Senate Standing Committee for the Scrutiny of Delegated Legislation

Written Questions on Notice – The Centre for Public Integrity

10th September 2020

Question 1: Are there any circumstances in which you consider that it is appropriate to exempt delegated legislation from parliamentary oversight mechanisms, such as disallowance?

We submit that it is only appropriate to exempt delegated legislation from parliamentary oversight mechanisms where the legislation involves technical matters and the following conditions are met:

- the exemptions are set out in primary legislation;
- the instruments have democratic oversight through other mechanisms (for example, where the democratic nature of the delegate ensures the requisite accountability or accountability is achieved via the requirement of parliamentary assent); and
- the instrument does not affect human rights or involve questions of policy or the expenditure of public funds.

Question 2: Henry VIII clauses are provisions in primary legislation which permit delegated legislation to amend primary legislation. Are there any circumstances in which it is appropriate for instruments made pursuant to Henry VIII clauses to be exempt from disallowance?

We consider that there are no circumstances in which it is appropriate for instruments made pursuant to Henry VIII clauses to be exempt from disallowance.

The legislature's main oversight mechanism in relation to delegated legislation is the capacity to disallow it. Because Henry VIII clauses *ipso facto* detract from the legislature's powers, the power to disallow is the only thing standing between a Henry VIII clause and a total usurpation of the Parliament's sovereignty.

Question 3: Is it necessary or appropriate to exempt Advance to the Finance Minister determinations from disallowance?

It is neither necessary nor appropriate to exempt Advance to the Finance Minister determinations from disallowance, in light of the fact that they delegate significant legislative power to the executive. Furthermore, they present a risk of misuse of power for partisan gain.

We reiterate our response set out at question 10.

Question 4: Noting that Advance to the Finance Minister determinations are exempt from disallowance, are there any alternative oversight mechanisms which could be

implemented to promote greater parliamentary scrutiny of instruments which allocate public funds?

Insofar as we consider disallowance to be an essential scrutiny mechanism in respect of the allocation of public funds, we do not consider there to be any “alternative” oversight mechanisms.

However, there are some additional oversight mechanisms that could be adopted. Specifically, we would propose that the determinations be brought within the Committee’s purview via an amendment to Order 23 of the Senate Standing Orders as a necessary (but by no means sufficient) way to achieve greater parliamentary scrutiny. We would propose that this amendment enable the Committee to report to the Parliament on whether determinations satisfy the criteria set out for their making under the relevant Appropriation Act.

Question 5: What is an appropriate threshold on the amount of money that may be allocated via an Advance to the Finance Minister determination, particularly noting the lack of parliamentary oversight?

For as long as the lack of parliamentary oversight of Advances to the Finance Minister persists, it is our submission that it is not appropriate to allocate any funds via this mechanism for the reasons set out at question 3.

Question 6: Some submissions have questioned the appropriateness or effectiveness of disallowance as a parliamentary oversight mechanism during times of emergency. In the absence of disallowance, are there any other parliamentary oversight mechanisms that would be appropriate alternatives during such periods?

It is unclear to us how the existence of an emergency calls into question the appropriateness of disallowance as a parliamentary oversight mechanism, and it is our view that disallowance must continue to be available to the Parliament even in times of crisis.

We reiterate our position as set out at question 1, and consider that in respect of technical instruments meeting the conditions we have enumerated the measures of tabling and Committee scrutiny may be sufficient.

We also note that the effectiveness of any parliamentary oversight mechanism depends upon the Parliament continuing to sit through times of emergency.

Question 7: A significant portion of the instruments made in response to COVID-19 affect personal rights and liberties. Do you consider that there are sufficient safeguards to protect personal rights and liberties in the absence of disallowance?

It is our view that in the absence of disallowance, there are not sufficient safeguards to protect personal rights and liberties.

We note that even if disallowance were to exist in relation to all instruments made in response to COVID-19, we consider that – notwithstanding the challenges presented by emergency circumstances – matters affecting personal rights and liberties should be set out in primary legislation.

Question 8: Approximately 19% of delegated legislation made in response to COVID-19 has been exempt from disallowance. Are exemptions from parliamentary oversight necessary for the Government to respond effectively to the pandemic?

