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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

National Integrity Commission Bill 2017

**EXPLANATORY MEMORANDUM
and
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Circulated by authority of
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National Integrity Commission Bill 2017

OUTLINE

The *National Integrity Commission Bill 2017* establishes a National Integrity Commission, bringing together and co-locating the independent oversight functions for:

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

The National Integrity Commission is established as an independent statutory agency and consists of the National Integrity Commissioner, the Law Enforcement Integrity Commissioner and the Independent Parliamentary Advisor.

The National Integrity Commissioner is concerned with corruption in relation to public officials and Commonwealth agencies and has full investigative powers, including conducting public and private hearings and summoning any person or agency to produce documents and appear before the Commissioner. The provisions in the Bill in relation to the National Integrity Commissioner dealing with corruption issues, conducting investigations, holding public inquiries, including powers requiring people to give evidence or produce documents, taking evidence at hearings, and applying for and executing search warrants are based on similar provisions in the *Law Enforcement Integrity Commissioner Act 2006*.

The Law Enforcement Integrity Commissioner is concerned with corruption in relation to national law enforcement agencies in accordance with the *Law Enforcement Integrity Commissioner Act 2006* and has the functions and powers conferred under that Act.

The Independent Parliamentary Advisor is concerned with providing independent confidential advice to ministers, parliamentarians, and former parliamentarians in relation to conflict of interest, ethics, proprietary and similar matters and providing advice on the development of codes of conduct.

The National Integrity Commission will operate in the federal jurisdiction and will not replace or over-ride state legislation. It establishes a provision for the ACT and Northern Territory to contract the National Integrity Commission to operate in respect of their territory, in the same way that the Commonwealth Ombudsman acts as the ACT Ombudsman.

FINANCIAL IMPACT

The bill will have no financial impact.

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1: Short Title

1. This clause provides that the Act may be cited as the *National Integrity Commission Act 2017*.

Clause 2: Commencement

2. This clause states that sections 1 and 2, and anything in the Act not specified in the table, will commence on the day the Act receives Royal Assent.
3. Section 3 to 180 will commence the day after the day on which the Consolidated Revenue Fund is appropriated under an Act to the Department in which this Act is administered for payment to the National Integrity Commission.
4. Schedule 1 will commence at the same time as the provisions covered by table item 2.

Clause 3: Objects of Act

5. 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.

Clause 4: Saving of powers, privileges and immunities

6. This clause provides that the Bill does not affect the powers, privileges and immunities of each House of Parliament, and of the members and committees of each House.

Clause 5: Application of Act

7. This clause provides that the National Integrity Commission will have jurisdiction within and outside Australia and every external Territory.

Clause 6: Definitions

8. This clause defines terms and expressions used frequently throughout the Bill in order to avoid doubt and clarify the intended meaning of each word for the specific purposes of the Bill.

Clause 7: Meaning of *corrupt conduct*

9. This clause provides for the definition of ***corrupt conduct*** as including any conduct that:
- a) adversely affects the honest or impartial exercise of functions by the Parliament, a Commonwealth agency or public officials by any person;
 - b) involves the dishonest exercise of functions by a public official;
 - c) involves a breach of public trust by a public official;
 - d) perverts the course of justice;
 - e) involves the misuse of information or material by a public official.

Furthermore, subclause 7(2) lists kinds of ***corrupt conduct***, such as blackmail, bribery and fraud, for the purposes of adversely affecting the exercise of functions by the Parliament, a Commonwealth agency or public officials.

Subclauses (3) and (4) provide for when conduct is able to be corrupt conduct even through it occurred before the commencement of the Bill or before a person became a public official. Subclause (5) provides that conduct can be corrupt conduct even though it occurred outside Australia. Subclause (6) provides that the specific mention of a kind of conduct does not limit the scope of any other provision in clause 7.

Subclause 7(7) provides that conduct does not amount to ***corrupt conduct*** unless it could involve a criminal offence, disciplinary offence, reasonable grounds for dismissing a public official or a substantial breach of a code of conduct. Subclause (8) provides that it does not matter if those proceedings or actions can no longer be brought.

Clause 8: Meaning of *corruption issue*

10. This clause provides that a ***corruption issue*** exists where public official has engaged, is engaging, or may at any time in the future engage, in corrupt conduct.

The capacity to investigate cases where corrupt conduct is foreseeable in the future makes the National Integrity Commissioner's role proactive in addressing corruption.

The clause also provides for investigations to be commenced in circumstances where the identity of public official alleged to be engaging in corrupt conduct is unknown. This provision is to ensure that corruption issues cannot be ignored because the person concerned has not been identified at the outset.

