

National Integrity Commission Bill 2013

Sponsor: Senator Milne

Introduced: Senate, 13 November 2013

Summary of committee concerns

1.169 The committee considers that a number of provisions of the bill, in particular those relating to the coercive investigative powers of the National Integrity Commissioner, give rise to serious concerns about human rights compatibility, and requires further information to determine whether the bill is compatible with human rights.

Overview

1.170 The bill proposes the establishment of a National Integrity Commission, bringing together the independent oversight functions for:

- the investigation and prevention of misconduct and corruption in all Commonwealth departments, agencies, federal parliamentarians and their staff;
- the investigation and prevention of corruption in the Australian Federal Police and the Australian Crimes Commission; and
- the provision of independent advice to Ministers and parliamentarians on conduct, parliamentary entitlements, ethics and matters of propriety.

1.171 The bill establishes the National Integrity Commission as an independent statutory agency, comprising the National Integrity Commissioner, the Law Enforcement Integrity Commissioner and the Independent Parliamentary Advisor.

1.172 The overall aim of the bill is 'to continuously improve the integrity of the Commonwealth agencies and ministers and parliamentarians by establishing an independent body responsible for detecting and investigating corrupt behaviour of those persons and within these agencies. The bill aims to deter corruption by increasing the risk of detection. The bill enables criminal offences to be prosecuted and civil penalty proceedings to be brought, where necessary following an investigation.'⁸⁶

1.173 The bill confers wide-ranging powers on the National Integrity Commissioner to inquire into and report on matters relating to alleged or suspected corruption in a range of Commonwealth agencies. The powers include the power to compel a person to provide information, to produce documents or to attend investigations and hearings; to apply for warrants to enter premises and seize materials; and to

86 Explanatory memorandum, p 2 (note on clause 3).

exercise a power of arrest in certain circumstances. The bill also proposes the complete or partial abrogation of the right of persons not to incriminate themselves and limits the application of legal professional privilege in certain circumstances.

1.174 The bill is in large part identical to the National Integrity Commissioner Bill 2010 and the National Integrity Commissioner Bill 2012, both of which were introduced into but not passed by previous Parliaments. In its September 2012 report on the National Integrity Commissioner Bill 2012 the House Standing Committee on Social Policy and Legal Affairs noted that the Senate Scrutiny of Bills Committee had examined the bill and had expressed concerns ‘about the following issues of possible undue trespass on personal rights and liberties:

- rights to a fair hearing and representation;
- revocation of legal professional privilege;
- protection against self-incrimination;
- broad definition of ‘authorised officer’; and
- inadequate explanation for increased search powers.⁸⁷

Compatibility with human rights

Statement of compatibility

1.175 The bill is accompanied by a statement of compatibility that identifies the rights affected by the bill as the right to privacy and reputation,⁸⁸ and the right to a fair hearing and a fair trial, including the right to be presumed innocent.⁸⁹ The statement of compatibility concludes:

While the Bill does touch on the body of human rights law, it is minimal, reasonable and proportionate to ensure that activities of public corruption can be properly detected, investigated and brought to public scrutiny.⁹⁰

1.176 The committee’s concerns with regard to this bill and with the contents of the statement of compatibility are set out below.

Committee view on compatibility

1.177 The committee notes that the objectives of the bill, the prevention and detection of corruption in public life, are important goals. The committee notes that the powers proposed to be conferred on the National Integrity Commissioner are

87 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report - National Integrity Commissioner Bill 2012*, September 2012, para 1.8. The committee noted that the same concerns had been raised by the Senate Scrutiny of Bills Committee in relation to the 2010 bill.

88 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

89 Article 14 of the ICCPR.

90 Statement of compatibility, para 2.9.

wide-ranging and involve the restriction on or removal of rights guaranteed by the ICCPR (and also enjoyed under common law). These powers are backed by the introduction of criminal offences with significant terms of imprisonment. The committee considers that an assessment of compatibility, in particular an assessment of its proportionality, involves an examination not just of the individual provisions of the bill but of its overall reach and impact.

