

Chapter 1

Introduction

1.1 On 29 November 2018 the Senate referred the provisions of the National Integrity Commission Bill 2018 to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 5 April 2019.¹

1.2 On 6 December 2018 the Senate referred the National Integrity Commission Bill 2018 (No. 2) and the provisions of the National Integrity (Parliamentary Standards) Bill 2018 to the committee for inquiry and report by 5 April 2019.²

1.3 Both the National Integrity Commission Bill 2018 and the National Integrity Commission Bill 2018 (No. 2) would establish an Australian National Integrity Commission. The National Integrity (Parliamentary Standards) Bill 2018 would, among other things, introduce a code of conduct for parliamentarians and their staff.

Conduct of the inquiry

1.4 The committee considered the three bills as part of a single inquiry.

1.5 Details of the inquiry were advertised on the committee's website, and the committee wrote to a range of individuals and organisations inviting written submissions by 22 January 2019. The committee received 23 submissions, which are listed at Appendix 1.

1.6 The committee held a public hearing for this inquiry on 8 February 2019 in Sydney. The witnesses who appeared at this hearing are listed at Appendix 2.

Structure of this report

1.7 This report consists of two chapters:

- This chapter provides a brief overview of the bills and relevant background, including in respect of the Commonwealth Integrity Commission proposed by the Australian Government, as well as the administrative details of the inquiry.
- Chapter 2 discusses the key issues raised during the inquiry and provides the committee's view.

Overview of the bills

1.8 The bills under inquiry were introduced into the Parliament as follows:

- The National Integrity Commission Bill 2018 (McGowan NIC bill) was introduced into the House of Representatives by Ms Cathy McGowan MP on 26 November 2018.³

1 *Journals of the Senate*, No. 133, 29 November 2018, pp. 4324–4326.

2 *Journals of the Senate*, No. 137, 6 December 2018, pp. 4480–4484.

3 *House of Representatives Votes and Proceedings*, No. 149, 26 November 2018, p. 1940.

- The National Integrity Commission Bill 2018 (No. 2) (Greens NIC bill) was introduced into the Senate by Senator Larissa Waters on 29 November 2018.⁴
- The National Integrity (Parliamentary Standards) Bill 2018 (NIPS bill) was introduced into the House of Representatives by Ms McGowan on 3 December 2018.⁵

1.9 The two bills introduced by Ms McGowan are intended as a package to 'promote public trust and confidence in the integrity of Parliament, the public sector and the system of Government'.⁶

1.10 The McGowan NIC bill would establish an Australian National Integrity Commission. The NIPS bill would, among other things, introduce a code of conduct for parliamentarians and their staff.

1.11 Like the McGowan NIC bill, the Greens NIC bill would also establish an Australian National Integrity Commission. The Explanatory Memorandum (EM) to the bill states that it is the fifth bill on this subject introduced by the Australian Greens since 2010.⁷

1.12 The Greens NIC bill is almost identical to the McGowan NIC bill. The EM to the McGowan NIC bill states that it builds on and incorporates aspects of others' work, including a 2012 Australian Greens bill of the same name.⁸ Similarly, the EM to the Greens NIC bill states that it was drafted using the McGowan NIC bill but with two major changes, namely 'to refine the definition of corrupt conduct and to limit investigations of corrupt conduct to the last ten years'.⁹ These differences are set out in more detail below.

1.13 In this report the McGowan NIC bill and the Greens NIC bill are referred to collectively as the NIC bills.

1.14 The following graphic outlines the proposed reforms and appears in the EM of each of the three bills:

4 *Journals of the Senate*, No. 133, 29 November 2018, p. 4329.

5 *House of Representatives Votes and Proceedings*, No. 153, 3 December 2018, p. 1992.

