Council of Trade Unions ('ACTU') makes the following submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *National Integrity Commission Bill 2018*, *National Integrity (Parliamentary Standards) Bill 2018*, and *National Integrity Commission Bill 2018 (No.2)*.
2. The ACTU is the peak body representing approximately 1.6 Million working Australians. The ACTU and its affiliated unions have a long and proud history of fighting for workers' interests and defending Australia's democratic institutions.
3. The ACTU supports the establishment of a Federal independent Commission against corruption with a broad mandate, effective powers and adequate safeguards against partisan abuse.
4. The case for a Federal anti-corruption body is undeniable. Our current framework fails to prevent corrupting influences on our political processes and the operation of government. Well known, for example, is the endemic corrupting influence of the tobacco lobby, gambling concerns, tax avoiding companies, and property developers. These influences undermine good government and merit-based policy and decision making.
5. It is also clear that there is a need for better whistle-blower protections for those who speak out about corruption and malpractice. At present, there is a strong disincentive for whistle-blowers to come forward, given the lack of protection and potential risk to their careers and reputations.
6. Reform is also required to ensure higher standards of parliamentary conduct, given the seemingly never-ending incidences of parliamentary travel and other roting and conflicts of interest scandals that are continually coming to light.
7. Hence, we support the measures aimed at addressing these problems in the proposed suite of draft legislation. The focus of our submissions is on the proposed National Integrity Commission. Below, we make some suggestions as to how the proposed model may be enhanced to help ensure the Commission remains strictly independent and impeccably non-partisan.

## The Reform Proposals

8. We note the proposed legislation would create a National Integrity Commission with broad jurisdiction over official corruption by Federal politicians and the Federal public sector and which would aim at promoting responsible business conduct in the private sector and a pro-integrity culture more generally.
9. The Commission would be the lead agency for key functions and fill gaps in coverage in the existing system, liaising with existing Commonwealth and State integrity and law enforcement bodies whilst providing much needed leadership and central co-ordination and the capacity to implement a national integrity plan.
10. The proposed reforms also include the establishment of a new Whistle-blower Commissioner and Parliamentary Standards Commissioner and Parliamentary Integrity Advisor.
11. Commendably, the model of Integrity Commission proposed is based on the most comprehensive option out of the options outlined in the Griffith University / Transparency International options paper.<sup>1</sup>
12. Clearly, the model is far superior to that finally proposed by the Coalition Government recently. The Coalition's proposed model has been heavily criticised for its secrecy, weak powers, and lack of sufficient funding and resources.<sup>2</sup> We strongly endorse former ICAC Commissioner, David Ipp's warning that in designing an anti-corruption body:

"It is very easy to create a commission that, on its face, will placate the public's demands for an ICAC-like body, but which in reality will be a fangless institution, the task of which will be to create a mirage of having an anti-corruption institution which in truth will do little to disturb the status quo."<sup>3</sup>

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<sup>1</sup> See Option 3 in Brown, J et al, *A National Integrity Commission – Options for Australia*, Griffith University & Transparency International, Australian Research Council Linkage Project, August 2018; See also Cathy McGowan MP, *National Integrity Bills Outline*, 22 November 2018, p4.

<sup>2</sup> See, for example, Amy Remeikis & Christopher Knaus, 'Morrison government announces new federal anti-corruption commission', *The Guardian*, 13 December 2018 <<https://www.theguardian.com/australia-news/2018/dec/13/morrison-government-announces-new-federal-anti-corruption-commission>>.

<sup>3</sup> Amy Remeikis & Christopher Knaus, 'Morrison government announces new federal anti-corruption commission', *The Guardian*, 13 December 2018 <<https://www.theguardian.com/australia-news/2018/dec/13/morrison-government-announces-new-federal-anti-corruption-commission>>.

13. The proposal before the Committee appears to be no such body. Unlike the Coalition's proposal, the proposed National Integrity Commission is to be backed by substantive investigative powers and resources with all hearings held in public where appropriate.

## Ensuring the Commission's Independence

14. The Australian public would undoubtedly benefit from a formidable anti-corruption body that helps our democratic institutions operate free from corrupting influences that erode the public interest. The existence of such a body would go some way to helping better ensure parliamentarians are elected and policies are made on their merits rather than as a result of the unfair influence of powerful and corrupt interests.
15. To work effectively, such a body must remain independent and protected from partisan abuse. This is no hypothetical danger. The Abbott/Turnbull/Morrison Coalition Government has shown that it is prepared to use investigative bodies and establish and/or direct independent agencies towards targeting its political opponents. Three examples are discussed below: a) the Coalition Government's 'Royal Commission into Trade Union Governance and Corruption' ('TURC'), b) the Australian Building and Construction Commission ('ABCC'), and c) the Registered Organisations Commission ('ROC').
16. The Coalition established TURC without bipartisan support and used it for partisan political gain to target the Leader of the Opposition, other Labor MPs and the Government's political adversaries in the trade union movement. With \$46 million dollars and strategically crafted terms of reference, plus extensive media and police resources and secret surveillance of union members and officials over 2 years of extended operation throughout the nation, the Commission's final report named 45 businesses, persons and entities as engaging in possible misconduct and these were then referred to police and relevant agencies. Only a small fraction ever made the litigation stage and even fewer of these matters resulted in successful prosecutions once the evidence was properly tested in court.
17. Unions and union staff were singled out by the Inquiry and the right-wing press. The terms of reference and the case studies that the Commission elected to pursue meant that employers and employer organisations received very little attention. The Commission's activities allowed the Coalition to demonise and sideline unions, giving them leverage to pursue a legislative and wage-suppressing agenda in the interests of tipping the capital/labour share of national income further towards capital.