It is unclear to us how exemptions from parliamentary oversight are necessary for the Government to respond effectively to the pandemic. Indeed, if that argument is being put we would question its basis.[1]

Specifically, it is not the case that the disallowance process – which is retrospective – inhibits the Government's ability to respond rapidly to a continually evolving crisis.

In respect of other parliamentary oversight mechanisms like debate, we note that the Parliament demonstrated its ability to respond quickly in its response to the two economic stimulus packages and JobKeeper legislation in March and April 2020.[2]

Finally, we consider that exempting delegated legislation from parliamentary oversight actually *inhibits* an effective Government response insofar as parliamentary decision-making and public accountability are integral to good decision-making.

Question 9: Which branch of government should be responsible for issuing guidance on the circumstances in which it may be appropriate for delegated legislation to be exempt from parliamentary oversight?

It should fall to the Parliament to determine the circumstances in which it is appropriate for delegated legislation to be exempt from parliamentary oversight (insofar as it is the functions of the Parliament being affected by exemption).

This could be achieved by amending the *Legislation Act 2003* (Cth) to set out the circumstances in which delegated legislation may be exempt from parliamentary oversight: the circumstances should be premised upon delegation being provided for in primary legislation, in order to ensure Parliament also has an ongoing role in scrutinising the propriety of delegations.

Question 10: Why is it important that Parliament has oversight of delegated legislation which allocates public funds, such as Advance to the Finance Minister determinations?

Authorising and scrutinising appropriations is one of the Parliament's central functions. The importance of the Parliament being able to perform this function is thrown into sharp relief in circumstances where the High Court has made it abundantly clear that the executive power of the Commonwealth does not extend to "any and every form of expenditure of public moneys".[3]

Enabling the Parliament to scrutinise delegated legislation allocating public funds is critically important to good decision-making and reducing the risk of corruption: it is trite to say that the spectre of corruption looms largest where power is concentrated in the hands of individuals, large amounts of public money is being spent in a short time frame – in the

[1] While some increase in ministerial power and discretionary spending is warranted in order for the Government to be able to respond expeditiously to the pandemic, this does not entail exemption from parliamentary oversight.
[2] Professor Joo Cheong Tham's briefing paper.
[3] Williams (No 2).

2019-2020, almost $2 billion was expended under Advance to the Finance Minister determinations[4] – and few oversight or accountability measures are in place.

Question 11: Should the committee have the power to scrutinise and report on delegated legislation that is exempt from disallowance? How would this improve parliamentary oversight of delegated legislation?

In our view the committee should have the power to scrutinise and report on delegated legislation that is exempt from disallowance. This would at least have the effect of enlivening the accountability mechanism of the tabling in Parliament of committee concerns about delegated legislation: while this is not a sufficient mechanism to achieve accountability, it is a necessary one.

Question 12: Unlike the requirements for the deferral of sunsetting, there is currently no requirement to include a justification for why an instrument is exempt from disallowance or sunsetting in its explanatory statement. Should there be a similar requirement to justify exemptions from disallowance and sunsetting in an instrument's explanatory statement?

We consider that a requirement to justify exemptions from disallowance and sunsetting would be beneficial. Such a requirement would mean the instrument maker had to identify reasons justifying exemption, and may deter the exempting of instruments from these oversight mechanisms where they should not properly be employed.

Additional questions regarding Parliamentary sittings and a National Integrity Commission

Please find attached our research on virtual Parliamentary sittings and the design of an effective National Integrity Commission.

Parliamentary scrutiny of delegated legislation is difficult if Parliament gets cancelled, postponed, or scaled back to quorum, at times of crisis. International experience has shown that there are options for virtual participation and voting for members that cannot attend in person.

Independent accountability of Ministers is limited in Australia. A National Integrity Commission would allow for allegations of Ministerial corruption or misconduct to be investigated.

[4] Department of Finance, "Advance to the Finance Minister – List of AFMs" https://www.finance.gov.au/publications/advance-finance-minister/advance-finance-minister-list-afms accessed 8 September 2020.

The Centre for Public Integrity

Parliamentary sittings during the COVID-19 crisis

Briefing paper **28 April 2020**

By Han Aulby
Reviewed by Professor Anne Twomey and Professor Joo Cheong Tham

Summary

The Australian Government's response to COVID-19 has included the adjournment of Parliament and the transfer of extensive decision making powers to individual Ministers. State Parliaments have also been adjourned, including in NSW. This heightens the risk of corruption and poor decision-making, and limits the ability of MPs to represent their constituents.