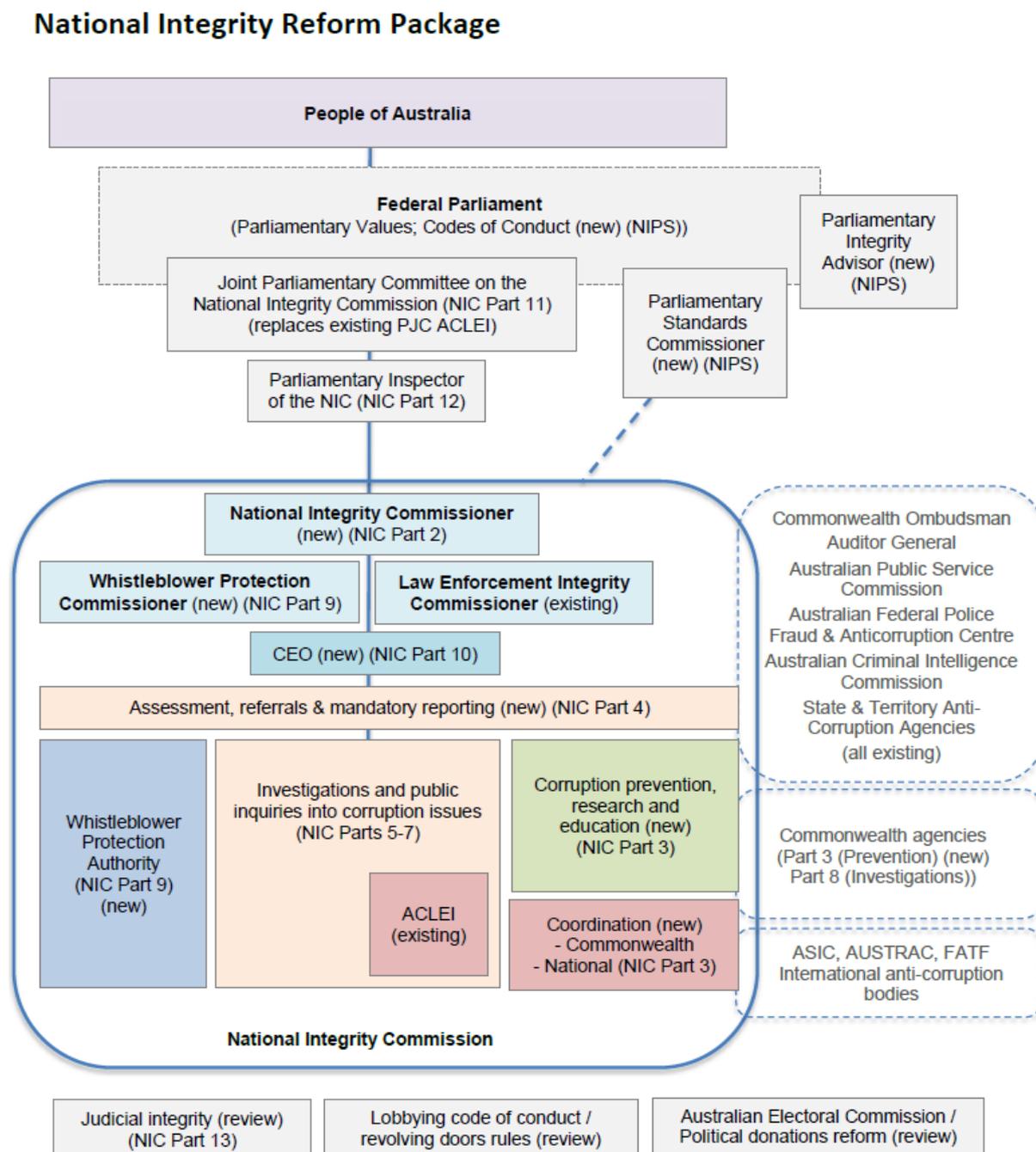
6 Explanatory Memorandum (EM), National Integrity Commission Bill 2018 (McGowan NIC bill), p. [2]; EM, National Integrity (Parliamentary Standards) Bill 2018 (NIPS bill), p. [2].

7 EM, National Integrity Commission Bill (No. 2) (Greens NIC bill), p. 1.

8 EM, McGowan NIC bill, p. [2].

9 EM, Greens NIC bill, p. 1.

Figure 1.1—Representation of proposed reforms



1.15 Each EM states that the graphic is based on a publication associated with Griffith University and Transparency International Australia.¹⁰

10 See A J Brown, Adam Graycar AM, Kym Kelly, the Hon Ken Coghill, Tim Prenzler, and Janet Ransley, *A National Integrity Commission – Options for Australia*, August 2018, <http://transparency.org.au/national-integrity-systems-assessment/> (accessed 20 March 2019), Option 3, p. 60.

