National Integrity Commissioner Bill 2012

House Standing Committee on Social Policy and Legal Affairs

14 August 2012

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Acknowledgement

The Law Council acknowledges the assistance of the following Constituent Bodies in the preparation of this submission:

- Law Society of South Australia;
- Queensland Law Society;
- New South Wales Bar Association;
- Law Institute of Victoria; and
- Victorian Bar.

Introduction

1. The Law Council is pleased to provide the House Standing Committee on Social Policy and Legal Affairs (the Committee) with this submission in response to its inquiry into the *National Integrity Commissioner Bill 2012* (the Bill). The Law Council notes that the Committee did not specifically call for written submissions on this occasion, but that the Committee's secretariat advised that the Committee would take note of any submissions received in response to the inquiry.

2. The Law Council made a submission to the Australian Greens in February 2011 in relation to an earlier version of the Bill - namely the *National Integrity Commissioner Bill 2010* (the 2010 Bill).[1] The Law Council notes that the Bill does not differ from the 2010 Bill, which was introduced into the Senate by Senator Bob Brown, then leader of the Australian Greens. The Hon Adam Bandt MP of the Australian Greens introduced the Bill into the House of Representatives on 28 May 2012.

3. The purpose of the Bill is to improve the integrity of Commonwealth agencies, Ministers and parliamentarians by establishing a National Integrity Commission (the Commission). Agencies are defined broadly to include:

    a. An agency as defined under the *Public Service Act 1999;*[2] or

    b. A department of the Parliament;[3] or

    c. People or bodies who hold office or exercise power under the Constitution or another Commonwealth Statute;[4] or

    d. An organisation established for a public purpose by a law of the Commonwealth or a Territory; the Governor-General; or a Minister.[5]

4. The Commission will consist of a new National Integrity Commissioner (the Integrity Commissioner), the existing Law Enforcement Integrity Commissioner (LEI Commissioner) and a new Independent Parliamentary Advisor.[6]

5. The existing provisions in relation to the LEI Commissioner under the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (the LEI Commissioner Act) continue under the Bill.[7] This submission will not comment on these provisions except in so far as they are relevant to the powers and functions of the new Integrity Commissioner.

---

[1] Law Council of Australia, Submission to Australian Greens, *National Integrity Commissioner Bill 2010*, 4 February 2011. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=5C22F1EA-B829-B73C-7405-71E375A608AB&siteName=lca.

[2] Subclause a) in the definition of 'Commonwealth agency' in clause 6 of the *National Integrity Commissioner Bill 2012*.

[3] Ibid., Subclause b).

[4] Ibid., Subclause c).

[5] Ibid., Subclause d).

[6] Explanatory Memorandum to *National Integrity Commissioner Bill 2012*, p.1. Available from http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation/billhome/r4833%22

[7] For example, Clause 13 of the *National Integrity Commissioner Bill 2012* states that the functions of the LEI Commissioner are conferred under section 15 of the LEI Commissioner Act. Clause 16 of the *National Integrity Commissioner Bill 2012* provides that the LEI Commissioner has the powers conferred under Parts 9 and 12 of the LEI Commissioner Act.

6. The Independent Parliamentary Advisor will provide advice about codes of conduct and relevant matters relating to parliamentarians acting with integrity. This submission will not comment on the provisions relating to the Independent Parliamentary Advisor except in so far as a number of provisions relate to the Commission of which the Independent Parliamentary Advisor is a member.

7. The Commission will be an independent statutory agency charged with:

    a. Investigating and preventing misconduct and corruption in all Commonwealth agencies and among federal parliamentarians and their staff;

    b. Investigating and preventing corruption in the Australian Federal Police (AFP) and the Australian Crime Commission (ACC); and

    c. Providing independent advice to Ministers and parliamentarians in relation to conduct, ethics and matters of propriety.[8]

8. The Bill provides the Integrity Commissioner with extensive investigative and coercive powers such as conducting public and private hearings and summoning any person or agency to produce documents and appear to give evidence.

9. The submission will focus on the following issues:

    a. Australia's obligations under the United Nations Convention Against Corruption (UNCAC);[9]

    b. the need for additional safeguards in relation to the coercive powers proposed in the Bill;

    c. the limitations on the right to claim legal professional privilege and the abrogation of the privilege against self-incrimination;

    d. the lack of detailed provisions regarding the granting of financial assistance for legal and other costs;

    e. issues of inconsistency and duplication in relation to the offences proposed in the Bill; and

    f. the qualifications of authorised officers.

Australia's international obligations

10. Australia ratified the UNCAC on 7 December 2005. It has also ratified the United Nations Convention against Transnational Organised Crime[10] and the Organisation

[8] Op.cit., Explanatory Memorandum, p.1.
[9] *United Nations Convention Against Corruption* (UNCAC), adopted by UN General Assembly Resolution 58/4 on 31 October 2003, ratified by Australia on 7 December 2005.. Available from http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
[10] *United Nations Convention against Transnational Organised Crime*, adopted by UN General Assembly Resolution 55/25 on 15 November2000 and ratified by Australia on 27 May 2004. Available from http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.

for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[11]

11. As a party to the UNCAC, Australia is required to develop policies in relation to anti-corruption;[12] establish and promote practices to prevent corruption;[13] strengthen systems for the recruitment, hiring, retention, promotion and retirement of public servants and other non-elected public officials;[14] and promote accountability and transparency in public finance.[15] Australia must also take steps to prevent corruption in the private sector.[16]

12. Australia's compliance with its obligations under Chapters III (Criminalisation & Law Enforcement) and IV (International Cooperation) of the UNCAC was the subject of a review by officials from the United States, Turkey and the United Nations Office on Drugs and Crime in March 2012.

13. The final report of Australia's review has not yet been publicly released. However, the executive summary of the review was released on 18 June 2012.[17] Whilst Australia was commended for "its comprehensive and proactive anti-corruption arrangements,"[18] the review team also made a number of recommendations for how Australia could strengthen its existing anti-corruption measures. These recommendations included that Australia should:

    a. Adopt and implement legislation currently under review for the establishment of a comprehensive scheme for public sector whistle-blower protection and to expedite access to existing protections for private sector whistle-blowers;[19] and

    b. Continue the consultative process for the development of a comprehensive national anti-corruption action plan, which will include an examination of how to make anti-corruption systems more effective.[20]

14. A number of measures are currently in place at the federal level to address corruption in Australia. These include offence provisions which criminalise corrupt activities such as bribery and abuse of public office;[21] statutorily prescribed public

[11] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* adopted by the Negotiating Conference on 21 November 1997 and ratified by Australia on 18 October 1999. Available from http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf.
[12] Art 5(1), UNCAC
[13] Ibid., Art 5(2)
[14] Ibid., Art 7(1)
[15] Ibid., Art 9
[16] Ibid., Art 12(1)
[17] United Nations Convention Against Corruption Review, Executive Summary, 18 June 2012. Available from http://www.ag.gov.au/Crimepreventionandenforcement/Corruption/Documents/Australias%20compliance%20with%20UNCAC%20Chapters%20III%20and%20IV%20%20Review%20Teams%20Executive%20Summary.PDF
[18] Australian Attorney-General, the Hon. Nicola Roxon MP, Media Release, "*Australia receives top marks for anti-corruption practices,"* 18 June 2012. Available from http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/18-June-2012-Australia-receives-top-marks-for-anti-corruption-practices.aspx.
[19] Op. cit., UNCAC Review Executive Summary, p.8.
[20] Ibid.
[21] Part 7.6 of the *Criminal Code Act 1995* contains Commonwealth bribery and corruption offences. The offence of bribery is outlined in s.141.1 and the abuse of public office offence is outlined in s.142.2.