Part 2 – The National Integrity Commission

Division 1 – Introduction

Clause 9: Guide to this Part

11. This clause provides for the guide to this part.

Division 2 – Establishment

Clause 10: Establishment

12. This clause establishes the National Integrity Commission as a statutory agency with the National Integrity Commissioner as its head. The National Integrity Commission consists of integrity officers, Assistant National Integrity Commissioners and Assistant Law Enforcement Integrity Commissioners and staff.

Clause 11: Definition of *integrity officers*

13. This clause defines *integrity officers* as the National Integrity Commissioner, the Law Enforcement Integrity Commissioner and the Independent Parliamentary Advisor.

Divisions 3 – Functions and powers of the integrity officers

Clause 12: Definition of *national integrity commissioner functions*

14. This clause defines the *national integrity commissioner functions* as investigating and reporting on corruption issues, conducting public inquiries at the request of the Minister and collecting and analysing information on corruption issues to make recommendations to the Minister.

This clause also provides for the National Integrity Commissioner, on his or her own initiative or on request by the Minister, to report to the Minister on necessary or desirable, legislative or administrative, action in relation to corruption in Commonwealth agencies or the integrity of public officials. The National Integrity Commissioner may also, with the consent of the Prime Minister, enter into an arrangement to perform the functions of a territory integrity commission.

The National Integrity Commissioner also has functions related to advising and assisting public officials as to changes in the law or procedures to reduce the likelihood of corrupt conduct and educating and disseminating information on strategies to combat corrupt conduct. Other functions may be conferred on the National Integrity Commissioner by other provisions of the Bill or by another Act.

Clause 13: Definition of *law enforcement integrity commissioner functions*

15. This clause defines the *law enforcement integrity commissioner functions* as conferred under section 15 of the *Law Enforcement Integrity Commissioner Act 2006*. Other functions may be conferred on the Law Enforcement Integrity Commissioner by other provisions of the Bill or by another Act.

Clause 14: Definition of *independent parliamentary advisor functions*

16. This clause defines the *independent parliamentary advisor functions* as providing confidential advice to Ministers on their compliance with the Standards of Ministerial Ethics as revised from time to time or any other code of conduct, providing confidential advice to parliamentarians on matters such as codes of

conduct, allowances, conflicts of interest, issues of ethics or proprietary, or similar issues, providing a presiding officer or a parliamentary committee with advice on any matters, preparing practice guides and fact sheets. The clause also provides for the Independent Parliamentary Advisor to provide an annual report to parliament on the provision of advice to ministers and parliamentarians, without identifying the parties. Other functions may be conferred on the Independent Parliamentary Advisor by other provisions of the Bill or by another Act.

Clause 15: Functions and powers of the National Integrity Commissioner

Clause 16: Functions and powers of the Law Enforcement Integrity Commissioner

Clause 17: Functions and powers of the Independent Parliamentary Advisor

17. Clause 15, 16 and 17 provide for the powers of the *National Integrity Commissioner*, *Law Enforcement Integrity Commissioner* and *Independent Parliamentary Advisor*. The *National Integrity Commissioner* and the *Independent Parliamentary Advisor* have the power to do all things necessary to be done for or in connection with the performance of their functions. The *Law Enforcement Integrity Commissioner* has the powers conferred under Parts 9 and 12 of the *Law Enforcement Integrity Commissioner Act 2006*.

Part 3 – Dealing with corruption issues

Division 1 – Introduction

Clause 18: Guide to this Part

18. This clause provides and outline of this Part.

Division 2 – Referring corruption issues to National Integrity Commissioner

Clause 19: Referral of corruption issues

19. This clause provides that any person may refer an allegation or information that raises a corruption issue to the National Integrity Commissioner. A person may refer allegations or information on behalf of another person, a government agency or an association.

A person can opt to refer allegations or information anonymously. This is an important feature of the clause, because it is anticipated that people who raise corruption issues with the National Integrity Commissioner may work with, or be acquainted with the persons about whom the information or allegation relates.

Clause 20: Person making referral under section 19 may elect to be kept informed

20. This clause provides that the National Integrity Commissioner must ask a person who refers an allegation or information that raises a corruption issue to elect whether he or she wishes to be kept informed of the action taken in relation to the matter.

The function of the National Integrity Commissioner is not primarily to vindicate the rights of private complainants but to pursue indications of corruption, however they arise. It is likely that many referrals of allegations or information will be in the nature

of tip-offs or reports of criminal conduct. Nonetheless, this clause provides a mechanism for identifying those who may have a personal interest in a matter and wish to be treated as complainants.

Division 3 - How National Integrity Commissioner deals with referred corruption issues

Clause 21: How National Integrity Commissioner may deal with referred corruption issues

21. This clause provides for how the National Integrity Commissioner may deal with referred corruption issues. The National Integrity Commissioner may decide to investigate the corruption issue or not investigate the corruption issue. The National Integrity Commissioner may deal with the issues unless they are already being investigated by another Commonwealth agency, or the referral was frivolous, vexatious or not made in good faith, or where the corruption issue is the subject of court proceedings or the investigation is not warranted having regard to all the circumstances.