Key provisions of the National Integrity Commission Bill 2018 and the National Integrity Commission Bill 2018 (No. 2)

1.16 The NIC bills would establish the Australian National Integrity Commission (NIC) 'as an independent, broad-based public sector anti-corruption commission for the Commonwealth'.¹¹ The EM to each bill states that the objectives of the Commission are:

...to promote integrity and accountability, prevent, investigate and expose corruption, support development and implementation of a national integrity and anti-corruption plan, improve coordination and efficiency in the Commonwealth integrity system, and ensure protection of whistleblowers.¹²

1.17 The EM to each of the NIC bills states that the proposed NIC would:

...be the lead agency for key functions (existing and proposed) in the Commonwealth integrity framework, and fill gaps in coverage. It will act as a partner to existing Commonwealth and State integrity and law enforcement agencies, with provisions for referrals, joint investigations and joint projects.¹³

1.18 The proposed NIC would consist of:

- the National Integrity Commissioner and any Assistant Commissioners;
- the Law Enforcement Integrity Commissioner and any Assistant Law Enforcement Integrity Commissioners; and
- the Whistleblower Protection Commissioner.¹⁴

1.19 There are certain requirements that would apply to prospective Commissioners. For example, the National Integrity Commissioner would need to be a current or former judge of the Federal Court of Australia or of the Supreme Court of a state or territory, or qualified for appointment as such a judge.¹⁵

1.20 The NIC would build upon the existing Australian Commission for Law Enforcement Integrity (ACLEI).¹⁶ For example, when providing for the functions and powers of the Law Enforcement Integrity Commissioner, the NIC bills refer to existing provisions of the *Law Enforcement Integrity Commissioner Act 2006*.¹⁷

11 EM, McGowan NIC bill, p. [2]; EM, Greens NIC bill, p. 1.

12 EM, McGowan NIC bill, p. [2]; EM, Greens NIC bill, p. 1.

13 EM, McGowan NIC bill, p. [3]; EM, Greens NIC bill, p. 2.

14 Subclause 11(2) of the NIC bills.

15 Subclause 187(2) of the NIC bills.

16 EM, McGowan NIC bill, p. [1] and p. [5]; EM, Greens NIC bill, p. 1 and p. 4.

17 Clauses 13 and 16 of the NIC bills.

Role and powers of the National Integrity Commission

1.21 The NIC bills contain a substantial number of provisions relating to the role and powers of the NIC. Key points, as summarised by the EM to each bill, are as follows:

The Commission will have a broad jurisdiction over official corruption including federal politicians and the federal public sector and promote responsible business conduct in the private sector. At this stage federal judicial officers under Chapter III of the Constitution are not included and the Bill establishes a review process to ensure their inclusion in a robust system of integrity oversight.

...

The Commission will be the lead agency for key functions (existing and proposed) in the Commonwealth integrity framework, and fill gaps in coverage. It will act as a partner to existing Commonwealth and State integrity and law enforcement agencies, with provisions for referrals, joint investigations and joint projects.

...

The Commission will have the powers of a Royal Commission to investigate, where necessary, corruption issues involving or affecting the Commonwealth Government, to be executed at the discretion of the Commissioner. It may hold a public inquiry and/or public hearings where satisfied this is the most effective means of investigation and, on balance, will be in the public interest.

Referrals to the Commission can be made by anyone who identifies a corruption issue. There will be a mandatory reporting requirement for public officials and Commonwealth agency heads. The Commissioner will have discretion on how to manage each referral, including dealing with frivolous or vexatious referrals.

After due process, the Commission will be empowered to make findings of fact, to be referred to the Commonwealth Director of Public Prosecutions or other enforcement agencies for consideration for prosecution, in criminal cases. It will also be empowered to make other findings of fact and recommendations, including by way of public report, in relation to non-criminal corruption issues, prevention and other areas of integrity reform.¹⁸

Parliamentary Joint Committee on the Australian National Integrity Commission

1.22 The NIC bills provide for the establishment of the Parliamentary Joint Committee on the Australian National Integrity Commission (the PJC NIC) to oversee

18 EM, McGowan NIC bill, p. [3]; EM, Greens NIC bill, pp. 2–3.

the NIC.¹⁹ The PJC NIC would replace the existing Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity.²⁰

1.23 The PJC NIC is intended to be bipartisan.²¹ Its members, of whom half would be senators and half would be members of the House of Representatives, would be:

- five members of the government, one of whom would be co-Chair;
- five members of the opposition, one of whom would be co-Chair; and
- two members from neither the government nor opposition.²²

1.24 Appointments of the National Integrity Commissioner, any Assistant Commissioners, and the Whistleblower Commissioner would be made by the minister, but only with the approval of the PJC NIC.²³

1.25 The PJC NIC would also review the performance of commissioners and report to the Parliament on matters relating to the NIC, but would not investigate corruption.²⁴