Right to reputation

1.178 The statement of compatibility notes that the bill may affect a person's reputation in a number of ways, including by the fact becoming known that a person has been summoned to attend or adverse findings or comments being made about a person in a report of the Commissioner (whether made public or not).

1.179 The statement of compatibility notes that the capacity of the Commissioner 'to issue a notation to a summons for a private hearing is also intended to guard the privacy and reputation of a person or persons who are the subject of an investigation.'⁹¹

1.180 The statement of compatibility notes the 'right to due process and procedural fairness are also incorporated into the bill to ensure that no opinions or findings that are critical of a person or agency are publicly released unless they have been given an opportunity to appear and make submissions to the Commission.'⁹² However, it also points out that where the Commissioner is satisfied that the person may have committed a criminal offence, contravened a civil penalty provision, engaged in conduct that could be the subject of disciplinary proceedings or grounds for termination of the person's employment, the bill provides for the suspension of this right if to provide a person the subject of a critical comment or finding would compromise the effectiveness of the investigation or related actions.⁹³

1.181 It is not clear whether there is any circumstance in which a finding critical of a person could be made public in a report by the Commission without the person first having had the opportunity to respond to the issue. If that were the case, there would be an interference with the person's right to reputation that might be viewed as arbitrary, and may also involve a violation of the presumption of innocence if a public report were to state a view that the person had committed a criminal offence.

1.182 The committee intends to write to Senator Milne to seek clarification as to whether there is any circumstance in which a finding critical of a person could be made public in a report by the Commission without the person first having had the opportunity to respond to the issue.

91 Statement of compatibility, para 2.2.

92 Statement of compatibility, para 2.3.

93 Clause 31.

Right to freedom of expression and assembly

1.183 The bill contains a number of provisions which engage the rights to freedom of expression and freedom of assembly. The statement of compatibility does not identify these rights as engaged by the bill and accordingly provides no justification for the limitations placed on them.

1.184 Clause 63(1) of the bill provides that a person commits an offence if:

(a) the person insults, disturbs or uses insulting language towards another person; and

(b) the person knows that:

(i) the other person is the National Integrity Commissioner; and

(ii) the other person is holding a hearing in the performance of his or her functions, or the exercise of his or her powers, as National Integrity Commissioner.

1.185 The penalty is imprisonment for up to 6 months.

1.186 Under clause 63(2) a person commits an offence if:

(a) the person creates a disturbance, or takes part in creating or continuing a disturbance, in or near a place; and

(b) the person knows that the place is a place where a hearing is being held for the purpose of:

(i) investigating a corruption issue; or

(ii) conducting a public inquiry.

1.187 The offence created by clause 63(1) limits the right to freedom of expression in article 19(2) of the ICCPR. It therefore needs to be explicitly justified as a permissible limitation within the terms of article 19(3) of the ICCPR. While the committee notes that the protection of the Commission's office and holding of hearings would be a legitimate objective for the purposes of the ICCPR, it is not clear whether the terms 'insults, disturbs or uses insulting language' towards the Commissioner are drawn so broadly that they may limit legitimate criticism of or objection to the Commission and its activities.

1.188 The offence created by clause 63(2) may limit both freedom of expression in article 19(2) of the ICCPR and freedom of assembly in article 21 of the ICCPR. Accordingly, it needs to be explicitly justified as a permissible limitation within the terms of article 19(3) and article 21. While the committee notes that the protection of the Commission's office and holding of hearings would be a legitimate objective for the purposes of the ICCPR, it is not clear whether the restriction imposed may have the effect of criminalising protected expression and assembly, for example, a demonstration organised by persons to protest against what they consider as the excessive or inappropriate use of the powers of the Commission or other matters relating to the work of the Commission. As currently drafted, there may be a danger

that the provisions may limit legitimate criticism of or objection to the Commission and its activities.

1.189 The committee considers that the offences created by clauses 63(1) and 63(2) involve restrictions on freedom of expression and the right of assembly. Accordingly, they must be justified as permissible limitations under articles 19(3) and 21 of the ICCPR, in the manner indicated in the committee's Practice Note 1.