sector standards;[22] and investigative, monitoring and supervisory functions performed by various regulatory and investigatory bodies.[23]

15. One such investigatory body is the Australian Commission for Law Enforcement Integrity (ACLEI) which was established by the Government in 2006. The ACLEI is headed by the LEI Commissioner who is charged with investigating corruption in the AFP; the ACC; and the Australian Customs and Border Protection Service.[24]

16. The Government has also taken other steps in an effort to address corruption in Australia. For instance, in September 2011, the then Minister for Home Affairs, the Hon Brendan O'Connor MP, announced that $700,000 in confiscated proceeds of crime would be used to develop and implement Australia's first National Anti-Corruption Plan (the Plan).[25] The Plan aims to outline the Commonwealth's approach to anti-corruption by highlighting the measures that are already in place across the Commonwealth to combat corruption. The Plan will also examine whether the Commonwealth's arrangements are adequate to combat existing and emerging corruption threats and whether Australia's response to such threats aligns with international best practice.[26]

17. To assist with the drafting of the Plan, a discussion paper titled 'The Commonwealth's Approach to Anti-Corruption' was released by the Commonwealth Attorney-General's Department for public consultation in March 2012. The Plan is currently being developed based on the comments received in response to the Discussion Paper.[27]

18. In addition to the anti-corruption measures that are in place or are currently being developed at the federal level, a number of jurisdictions in Australia have either adopted, or are considering adopting independent anti-corruption bodies which broadly cover the public sector in those jurisdictions. Anti-corruption bodies have been established in Western Australia, Tasmania, New South Wales and Queensland.[28] Victoria's Independent Broad-based Anti-corruption Commission (IBAC) came into operation on 1 July 2012.[29]

---

[22] For example, the *Criminal Code Act 1995*, *Public Service Act 1999*, *Commonwealth Electoral Act 1918*, *Financial Management and Accountability Act 1997*, *Freedom of Information Act 1982*, *Corporations Act* 2001*, Proceeds of Crime Act 2002* and the *Mutual Assistance in Criminal Matters Act 1987.*

[23] For example, the auditing of government agencies by the Australian National Audit Office and the publication of public budget statements, as well as investigative functions of the Australian Federal Police, the Australian Crime Commission, the Australian Securities and Investment Commission and the Australian Public Service Commission.

[24] See definition of 'Law Enforcement Agency' in s.5, *Law Enforcement Integrity Commissioner Act 2006* (Cth).

[25] Media Release by the then Minister for Home Affairs, Brendan O'Connor, "*Proceeds of crime to be used to fight corruption*, " 22 September 2011. Available from http://pandora.nla.gov.au/pan/122803/20111212-1530/www.ministerhomeaffairs.gov.au/Mediareleases/Pages/2011/Thirdquarter/22-September-2011---Proceeds-of-crime-to-be-used-to-fight-corruption.html

[26] Attorney-General's Department, Discussion Paper, *The Commonwealth's Approach to Anti-Corruption"*, 19 March 2012. Available from http://www.ag.gov.au/Crimepreventionandenforcement/Corruption/Documents/Anti-Corruption%20Discussion%20Paper%20FINAL%20PDF%20-%2015%20March%202012.pdf

[27] Op.cit., Media Release, "*Australia receives top marks for anti-corruption practices"*.

[28] Anti-corruption bodies in Australia include the Crime and Corruption Commission (WA); the Integrity Commission (Tas); the Independent Commission against Corruption (NSW); and the Crime and Misconduct Commission (QLD).The Victorian Government recently established an Independent Broad-based Anti-corruption Commission (IBAC) which came into operation on 1 July 2012. In May 2012, the South Australian Government introduced the *Independent Commissioner Against Corruption Bill 2012* which would establish an anti-corruption commissioner in SA.

[29] Premier of Victoria, Ted Baillieu, Media Release, "*Commissioner appointed to begin IBAC operations*", 28 June 2012. Available from http://www.premier.vic.gov.au/media-centre/media-releases/4321-commissioner-appointed-to-begin-ibac-operations.html.

19. South Australia is considering the establishment of an anti-corruption commissioner and has taken steps to progress the issue. In May 2012, the South Australian Government introduced the *Independent Commissioner Against Corruption Bill 2012*[30] into Parliament. This Bill aims to establish an anti-corruption commissioner and an Office for Public Integrity in that State. The Bill is still before the South Australian Parliament.[31]

20. At the federal level, the ACLEI exists to investigate allegations of corruption amongst Australian law enforcement agencies. However, there is currently no investigative body with the specific power to investigate allegations of corruption in other agencies and among federal parliamentarians and their staff. The Law Council notes that it is this gap that the Bill proposes to address.[32]

Concerns with provisions of 2012 Bill

21. As noted above, the Law Council has a number of concerns with the Bill. These concerns relate to:

    a. Coercive powers;

    b. Legal professional privilege;

    c. Privilege against self-incrimination;

    d. Procedural fairness;

    e. Legal representation;

    f. Non-compliance offences and penalties;

    g. Review and monitoring provisions;

    h. Reporting and implementation;

    i. Appointments; and

    j. Resourcing.

22. The Bill contains a number of features similar to those set out in the *Royal Commissions Act 1902* (RCA) and the LEI Commissioner Act. The Law Council notes that the Australian Law Reform Commission (ALRC) recently inquired into the operation of the RCA. The ALRC made a number of recommendations for reform of

[30] A copy of this Bill is available from http://www.legislation.sa.gov.au/lz/b/current/independent%20commissioner%20against%20corruption%20bill%202012/c_as%20passed%20ha/independent%20against%20corruption%20bill%202012.un.pdf

[31] See http://www.legislation.sa.gov.au/lz/b/current/independent%20commissioner%20against%20corruption%20bill%202012.aspx

[32] In a media release on 22 May 2012, Adam Bandt MP stated that "Anti-corruption bodies exist in most of the states but there is nothing at a Federal level, so action on an Integrity Commissioner is long overdue." Available from http://adam-bandt.greensmps.org.au/content/media-releases/bandt-puts-integrity-commissioner-bill-parliament.

the RCA which the Law Council considers are relevant to the Committee's inquiry into the Bill.[33]

23. The ALRC's recommendations[34] included a recommendation for a new statutory framework for official inquiries under which there would be two tiers of public inquiry: Royal Commissions (for matters of substantial public importance) and Official Inquiries (for matters of public importance).

24. The ALRC's recommendations included recommendations for distinctions between the powers (particularly for information gathering) to be held by Royal Commissions and Official Inquiries. The ALRC's recommendations included recommendations in relation to:

    a. the tabling of Royal Commission and Official Inquiry reports and Government's responses to the reports;

    b. the protection of national security information utilised by both Inquiries;

    c. the development of procedures and guidelines for both Inquiries, including in relation to procedural fairness principles;

    d. access to legal assistance and expenses for witnesses;

    e. privileges and public interest immunity;

    f. contempt; and

    g. offences and penalties.

25. While the ALRC's recommendations are still being considered by the Australian Government,[35] the Law Council considers that a number of them are relevant to the Committee's consideration of the Bill and these recommendations are discussed below.

