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Office of the President

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By email: [redacted]

Dear Mr Tidball

Commonwealth Integrity Commission Exposure Draft

Thank you for the opportunity to provide feedback on the Commonwealth Integrity Commission Exposure Draft for inclusion in a submission made by the Law Council

The Queensland Law Society (**QLS**) supports the establishment of a Commonwealth Integrity Commission (**CIC**). In our 2019 Call to Parties Statement, we noted that an integrity commission would assist in the preservation of a strong and independent system of government, which is essential to maintaining public confidence in the administration of justice and the promotion of the separation of powers. We commend the Law Council for its longstanding advocacy on this issue.

We also commend the Government for progressing this legislation. However, there are some key areas in the exposure draft which, without amendment, will either be damaging to the effectiveness of the Commission or will interfere with an individual's fundamental legal rights. We have outlined the points below under the following headings:

1. **Objective of the legislation**
2. **Appointment process and efficacy of the Commission**
3. **Who can make a referral to the Commission**
4. **Clause 70 – offence**
5. **Legal professional privilege**
6. **Privilege against self-incrimination and derivative use of evidence**
7. **Open justice and procedural fairness**

There has been significant commentary about the proposed scope of the Commission, including critiques of the limited ability to refer a complaint and type of conduct that is referable.

We consider some of these criticisms are reasonable, however, it is also critical that a commission is not used, or is not seen to be used, for political gain or to cause political injury.

In our view, the recommendation below, relating to the appointment process, will address these legitimate concerns and allow for the widening of who is eligible to make a referral.

1. Objective of the legislation

QLS recommends the inclusion of an "objects" clause at the beginning of this draft legislation which outlines its purpose or objectives.

While clause 3 provides a "Simplified outline of the Act", it is more in the style of explanatory notes. An objects clause sets the tone for the legislation and can outline a purpose, or purposes, that every other provision in the legislation relates back to and supports.

These types of provisions are fundamental, particularly when a new body and jurisdiction is being established. They enable the new Commission, and those who interact with it, the ability to better interpret the operative provisions of the legislation by reference to the objectives of the legislation.

In its report, *For Your Information: Australian Privacy Law and Practice (ALRC Report 108)*[1], the Australian Law Reform Commission considered the importance of an objects clause in the context of reviewing the *Privacy Act 1988 (Cth)*, noting that these clauses "*can be used to resolve uncertainty and ambiguity*". The ALRC referred to section 15AA of the *Acts Interpretation Act 1901* (Cth) which states that:

> "*In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.*"

The ALRC's report recommended an objects clause be inserted into the *Privacy Act 1988 (Cth)*. We consider a similar approach should be taken with respect to this legislation.

Recommendation 1
An objects clause be inserted into the exposure draft which sets out the purpose and aims of the legislation.

2. Appointment process and efficacy of the Commission

Part 11 of the exposure draft sets out how the key roles of the Commission are to be appointed.

Clause 212 provides that a CIC office holder is to be appointed by the Governor-General by written instrument. However, the draft legislation does not prescribe how the Governor-General's decision is to be informed. A 'CIC office holder' is defined in the definitions section in clause 5 to mean:

[1] https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/5-the-privacy-act-name-structure-and-objects/the-objects-of-the-act/

- the Integrity Commissioner; or
- the Law Enforcement Integrity Commissioner; or
- the Public Sector Integrity Commissioner; or
- the Assistant Integrity Commissioner.

There is no explicit requirement for these appointments be made with bipartisan support. We consider this to be a fundamental design flaw of the scheme and is contrary to how similar schemes in other jurisdictions have been established and are thus able to function with the confidence of the public.

We make similar comments with respect to the Minister's appointment of the Commission's Inspector-General pursuant to clause 244 of the exposure draft.

In Queensland, the *Crime and Corruption Act 2001* establishes the Crime and Corruption Commission (**CCC**) and sets out, in section 228:

> **228 Prior consultation and bipartisan support for appointments**
>
> The Minister may nominate a person for appointment to the office of chairperson, deputy chairperson, ordinary commissioner or the chief executive officer only if—
>
> (a) the Minister has consulted with—
>
> (i) the parliamentary committee; and
>
> (ii) except for an appointment as chairperson—the chairperson; and
>
> (b) the nomination is made with the bipartisan support of the parliamentary committee.