1.190 The committee intends to write to Senator Milne to seek an explanation of whether the offences created by clauses 63(1) and 63(2) may be justified as permissible restrictions on the exercise of on freedom of expression and the right of assembly under articles 19(3) and 21 of the ICCPR.

Right not to incriminate oneself

1.191 The bill confers on the National Integrity Commissioner a number of powers to order the provision of information or the production of documents or things. For the purposes of investigation of a corruption issue, the Commissioner may request a person to provide specified information or to produce specified documents or things.⁹⁴ The person must provide the information in writing; or produce the documents or things; within the time specified in the request or within an extended deadline.⁹⁵ Failure to do so is an offence, punishable by up to two years' imprisonment.⁹⁶

1.192 A person is not excused from complying with a request to provide the specified information or documents on the ground that doing so would tend to incriminate the person or expose the person to a penalty.⁹⁷ However, partial use immunity is provided,⁹⁸ so that neither the information provided nor the document or thing produced is admissible in evidence against the person in criminal proceedings, or any other proceedings for the imposition or recovery of a penalty. No derivative use immunity is provided in relation to any proceedings.⁹⁹

94 Clause 43(1).

95 Clause 43(4).

96 Clause 45.

97 Clause 49.

98 Use immunity is not available for proceedings for an offence against clause 45 (refusal to provide the information, document or thing), confiscation proceedings, proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* (which deals with false or misleading information or documents) that relates to this bill, proceedings for an offence against section 149.1 of the 1 *Criminal Code* (which deals with obstruction of Commonwealth public officials) that relates to this Act; or disciplinary proceedings against the person if the person is an employee of a Commonwealth agency.

99 Clause 49(4).

1.193 It is an offence, punishable by imprisonment of up to two years, for a person who has been summoned to attend a hearing before the National Integrity Commissioner, to fail to answer a question that the Commissioner requires the person to answer.¹⁰⁰ Similar provision is made in relation to a failure by a person to produce a document or thing that the person has been summoned to produce.¹⁰¹ While the person may refuse to answer the question or produce the document or thing on the ground of legal professional privilege (provided certain conditions are satisfied), a person is not excused from answering a question on the ground or producing the document or thing that doing so would tend to incriminate the person or expose the person to a penalty.¹⁰² Once again, partial use immunity is provided,¹⁰³ but no derivative use immunity is provided in relation to any proceedings.

1.194 The statement of compatibility offers the following justification for limiting the right not incriminate oneself:

... The privilege against self-incrimination is partially abrogated by clause 49 of the bill because use immunity is available. This is necessary to ensure that the public interest is served by not having crucial and relevant material relating to corruption withheld, while also respecting a citizen's right to not be incriminated by their own statements.¹⁰⁴

1.195 The committee also notes that, in relation to claims of legal professional privilege made in relation to information or documents requested by the National Integrity Commissioner, the bill provides that the Commissioner may require the information or document to be produced for the purposes of the Commissioner's determining whether the claim of legal professional privilege is to be upheld. The bill provides that, where the Commissioner decides that legal professional privilege applies, relevant material is to be expunged from the record and disregarded in any report by the Commissioner and in the case of a document, the document is to be returned to the person and is to be disregarded in any report.

1.196 As set out in the committee's Practice Note 1, the committee expects statements of compatibility to set out adequate justifications for limitations on rights, which involves identifying whether the restrictions are aimed at a legitimate objective, and whether those restrictions are reasonable, necessary and proportionate to that objective.

1.197 The committee does not consider that the statement of compatibility provides an adequate justification for the significant limitations of the right not to

100 Clause 62(2).

101 Clause 62(3).

102 Clause 67(1).

103 Similar to proceedings in the context of clause 49(4) (clause 67(4)).

104 Statement of compatibility, para 2.5.

incriminate oneself. In particular, it is not clear to the committee why only use immunity is provided and not derivative use immunity.

1.198 The committee intends to write to Senator Milne to seek clarification as to why the limitations of the right to not incriminate oneself by clauses 49 and 67 are not accompanied by derivative use immunity as well as use immunity.