Coercive powers

26. The Bill contains a number of provisions that would enable extensive coercive information gathering by the Integrity Commissioner. These include the power to:

    a. Compel a person to provide information or produce documents or things;[36]

    b. Summon a person to appear at a hearing to give evidence or produce documents or things;[37]

    c. Require a person appearing to give evidence to take an oath or to make an affirmation;[38]

    d. Cross-examine witnesses;[39]

[33] Australian Law Reform Commission, Report 111, *Making Inquiries: A New Statutory Framework*, October 2009. Available from http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC111.pdf.
[34] Ibid.
[35] See http://www.alrc.gov.au/publications/appendices/appendix-h-implementation-status-alrc-reports
[36] Clauses 43 and 45
[37] Clause 52
[38] Clause 56

e. Apply to a judge for a warrant for a person's arrest;[40]

f. Retain or make copies of any documents or other things;[41] and

g. Apply to 'issuing officers' for search warrants.[42]

27. Offence provisions for non-compliance also apply to a number of these powers. For instance, a person will have committed an offence if they fail to attend as required by a summons;[43] fail to produce a document;[44] or refuse to be sworn or make an affirmation.[45]

28. The coercive powers in the Bill are similar to those in the LEI Commissioner Act and the RCA. For example, section 75 of the LEI Commissioner Act provides the LEI Commissioner with the power to compel a person to provide information or produce documents or things; and section 6 of the RCA provides that it is an offence to refuse to be sworn or make an affirmation.

29. The Law Council has previously noted its concerns in relation to the lack of an appropriate balance between robust public scrutiny and the protection of the rights of participating individuals under the RCA.[46] This is particularly apparent when one considers the broad range of coercive powers available, the sanctions imposed for non-compliance with these powers and the limited rights afforded to witnesses under the RCA.

30. While the Law Council acknowledges the need for coercive powers for investigations and inquiries into corruption, it considers that these powers should be seen as exceptional due to their intrusive impact on individual rights. This is particularly the case when these powers are used in executive rather than judicial processes.

31. The Law Council is of the view that the use of coercive powers is only justified when it is necessary to achieve a legitimate purpose and only when the powers are accompanied by sufficient safeguards to protect against their overuse or misuse. More specifically, the Law Council considers that such powers should be available only if they are accompanied by provisions to mitigate their adverse impact on individual rights.

32. The ALRC '*Making Inquiries*' report[47] addressed such concerns. For instance, as noted above, it recommended a distinction between the powers available to Royal Commissions (for matters of 'substantial public importance')[48], and Official Inquiries (for 'matters of public importance')[49]. The ALRC recommended that Royal

[39] Clause 57
[40] Clause 70
[41] Clause 73.
[42] Clauses 78-79. The term 'issuing officer' also needs to be defined in the Bill.
[43] Clause 62(1)
[44] Clause 45
[45] Clause 62(2)
[46] Law Council of Australia, *Review of the Royal Commissions Act Issues Paper Submission*, 19 May 2009, pp.8-11. Available from http://www.lawcouncil.asn.au/shadmx/apps/fms/fmsdownload.cfm?file_uuid=576F6322-1E4F-17FA-D208-9C2CWAD5AA9F&siteName=lca
[47] Op.cit., *Making Inquiries: A New Statutory Framework Report 111*.
[48] Ibid., p.31.
[49] Ibid.

Commissions, but not Official Inquiries, should be able to apply to a judge for warrants:

a. To exercise entry, search and seizure powers;[50] and

b. To apprehend persons who failed to appear before it.[51]

33. The Law Council's concerns with the coercive powers contained in the RCA are also applicable to the coercive powers contained in the Bill. As noted by the Law Council in its submission on the 2010 Bill, one way in which the coercive powers in the Bill may be able to be mitigated is through the inclusion of a principle of proportionality.[52]

34. The principle of proportionality as a safeguard against the misuse of coercive powers was recognised by the 'Review of Victoria's Integrity and Anti-Corruption System' (the Proust Review). This Review was commissioned by the Victorian Labor Government in 2009 and was completed in May 2010. One of the recommendations of this review was a multi-layered Integrity model including the establishment of a Victorian Integrity and Anti-Corruption Commission (VIACC).[53]

35. In an effort to safeguard the misuse of the coercive powers that the VIACC would have, the Proust Review recommended that VIACC's exercise of coercive powers must be:

a. Proportionate to the nature of the matter under investigation; and

b. Consistent with codified principles of procedural fairness that should be abrogated only so far as necessary and appropriate for VIACC's effective functioning.[54]

36. The Victorian Labor Government was defeated in the Victorian election in November 2010 before it implemented the Proust Review recommendations.

37. The Victorian Liberal Party introduced an alternative Integrity model: the IBAC.[55] As noted above, the IBAC commenced operation in Victoria on 1 July 2012.

38. The Victorian Government introduced several pieces of legislation to establish the IBAC.[56] This legislation provides for a number of coercive powers,[57] but does not

[50] Ibid., Recommendation 11-7, p.17.
[51] Ibid., Recommendation 11-3.
[52] Op.cit., Law Council of Australia Submission on *National Integrity Commissioner Bill 2010*, p.15.
[53] Public Sector Standards Commissioner, *Review of Victoria's Integrity and Anti-Corruption System*, 31 May 2010, Recommendation 1.1, p.xix. Available from http://www.vic.ipaa.org.au/sb_cache/professionaldevelopment/id/193/f/PSSC_Integrity_Review.pdf.
[54] Ibid., Recommendation 1.11, p.xx.
[55] The IBAC is modelled on existing independent anti-corruption agencies in other jurisdictions, such as the Crime and Misconduct Commission in Queensland. It is intended to cover the entire public sector including local government, the judiciary and the police, members of Parliament, ministers and staff. The VIACC differed from this model in that it was intended to only investigate allegations of serious misconduct and corruption in the public sector and local government, including whistleblower complaints. A Parliamentary Integrity Commissioner was also going to be established to receive and investigate complaints about the conduct of Members of Parliament. For more information, see C. Ross, B. Merner, A. Delacorn, *Independent Broad-based Anti-corruption Commission Bill 2011*, Current Issues Brief, November 2011, p.8. Available from http://www.parliament.vic.gov.au/publications/research-papers?sort=latest.
[56] The IBAC is established by the following Acts: *Independent Broad-based Anti-corruption Act 2011*; *Independent Broad-based Anti-corruption (Investigative Functions) Act 2011; Independent Broad-based Anti-*

appear to incorporate a proportionality principle such as that recommended by the Proust Review.

39. Anti-Corruption legislation[58] that is currently being considered by the South Australian Parliament also does not appear to specifically refer to a proportionality requirement.

40. The Law Council considers that a proportionality principle, like that recommended in the Proust Review, should be introduced into the Bill. This would help to ensure that the exercise of the Commissioner's powers must be proportionate to the nature of the matter being investigated and would also help to ensure that the Commissioner exercised his or her coercive powers in only the most serious matters.

41. The Law Council submits that it is also important that coercive powers are applied at the operational level in accordance with administrative law values of fairness, lawfulness, rationality, transparency and efficiency. The Administrative Review Council's *Coercive Information-Gathering Powers of Government Agencies* report, which was published in May 2008,[59] is a useful document in this regard. This report contains 20 best-practice principles which are generally applicable to agencies with such powers. These principles seek to strike a balance between agencies' objectives in using the coercive information-gathering powers available to them and the rights of those in relation to whom the powers are exercisable.

42. The Law Council suggests that the Committee recommend that the Commissioner should be required to adhere to these best practice principles and report against them.

Legal Professional Privilege

43. The Bill contains a number of clauses that deal with legal professional privilege.[60] These provisions are based on similar provisions in the RCA. For example, clause 47 is almost identical to section 6AA in the RCA.