Commonwealth and State Parliaments could continue to provide scrutiny and representation by meeting online. There are examples of Parliaments adapting their procedures to fit with video conference technologies, and this could be done at a Commonwealth level in line with the requirements of the Australian Constitution:

- Constitutional requirements that Parliament sits in the "seat of government" could be met by a core group of Ministers and MPs sitting in Canberra and hosting others by video conference.
- The quorum of attendance of Parliament outlined in the Constitution could be adapted by each House to include online attendance.
- Wales, Scotland and the UK Parliaments are holding online questions and statements, and the Welsh Assembly and the European Council are trialing online voting.
- The UK hybrid model of online and in-person attendance could meet Australian Constitutional requirements and allow for greater participation of all elected representatives.

Australian context

Parliaments around the world have continued to sit during the coronavirus pandemic.

Travel restrictions and the geographical distance between Canberra and many electorates make physical attendance difficult for many MPs. In addition social distancing makes the normal functioning of Parliament untenable.

Prime Minister Scott Morrison cited a potential "trial run' of the reconvening of Commonwealth Parliament in May 2020.[1] In March the Senate Standing Committee on Procedure was tasked with preparing for meetings of the Senate in alignment with social distancing and Constitutional requirements.[2]

Developing a model whereby state and Commonwealth Parliaments can meet with full attendance is critical for proper Parliamentary scrutiny and democratic representation. Relying on diminished attendance of MPs in person via pairing or proxy could limit the engagement of backbenchers, minor parties and the crossbench.

Constitutional issues

The Australian Constitution outlines a range of requirements for Commonwealth Parliamentary sittings. Importantly, it gives the Commonwealth Parliament power to legislate with respect to "postal, telegraphic, telephonic, and other like services." This recognizes existing and future advances in technology that could not have been envisaged at the time of the drafting of the Constitution.

Professor Anne Twomey of the University of Sydney has analysed key sections of the Constitution in relation to the possibility of a virtual or online meeting of Parliament.

Professor Twomey found:[3]

- Section 125 of the Constitution requires that Parliament meet in the "seat of government". This requirement could be met by a small number of MPs and the Presiding Officer meeting at Parliament House in Canberra and hosting other MPs online
- Sections 20 and 38 require "attendance" of members of House and Senate. This attendance could be online attendance with the permission of each House.
- Sections 44 and 46 reference members "sitting" which could be online with the permission of each House.
- Sections 22 and 39 require the "presence of at least one-third" of senators or members "to constitute a meeting of" the Senate or the House of Representatives "for the exercise of its powers". These provisions permit parliament to "otherwise provide", in this case, to allow "online presence" of representatives.

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[1] Sky News, 2020, *Parliament set for trial run in May,* 17th April 2020, https://www.msn.com/en-au/news/australia/parliament-set-for-a-trial-run-in-may/ar-BB12HJZU?li=AAaeSy5

[2] Department of the Senate, *Procedural Information Bulletin for the sitting period 23 March,* https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Procedural_Information_Bulletins/2020/bull_342

[3] Twomey, 2020, *A virtual Parliament is possible – and may be needed – during coronavirus pandemic,* The Conversation 24th March 2020, https://theconversation.com/a-virtual-australian-parliament-is-possible-and-may-be-needed-during-the-coronavirus-pandemic-134540

Case studies: the UK and Europe

Scotland, Wales, the UK and the EU have all developed abilities for their Parliaments to meet at least partially online. Each jurisdiction has cited the need for parliamentary scrutiny of government's responses to the coronavirus crisis.

Scotland convened a virtual question time on 9th April 2020 where members were able to put questions to the Ministers most closely involved in the government's response to the Corona 19 crisis, including the First Minister and four Cabinet Secretaries. The session was made public via online streaming and was broadcast via the BBC.[4]

The Scottish Parliament already uses an electronic voting system. MPs insert their identity cards into the console on their desk in the chamber. The MP has 30 seconds to vote, and votes overall take about one minute each. This system could easily be adapted to online remote voting.[5,6]

Wales has held two virtual assemblies including statements and question time to the First Minister and the Environment Minister. On the 8th April the Assembly held its first vote online, with leaders of each party voting on behalf of their members, followed by independents. Proceedings were broadcast live.[7]