The presence of this section in the Queensland legislation has generally prevented the CCC from being utilised for political purposes as each side of politics has given support to the appointment of key roles. We recommend that a similar provision be inserted into this legislation.

The exposure draft requires the appointment of a Parliamentary Joint Committee on the Commonwealth Integrity Commission (clause 257, Part 13). QLS supports the appointment of this Committee and the provisions in the exposure draft to ensure it is representative of the Parliamentary composition of the day. We also support the provisions relating to oversight.

However, we believe that the Committee's role could also extend to appointments. For example, in New South Wales, the *Independent Commission Against Corruption Act 1988*, provides:

> **64A Power to veto proposed appointment of a Commissioner or the Inspector**
>
> (1) The Minister is to refer a proposal to appoint a person as a Commissioner or Inspector to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.
>
> (2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.

(3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.

(4) A referral or notification under this section is to be in writing.

Effect of a partisan appointment process

The appointment processes and the individuals appointed under these processes to the Commission's lead roles are fundamental to the success of its functions. They will either instil or diminish confidence in the Commission. Should there be a lack of confidence in the Commission, there are likely to be fewer complaints made and a distrust of the investigation and reporting processes. Outcomes are unlikely to be accepted by both the subjects of the investigation and the community. The Commission will be criticised, avoided and therefore impotent.

The effectiveness of an integrity commission will be undermined if it appears to be, or is, political. The exposure draft has limited the ways in which a referral to the Commission can be made, specifically by limiting who is able to make a referral. While this limitation could potentially lessen the likelihood of the Commission being used for partisan purposes, it does not negate the risk. The limitation potentially creates more confidence issues as the Commission will be seen as ineffective or irrelevant if the scope of eligible complaints and complainants are inappropriately limited.

Limiting who is able to make a referral will also not overcome the perceptions created by the current appointment processes.

Recommendation 2

a. the exposure draft be amended to provide that a CIC officer holder and the Inspector-General are to be appointed with bipartisan support (however obtained); and/or

b. the exposure draft be amended to provide the Parliamentary Joint Committee with powers in relation to the appointment of a CIC officer holder and the Inspector-General.

3. Who can make a referral to the Commission

Clauses 33 to 47 of the exposure draft only permit certain people the opportunity to make a referral to the Commission in respect of certain types of corrupt conduct. Restricting referrals to the Commission in this way means, for example, that:

- a parliamentarian cannot refer a complaint or information to the Commission about corrupt conduct engaged in by a person in a government department or agency, or corrupt conduct engaged in by another parliamentarian[2];

[2] Pursuant to clause 35, a parliamentarian may only make a referral in respect of themselves, or their office and, may only do so if only if the parliamentarian reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed.

- a minister cannot refer a complaint or information to the Commission about corrupt conduct engaged in by another minister, a person in another minister's department, or another parliamentarian[3];
- an individual, including someone working in the Government or a member of the public, cannot refer a complaint or information to the Commission about corrupt conduct engaged in by:
    - a parliamentarian; or
    - a minister; or
    - a person in the employ of, or contracted to, a public sector agency, apart from a law enforcement agency[4].

These gaps in the Commission's purview will undermine its ability to be informed of corruption issues in the government and public sector and will reduce public confidence in the Commission to achieve its purpose and tackle corruption.

The effect of these provisions is that a person who is not a minister/parliamentarian, the head of an agency or a commonwealth integrity office holder cannot make a complaint directly to the Commission. In order for information about corrupt conduct to reach the Commission, in practice, that person will first need to provide the information to someone with the power to make the complaint and request that the second person exercise their discretion to do so.

There are some provisions in the exposure draft which require mandatory reporting, but for new allegations, these are typically limited to regulated entities or security agencies.[5]

This requirement to first pass information up the chain will add an additional layer of burden and delay to the process and may prejudice a subsequent investigation. It is also unclear what further options a person has if the person capable of making a referral does not do so in circumstances where they have this discretion.