18. It is unlikely that if such a focused, well-resourced and long-running inquiry were to be brought to bear on the practices of the business community, particularly in areas such as mining and environmental resource licensing and exploitation, property development, gambling and the alcohol and tobacco industries, no significant concerns would emerge. The evidence from the Banking and Finance Royal Commission indicates unethical practices on a massive scale in the finance industry and financial exploitation many orders of magnitude greater than the cost of the inquiry.
19. Another instance of this kind of partisan use of an investigative body is the Coalition government's establishment and re-establishment of the ABCC. It has been used, in a highly partisan and lop-sided way to target unions and workers and not business in the industry. The Coalition Government's strategy has been to implement greater and greater restrictions on unions' freedom of association and activities (in flagrant breach of international standards), and to give the ABCC large resources and powers to ruthlessly prosecute unions for breaches of these unworkable and unreasonable rules. This is then used to feed the Coalition's propaganda narrative about union officials acting 'unlawfully' which is used as justification for increased penalties, restrictions and attacks on unionism in a vicious cycle that ratchets up pressure on the Coalition's political adversaries and bleeds the building and construction unions of millions of dollars in legal fees.
20. The Coalition government established the ROC to gather information on, and interfere with, the internal operations of unions, as well as to frustrate their activities with onerous rules and compliance obligations. Last year, the then relevant Minister, Michaela Cash, appears to have requested that the ROC investigate the AWU, the Opposition Leader's former employer, thus precipitating a police raid on AWU offices of which the media had advance notice because they were 'tipped-off' by the Minister's office that the raid was to take place. Only this week, after a 6-month investigation, did the AFP and Commonwealth DPP confirm they were not proceeding to prosecute Minister Cash's office over the leaks.<sup>4</sup> The AWU's Federal Court challenge to the ROC's investigation is still underway.
21. If investigative bodies are not truly independent they cannot maintain the necessary public respect and support they need to operate. How may we ensure that the National Integrity Commission remains non-partisan so that it may enhance democracy and not diminish it?

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<sup>4</sup> Matthew Doran, No criminal charges for anyone implicated in leaking information in AWU raids case, ABC News, 15 January 2019 < <https://www.abc.net.au/news/2019-01-15/no-criminal-charges-in-awu-raids-case/10714942>>.

It is commendable that the appointment of the National Integrity Commissioner would involve the use of a bi-partisan selection committee. However, we note with some concern that:

- (a) The power of the Minister or a House of Parliament to request that the Commission conduct an inquiry could be used for partisan political advantage to unduly pressure one's political adversaries;
- (b) The Minister is not required to only recommend to the Governor-General for appointment a person approved by the Committee, and may refer another person for appointment as National Integrity Commissioner instead;
- (c) Whilst the Commission's focus appears to be on corruption within the public service and transactions with the State, it is not clear if the Commission's powers and purview also relate to lesser misconduct between private individuals. The intent of the legislation appears to be to address corruption involving the state or that could undermine public confidence in state administration, and 'corrupt conduct' is defined in these terms. The terms 'corruption issue' and 'corruption investigation' are also defined in terms of 'corrupt conduct'. The power to conduct preventative inquiries under Part 3, Division 3, and public inquiries and investigations under Part 5 relates to corrupt conduct and corruption issues. However, the powers and functions vested in the Commission by section 12, include the ability for the Commission to, on its own initiative or request by Minister or either house of parliament, make reports/recommendations to Parliament about the need or desirability of legislative or administrative action regarding (iii) **"corruption generally in or affecting Australia**, where the word 'corruption' is not defined and could include lesser conduct between private individuals. The capacity for the Minister to request that the Commissioner investigate lesser conduct not involving the State opens the Commission up to partisan abuse, although some protection is given by the fact that the National Integrity Commissioner is directed by s15 to focus on "serious corrupt conduct and systemic corrupt conduct" as far as practicable;
- (d) Although the explanatory memorandum says the National Integrity Commissioner "must be a judge or a retired judge", the Bill states that the pre-requisite for appointment of a person as the National Integrity Commissioner is that the person:

- is or has been a Judge of the Federal Court or the Supreme Court of a State or Territory; or
- **is qualified for appointment as such a Judge.**

The required qualifications for appointment as such a judge are set out in the Supreme Court Acts and Constitutions of the States and Territories and the *Federal Court of Australia Act 1976* (Cth). In Queensland and Victoria, qualified persons include barristers or solicitors of at least 5 years standing in any state or territory or the Commonwealth.<sup>5</sup> Hence, the Minister could potentially appoint a current or former politician from the Minister's own party and one without any experience in, or the public's confidence in them as, the impartial role of a judge, for example, a current or former attorney general or another politician with a legal background. Such an appointment is unlikely to be, or to be publicly accepted as, non-partisan, undermining the Commission's integrity and authority; and

- (e) Corrupt conduct is defined to include tax evasion that could impair public confidence in Commonwealth public administration.<sup>6</sup> However, the capacity of both the Commission and the public to monitor this kind of corporate tax evasion is limited by the lack of a publicly available register of beneficial corporate ownership.