The UK Parliament has established a hybrid model where questions and statements are able to be put by members both in person and via Zoom. The Commons Chamber can accommodate 50 members in person while respecting social distancing requirements. Up to 120 members are able to attend online. The Chamber is fitted with screens to allow for equality of participation for those online. The scheduling of questions and statements is organised by the Speaker and the government two days prior.[8]

The UK Speaker and the Procedure Committee are planning to extend this hybrid model to government motions, the consideration of legislation, and voting on divisions. Currently divisions are held in person but with consideration for social distancing. The Parliamentary Digital Team is tasked with developing a model for online voting on legislation.[9]

The European Union has also begun to adapt. The EU College of Commissioners are meeting weekly by teleconference. The 27 heads of state on the European Council met via video conference on the 26th March, temporarily allowing electronic voting by email until 31st July.[10]

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[4] The Scottish Parliament, 2020, *Scottish Parliament to hold Leaders' Virtual Question Time*, 8th April 2020, https://www.parliament.scot/newsandmediacentre/114963.aspx

[5] Scottish Parliament, *Standing Orders of the Scottish Parliament – Decisions and Voting*, accessed 21st April 2020, https://www.parliament.scot/parliamentarybusiness/26509.aspx

[6] BBC, 2016, *How does Holyrood's electronic voting system work?*, 23rd September 2016, https://www.bbc.com/news/uk-scotland-scotland-politics-37450323

[7] National Assembly for Wales, 2020, *First vote cast at virtual Plenary as National Assembly for Wales meets online*, 8th April 2020, https://www.assembly.wales/en/newhome/pages/newsitem.aspx?itemid=2093

[8] UK House of Commons, 2020, *Procedure under coronavirus restrictions: proposals for remote participation*, Procedure Committee report 21st April 2020.

[9] UK House of Commons, 2020, *Procedure under coronavirus restrictions: proposals for remote participation*, Procedure Committee report 21st April 2020.

[10] Electoral Reform https://www.electoral-reform.org.uk/how-other-parliaments-are-handling-the-coronavirus-outbreak/

Way forward

Commonwealth and State Parliaments should continue to sit during the COVID-19 crisis. The scrutiny of legislation in public view is crucial to our democratic process, particularly at time of increased government intervention and public spending.

Commonwealth Parliament could adopt a similar hybrid model to that of the UK. This would meet both the requirements of the Australian Constitution and social distancing:

- A limited number meeting at Parliament House in Canberra to meet Constitutional requirements;
- The remainder joining via video conferencing to allow for full representation;
- Equality of participation of online and in person attendants to ensure engagement from backbenchers, minor parties and the crossbench;
- The order of questions and statements agreed beforehand and facilitated by the Speaker;
- Government motions and bills to be considered;
- Investigation of Scottish, EU and Welsh models of online voting.

About The Centre for Public Integrity

The Centre for Public Integrity is an independent think tank dedicated to preventing corruption, protecting the integrity of our accountability institutions, and eliminating undue influence of money in politics in Australia. Board members of the Centre are the Hon Tony Fitzgerald AC QC, the Hon David Ipp AO QC, the Hon Stephen Charles AO QC, the Hon Anthony Whealy QC, Professor George Williams AO, Professor Joo Cheong Tham and Geoffrey Watson SC. More information at www.publicintegrity.org.au.

The Centre for Public Integrity

Pandemic international but shutting Parliament uniquely Australian

Briefing paper 1st April 2020

Summary

- Australian Parliament suspended for 5 months until 11 August.
- Number of sitting days for 2020 cut by 21, which is almost a 30% reduction in the 72 scheduled sitting days for the House of Representatives originally planned for the year.
- Other democracies facing coronavirus have limited the impact on parliamentary sitting, losing 0-9 sitting days, and have put in place other accountability measures including NZ's Epidemic Response Committee.