Clause 22: Advising person who refer corruption issue of decision about how to deal with corruption

22. This clause provides for the National Integrity Commissioner advising a person who refers a corruption issue of decisions about how to deal with the issue. If a person refers a corruption issue to the National Integrity Commissioner under clause 19 and elects to be kept informed of action taken in relation to the issue under clause 20, the National Integrity Commissioner must advise the person in writing of his or her decision about how to deal with the issue under clause 21, and the result of any reconsideration of how to deal with the corruption issue under clause 27. The National Integrity Commissioner does not have to notify the person if he or she is satisfied that doing so is likely to prejudice an investigation of a corruption issue. However, if circumstances change so that notifying the person would no longer prejudice the investigation, then the person's right to be advised is revived.

Clause 23: Advising person to whom referred corruption issue relates of decision about how to deal with corruption issue

23. This clause provides that the National Integrity Commissioner may advise a person to whom a referred corruption issue relates as to a decision about how to deal with the issue. There is no mandatory obligation for the National Integrity Commissioner to advise the person under this clause, because such an obligation might preclude an effective investigation of the issue in some cases.

Division 4 - National Integrity Commissioner dealing with corruption issues on own initiative

Clause 24: National Integrity Commissioner may deal with corruption issues on own initiative

24. This clause provides that if the National Integrity Commissioner becomes aware of an allegation or information that raises a corruption issue, the National Integrity Commissioner may deal with the issue on his or her own initiative. This includes an

allegation or information that the National Integrity Commissioner becomes aware of in the course of investigating or inquiring into another corruption issue.

Clause 25: Advising head of Commonwealth agency of decision to deal with corruption issue on own initiative

25. This clause provides that if the National Integrity Commissioner decides to deal with a corruption issue under clause 24 on his or her own initiative, he or she must advise the head of the relevant Commonwealth agency of his or her decision to deal with the matter in that way, or any decision made following reconsideration under clause 27. The agency head must be advised in writing and as soon as reasonably practicable after the decision is made. However, the National Integrity Commissioner need not advise the head of the agency if doing so is likely to prejudice an investigation or any action taken as a result.

Clause 26: Advising person of decision to deal with corruption issue on own initiative

26. This clause applies if the National Integrity Commissioner decides to deal with a corruption issue on his or her own initiative and the corruption issue relates to a person who is, or has been a public official. The National Integrity Commissioner may advise the public official of the decision to deal with the corruption issue in that way, or any decision made following reconsideration under clause 27. There is no mandatory obligation for the National Integrity Commissioner to advise the staff member under this clause, because such an obligation might preclude an effective investigation of the issue in some cases.

Division 5 – Reconsidering how to deal with a corruption issue

Clause 27: Reconsidering how to deal with a corruption issue

27. This clause provides that the National Integrity Commissioner may, at any time, reconsider how a corruption issue is to be dealt with. On that reconsideration, the National Integrity Commissioner may decide to adopt a new or an alternative method of investigation under subclause 21(1) or subclause 24(1). If the corruption issue is already being, or will be, investigated by another Commonwealth agency, the National Integrity Commissioner may decide to take no further action in relation to that issue, although an investigation by the National Integrity Commissioner is not precluded in these circumstances. The National Integrity Commissioner may also take no further action if the allegation or information which raises the corruption issue is frivolous, vexatious or not made in good faith or where the corrupt conduct has been, is or will be the subject of court proceedings.

Part 4 – Investigations by the National Integrity Commissioner

Division 1 – Introduction

Clause 28: Guide to this Part

28. This clause provides an outline for this Part.

Division 2 – Investigation

Clause 29: Application of Division

29. This clause provides that Division 2 dealing with Investigation applies if the National Integrity Commissioner investigates a corruption issue.

Clause 30: national Integrity Commissioner to determine manner of conducting investigation

30. This clause provides that the National Integrity Commissioner may conduct the investigation in such a manner as the National Integrity Commissioner thinks fit.

Clause 31: Opportunity to be heard

31. This clause provides that the National Integrity Commissioner must not disclose any opinions or findings that are critical of a Commonwealth agency or person in a report, unless the head of the agency or the person has been given an opportunity to appear, or have a representative appear before the National Integrity Commissioner to make submissions in relation to the subject matter.

Where the opinion or finding is critical of a person, the National Integrity Commissioner must provide the person with a statement setting out the opinion or finding and give the person a reasonable opportunity to be heard or make submissions. Where the opinion or finding is critical of an agency, the National Integrity Commissioner must provide the head of the agency with the same opportunities. The clause also provides for submissions to be made by a representative of the head of agency or person.