## ACTU Recommendations

22. Accordingly, we make the following recommendations:

- (a) It should be made clear that where the Minister or a house of parliament requests that the Commissioner conduct an inquiry, the Commissioner must be satisfied that this is in the public interest, including that a higher bar is required (in terms of the seriousness and extent of likely conduct) in cases where conducting the inquiry is likely to result in partisan political advantage by the Minister/body requesting it;

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<sup>5</sup> s59 Constitution of QLD; s75B, Constitution Act 1975 (Vic)

<sup>6</sup> see s9(2)&(3) of the Bill and s15GE(2)(c) of the *Crimes Act 1914* (Cth).



- (b) The term 'Corruption' should be defined in s12 to relate only to 'corrupt conduct', as elsewhere defined;
- (c) The Commission could be greatly aided in its research, investigatory and preventative function regarding tax avoidance by the creation of a register of beneficial ownership for all companies and trusts registered in and/or operating in Australia. This should update the Australian Securities and Investment Commission company register to publicly disclose ultimate beneficial ownership and be accessible by the public without charge. Such a measure is consistent with global efforts to reduce corruption, money laundering, tax evasion and the promotion of greater transparency; and
- (d) Further, we recommend the following alternative appointment process.

## Appointment Process

- 23. We recommend the following process of appointing National Integrity Commissioners to ensure they are independent, non-partisan, free from corrupting influences, trusted by the public and enjoy sufficient bi-partisan or broad parliamentary support:
  - (a) That there be three National Integrity Commissioners. This would help protect against a corrupt Commissioner being appointed. This may consist of three Commissioners of equal status or one and two deputies. Multiple Commissioners means any conspiracy involving a Commissioner is more likely come to light;
  - (b) A person must not be appointed as a National Integrity Commissioner unless the person is or has been a Judge of the Federal Court or the Supreme Court of a State or Territory. Merely being qualified for appointment as such a judge is insufficient;
  - (c) A person who has ever been elected to the House of Representatives, the Senate or a House of the government of a State or Territory is excluded from being appointed a National Integrity Commissioner;
  - (d) Any National Integrity Commissioner's term must not exceed four years. In the establishment of the Commission, three Commissioners are to be appointed as follows:

- One Commissioner for a maximum term of 4 years;
  - One Commissioner for a maximum term of 3 years;
  - One Commissioner for a maximum term of 1 year; and
  - Thereafter, Commissioners' terms must not exceed four years. This process ensures that no Government will be able to replace all Commissioners in a single term;
- (e) A National Integrity Commissioner may be re-nominated;
- (f) A National Integrity Commissioner is to be appointed by the Governor-General by written instrument;
- (g) The Governor-General may only appoint a Commissioner nominated by the Minister (NB: in principle, the Governor-General could veto the appointment but this would be extremely unlikely due to the political fallout);
- (h) The Minister may not nominate a person for appointment as a National Integrity Commissioner unless the person has been ratified by the Parliamentary Joint Committee for National Integrity;
- (i) The Parliamentary Joint Committee will be established with 16 members as follows:
- Eight members will be Members of the Senate;
  - Eight members will be Members of the House of Representatives;
  - Six members will be nominated by the Prime Minister, including the Chair of the Committee;
  - Six members will be nominated by the Leader of the Opposition, including the Deputy Chair of the Committee;
  - Two members will be appointed by the Senate, and must not be members of either the Government Parties nor the Opposition Parties; and
  - Two Members will be appointed by the House of Representatives, and must not be members of either the Government Parties nor the Opposition Parties.

This, together with the below, would ensure there is broad parliamentary support or at least not broad parliamentary opposition to the appointment;

(j) The Parliamentary Joint Committee for National Integrity will have the responsibility to ratify or reject nominations as follows:

- The Committee will only consider for ratification those persons recommended by the Minister;
- The Committee shall have 10 sitting days to either ratify the nomination or reject the nomination;
- If the nomination is ratified, the Parliamentary Joint Committee must inform the Minister immediately;
- A person's nomination will be ratified if a simple majority of the Committee vote in favour of ratification, or no vote takes place within 10 sitting days of the Minister's recommendation; and
- A person's nomination is rejected if a simple majority of the Committee votes but fails to approve by the person's nomination.

ACTU January 2018

**address**

ACTU  
Level 4 / 365 Queen Street  
Melbourne VIC 3000

**phone**

1300 486 466

**web**

[actu.org.au](http://actu.org.au)  
[australianunions.org.au](http://australianunions.org.au)

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01/2019



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