The exposure draft therefore includes clear and unreasonable barriers to accessing the Commission, which we do not consider to be justified. We refer to our comments above about rectifying deficiencies with the appointment process. In our view, these amendments may address the drafters' apparent concerns regarding baseless, politically-motivated, or vexatious complaints.

It is inevitable, at least to some degree, that the Commission and its work will be the subject of politically-motivated action or discourse. While we consider it appropriate to take reasonable measures to prevent this, including by relying on bipartisan appointments and allowing the Commission to dismiss vexatious complaints, we do not consider it is reasonable or justified to limit the Commission's effectiveness by restricting its ability to be informed and respond to relevant information.

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[3] Clause 35 provides that that the responsible Minister for a regulated entity that is: a law enforcement agency, public sector agency, a higher education provider, a research body may refer to the Integrity Commissioner an allegation, or information, that raises a corruption issue that relates to the entity. However, unless the corruption issue is a law enforcement corruption issue, a responsible Minister may refer an allegation or information only if the responsible Minister reasonably suspects that the offence to which the corruption issue relates has been, or is being, committed.

[4] The only provision in Division 1 of Part 4 which explicitly refers to an "individual" or "person" is clause 44 a law enforcement corruption issue.

[5] See proposed Part 4, Division 1, Subdivision B

We refer again to the *Crime and Corruption Act 2001* (QLD) where Chapter 2, Part 3, Division 2 allows, in section 36, anyone to make a complaint about corruption.

Reasonable suspicion

The clauses permitting the referral of information and complaints by the Attorney-General, relevant minster, and parliamentarians provide that they may only do so in relation to a public sector corruption issue when they have a reasonable suspicion that an offence has been committed.[6]

There are several problems with this requirement. First, there will be an obvious impact on a person and their department, office, or entity under their control if a complaint is made, even if the Commission does not decide to pursue the complaint. The person in the position of deciding the "reasonable suspicion" threshold is not impartial. There may be occasion where a complaint is not pursued so that the person and/or their office etc is prevented from reputational and other damage and they will be able to cite that this threshold of a "reasonable suspicion" was not met.

We note the presence of clause 277 "concealing corrupt conduct" in the exposure draft, however, this offence only applies to specific regulated entities.

The "reasonable suspicion" threshold is particularly concerning as, as discussed above, they are some of the few people who can make a referral to the Commission about a public service corruption issue.

Clause 16(1)(a)(iii)

Finally, we hold a similar concern about the drafting of clause 16(2)(a)(iii) in the exposure draft which states, in relation to a staff member of a law enforcement agency, a corruption issue includes where a person "will, or may at any time in the future, engage in corrupt conduct".

There are significant issues with both requiring someone to make that assessment and with someone being accused, investigated and penalised for conduct they have not yet in fact undertaken. We consider the word "may" sets a particularly low bar.

Recommendation 3

a. The provisions in Part 4, Division 1 of the exposure draft be expanded to allow individuals to make a referral to the Commission and/or, individuals in the employ or connected with a minister, parliamentarian, or public sector entity be included in the persons permitted to make a referral to the Commission.

b. The "reasonable suspicion" test for public sector corruption issues should be reconsidered.

c. Clause 16(1)(a)(iii) should be removed from the exposure draft.

4. Clause 70 – offence

We hold some concerns about the inclusion of this offence in the exposure draft. On the one hand, an offence of this nature could assist to deter vexatious or nefarious complaints. However,

[6] See clauses 33, 34, 37, 42 & 46

in our view, such an offence would be better justified if the provisions permitting referrals were not so restrictive. We refer to our comments in the previous section.

As currently drafted, the persons permitted to make referrals, outside of those related to a law enforcement corruption issue, will be either the Attorney-General, a minister, a parliamentarian, the head of an agency (regulated entity or intelligence agency) or a Commonwealth integrity office holder (see clause 20(1)) and will be doing so in their capacity as persons appointed or elected to these roles.

Accordingly, there will already be consequences, depending on the circumstances, for making a false referral with the intent of causing detriment, including potentially under clause 278 of the exposure draft[7] and under existing, similar offences under other statutes. There may also be disciplinary action taken or the potential for private or public rebuke by superiors or colleagues (including political leaders and influencers).