Australian response to coronavirus unique in affecting democratic government

On Monday 23 March a reduced House of Representatives sat in Canberra ostensibly to pass a number of measures in the Coronavirus Economic Response Package Omnibus Bill 2020. Once this business was concluded, at 18.45, Attorney-General and Leader of the House Christian Porter presented a revised program of sittings for 2020 which effectively suspended federal parliament for almost five months until 11 August, with the federal budget delayed from May to 6 October.[1]

In support of its decision to suspend parliament the government argued that "putting budgets together at this time, with the enormous uncertainty that exists in predicting, anticipating and estimating economic parameters, is not something that any Commonwealth or state government should be doing", and the risks attached to the operation of parliament "during what is anticipated to be the peak point in the transmission of the coronavirus". [1]

Labor and the Greens responded in opposition to the government's proposition, with Manager of Opposition Business Tony Bourke saying "during this period, during a time of crisis, is when the Australian public needs us to sit". Bourke also noted that the government would need to make decisions of incredible importance in response to COVID-19, and "decisions of that magnitude being made without the parliament convening and without there being a question time and an opportunity for people representing the different corners of Australia to hold the government to account is an unwise course for us to take". [1]

Australia is not alone among countries with similar types of democratic institutions in suspending parliamentary sittings, however Australia is an outlier for taking the most drastic action. The Australian federal government has reduced the number of sitting days for 2020 by 21, which is almost a 30% reduction in the 72 scheduled sitting days for the House of Representatives originally planned for the year.

Other countries with far many more confirmed cases of COVID-19 are suspending their parliaments for less time, and/or taking provisions to allow for proper and transparent governance to continue.

New Zealand, for example, has established an Epidemic Response Committee "to consider and report to the House on any matter relating to the Government's management of the COVID-19 epidemic", chaired by the Leader of the Opposition. In establishing the committee Leader of the House Chris Hipkins said he wanted to "acknowledge that scrutiny during this unprecedented time, when the Government is placed in the position of exercising such extraordinary powers, has never been more important". [11]

In the United Kingdom, provisions were made so "Scrutiny of the government and its legislation will continue", with a working group created to investigate ways that members can use remote collaboration and videoconferencing. [8]

The following table compares the responses from different countries to COVID-19 in terms of the period of suspension of their parliaments, the actual number of scheduled sitting days lost, other particular arrangements made that will facilitate continued scrutiny of government decisions, and the severity of the pandemic in each country according to numbers of confirmed cases.

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Table: Comparison of parliamentary sittings across Covid-affected democracies

Country	Total period of suspension (includes scheduled breaks)	Number of scheduled Sitting Days lost	Particular arrangements to continue	COVID-19 case numbers (as at 30 March) [10]
Australia	139 days [1]	21 days [1]	- None in place	4,361
Canada	38 [2]	Approximately 9 days (based on Senate calendar) [3]	- Provision to be able to recall parliament for the consideration of measures related to the COVID-19 pandemic	7,398
Spain	14 days from 12 March [4]	6 days [5]	- Congress not officially closed and will continue to operate for any urgent matter - Plenary sessions can be held - Videoconference meetings or telematic voting to be used [8]	87,956
NZ	34 days [6]	5 days [7]	- Opposition leader to chair a cross-party committee to scrutinise government's response to Covid-19 [2]	589
United Kingdom	1 week (planned recess bought forward) [8]	< 5 days	- For the first three weeks after returning to business, sitting days will be Tuesday to Thursday, with sittings beginning earlier than usual on Tuesdays and Wednesdays.	22,141

			- Scrutiny of the government and its legislation will continue. Each day will begin with questions to the government from members - Working group created to investigate ways that members can use remote collaboration and videoconferencing. - Physical distancing measures that have recently been put in place will continue. [8]	
USA	0	0	- Business as usual	161,807
France	0	0	- Questions for the Government restricted to one day - Limited number of MPs attending the sitting [9]	44,550
Germany	0	0	- Business as usual	66, 885

Sources

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4. Statement, Spanish Parliament, accessed 31 March 2020, http://www.congreso.es/portal/page/portal/Congreso/Congreso/SalaPrensa/NotPre?_piref73_7706063_73_1337373_1337373.next_page=/wc/detalleNotaSalaPrensa&idNotaSalaPrensa=35249&anyo=2020&mes=3&pagina=1&mostrarvolver=S&movil=null

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6. NZ Parliament, Hansard Reports, 25 March 2020, https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20200325_20200325_30
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9. Private email correspondence, Division de l'Information multimedia, National Assembly
10. NPR, Coronavirus World Map: Tracking The Spread Of The Outbreak, https://www.npr.org/sections/goatsandsoda/2020/03/30/822491838/coronavirus-world-map-tracking-the-spread-of-the-outbreak
11. Chris Hipkins in NZ Hansard, 25 March 2020, https://www.parliament.nz/en/pb/hansard-debates/rhr/document/HansS_20200325_059400000/hipkins-chris

The Centre for Public Integrity

Promoting integrity and preventing corruption through a National Integrity Commission

A discussion paper of The Centre for Public Integrity **August 2019**

The establishment of a National Integrity Commission is crucial to restoring public trust in government and its institutions. Increasing perceptions of corruption have led to public concern that government, politicians and public servants do not always act in the public interest. A perceived lack of integrity in government also costs the economy, as businesses no longer believe they are operating on a level playing field.