44. The legal professional privilege provisions in the current Bill are also similar to legal professional privilege provisions in the LEI Commissioner Act so far as they appear to distinguish between communications in which the Commonwealth holds legal professional privilege and those in which an individual holds the privilege.[61]

45. Where the privilege is held by the Commonwealth, it appears to be abrogated by the Bill. Specifically, the Bill provides that a person is not entitled to refuse to give information, or to produce a document or thing, to the Integrity Commissioner in response to a request on the basis that to do so would disclose legal advice given to a Minister or a Commonwealth government agency or any other communication

---

corruption Amendment (Examinations) Act 2012; Victorian Inspectorate Act 2011; and *Victorian Inspectorate Amendment Act 2012.*

[57] See for example, section 82X in the *Independent Broad-based Anti-corruption Commission Amendment (Examinations) Act 2012* which allows IBAC to apply to a Judge of the Supreme Court for the issue of a warrant to arrest a person who fails to appear before IBAC in accordance with a witness summons.

[58] *Independent Commissioner Against Corruption Bill 2012*

[59] Administrative Review Council, *Report No. 48 – The Coercive Information-Gathering Powers of Government Agencies*, May 2008. Available from http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf

[60] See for example, Clauses 46, 47, 48, 64, 65, 66.

[61] See for example, Section 80, *Law Enforcement Integrity Commissioner Act 2006*

between an officer of a Commonwealth government agency and another person or body that is otherwise protected against disclosure by legal professional privilege.[62]

46. Where someone other than the Commonwealth holds the privilege, the Bill appears to preserve the right to claim the privilege. For instance, the Bill provides that a person must not refuse or fail to provide information, or a document or thing, to the Integrity Commissioner on the ground that it would disclose a communication that is subject to legal professional privilege, unless either a court has found the information or document to be subject to legal professional privilege or a claim to that effect is made to the Integrity Commissioner.[63]

47. Where such a claim is made, the Bill provides that the Commissioner may still require the information, document or thing to be provided or produced for the purposes of assessing the claim and determining whether the information, document or thing is in fact covered by the privilege.[64]

48. If the Commissioner is satisfied that the information, document or thing is covered by the privilege he or she must disregard the information and/or return the document or thing.[65] Where the claim is rejected, the Commissioner may use the information, document or thing for the purposes of his or her inquiry.[66]

49. The Law Council supports the approach adopted by the Bill to the extent that it preserves the right to claim legal professional privilege. However, the Law Council has concerns about the transplantation of the procedure for the claiming of the privilege from the RCA. While that procedure may be appropriate in the unique and very specific circumstances of a Royal Commission, the Law Council does not consider that it is one that should be replicated for federal agencies more generally.

50. This view is supported by the findings of the ALRC, which, in its Final Report on Client Legal Privilege and Federal Investigations, concluded that:

> *"...the Royal Commissions Act now includes a procedure for the resolution of privilege claims. The procedure applicable to Royal Commissions is not one the ALRC considers to be appropriate for other federal bodies insofar as it would require production of a disputed document to the federal body in order for the federal body to decide whether or not to accept the claim for privilege. While it may be appropriate for Royal Commissioners—who are usually retired judges—to assess whether or not a document is privileged in the context of an independent inquiry to discover the truth—it is not, in the ALRC's view, appropriate for members of other federal bodies or government departments to make such an assessment—particularly where those bodies have enforcement functions."*[67]

51. The Law Council does not believe that legal professional privilege should be abrogated by coercive information gathering powers. There are a number of reasons for this. First, the existence of the privilege encourages full and frank disclosure between the client and legal practitioner. Such disclosure allows people to obtain accurate and comprehensive advice about their legal rights and obligations. In this

[62] Clause 49, 58 and 67
[63] Clauses 47 and 65. Section 6AA of the *Royal Commissions Act 1902* is almost identical to these clauses in the Bill.
[64] Sub-clauses 47(3), 65(3)
[65] Sub- clauses 47(4), 65(4)
[66] Sub-clauses 47(5), 65(5)
[67] Australian Law Reform Commission, *Report 107: Review of Legal Professional Privilege and Federal Investigatory Bodies,* February 2008, p.329. Available from http://www.alrc.gov.au/report-107.

regard, the existence of the privilege facilitates greater compliance with the law and more efficient resolution of legal disputes.

52. Secondly, it is short-sighted to abrogate the privilege in the name of giving regulatory agencies unfettered access to a larger information base. In the longer run the administration of justice is better served by the preservation of the privilege and an environment where legal advice can be sought without prejudice.

53. The Law Council submits that a more appropriate procedure for resolving privilege claims would be to provide for a process whereby an independent third party could be engaged to determine the claim, and that, upon receiving the view of the third party, each party would have the opportunity, within a specified period, to commence proceedings seeking declaratory orders from a superior court in relation to whether the material is privileged.[68]

54. The Law Council submits that the Committee should consider whether such a procedure should be set out in the Bill or, alternatively, whether this type of procedure should be included in federal legal professional privilege legislation of general application to all federal investigative bodes exercising coercive information gathering powers, as envisaged by the ALRC.[69]

Privilege against self-incrimination

55. The privilege against self-incrimination is recognised as a fundamental human right. For example, article 14(3) of the *International Covenant on Civil and Political Rights* provides that in the determination of any criminal charge, everyone shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.[70]

56. The Bill contains a number of provisions in relation to self-incrimination. For instance, it provides that a person is not excused from giving information, or producing a document or thing, when requested to do so, on the ground that it would expose them to self-incrimination.[71]

57. The Bill provides for 'direct use' immunity only in relation to the admission of the information, document or thing against the person in criminal proceedings, or proceedings for which a penalty applies.[72] This immunity applies only if a person claims that the information, document or thing may tend to incriminate the person, either prior to or at the same time as it is provided.[73]

58. The Bill does not provide for 'derivative use' immunity. This means that information gathered *as a result of* information obtained under the coercive powers, is able to be used against the person in subsequent criminal or civil proceedings.

59. The Law Council considers that a witness should, at the very least, be entitled to *both* direct use and derivative use immunity with respect to any evidence or information she or he provides. Such protections provide an appropriate balance

[68] Op.cit., Law Council of Australia Submission on *National Integrity Commissioner Bill 2010*, p.17.
[69] Ibid.
[70] See also UN Human Rights Committee, General Comment No 13 on Article 14 (Administration of Justice), 13/04/84. Available from http://www.unhchr.ch/tbs/doc.nsf/0/bb722416a295f264c12563ed0049dfbd?Opendocument.
[71] Clauses 49 and 67
[72] Sub-clauses 49(4) and 67(4)
[73] Sub-clauses 49(2) and 67(2)

between the coercive powers of an inquiry head and the rights of witnesses. They also encourage witnesses to provide full and accurate evidence to inquiries.

60. As noted by the Law Council in its submission on the 2010 Bill, the Law Council is of the view that witnesses appearing before the Commission for questioning 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.[74]

61. The Law Council further submits that the abrogation of the privilege against self-incrimination appears to be broader in the Bill than in the RCA. The RCA enables individuals to invoke the privilege where criminal proceedings or civil proceedings have commenced but have not been dealt with.[75] No such protection applies in the current Bill.

62. Accordingly, the Law Council submits that the Committee should recommend that a provision allowing individuals to be able to invoke the privilege where criminal or civil proceedings have been commenced but have not been dealt with, should be incorporated into the Bill.

Procedural fairness

63. In its submission to the ALRC inquiry into the RCA the Law Council recognised the need for flexibility in public inquiries so that information may be gathered and inquiries conducted as Royal Commissioners think appropriate. Indeed, this is an important means of ensuring robust public scrutiny of matters of public importance.[76]

64. At the same time, the Law Council stressed the importance of ensuring that procedural fairness applies in public inquiries. This is to enable the appropriate balance to be achieved between the powers of an inquiry and the rights of individuals interested in or affected by an inquiry.[77]

65. The rules of procedural fairness require a decision-maker to give a person, whose interests may be adversely affected by a decision, an opportunity to present his or her case. This is essential in the context of a public inquiry, as it guards against a person being unfairly discredited without any right of reply or avenue of review.