Parliamentary Inspector

1.26 The McGowan NIC bill would establish a Parliamentary Inspector as an independent officer of the Parliament to assist the PJC NIC to oversee the NIC.²⁵ The Parliamentary Inspector would fulfil its functions at the request of the NIC committee.²⁶ The functions of the Parliamentary Inspector include:

- inspecting records of the National Integrity Commission, including to consider whether the Commissioner has exercised power appropriately;
- investigating complaints made against the National Integrity Commission or its staff; and
- reviewing alleged incidences of unauthorised disclosure.²⁷

19 Subclause 244(1) of the NIC bills; also see EM, McGowan NIC bill, p. [4]; EM, Greens NIC bill, p. 3.

20 This is indicated by the graphic included in the EM to each of the NIC bills (see above). Also see Item 5 of Schedule 1 of the NIC bills.

21 EM, McGowan NIC bill, p. [3]; EM, Greens NIC bill, p. 2.

22 Subclauses 244(2), 244(3) of the NIC bills; also see EM, McGowan NIC bill, p. [76]; EM, Greens NIC bill, p. 78.

23 See clauses 187, 197, 206, and 246 to 249 of the NIC bills. It appears that Law Enforcement Integrity Commissioner would be appointed by the Governor-General without the need for approval by the PJC NIC; see clause 196 of the NIPS bill.

24 Subsections 246(1) and 246(2) of the NIC bills.

25 Part 12 of the NIC bills; also see EM, McGowan NIC bill, p. [4]; EM, Greens NIC bill, p. 3.

26 Subclause 254(2) of the NIC bills.

27 Clause 254 of the NIPS bill.

Corruption prevention, research and coordination

1.27 The NIC bills provide for various measures to prevent corruption and coordinate anti-corruption measures.²⁸ These include:

- requiring each Commonwealth agency head to prepare, every two years, a plan to enhance integrity in the performance of the agency's functions;²⁹ and
- provisions relating to coordination and cooperation between Commonwealth agencies, facilitated by the National Integrity Commissioner.³⁰

Differences between the McGowan NIC bill and the Greens NIC bill

1.28 The EM to the Greens NIC bill states that it was drafted using the McGowan NIC bill but with two major changes.³¹

Difference 1: the definition of 'corrupt conduct'

1.29 The definitions of 'corrupt conduct' in the NIC bills are similar, but there are some differences.

1.30 Both the NIC bills provide a broad definition of corrupt conduct.³² Both definitions encompass conduct that is not criminal, but is nonetheless misconduct that could constitute, for example, a disciplinary offence or reasonable grounds for dismissing a public official.³³

1.31 A key difference is that the definition in the McGowan NIC bill covers conduct by a public official or parliamentarian that could constitute or involve 'a substantial breach of an applicable code of conduct'.³⁴ The definition in the Greens NIC bill modifies this criterion such that it only applies 'in the case of conduct of a Minister or a parliamentarian'.³⁵

1.32 An additional difference is noted in the EM to the Greens NIC bill, which states that the Greens NIC bill modified the definition in the McGowan NIC bill to 'remove and clarify the unclear terms in the existing NSW provisions replicated in the [McGowan NIC bill]'.³⁶

28 See Part 3 of the NIC bills.

29 Clause 20 of the NIC bills.

30 Division 6 of Part 3 of the NIC bills.

31 EM, Greens NIC bill, p. 1.

32 See clause 9 of each of the NIC bills.

33 Subclause 9(6) of the McGowan NIC bill and subclause 9(4) of the Greens NIC bill.

34 Paragraph 9(6)(d) of the McGowan NIC bill; also see the definition of 'applicable code of conduct' at clause 8 of the McGowan NIC bill.

35 Paragraph 9(4)(d) of the Greens NIC bill; also see an exchange between Senator the Hon Ian Macdonald, Senator Larissa Waters, and Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department, *Committee Hansard*, 8 February 2019, p. 36.