However, the National Integrity Commissioner does not have to give a person the opportunity to be heard where the National Integrity Commissioner is satisfied that a person may have committed a criminal offence, contravened a civil penalty provision or engaged in conduct which could be the subject of disciplinary proceedings or termination of employment/ appointment, and that an investigation or any related action would be compromised by giving the person the opportunity to make submissions.

Division 3 – Reporting

Subdivision A – Reporting during investigation

Clause 32: National Integrity Commissioner to keep person who referred corruption issue informed of progress of investigation

32. This clause provides that the National Integrity Commissioner must take reasonable steps to inform a person who refers a matter to the National Integrity Commissioner about the progress of the investigation if the person has elected to be kept informed under clause 20 as to the progress of an investigation

Subdivision B – Reporting at the end of investigation

Clause 33: Report on investigation

33. This clause provides that the National Integrity Commissioner must complete a report after an investigation of a corruption issue. The report must set out the

National Integrity Commissioner's findings, evidence, action taken or to be taken, recommendations and reasons. The National Integrity Commissioner may recommend termination of the employment of a person, or the adoption of measures to remedy deficiencies in policy, procedures or practices. The National Integrity Commissioner may exclude sensitive information, however, that information must be included in a supplementary report.

Clause 34: National Integrity Commissioner to give report to Prime Minister

34. This clause provides that the National Integrity Commissioner must give a copy of the report and any supplementary report to the Prime Minister.

Clause 35: Advising person who referred corruption issue of outcome of the investigation

35. This clause provides that the National Integrity Commissioner must also inform a person who refers a matter to the National Integrity Commissioner about the outcomes of the investigation if the person has elected to be kept informed under clause 20. However, if the National Integrity Commissioner is satisfied that advising the person is likely to prejudice an investigation or any related action, the National Integrity Commissioner can withhold advising the person until such time as the circumstances change to remove such prejudice.

Clause 36: Advising person whose conduct is investigated of outcome of the investigation

36. This clause provides that the National Integrity Commissioner may advise a person about the outcome of the investigation where the corruption issue relates to that person. The National Integrity Commissioner may provide the person with a copy of the whole or part of the report. However, the National Integrity Commission may withhold sensitive information if it is desirable to do so in the circumstances.

PART 5 – Public inquiries into corruption issues

Division 1 – Introduction

Clause 37: Guide to this part

37. This clause provides the outline to the Part.

Division 2 – Conducting a public inquiry

Clause 38: National Integrity Commissioner may conduct public inquiry

38. This clause provides that the National Integrity Commissioner may conduct a public inquiry into a corruption issue if satisfied it is in the public interest.

Clause 39: Publicising inquiry

39. This clause imposes a duty on the National Integrity Commissioner to invite submissions on issues that are the subject of the public inquiry.

Division 3 – Reporting

Clause 40: Report on inquiry

40. This clause provides that at the end of an inquiry the National Integrity Commissioner is required to prepare a report on the inquiry. The report must include the findings, evidence, action taken or proposed to be taken and recommendations.

The report may exclude “sensitive information” that it is desirable in the circumstances to exclude. When deciding whether to exclude sensitive information, the National Integrity Commissioner must take into account the public interest that would be served by including the information in the report, and the potential prejudicial consequences that might result from including the information in the report. If information has been excluded from the report, a supplementary report must be prepared by the National Integrity Commissioner with the excluded information and reasons for the exclusion.

Clause 41: Giving report to Prime Minister

41. This clause provides that at the conclusion of the inquiry, the National Integrity Commissioner must provide the Prime Minister with a copy of the report on the public inquiry prepared under clause 40 and any supplementary report. Under clause 157 the Prime Minister is required to table the report in Parliament, however there is no requirement for the Prime Minister to table a supplementary report.

Part 6 – National Integrity Commissioner’s powers in conducting investigations and public inquiries

Division 1 – Introduction

Clause 42: Guide to part

42. This clause provides an outline to this Part.

Division 2 – Requiring people to give information or produce documents or things

Clause 43: Request to person to give information or produce documents or things

43. This clause provides that the National Integrity Commissioner will be able to make requests to persons requiring them to provide information or produce documents or things for the purposes of investigating a corruption issue. All requests made under clause 43 must be made in writing, signed by the National Integrity Commissioner and served on persons (subclause 43(2)).

A person that has a request made to him or her under clause 43 must give the information in writing or produce the documents or things within the time specified in the request or such further time as the National Integrity Commissioner allows (subclause 43(4)).

A person will commit an offence if he or she fails to comply with a request made to him or her under clause 43. The offence is set out in clause 45 of the Bill.

To ensure that investigations into corruption issues are conducted efficiently, effectively and fairly, it is necessary to provide the National Integrity Commissioner with the power to compel the production of documents and information relevant to an investigation.