66. Clause 31 of the Bill states that the Integrity Commissioner must not include in a report an opinion or finding that is critical of a Commonwealth agency or a person unless the Commissioner has given the head of a Commonwealth agency or a person a statement setting out the finding, and a reasonable opportunity to appear and make submissions in relation to the opinion or finding.

67. However, clause 31(2) states that this requirement does not apply if the Commissioner is satisfied that:

- the person may have committed a criminal offence; contravened a civil penalty provision; engaged in conduct that could be subject of disciplinary proceedings; engaged in conduct that could be grounds for terminating the person's appointment or employment; and

[74] Op.cit., Law Council of Australia Submission on *National Integrity Commissioner Bill 2010*, p.18.
[75] Subsections 6A (3) and (4), *Royal Commissions Act 1902*
[76] Op.cit, Law Council of Australia Submission on *Discussion Paper 75: Royal Commissions and Official Inquiries*, p.13.
[77] Ibid.

- providing the person with an opportunity to respond would compromise the effectiveness of the investigation of the corruption issue or another corruption investigation.[78]

68. It is assumed that the reference to 'a person' is intended to apply to all natural persons, and not only persons who are employed by a Commonwealth agency. The Law Council considers that these provisions should apply to all individuals whose reputation is potentially under question due to a corruption investigation.

69. Whilst clause 31 does afford a person the opportunity to respond to possible adverse findings against them, the Law Council prefers the wording proposed by the ALRC in recommendation 15-1 in its report regarding procedural fairness in the context of Royal Commissions.[79] That is, that reports of Royal Commissions and Official Inquiries should not make findings that are adverse to a person, unless the inquiry has taken all reasonable steps to give notice of the proposed findings, or of the risk or likelihood of adverse findings, and disclosed the relevant material relied upon and the reasons on which such a finding might be based. Further, the inquiry should take all reasonable steps to give that person an opportunity to respond to the proposed finding, and should properly consider any response given.[80]

70. By disclosing the relevant material that has been relied upon and the reasons for the decision, the person is able to be made aware of the basis for the finding. This differs from the current wording used in the Bill which requires a person to simply be provided with the proposed finding itself.[81]

71. The ALRC recommendation also emphasises that the inquiry must properly consider any response given by the person. This ensures that weight is given to his or her evidence as part of the deliberative process, rather than after the decision is already taken. The wording of the current Bill does not include such an emphasis.

72. The Law Council is of the view that a person's ability to address the finding would be significantly compromised if the person were not provided with the reasons and evidence supporting the decision. Accordingly, the Law Council submits that the Committee should recommend that the Bill be amended in this regard.[82]

73. In addition to the comments above, the Law Council also supports the greater emphasis by the ALRC on procedural fairness in its other recommendations. Specifically that:

    (a) the freedom of Royal Commissions and Official Inquiries to conduct inquiries and gather information as members consider appropriate should be "subject to the requirements of procedural fairness" [and any other provisions in the Act];[83] and

[78] Clause 31(2)(b)
[79] Op.cit., *Making Inquiries: A new statutory framework*, Recommendation 15-1.
[80] Ibid., Recommendation 15-1.
[81] See Sub-clauses 31(3) and 31(4)
[82] Clause 52(3) of the Bill does provide that a summons requiring a person to give evidence must set out, so far as is reasonably practicable, the general nature of the matters in relation to which the Commissioner intends to question the person. However, this does not require the level of specificity recommended by the ALRC, and only applies to individuals who have received a summons, whereas Clause 31 has a broader application.
[83] Op.cit., *Making Inquiries: A new statutory framework*, Recommendation 15-4.

(b) a new Inquiries Handbook should set out procedural fairness principles as part of the kinds of procedures to be used in inquiries.[84]

74. The Law Council considers that incorporating a general procedural fairness principle into the Bill such as that recommended by the ALRC would help to ensure that decisions taken under clause 31(2) (whereby the Integrity Commissioner can elect not to provide a right of reply because it would compromise the effectiveness of a corruption investigation) are not made simply because it would be inconvenient to provide such a right.

75. The second issue in relation to procedural fairness on which the Law Council would like to comment concerns clause 36 of the Bill. Clause 36 provides that the Integrity Commissioner 'may' inform a person whose conduct is investigated of the outcome of the investigation. This includes giving the person a copy of, or part of, the investigation report.[85] However, the Integrity Commissioner may exclude information which is sensitive where he or she considers that this is desirable in the circumstances.[86] In making this decision, the Integrity Commissioner should seek to achieve an appropriate balance between the person's interest in having the information, and the prejudicial consequences which may arise from including the information in the advice.[87] This clause is almost identical to section 59 of the LEI Commissioner Act.[88]

76. The Law Council recognises the need to balance the competing interests of openness and transparency with the need to ensure that investigations are not compromised – for example, where the outcome involves a recommendation that the police conduct a criminal investigation, notification of this decision may result in destruction of evidence.

77. However, the Law Council considers that a person whose conduct has been investigated should be provided with the outcome (and supporting reasons) within a specified period, unless this would have prejudicial consequences for a corruption investigation or further proceedings. The Law Council recommends that the Committee suggest that the Bill be amended accordingly.

Legal representation

78. The Law Council considers that the provision of legal representation is necessary to protect the rights and liberties of people who are affected by investigations or public inquiries. For this reason, the Law Council supports the clauses in the Bill which allow for legal representation, such as:

(a) the Head of a Commonwealth agency may appear before the National Integrity Commissioner themselves, or authorise another person to appear before the Integrity Commissioner on their behalf;[89]

(b) a person who is the subject of a critical finding by the Integrity Commissioner may appear before the Integrity Commissioner themselves, or may be

[84] Ibid., Recommendation 15-5.
[85] Sub-clause 36(2)
[86] Sub-clause 36(3)
[87] Sub-clause 36(4)
[88] Section 59, *Law Enforcement Integrity Commissioner Act 2006*
[89] Sub-clause 31(6)

represented by another person (with the Integrity Commissioner's permission);[90]

(c) a person giving evidence at a hearing may be represented by a legal practitioner; [91] and

(d) the Commissioner must allow a legal practitioner representing the person giving evidence to be present when the evidence is given.[92]

79. The funding of representation for a person who may be subject to adverse comment and cannot afford a lawyer is essential to support the requirements of natural justice and access to justice. The Law Council particularly supports clause 74 of the Bill, which enables a person summoned to attend a hearing to apply to the Attorney-General for legal and financial assistance. A person who is not giving evidence, but is represented at the hearing by a lawyer with the Commissioner's consent, may also apply.[93] A person who is making an application for an order for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) in respect of 'a matter arising under the Act' may also make an application for legal and financial assistance.[94]

80. The Bill provides that the Attorney-General may authorise legal or financial assistance to be provided to the applicant if it would involve substantial hardship to refuse the application, or the circumstances of the case are of such a special nature that the application should be granted.[95]

81. This provision is similar to the ALRC's proposal in relation to Royal Commissions that the Attorney-General's Department should have the discretion to meet the costs of legal and related assistance. Under the ALRC proposal, however, the ALRC recommended that the Attorney-General's Department have regard to the following:

(a) whether the person has a valid reason to seek legal representation;

(b) whether it would cause hardship or injustice for the person to bear the costs of legal representation or appear without legal representation;

(c) the nature and possible effect of any allegations made about the person;

(d) whether the person could be the subject of adverse findings; and

(e) the nature and significance of the contribution that the person will, or is likely to, make to the inquiry. [96]

82. The threshold proposed by the ALRC for legal and related costs to be met is lower than that set out in the Bill. For example, it refers to "hardship or injustice" rather than "substantial hardship"[97] and requires consideration of the effect of allegations or adverse findings on the applicant. The Law Council notes that this could result in the provision of assistance to a broader group - for example, to an individual who is

[90] Sub-clause 31(7)
[91] Sub-clause 54(1)
[92] Sub-clause 55(2)
[93] Sub-clause 74(2)
[94] Clause 175
[95] Sub-clause 74(3)
[96] Op.cit., *Making Inquiries: A new statutory framework*, Recommendation 9-1.
[97] Sub-clause 74(3)(a)

of minor relevance to the investigation as a whole, but whose reputation is nevertheless under question during the course of the hearing.