Currently there is no federal agency with the necessary jurisdiction and investigative powers to scrutinise the operations of government and the public service. No agency can currently investigate allegations of corruption involving members of parliament or their staff, and a large portion of the public sector is not covered by any existing anti-corruption agency. A National Integrity Commission is needed to prevent, investigate and expose corruption in the Federal Government and public sector.

In order to restore public trust in government, and fulfil its purpose of investigating and exposing corruption, a National Integrity Commission must have a broad jurisdiction and the strong investigative powers of a Royal Commission, including the ability to hold public hearings.

The National Integrity Committee of retired judges, hosted by The Australia Institute, researched the effectiveness of state corruption commissions and produced a framework for the design of a National Integrity Commission. The Centre for Public Integrity supports this framework, and it was used as a foundation for the detailed design features set out below.

Objectives of a National Integrity Commission

The objectives of a National Integrity Commission will be to:

a) to promote and improve the integrity and accountability of public administration; and
b) to investigate, expose and prevent corruption involving or affecting the impartial exercise of public administration; and
c) to educate and guide public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community.

The objectives of a National Integrity Commission do not include prosecuting convictions, as the Commission will operate primarily as an investigative agency.

The independence of a National Integrity Commission

A National Integrity Commission must be independent from government, politics, and business in order to improve the integrity of public administration, and investigate and expose corruption in government and the public sector.

Independence requires:

a) establishment of a National Integrity Commission as an independent statutory agency;
b) appointment of one Chief Commissioner and two Deputies via nomination by a cross-party parliamentary committee;
c) appointment of Commissioners for 5 year terms, with inbuilt flexibility to ensure that the terms of all Commissioners do not expire at the same time, and that terms may be extended if terms expire during an investigation;
d) appointment of Chief Commissioners only with the qualifications necessary to be appointed as a judge in a Supreme or Federal court;
e) a limited number of circumstances where the Commissioners may be removed from office during their terms,
f) secure, sufficient and multi-year funding of the Commission of at least $100 million per year made available every 3 years.

The jurisdiction of a National Integrity Commission

The jurisdiction of a National Integrity Commission must be broad to encompass corruption and misconduct that is beyond the definition set out in any criminal code. It must cover any conduct of any person, whether or not they are a public official, that affects the impartiality of public administration.

The Chief Commissioner of a National Integrity Commission must have the authority to begin investigations if they believe the conduct in question may be serious or systemic. The Chief Commissioner may begin investigations based on referrals from other agencies, issues arising from own motion investigations, and complaints from the public which may be anonymous.

Corrupt conduct, broadly defined, is:

a) Any conduct of any person that has the potential to involve or induce the placing by a public official of private interests over the public good in public office, or
b) any conduct of any person that has the potential to impair the efficacy or probity of an exercise of an official function, or public administration, by a public official, or
c) any conduct of any person that adversely affects or could adversely affect, directly or indirectly, the honest or impartial exercise of public administration, or
d) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
e) any conduct of a public official or former public official that involves the improper use of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person,

provided that such conduct would, if proven in criminal proceedings, be a criminal offence, a disciplinary offence, reasonable grounds for dismissal, or a breach of an applicable code of conduct.

Allegations made against a member of the judiciary must be investigated by an agency with adequate investigative powers of a Royal Commission, whether that is a National Integrity Commission or a Federal Judicial Commission.