Any offence should, and we note that clause 70 does, require an intent element. We also note the requirement that there be "*no basis on which a reasonable person could suspect that the offence to which the issue relates has been, or is being, committed*". These elements set a fairly high bar.

However, we are conscious that such an offence may be used to deter a person from making a referral. A person could be pressured by someone not wanting the referral to be made, using the offence (including the potential penalty of a term of imprisonment) to persuade someone not to proceed. For example, the issue could concern someone that the potential complainant does not have a good relationship with, raising the prospect that subclause (1)(e) could be established even if the person considers there to be corrupt conduct.

We understand that the Law Council will raise the issue of the need for better protection for whistle blowers, including consideration as to whether clause 279 (and clause 284) is sufficient. QLS supports reasonable measures to advance this cause. With the risk to a person's career and therefore livelihood from making a referral (in some circumstances, irrespective of whether it is progressed or dismissed), the added risk of a term of imprisonment could significantly stifle referrals.

The Commission should actively encourage referrals and publicly reassure complainants that their complaints will be examined without any adverse consequences for them, but for circumstances where the complaints are frivolous or vexatious. In these cases, there will need to be a determination about whether a decision not to pursue a complaint is sufficient and this decision may need to be balanced against the need to ensure that complainants are not deterred from making legitimate referrals.

Under proposed Division 4 of Part 4, a vexatious complainant (declared so by the Commission) is someone who makes repeated allegations. This appears at odds with clause 70 where an offence could be committed based on one referral. Again, the appropriate balance is needed to ensure vexatious complaints are identified, while at the same time encouraging appropriate referrals.

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[7] Section 137.1 of the *Criminal Code Act 1995* makes it an offence to give false or misleading information to, or omit a matter which therefore misleads, a Commonwealth entity. The office carries a penalty of imprisonment of 12 months. Although we make reference to clause 278, we query whether that offence is necessary given section 137.1.

We consider that the presence of this offence in the exposure draft should be reviewed based on the issues raised in this submission.

5. Legal professional privilege

Clause 96 of the exposure draft provides some protection of legal professional privilege. However, sub-clause 4 states:

> (4) If the legal practitioner refuses:
> (a) to give the information; or
> (b) to produce the document or thing;
> the legal practitioner must, if required by the Integrity Commissioner, give the Integrity Commissioner the name and address of the person to whom the communication was made (or by whom the communication was made).

This requirement is a clear breach of legal professional privilege, but will be permissible if explicitly provided for in this legislation.[8] This is extremely concerning. Disclosure of this type of information may confirm the identity of person not otherwise known to the Commission or agency and thus the power to compel these details could be used as a fishing exercise. Further, the requirement to disclose these details may also confirm that legal advice had been sought or obtained by the client which, in itself, could lead to adverse inferences being drawn about the legal practitioner's client.

Recommendation 4
Clause 96(4) should be removed from the exposure draft.

6. Privilege against self-incrimination and derivative use of evidence

Clause 97 deals with self-incrimination, essentially stating that a person is not excused from giving information or producing a document or thing on the ground where doing so would tend to incriminate them or expose them to a penalty.

The right to claim privilege against self-incrimination is a fundamental legal right and consequently, any breach of this right should only occur as a last resort. Fundamental rights of this nature underpin the rule the law and the justice system as a whole.

While there may be circumstances where compelling the provision of certain information is justified, the Commission should develop and adhere to guidelines (and should ensure other entities/agencies who they refer investigations to, or conduct investigations jointly with, do the same) to ensure other, more appropriate actions are taken to obtain this information before someone is compelled in this way.

Clause 97(3) provides that the information given, or the document or thing produced, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition or recovery of a penalty; or

[8] *Z v New South Wales Crime Commission* [2007] HCA 7

(c) a confiscation proceeding.

However, subclause (4) permits the use in:

(a) a confiscation proceeding, if the information was given, or the document or thing was produced, at a time when the proceeding had not commenced and was not imminent; or

(b) a proceeding for an offence against section 94 or 95; or

(c) a proceeding for an offence against section 137.1 or 137.2 of the Criminal Code (about false or misleading information or documents) that relates to this Act; or

(d) a proceeding for an offence against section 149.1 of the Criminal Code (about obstruction of Commonwealth public officials) that relates to this Act; or

(e) a disciplinary proceeding against the person if the person is a staff member of a regulated entity.