83. The Law Council submits that the Committee should recommend that the provisions in the Bill relating to legal and related costs should be amended in this regard.

Non-Compliance Offences and Penalties

Penalties

84. The Integrity Commissioner's coercive powers are enforced by criminal offences. For example, a person who:

(a) fails to give information or produce documents or things as requested by the Integrity Commissioner can be punished by 2 years imprisonment;[98]

(b) continues to fail to give information or produce documents or things requested by the Integrity Commissioner, after the Integrity Commissioner has rejected a claim that these are protected by client legal privilege, can be punished by a fine of $1,000 or imprisonment for 6 months;[99]

(c) fails to comply with an order by the Integrity Commissioner limiting the publication of evidence, documents or things relating to a hearing, or who discloses prohibited information in relation to a summons, can be punished by 12 months imprisonment;[100]

(d) fails to respond to a summons, can be punished by 12 months imprisonment;[101]

(e) fails to make an affirmation or swear an oath, or answer a question at a hearing, can be punished by 2 years imprisonment;[102]

(f) fails to produce a document or thing required under a summons, can be punished by 2 years imprisonment;[103] and

(g) insults the Integrity Commissioner during the course of a hearing, disturbs or interrupts a hearing, or does any other thing which, if the hearing were in a court of record, would constitute contempt of court, can be punished by six months imprisonment.[104]

85. The penalties which apply to the proposed non-compliance offences set out above range from a fine of $1000 or a period of imprisonment ranging from six months to two years. The Law Council notes that the Bill's explanatory memorandum does not provide any guidance in relation to the reasons for the differences in penalties for offences which appear to be of a similar nature.

[98] Clause 45.
[99] Clauses 48 and 66.
[100] Clauses 59 and 61. Defences apply, for example, if a person discloses information about a summons to a legal practitioner for the purposes of obtaining legal advice: Clause 61(2).
[101] Sub- clause 62(1).
[102] Sub-clause 62(2).
[103] Sub- clause 62(3).
[104] Clause 63

86. Indeed, the Law Council raised similar concerns with the inconsistency in penalty provisions in its submission to the ALRC's review of the RCA.[105] In recognition of such concerns, the ALRC ultimately recommended that the maximum penalty for offences of refusing or failing to: swear or affirm; answer a question; or comply with notices requiring attendance or the production of documents or things, should be six months imprisonment or 30 penalty units.[106]

87. The Law Council submits that the Committee should recommend the application of a similar maximum penalty for offences in the Bill.

88. For contempt offences such as those outlined in clause 63 of the Bill (ie. insulting, disturbing or using insulting language towards another person), the Bill provides a penalty of six months imprisonment. This appears to be more severe than what was recommended by the ALRC in relation to contempt offences relating to inquiries. The ALRC recommended that the person who is disrupting the proceedings of an inquiry be merely excluded from those proceedings by a member of the Royal Commission or Official Inquiry.[107] The ALRC recommended a term of imprisonment only for individuals who cause a '*substantial disruption'* to the proceedings with the intention of disrupting those proceedings, or recklessness as to whether their conduct would have that result.[108] The ALRC's recommended penalty for causing a 'substantial disruption' is six months imprisonment or 30 penalty units.[109]

89. The Law Council submits that the Bill should be amended to reflect the fact that only 'substantial disruption' will attract a penalty of imprisonment.

Notice requirements

90. In its review of the RCA, the ALRC stated that, before individuals are subject to criminal sanctions, it is essential that they are made aware of their obligation to comply, their rights in relation to that obligation and how they could comply. In particular, it stated that providing notice of the consequences of non-compliance was an important "procedural safeguard."[110]

91. Accordingly, the ALRC recommended that a notice requiring a person to attend or appear before, or to produce a document or other thing, to a Royal Commission or Official Inquiry should include:

    (a) the consequences of not complying;

    (b) what is a reasonable excuse for not complying, as provided in the RCA,

    (c) the time and date for compliance; and

    (d) the manner in which the person should comply with the notice requiring the production of a document or other thing.[111]

92. In addition to this, the ALRC recommended that the offence of refusing or failing to answer a question be committed only if the person refuses or fails to answer after being informed that it is an offence to do so.[112]

[105] Op.cit., Law Council of Australia Submission on *Review of the Royal Commissions Act,* p. 20.
[106] Op.cit., *Making Inquiries: A new statutory framework*, Recommendation 21-1.
[107] Ibid., Recommendation 20-1.
[108] Ibid., Recommendation 20-4.
[109] Ibid., Recommendation 21-4.
[110] Ibid., p.497.
[111] Ibid., Recommendation 19-2.

93. The Law Council supports the inclusion of similar procedural safeguards in the Bill, and submits that the Committee should recommend that the Bill be amended to include such safeguards.

Contempt Offences

94. The Law Council is of the view that clause 63 (which relates to contempt offences) partially overlaps with other offences in the Bill. Clause 63 states that a person commits an offence if he or she:

(a) insults or disturbs the Integrity Commissioner;[113]

(b) disturbs a hearing;[114]

(c) interrupts a hearing;[115] or

(d) does any other act or thing which constitutes a contempt of the court.[116]

95. The type of conduct covered by the phrase, "does any other act or thing which constitutes a contempt of the court" is most likely intended to cover instances where a person fails to comply with a direction of the Commissioner, for example, to give evidence or attend a hearing. Such conduct is already covered by other offences in the Bill.[117]

96. To avoid duplication of offences, the Law Council suggests that the Committee recommend that the Bill be amended so that sub-clause 63(3)(b) reads as follows:

A person commits an offence if:

a) the person interrupts a hearing that is being held for the purpose of:

i. investigating a corruption issue; or

ii. condutcing a public inquiry; or

b) the person does any other act or thing that would, if the hearing were held in a court of record, constitute a contempt of that court, unless that act or thing constitutes an offence under another provision of the Act.

[112] Ibid., Recommendation 19-13.
[113] During a hearing or otherwise in the exercise of his or her powers. See Sub-clause 63(1).
[114] Sub-clause 63(2).
[115] Sub-clause 63(3).
[116] Sub-clause 63(3)(b).
[117] For example, clause 62 outlines offences in relation to hearings, and in particular, failure to attend a hearing.

Review and Monitoring provisions

Right to review

97. As noted earlier in this submission, while the Bill does not refer to a general ability to apply for review of decisions of the Integrity Commissioner, clause 175 does provide that a person may apply to the Attorney-General for assistance in respect of an application to the Federal Court or Federal Magistrates Court under the ADJR Act for an order for review in respect of 'a matter arising under this Act'.[118]

98. There are a number of instances where the Integrity Commissioner's decisions could be the subject of an application for judicial review. For example, this could include an application made on the basis that the Integrity Commissioner has denied somebody their right to procedural fairness.[119]

99. The Law Council emphasises the importance of ensuring a level of oversight of the Integrity Commissioner's decisions. The availability of judicial review means that courts are able to intervene when they consider it appropriate, and ensure that the Integrity Commissioner does not exceed his or her powers.