The investigative powers of a National Integrity Commission

Corruption is by nature secret, difficult to prove, and often involves complex networks of mutually beneficial relationships. Those involved in large-scale corruption are often well organised, experienced and wealthy and have access to complex means of concealing misconduct including legal and technical barriers. To effectively expose and prevent corruption, a National Integrity Commission requires the full investigative powers of a Royal Commission including:

a) search and surveillance powers;
b) coercive powers to compel witnesses and documents;
c) exercise arrest warrants;
d) the ability to hold both private and public hearings;
e) the absence of legal professional privilege except when applied to communication between a lawyer and a client in relation to Commission hearings;
f) retrospective powers to investigate issues and draw evidence from the past;
g) the ability to make findings in investigation reports, and refer matters to the Commonwealth Director of Public Prosecutions for consideration of prosecution by a specialised unit within the DPP;
h) the ability to immunise witnesses on terms, and protection to witnesses that anything said or disclosed may not be used against in criminal proceedings;
i) measures for enforcing the above powers through the offences relating to the Commission for withholding evidence, giving false or misleading evidence, misleading witnesses, bribing witnesses, acting in contempt of the Commission etc.

The ability of a National Integrity Commission to hold public hearings

After preliminary private hearings, the National Integrity Commission requires the ability to open hearings to the public. This ability may be used in cases where the Commissioner believe it is in the public interest to do so, and will be make the investigation to which it relates more effective.

1. For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.
2. Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission may consider the following:
    a) the benefit of exposing to the public, and making it aware, of corrupt conduct,
    b) the seriousness of the allegation or complaint being investigated,
    c) whether conducting a public inquiry will make the investigation to which it relates more effective,
    d) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),
    e) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

Oversight mechanisms and safeguards of a National Integrity Commission

The following oversight mechanisms will be in place to provide safeguards against the risk of misuse of investigative powers. These oversight mechanisms are greater than any current oversight of Royal Commissions:

a) the appointment of an Inspector to ensure legal compliance of the Commission's activities and to receive and process complaints;
b) a cross-party parliamentary oversight committee;
c) the appointment of Commissioners via this cross-party committee;
d) a threshold for beginning investigations, whereby the Commissioner deems the conduct to be serious or systemic, and would, if proven, be a criminal offence, a disciplinary offence, reasonable grounds for dismissal, or a breach of an applicable code of conduct;
e) the necessity for private hearings to be held prior to opening any hearings to the public;
f) the opening of hearings to the public only in instances where the Commissioner believes it to be in the public interest;
g) the necessity for procedural fairness to be followed in all hearings;
h) the provision of search, surveillance, and arrest warrants by a Public Interest Monitor within the Federal Court;
i) the availability of judicial review;
j) a transparent reporting regime for Annual Reports and investigation reports, with reports on public inquiries being tabled in both Houses of Parliament, and reports on private inquiries being made available to those involved in the investigation.

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This discussion paper was prepared by The Centre for Public Integrity's project committee on a National Integrity Commission. Members of the committee include the Hon Stephen Charles AO QC, Nick Cowdery AO QC, Professor Colleen Lewis, and Morry Bailes.

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Remote voting procedures adopted in the UK Parliament

On 8 May 2020, the House of Commons Procedure Committee produced a report titled '*Procedure under coronavirus restrictions: remote voting in divisions'* which sets out the arrangements for remote participation in its proceedings.

Below is an overview of those voting procedures:

- A member in charge of an item of business may, with the leave of the Speaker, designate the business as subject to a remote division.
- When the Speaker has determined that a remote division is necessary on a question on a business item subject to remote division, he shall propose the question.
- Members will have 15 minutes to record their vote via the MemberHub system.
- Following routine checking of the result, the tallied figures are taken to and declared by the Chair.
- The Speaker is given considerable power over the operation of the system, including the power to interrupt and suspend a remote division and to declare a division result null and void and order a re-run if notified of a technical problem.

Technical aspects of the remote voting system

- MemberHub infrastructure was designed and built by the Parliamentary Digital Service to be used by Members to digitally table written and oral questions and propose early day motions.
- Access to the MemberHub system is via single sign on with an email address as an identifier, and is secured by multifactor authentication. All data is encrypted and sent over a secure connection, with results stored in two locations. The National Cyber Security Council has confirmed that it is content with the information security protocols.
- Any attempt to facilitate a non-Member to cast a vote over the remote voting system is likely to constitute contempt of the House, and the reputational risk to any Member suspected of facilitating the access of any other person to the MemberHub system in order to cast a vote in a division is likely to be substantial.
- The system tests in the live environment which have been undertaken indicate that the system is sufficiently reliable to be deployed for the purpose assigned.
- Where a Member facing technical voting difficulties experiences failure of access, the Member will be able to contact the relevant House office which will immediately call the Member and arrange for their vote to be recorded.