The type of documents or information that the National Integrity Commissioner will be able to request under clause 75 is limited to those that are necessary for the purposes of investigating a corruption issue.

Corruption issue is a term defined in clause 8 of the Bill.

Clause 44: National Integrity Commissioner may retain documents and things

44. This clause allows the National Integrity Commissioner to retain documents or things produced to him or her pursuant to a request made under clause 43. Under clause 44, the National Integrity Commissioner will be able to:

- Take possession of a document or thing,
- Make copies of a document or thing,
- Take extracts from a document, and
- Retain possession of a document or thing for as long as necessary for the purposes of the investigation for which the document or thing was requested.

Documents or things obtained pursuant to a request made under clause 43 will not be able to be retained indefinitely. Rather, the period of time that the National Integrity Commissioner can retain documents or things under clause 44 is limited to the period for which those documents or things are necessary for the purposes of the investigation for which they were requested.

At all times while the National Integrity Commissioner retains a document or thing obtained pursuant to a request made under clause 43, the National Integrity Commissioner must allow persons who would otherwise be entitled to inspect or view the document or thing to inspect or view the document or thing at the times that the person would ordinarily be able to do so (subclause 44(2)). Providing a power of inspection means that the person is not completely deprived of the document or thing.

Clause 44 is necessary to enable the National Integrity Commissioner to access documents and information relevant to an investigation into a corruption issue. It also preserves the chain of evidence, for example, should an investigation eventually lead to action being taken by prosecutorial authorities or regulators. This clause is similar to sections 2 and 6F of the Royal Commissions Act, section 18 of the Inspector-General of Intelligence and Security Act, sections 28 and 29 of the ACC Act, sections 9 and 13 of the Ombudsman Act and sections 18 and 19 of the Inspector-General of Taxation Act.

Subdivision B – Offence and related provisions

Clause 45: Failure to comply with National Integrity Commissioner's request

45. This clause provides that a person commits an offence if he or she fails to comply with a request made to him or her under clause 43 within the time period specified in the request.

A person is not excused from complying with a request made under clause 43 on grounds that production of the information or documents requested could incriminate them. The privilege against self-incrimination is abrogated in clause 49 of the Bill.

Clause 46: Legal professional privilege – information

Clause 47: Legal professional privilege – documents or things

Clause 48: Offences relating to claims for legal professional privilege

46. These clauses refer to legal professional privilege. A person must not fail to provide information or produce a document or thing to the National Integrity Commissioner on the ground of legal professional privilege unless a claim has been made to that effect to the National Integrity Commissioner within the time requiring the information or document or thing to be produced. In relation to a request to produce a document or thing legal professional privilege may be claimed if a court has found the document or thing to be subject to legal professional privilege.

A person commits an offence if they refuse to comply with a request under clause 43 and the National Integrity Commissioner has decided to reject a claim that the information, document or thing is subject to legal professional privilege. The maximum penalty for the offence is \$1,000 or imprisonment for 6 months.

Clause 49: Self-incrimination etc.

47. This clause provides that the privilege against self-incrimination is abrogated. This means that a person, requested to provide information, documents or things under clause 43 cannot refuse to produce the document, information or things on grounds that doing so could incriminate him or her.

The privilege is not completely abrogated; rather, a use immunity is provided (see subclauses 49(2) and (4)). However the use immunity is not available in five specified circumstances (see subclause 49(4)).

The use immunity operates where a person, prior to producing information or documents or things pursuant to a request under clause 43 claims that doing so may tend to incriminate or expose them to a penalty, the information or documents or things will not be admissible as evidence against the person in criminal proceedings or any other proceedings for the imposition or recovery of a penalty. There are five circumstances where this use immunity will not be available.

The use immunity will not be available, meaning that the information or documents or things will be able to be used in evidence, in:

- (a) Proceedings for an offence against clause 45 of the Bill – failure to provide information, documents or things requested by the National Integrity Commissioner under clause 43 of the Bill,
- (b) Confiscation proceedings – this term is defined in clause 5 of the Bill to mean proceedings under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*, or a corresponding law within the meaning of either of

- those Acts, but does not include a criminal prosecution for an offence under either of those Acts or a corresponding law,
- (c) Proceedings for an offence against section 137.1 or 137.2 of the *Criminal Code* – being offences for providing false or misleading statements or documents,
 - (d) Proceedings for an offence against section 149.1 of the *Criminal Code* – being an offence for obstructing a Commonwealth public official, or
 - (e) Disciplinary proceedings against the person if the person is an employee of the Commonwealth – ‘disciplinary proceedings’ is a term defined in clause 5 of the Bill and extends to proceedings against the person if they are an employee of the Commonwealth. This exclusion will only apply if the disciplinary proceedings are against an employee of the Commonwealth. That is, the use immunity will not be abrogated in respect of disciplinary proceedings that could be taken in respect of another profession (for example, the use immunity will exist for information, documents or things produced by a doctor so that they could not be used in disciplinary proceedings that might be taken by a medical professional association against that doctor, for example, for medical negligence).