36 EM, Greens NIC bill, p. 6.

Difference 2: Limiting investigations of corrupt conduct to the last ten years

1.33 The Greens NIC bill provides that the national integrity commission would not be able to investigate corruption issues that arose more than ten years prior to the commencement of the bill.³⁷ The McGowan NIC bill does not contain this limitation.³⁸

Key provisions of the National Integrity (Parliamentary Standards) Bill 2018

1.34 The NIPS bill would establish the *National Integrity (Parliamentary Standards) Act 2018*. The key provisions of the bill are:

- the introduction of a parliamentary code of conduct for parliamentarians and their staff;³⁹
- the establishment of a Parliamentary Integrity Advisor to provide confidential advice and guidance to parliamentarians and their staff about how to honour the code of conduct or about other integrity issues;⁴⁰
- the establishment of a Parliamentary Standards Commissioner (Standards Commissioner) to investigate alleged contraventions of a code of conduct (including the proposed parliamentary code of conduct or a ministerial code of conduct);⁴¹
- in relation to the Parliamentary Integrity Advisor and the Standards Commissioner, the introduction of an offence of victimisation⁴² and an offence for the unauthorised disclosure of confidential information;⁴³
- requirements that reviews be conducted relating to various integrity issues, including a review of the NIPS bill to be conducted after three years;⁴⁴ and
- provisions relating to parliamentarians' registers of interests, which the EM to the NIPS bill states provide 'a statutory basis' for those registers.⁴⁵

37 Subclause 12(3) of the Greens NIC bill; also see EM, Greens NIC bill, p. 1 and p. 7.

38 Subclause 12(1) of the McGowan NIC bill; EM, McGowan NIC bill, pp. [7]–[8].

39 See Divisions 1 and 2 of Part 2 of the National Integrity (Parliamentary Standards) Bill 2018 (NIPS bill).

40 See Part 4 of the NIPS bill.

41 See Part 5 of the NIPS bill.

42 Clause 93 of the NIPS bill.

43 Clauses 35 and 37 of the NIPS bill (in relation to the Integrity Adviser); Clauses 67 and 69 of the NIPS bill (in relation to the Standards Commissioner).

44 Clause 99 of the NIPS bill (relating to the review of the NIPS bill); clauses 96 to 98 of the NIPS bill (relating to other reviews)

45 EM, NIPS bill, p. [2]; Clauses 21 and 22 of the NIPS bill.

The Commonwealth Integrity Commission proposed by the Government

1.35 While each of the NIC bills would establish an NIC, the government has announced its intention to establish an alternative anticorruption commission.

1.36 On 13 December 2018 the Prime Minister, the Hon Scott Morrison MP, and the Attorney-General, the Hon Christian Porter MP, announced the government's intention to establish a Commonwealth Integrity Commission (CIC).⁴⁶

1.37 The government released a consultation paper outlining the proposed commission and called for public submissions to be received by 1 February 2019.⁴⁷ The paper notes that the Commonwealth's existing integrity arrangements are a multi-agency approach.⁴⁸

1.38 The proposed CIC is intended to 'detect, deter and investigate suspected corruption and to work with agencies to build their resilience to corruption and their capability to deal with corrupt misconduct'.⁴⁹

1.39 The CIC would have two divisions: a law enforcement integrity division and a public sector integrity division. The law enforcement division would:

...retain the powers and functions of [the Australian Commission for Law Enforcement Integrity], but with an expanded jurisdiction to cover several further agencies that exercise the most significant coercive powers and therefore present a more significant corruption risk.⁵⁰

1.40 The public sector division would cover the remainder of the public sector.⁵¹ It would only investigate 'corrupt conduct' where the commissioner has a reasonable suspicion that the conduct in question constitutes a criminal offence.⁵² The public sector division would have fewer powers than the law enforcement division.⁵³ It would not make findings of 'corruption at large', and the consultation paper states this would ensure that 'it is the courts making findings of criminally corrupt conduct'.⁵⁴

46 Press conference with the Attorney-General, Transcript, 13 December 2018, <https://www.pm.gov.au/media/press-conference-attorney-general-0> (accessed 11 January 2019).

47 Attorney-General's Department, *A Commonwealth Integrity Commission – Proposed reforms*, December 2018, p. 1.

48 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 1.

49 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 3.

50 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 3.

51 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 3.

52 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 7.

53 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 8.

54 Attorney-General's Department, *A Commonwealth Integrity Commission*, December 2018, p. 5.

Consideration by other parliamentary committees

Scrutiny of Bills Committee

1.41 The Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) commented on both the McGowan NIC bill and the Greens NIC bill.⁵⁵ The concerns raised by the Scrutiny of Bills Committee include the following:

- In circumstances where the National Integrity Commissioner will make a finding that is critical of a person, the National Integrity Commissioner is not always required to provide that person with an opportunity to be heard. This effectively excludes the right to a fair hearing.⁵⁶
- The bills confer on the National Integrity Commissioner a broad range of coercive powers to require persons to give information, answer questions, and produce documents and things.⁵⁷ The Scrutiny of Bills Committee raised similar concerns regarding the Whistleblower Protection Commissioner.⁵⁸
- The bills allow persons other than police officers to execute search warrants, which include powers to use force and to conduct personal searches, with no specific requirements as to those persons' qualifications or expertise.⁵⁹
- The bills would abrogate the privilege against self-incrimination, and the EM of each bill does not provide a rationale for this.⁶⁰
- The bills would abrogate legal professional privilege, and the EM of each bill does not provide a rationale for this.⁶¹
- The bills would introduce a number of offence-specific defences, which reverse the burden of proof.⁶²
- The bills would confer immunity from civil liability on certain persons performing functions under or in relation to the bill. The Scrutiny of Bills Committee stated that such provisions should be 'soundly justified', but the EM of each bill merely restates the terms of the provisions.⁶³

55 Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee), *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 29–43.

56 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 29–31.

57 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 31–33.

58 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, p. 42.

59 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 33–36.

60 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 36–37.

61 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 37–38.

62 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, pp. 40–41.

63 Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2018*, 5 December 2018, p. 43.

1.42 The Scrutiny of Bills Committee also commented on the NIPS bill.⁶⁴ The concerns raised by the Scrutiny of Bills Committee include the following:

- The introduction of offence-specific defences, which reverse the burden of proof, in relation to the unauthorised disclosure of protected information.⁶⁵
- In circumstances where the Standards Commissioner will make a finding that is critical of a person, the Standards Commissioner is not always required to provide that person with an opportunity to be heard. This effectively excludes the right to a fair hearing.⁶⁶
- The NIPS bill provides for the Governor-General to make regulations that may require that information or reports that are required to be given under prescribed provisions are also to be given to prescribed persons in specified circumstances. The Scrutiny of Bills Committee stated that significant matters such as this should be included in primary legislation unless a 'sound justification' is provided; the EM to the bill does not provide such a justification.⁶⁷

Parliamentary Joint Committee on Human Rights

1.43 It does not appear that the Parliamentary Joint Committee on Human Rights considered either of the NIC bills or the NIPS bill.⁶⁸

Related inquiries by Senate select committees

1.44 Two Senate select committees recently inquired into the establishment of a national integrity commission.

1.45 On 24 February 2016 the Senate resolved to establish the Select Committee on the Establishment of a National Integrity Commission to inquire into the adequacy of Australia's integrity framework, and whether a federal integrity commission should be established. It presented an interim report in May 2016 containing one recommendation, as follows:

The committee recommends that the Australian Government support current and sound future research into potential anti-corruption systems appropriate for Australia including the research led by Griffith University, in partnership with Transparency International Australia.⁶⁹

64 Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, 13 February 2019, pp. 11–16.

65 Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, 13 February 2019, pp. 11–12.

66 Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, 13 February 2019, pp. 12–14.

67 Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, 13 February 2019, pp. 15–16.

68 Parliamentary Joint Committee on Human Rights, *Index of bills and instruments considered by the committee: 2018*, as at 15 February 2019; Parliamentary Joint Committee on Human Rights, *Index of bills and instruments considered by the committee: 2019*, as at 15 February 2019.

69 Select Committee on the Establishment of a National Integrity Commission, *Interim report*, May 2016, p. 39.

1.46 On 8 February 2017 the Senate established a new committee, the Select Committee on a National Integrity Commission, with substantially the same terms of reference. That committee presented a final report in September 2017. The report made seven recommendations, including the following:

- 'The committee recommends that the Commonwealth government gives careful consideration to establishing a Commonwealth agency with broad scope and jurisdiction to address integrity and corruption matters.'⁷⁰
- 'The committee encourages the Senate to review the question of a national integrity commission following the release of the Open Government Partnership review and the Griffith University and Transparency International Australia et al research, with a view to making a conclusive recommendation based on the evidence available at that time.'⁷¹

Note on terminology

1.47 For clarity, in this report:

- the National Integrity Commission Bill 2018 is referred to as the McGowan NIC bill;
- the National Integrity Commission Bill 2018 (No. 2) is referred to as the Greens NIC bill;
- the McGowan NIC bill and the Greens NIC bill are referred to collectively as the NIC bills; and
- the National Integrity (Parliamentary Standards) Bill 2018 is referred to as the NIPS bill.

Acknowledgements

1.48 The committee thanks all submitters and witnesses for the evidence they provided to this inquiry.

70 Select Committee on a National Integrity Commission, *Report*, September 2017, p. 218.

71 Select Committee on a National Integrity Commission, *Report*, September 2017, p. 219.