We note that subclause (5) states that (4) does not affect the admissibility or relevance of the information, document or thing for any other purpose and that the term "disciplinary proceeding" is defined broadly in clause 5. Therefore there is potential for information compelled from a person to be used against them in a disciplinary action or other setting.

We do not consider there is appropriate justification for allowing the information compelled from a person (particularly when the person's right to claim privilege has been abrogated) to be used as evidence in any action, including a disciplinary proceeding, not explicitly referred to in clause 97(4) or one not allowed by the Commission, for example under clause 176(1)(b)(ii).

There should be a clear prohibition against this use in the legislation.

Recommendation 5

a. Guidelines and/or procedures should be developed by the Commission, and adhered to by officers, staff and other entities conducting investigations and hearings with or for the Commission, to ensure that compelling information and documents etc where this will breach the right to claim privilege against self-incrimination will only occur as a last resort, with the steps/actions to be undertaken before this is done, clearly outlined.

b. Clause 97 should be amended to insert:

(d) a disciplinary proceeding other than a proceeding explicitly mentioned in section 97(4) or one that is otherwise initiated under this Act.

c. Clause 97(5) should be removed from the exposure draft.

7. Open justice and procedural fairness

Private hearings

Part 8, Division 3 outlines the process for conducting hearings. Clause 99(5) dictates that, "*(a) hearing for the purpose of investigating a corruption issue must be held in private to the extent that the hearing is dealing with a public sector corruption issue*". Similarly, clause 99(9) provides that:

> "(9) A hearing for the purpose of conducting a corruption inquiry must be held in private to the extent that it is dealing with corruption in, or the integrity of staff members of:

(a) public sector agencies; or
(b) higher education providers; or
(c) research bodies."

For other types of corruption, it appears that the Integrity Commissioner has some discretion to hold a hearing in public or private pursuant to clause 99(6) and (7).

Open justice is a fundamental tenet of our justice system and this should be promoted except in appropriate cases where there are concerns about safety and security. It may be that the rationale for these clauses is to negate the politicisation of a hearing's progress and outcome. However, such a concern does not necessarily outweigh the principles of open justice including that proceedings should be subjected to public and professional scrutiny.[9] The right balance must be struck between ensuring the Commission is able to operate effectively, without inappropriately protecting political sensitivities.

Transparency in the hearing process and of the conduct of all involved critical for achieving the purposes of the legislation and the Commission.

Provision of information, updates and reports

There are a number of provisions in the exposure draft which will allow the Commission, or an entity conducting an investigation at the request of the Commission, to withhold information, other updates and reports about an investigation from the public, and importantly, from individuals who have made a referral about a law enforcement agency.[10]

Generally, the clauses that deal with providing or releasing information contain exceptions for doing so, including if the release of the information would jeopardise an ongoing investigation. Many of these exceptions are usual and reasonable.

Therefore, it is concerning that some provisions do not require the release of information to inquirers and also that some provisions expressly prohibit the release of information altogether. The Attorney-General's power to certify non-disclosure could also be reviewed in this regard.[11]

Again we query how restricting access to the outcome, and reasons for the outcome, of an investigation accords with the principles of open justice. It will also adversely affect any assessment of how the Commission has conducted the specific process, and performed overall.

Where these updates, documents and reports are not provided to affected/interested individuals, this creates a clear denial of procedural fairness and natural justice.

This issue should also be something that is regularly reviewed by the Parliamentary Joint Committee.

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[9] https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-interim-report-127/10-fair-trial/open-justice/#:~:text=10.43%20Open%20justice%20is%20one,rule%20of%20the%20common%20law'.

[10] Examples of these provisions include:
• Pursuant to clause 82(14), final reports are not to be made public.
• Clause 81(5) permits the investigating entity to keep an interested person (a person who referred a law enforcement corruption issues under clause 44) updated on the investigations.

[11] See Part 15 of the exposure draft

Recommendation 5

The release of any information should only be restricted if the release would jeopardise an ongoing investigation or must otherwise be retained to preserve sensitive information.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Elizabeth Shearer
President