Immunity on public interest grounds

A person is not excused from answering a question or providing information or documents or things when requested under clause 43, on the grounds that answering the question, or producing the information or documents or things would disclose:

- Legal advice given to a Minister or Commonwealth Government Agency, or
- A communication between another officer of a Commonwealth government agency and another person, if that disclosure is protected by legal professional privilege.

Commonwealth government agency is a term defined in clause 5 of the Bill.

Similarly, a person is not excused from answering a question or providing information or documents or things when requested under clause 43, on the grounds that answering the question, or producing the information or documents or things would breach a secrecy provision.

There is an exception however if disclosure would breach a taxation secrecy provision or a law enforcement secrecy provision. This means that if answering the question or disclosing the information or document or thing would breach a taxation secrecy provision or a law enforcement secrecy provision, the person will not be required to answer the question or disclose the information or document or thing and hence could not be held criminally responsible under clause 45 for failing to comply with a request made under clause 43.

‘Taxation secrecy provision’ and ‘law enforcement secrecy provision’ are terms defined in clause 5 of the Bill.

If a person answers a question or provides documents or information or things in response to a request made of him or her under clause 43, and that answer or disclosure constitutes a breach of a secrecy provision (other than a taxation secrecy provision or a law enforcement secrecy provision), subclause 49(7) provides that

the person cannot be liable to a penalty for an offence of breaching the secrecy provision.

Clause 49 also provides that it is no excuse for a person to refuse or fail to comply with a request made under clause 43 to answer a question or produce information or documents or things on grounds that doing so would be contrary to the public interest.

It is necessary to abrogate the privilege against self-incrimination to ensure that the National Integrity Commissioner can be given access to information, documents and things relevant to an investigation into a corruption issue. The inclusion of a use immunity in all but five limited cases provides a safeguard to persons that are required to answer questions or produce documents or information or things under a request made under clause 43 that compliance with that request cannot be used against them in criminal proceedings or proceedings for the imposition or recovery of a penalty (this includes civil penalty proceedings).

Clause 50: Protection of person required to give information or produce documents of things

48. This clause provides that a person who gives information or documents to the National Integrity Commissioner in response to a request made under clause 43 of the Bill has the same protection as a witness in proceedings of the High Court.

For example, witnesses will be afforded protections against threatening behaviour, intimidation, injury and violence. These protections arise from existing offences, such as those for threatening, intimidating and inflicting injury or violence upon a witness in Part III of the *Crimes Act*. Further, no action lies in relation to the evidence given by the witness in respect of words he or she uses in the course of the proceedings before the National Integrity Commissioner.

Division – Conducting hearings

Subdivision A – General provisions

Clause 51: National Integrity Commissioner may hold hearings

49. This clause confers powers on the National Integrity Commissioner to hold a hearing for the purpose of investigating a corruption issue or conducting a public inquiry.

The National Integrity Commissioner has a general power to regulate the conduct of proceedings at a hearing as he or she sees fit.

Hearing in relation to an investigation into a corruption issue

Subclause 51(3) confers power on the National Integrity Commissioner to hold the whole, or part of, a hearing into a corruption issue in public or in private. In determining whether to hold a hearing into a corruption issue in public or in private, subclause 51(4) requires the National Integrity Commissioner to have regard to whether:

- Evidence that may be given, or a matter that could arise, in the hearing is of a confidential nature, or relates to the commission (whether real, alleged or suspected) of an offence,
- The seriousness of the corruption issue,
- A person's reputation could be unfairly prejudiced if the hearing is held in public, and
- It is in the public interest for the hearing to be held in public.

In making the decision whether a hearing into a corruption issue should be held in public or private, the National Integrity Commissioner is also required to consider any other relevant matters.

Even where the National Integrity Commissioner determines that a hearing into a corruption issue is to be held in public, under clause 58 a witness can still request that his or her evidence be taken in private. Under subclause 58(3) the National Integrity Commissioner can allow evidence in a public hearing to be given in private if he or she considers it appropriate.

Hearing in relation to a public inquiry

Subclause 51(5) requires that a hearing into a public inquiry be held in public, however it also confers a discretion on the National Integrity Commissioner to direct that part of a hearing into a public inquiry be held in private.