100. However, the Bill's provisions may mean that an individual may not always be able to access the Integrity Commissioner's decisions to seek judicial review. For example, as discussed above, clause 36 of the Bill provides that the Integrity Commissioner "may" inform a person whose conduct is investigated of the outcome of the investigation. This includes giving the person a copy of, or part of, the investigation report. However, the Integrity Commissioner may exclude information which is sensitive where he or she considers that this is desirable in the circumstances. In making this decision, the Integrity Commissioner must seek to achieve an appropriate balance between the person's interest in having the information, and the prejudicial consequences which may arise from making it available.[120]

101. As noted above, the Law Council is of the view that a person whose conduct has been investigated should be entitled to know the outcome of that investigation and supporting reasons for the outcome, unless prejudicial consequences would result. Further clarification of the Bill's intended intersection with the ADJR Act, and an individual's rights under that Act (including accessing the reasons for a decision) would be useful in this regard.

Committee oversight

102. Part 10 of the Bill proposes to establish a Parliamentary Joint Committee on the National Integrity Commission (the PJCNIC).[121] The PJCNIC would have a number of duties in relation to the Integrity Commissioner. These include:

    a. Considering the Prime Minister's recommendation for the appointment of the Integrity Commissioner and monitoring and reviewing the Integrity Commissioner's performance of his or her functions;[122]

[118] Clause 175.
[119] *Mahon v Air New Zealand Ltd and Others* (1983) 50 ALR 193*; Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564
[120] Sub-clause 36(4).
[121] Part 10, *National Integrity Commissioner Bill 2012.*
[122] Sub-clauses 168(1)(a) and 168(1)(b).

b. Examining the Integrity Commissioner's annual and special reports;[123]

c. Providing reports to Parliament on any matter concerning the performance of the Integrity Commissioner's functions, or relating to the National Integrity Commission, that the PJCNIC believes warrants the attention of the Parliament;[124]

d. Examining trends and changes in law enforcement and making recommendations to Parliament about any changes that should be made to the Integrity Commissioner's functions, powers and procedures and the Commission's structure in light of such changes;[125] and

e. Inquiring into any question in connection with the PJCNIC's duties that is referred to it by either House of Parliament and to report back to that House on that question.[126]

103. The PJCNIC would not investigate corruption issues or review the Integrity Commissioner's individual decisions.[127]

104. The Bill also provides that the PJCNIC would have similar duties in relation to the LEI Commissioner.[128]

105. The Law Council considers that the PJCNIC would play an important role in ensuring the accountability of the Integrity Commissioner and the LEI Commissioner. This is particularly important in light of the strength of the powers granted to the Integrity Commissioner and the restrictions that the Bill places on individuals' liberty.

106. The Law Council is of the view that it is essential that such parliamentary committees have timely and comprehensive access to information about the activities of the organisations that they are intended to oversee.[129] Indeed, in its submission on the *Parliamentary Joint Committee on Law Enforcement Bill 2010,* the Law Council noted that this had been an ongoing problem which hampered the effectiveness of the Parliamentary Joint Committee on the Australian Crime Commission (replaced under that Bill by the Parliamentary Joint Committee on Law Enforcement).[130]

107. In this regard, it is crucial that the PJCNIC established by the Bill can effectively perform its role. With this in mind, the Law Council has a number of suggestions for improving the PJCNIC's effectiveness, as discussed below.

108. Clause 170 of the Bill provides that the Integrity Commissioner has a general duty to comply with a request by the PJCNIC for information. However, the Integrity

---

[123] Sub-clause 168(1)(d).
[124] Sub-clause 168(1)(c).
[125] Sub-clause 168(1)(e).
[126] Sub-clause 168(1)(f).
[127] Sub-clause 168(2).
[128] Sub-clause 168(3).
[129] Law Council of Australia, submission to Senate Legal and Constitutional Affairs Committee, *National Security Legislation Amendment Bill 2010* and *Parliamentary Joint Committee on Law Enforcement Bill 2010*, 10 May 2010, p.30. Available from http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=BC01A853-9E8F-4F89-5DCC-289C3987760F&siteName=lca
[130] Ibid., p.32.

Commissioner may decide not to comply with the request if he or she is satisfied that:

(a) the information is sensitive information;[131] and

(b) the public interest that would be served by giving the information to the PJCNIC is outweighed by the prejudicial consequences that might result from giving the information to the PJCNIC.[132]

109. If the Integrity Commissioner does not provide the information on this basis, the PJCNIC may refer the request to the Prime Minister,[133] who must then make a written determination weighing up the factors described above.[134] The Prime Minister is not required to give reasons for this determination.[135]

110. The Law Council is of the view that these disclosure provisions are an improvement on previous provisions of this nature. For example, they recognise that, even where the disclosure of certain information may have prejudicial consequences, this may be outweighed by the public interest in the information being disclosed to the PJCNIC.[136]

111. However, the Law Council considers that, if the Integrity Commissioner or the Prime Minister decides to withhold the information sought, he or she should be required to provide reasons to the PJCNIC to the extent that is possible without compromising the effectiveness of an investigation or the confidentiality of the information.

112. To promote timely oversight of the Integrity Commissioner's functions, timelines should also apply in which the Commissioner must respond to a request of the PJCNIC for information.

113. The Law Council considers that such amendments would improve the processes for the disclosure of information to the PJCNIC and accordingly, submits that the Committee should recommend that the Bill be amended to reflect these suggestions.

Review of Commissioners' use of powers

114. The Law Council considers that, given the limitations of the parliamentary committee system, further consideration is warranted as to how the Integrity Commissioner will be held accountable for the use of its broad and discretionary powers.

115. At the federal level, the Commonwealth Ombudsman currently has statutory responsibility for inspecting the records of law enforcement and other enforcement agencies, including the ACLEI, in relation to the use of their covert powers.[137] The Ombudsman produces a report on the results of his or her inspections, and briefs the Parliamentary Joint Committee on Law Enforcement. The Law Council submits that the Committee should consider whether the creation of a similar role is necessary in relation to the proposed Integrity Commissioner.

[131] Sub-clause 170(2)(a).
[132] Sub-clause 170(2)(b).
[133] Sub-clause 170(3).
[134] Sub-clause 170(4).
[135] Sub-clause 170(4)(c).
[136] Sub-clause 170(6)(b).
[137] http://www.ombudsman.gov.au/pages/about-us/our-office/our-inspections-role.php#1

116. Alternatively, an independent investigations inspector role could be considered. In New South Wales, an independent investigator role exists in addition to a parliamentary oversight committee.[138] This inspector oversees the Independent Commission Against Corruption's (ICAC) use of investigative powers, investigates complaints against ICAC employees and monitors compliance with the law. The inspector also monitors delays in investigations and any unreasonable invasions of privacy.[139]

117. The Law Council submits that the role of an independent investigations inspector could be broader than that held by the Ombudsman in relation to the ACLEI. For example, it could assess whether the Integrity Commissioner's coercive powers were exercised in accordance with best practice principles such as those developed by the Administrative Review Council.[140] It could also monitor whether the Prime Minister responds to the Integrity Commissioner's recommendations within appropriate timeframes if such a requirement is introduced.

Reporting and Implementation

118. The Law Council notes that the Bill outlines a number of reporting obligations on the part of the Integrity Commissioner in relation to investigations and public inquiries.

119. In relation to investigations, these include the Commissioner's obligations to:

    a. Keep the person who referred the corruption issue informed of the progress of the investigation;[141]

    b. Prepare a report on the outcome of the investigation of the corruption issue once the investigation is complete;[142] and

    c. Provide a copy of the report of the investigation to the Prime Minister.