It is necessary for the National Integrity Commissioner to have the discretion to hold part of a hearing into a public inquiry in private because subclause 58(1) of the Bill provides that certain evidence can only be given in private. Subclause 58(1) requires evidence to be given in private if the evidence would disclose:

- Legal advice given to a Minister or Commonwealth Government Agency, or
- A communication between another officer of a Commonwealth government agency and another person, if that disclosure is protected by legal professional privilege.

Subclause 58(1) also requires that evidence be given in private if giving the evidence would breach a secrecy provision.

Record of a hearing

Subclause 51(6) requires the National Integrity Commissioner to make a record of each hearing he or she conducts. Subclause 51(7) sets out certain matters that the National Integrity Commissioner must cause to be included in a record of a hearing. These are:

- Any document produced to the National Integrity Commissioner at the hearing, and
- Description of any thing (other than a document) produced to the National Integrity Commissioner at the hearing.

However, the National Integrity Commissioner will not be required to include these matters in the record of a hearing if he or she directs otherwise under subclause 51(7). A direction given by the National Integrity Commissioner under subclause 51(7) is not a legislative instrument.

The National Integrity Commissioner holds the discretion as to whether a hearing into a corruption issue will be heard in public or in private.

Clause 52: National Integrity Commissioner may summon person

50. This clause confers power on the National Integrity Commissioner to summon a person. Under subclause 52(1), the National Integrity Commissioner can serve a summons on a person to attend a hearing at a time and place specified in the summons for the purpose of giving evidence or producing documents or things specified in the summons. The summons must be in writing, signed by the National Integrity Commissioner and served on the person required to attend the hearing (subclause 52(2)).

If the hearing is held for the purpose of investigating a corruption issue and the summons requires the person to give evidence at the hearing, the summons must set out, to the extent that is reasonably practicable, the general nature of the matters that National Integrity Commissioner intends to question the person on (subclause 52(3)). The National Integrity Commissioner will not be required to set out the matters if he or she is satisfied that doing so would be likely to prejudice the investigation into the corruption issue, or any action that could be taken as a result of the investigation into the corruption issue (as examples, disciplinary action, criminal prosecution, or proceedings for a contravention of a civil penalty provision).

Although a summons requiring a person to attend a hearing to answer questions should set out the matters that the National Integrity Commissioner intends to question a person on, subclause 83(4) provides that if the matters are listed in the summons, the matters listed will not limit the ability of the National Integrity Commissioner to question the person on aspects of any corruption issue (whether or not it is the corruption issue that the hearing relates to).

Clause 74 provides that a person can apply for legal and financial assistance in respect of his or her attendance at a hearing.

Subclause 52(6) provides that a person that is summoned to appear as a witness at a hearing is entitled to be paid allowances for travel and other expenses. The regulations will prescribe the allowances. It is necessary for the allowances to be prescribed in the regulations so that the allowances can be adjusted in a timely manner to respond to changes in market conditions.

Failure to comply with a summons issued under clause 52 is an offence under clause 61 of the Bill.

It is also an offence for a person to disclose the existence of a summons, or information about a summons (see clause 61 of the Bill).

Clause 53: National Integrity Commissioner may take evidence outside Australia

51. This clause provides that if there are arrangements in place between Australia and another country that allow evidence to be taken in that other country for the purposes of a hearing held under the Bill, the National Integrity Commissioner may take evidence on oath or by affirmation in that country. Provided that use of the evidence is in accordance with Australia's arrangement with the other country, the

National Integrity Commissioner can use the evidence for the purposes of performing his or her functions, or exercising his or her powers, under the Bill.

Subdivision B – Procedure at hearing

Clause 54: Who may be represented at a hearing

52. This clause provides that those providing evidence at a hearing are entitled to be represented by a legal practitioner. Those not providing evidence at a hearing are also entitled to be represented by a legal practitioner if special circumstances exist and they have consent from the National Integrity Commissioner.

Clause 55: Who may be present at a hearing

53. This clause provides that, for a private hearing, the National Integrity Commissioner may determine the people who can be present during all, or part of the hearing. A determination made by the National Integrity Commissioner under subclause 55(1) is not a legislative instrument.

In any case however, the National Integrity Commissioner must allow all legal practitioners representing a person giving evidence to be present when the evidence is being given. The National Integrity Commissioner can also consent to a legal practitioner representing a person not giving evidence to be present.

If a witness is giving evidence at a hearing and there is another person present who is neither a staff member of the Commission nor a legal practitioner representing a person at the hearing, the National Integrity Commissioner must inform the witness that the person is present and give the witness an opportunity to comment on the person's presence.

Subclause 55(4) also provides, for the avoidance of doubt, that even if the National Integrity Commissioner fails to inform the witness that a person, who is neither a staff member of the Commission nor a legal practitioner representing a person at the hearing, is present at the hearing, or the National Integrity Commissioner does not give the witness the opportunity to comment on the person's presence at the hearing, the person is still entitled to be present at the hearing if the National Integrity Commissioner has determined this to be the case under subclause 55(1).