120. In relation to public inquiries, these include:

    a. Preparing a report on the inquiry setting out:[143]

        i. the inquiry findings;
        ii. the evidence and material used to arrive at the findings;
        iii. any action that the Integrity Commissioner has taken or proposes to take; and
        iv. any recommendations. These recommendations must be accompanied by reasons.[144]

    b. Preparing a supplementary report if the Integrity Commissioner feels it is necessary to exclude sensitive information from the main report. The supplementary report must set out the sensitive information and the reasons why this information was excluded from the main report.[145]

[138] See http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability
[139] http://www.icac.nsw.gov.au/about-the-icac/independence-accountability/accountability
[140] See http://www.arc.ag.gov.au/Publications/Reports/Pages/OtherDocuments.aspx
[141] Clause 32
[142] Clause 33
[143] Sub-clause 40(1).
[144] Sub-clause 40(2).
[145] Sub-clause 40(5).

c. Providing the report (and supplementary report if there is one) to the Prime Minister.[146]

121. In addition to these reporting obligations, the Law Council submits that the Integrity Commissioner should also be required to report on his or her exercise of coercive powers according to best practice principles (such as those developed by the Administrative Review Council) to the extent that is possible to do so without compromising the effectiveness of an investigation or confidentiality.

122. The Law Council has long standing concerns about the effectiveness of Royal Commissions and other public inquiries in contributing to open and transparent government processes, due to the failure of successive Australian Governments to fully implement their recommendations or respond to their key findings. For example, key recommendations from Royal Commissions, such as the Royal Commission into Aboriginal Deaths in Custody,[147] remain outstanding, despite the urgency of those recommendations and the significant time period that has lapsed since the recommendations were made.

123. Under the RCA, there is no requirement to table the reports of Royal Commissions in Parliament, or respond to recommendations made by a Royal Commission, or to report to Parliament on the implementation of recommendations.

124. The Law Council is pleased to see that the Bill addresses these concerns to some extent by ensuring that the Integrity Commissioner's report of an investigation or public inquiry, including any recommendations he or she makes, must be provided to the Prime Minister.[148] Where the inquiry is public, this report must also be tabled in Parliament.[149] However, neither the Prime Minister nor the Government is obliged to respond to the Integrity Commissioner's recommendations, or report on their implementation.

125. The Law Council submits that the Committee should recommend that the Bill include a provision requiring a response to the Integrity Commissioner's recommendations so that the effectiveness of the Integrity Commissioner's role is enhanced.

Appointments

Commissioner

126. The appointment of the Integrity Commissioner, as well as the LEI Commissioner and other officers, is outlined in Division 2 of Part 9 of the Bill.

[146] Clause 41.

[147] The Royal Commission into Aboriginal Deaths in Custody reported in 1991. One of the key recommendations that remains outstanding is Recommendation 62 which concerns the need for Governments to address over-representation of Indigenous juveniles in the criminal justice system and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being detained, imprisoned or otherwise. Despite this, Indigenous juveniles continue to be over-represented in the criminal justice system. A list of the Royal Commission's recommendations can be accessed from the following link: http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf

[148] Clauses 34 and 40

[149] Clause 41

127. The Commissioner is to be appointed by the Governor-General upon the recommendation of the Prime Minister. Before the Prime Minister makes a recommendation, he or she must refer the recommendation to the PJCNIC.[150]

128. The Law Council supports the Bill's establishment of the Integrity Commissioner's position as a full time position, with tenure of up to five years and with a prohibition on undertaking other paid employment.[151] These factors contribute to ensuring the Commissioner remains independent and impartial.

Authorised officers

129. The Bill contains a number of provisions in relation to the powers of authorised officers. For example, authorised officers are able to apply to issuing officers for search warrants in certain circumstances,[152] and are also permitted to obtain necessary assistance and use force against people and things if this is reasonable in the circumstances.[153] If the authorised officer suspects that it will be necessary to use firearms in executing the warrant, he or she must state this suspicion, and the reasons, in the application for the warrant.[154] Authorised officers may also apply to a judge to arrest a person in certain circumstances.[155]

130. The Bill's explanatory memorandum recognises the need for searches and warrants to be carried out by "those who have been provided with training and fulfilled the requirements to ensure that care, professionalism and due diligence are present."[156]

131. However, the Bill allows for individuals other than police officers to become "authorised officers". For instance, clause 110 provides that the Commissioner may appoint either a member of the Australian Federal Police, or a staff member of the Commission whom he or she considers has suitable qualifications or experience.[157] Authorised officers who are not "constables" are held to have the same powers as constables for the purposes of investigating corruption issues.[158]

132. Given the breadth of powers available to authorised officers, including the reasonable use of force and potentially the use of firearms, it is difficult to envisage why all authorised officers are not required to be police officers who have undergone the necessary training and are subject to careful pre-employment screening checks. In this context, it is worth noting that the Proust Review recommended that the use of defensive weapons, including firearms, should be restricted to operations involving sworn police officers only.[159]

Resources

133. Neither the second reading speech nor the Bill's explanatory memorandum makes any reference to the resources required to implement the Bill. While the decision on resourcing may ultimately be an issue for the Australian Government, it may be something that the Committee wishes to consider.

[150] Clauses 125 and 169
[151] Clauses 126 and 127
[152] Clause 78
[153] Clause 87
[154] Sub-clause 78(6)
[155] Clause 70
[156] Op.cit., Explanatory Memorandum, p.27.
[157] Sub-clause 110(2)
[158] Clause 109
[159] Op.cit., *Review of Victoria's Integrity and Anti-Corruption Commission*, 2010, p. xvi.

134. The Law Council considers that any new system to promote integrity at the federal level must be properly resourced.

135. Unless the proposed Commission has some long term security of adequate funding, there is a serious risk that its independence will be compromised.

136. It has been estimated that on the basis of past experience in Australia, operating a standing independent anti-corruption body is likely to cost somewhere between $20 million and $40 million per annum.[160] The Commission also includes the Independent Parliamentary Advisor as a member. Current State and Territory anti-corruption bodies do not include such a position.

137. Without adequate funding, the Commissioner may not be able to carry out his or her roles effectively. Whilst it is acknowledged that the Government is currently operating in a tight fiscal environment, the Law Council submits that it is vital that the Commission is sufficiently funded to enable it to perform its role properly.

Conclusion

138. The Law Council considers that corruption has many corrosive effects on society. It undermines democracy and the rule of law, and it distorts market forces. Australia is fortunate in that it is considered to have a relatively strong overall record on corruption. Nevertheless, there are persuasive arguments that a federal anti-corruption body is needed to ensure transparency and accountability in the conduct of its officials.

139. Whilst the Law Council considers the establishment of the Commission to be desirable given that most other jurisdictions have established, or are considering establishing, independent anti-corruption bodies, the Law Council has some concerns in relation to a number of provisions in the Bill. These include:

    a. the need to ensure that the coercive powers outlined in the Bill are accompanied by appropriate safeguards to prevent the abuse of such powers;

    b. strengthening the Bill's provisions relating to the rules of procedural fairness;

    c. including more detailed provisions in the Bill in relation to the granting of financial assistance for legal and other costs;

    d. specifying appropriate qualifications for authorised officers; and

    e. ensuring the Commission is adequately resourced to perform its functions properly.

140. The Law Council thanks the Committee for the opportunity to comment on the Bill and hopes that these comments will be of assistance to the Committee in its consideration of the Bill.

[160] Tim Smith, *Corruption: The Abuse of Entrusted Power in Australia*, published by the Australian Collaboration, 2010, page 40. Available from http://www.australiancollaboration.com.au/pdf/Essays/Corruption.pdf

Attachment A: Profile of 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 Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital 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 Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. 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, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.