Subclause 55(5) creates a criminal offence. The offence applies if a person is present while evidence is being given in private at a hearing and the person is not authorised to be there. The only time a person can be taken to be authorised to be there is where:

- The person is giving evidence, or
- The person is a legal practitioner representing a person giving evidence,
- The person is a legal practitioner and even though he or she is not representing a person giving evidence, the National Integrity Commissioner has consented to him or her being present,
- The National Integrity Commissioner has determined under subclause 86(1) that the person can be present.

The offence is punishable by a maximum penalty of 12 months imprisonment.

Subdivision C – Taking evidence at hearing

Clause 56: Evidence on oath or by affirmation

54. This clause provides that the National Integrity Commissioner may require a witness at a hearing to take an oath or affirmation. Clause 56 confers power on the National Integrity Commissioner to administer an oath or affirmation to a witness.

The consequence of the power of the National Integrity Commissioner under subclause 56(1) to compel a witness to take an oath or affirmation is that hearings held by the National Integrity Commissioner under the Bill are characterised as 'judicial proceedings' under Part III of the Crimes Act. This means that the offences attaching to judicial proceedings as set out in Part III of the Crimes Act are applicable to hearings conducted under the Bill. For example, offences for giving false testimony, fabricating evidence, intimidation of witnesses, corruption of witnesses, deceiving witnesses, destroying evidence etc are available.

If the National Integrity Commissioner is taking evidence from a witness overseas, as he or she is authorised to do under clause 53 of the Bill, the National Integrity Commissioner is empowered by subclause 56(2) to administer an oath or affirmation on the witness. If the National Integrity Commissioner does administer an oath or affirmation on a witness overseas, subclause 56(2) requires the National Integrity Commissioner to ensure that the oath or affirmation is administered in accordance with the arrangement made between Australia and the other country for the taking of that evidence (this is the same 'arrangement' referred to in clause 53 of the Bill) and in accordance with the laws of that other country.

An oath or affirmation administered by the National Integrity Commissioner under clause 56 is an oath or affirmation that the evidence the witness will give will be true.

Under subclause 56(4) the National Integrity Commissioner has a discretion to allow a person who is attending a hearing who has been sworn or has made an affirmation to give evidence at the hearing by tendering a written statement and verifying it by oath or affirmation.

Failure to take an oath or make an affirmation if requested by the National Integrity Commissioner is an offence under clause 62 of the Bill. The offence is punishable by a maximum penalty of two years imprisonment. Clause 67 of the Bill abrogates the privilege against self-incrimination for this offence.

Conferring power on the National Integrity Commissioner to compel a witness to take an oath or affirmation ensures the efficacy of evidence given in a hearing.

Clause 57: Examination and cross-examination of witnesses

55. This clause provides that the National Integrity Commissioner can allow for a witness to be examined and cross-examined during a hearing. However the only persons who the National Integrity Commissioner can authorise to conduct examination and cross-examination are:

- Counsel assisting the National Integrity Commissioner generally,
- Counsel assisting the National Integrity Commissioner in the investigation or public inquiry to which the hearing relates,
- Persons summoned, or otherwise authorised under the Bill, to appear before the National Integrity Commissioner, and
- Legal practitioners representing a person at the hearing.

This clause provides for a way for evidence of a witness to be adduced and tested during a hearing. It is similar to section 6FA of the Royal Commissions Act.

Clause 58: Giving evidence in private

56. This clause relates to the giving of evidence in private.

Certain evidence must be given in private

Subclause 58(1) of the Bill provides that certain evidence can only be given in private. Subclause 58(1) requires evidence to be given in private if the evidence would disclose:

- Legal advice given to a Minister or Commonwealth Agency, or
- A communication between another officer of a Commonwealth agency and another person, if that disclosure is protected by legal professional privilege.

Subclause 58(1) also requires that evidence be given in private if giving the evidence would breach a secrecy provision.

There is an exception to the requirement to give evidence at all if disclosure would breach a taxation secrecy provision or a law enforcement secrecy provision. If answering the question or disclosing information or a document or thing would breach a taxation secrecy provision or a law enforcement secrecy provision, the person will not be required to answer the question or disclose the information or document or thing.

Person may request that certain evidence be given in private

Under subclause 58(2), a witness who is giving evidence at a public hearing can request that the evidence be given in private if the evidence relates to the profits or financial position of a person and the taking of the evidence in public would be unfairly prejudicial to the interests of that person.

Under subclause 58(3), the National Integrity Commissioner has the discretion to allow the evidence to be given in private if he or she considers it appropriate.

Clause 59: Directions in relation to confidentiality

57. This clause provides for directions in relation to confidentiality.

Prohibition of limitation on publication

Subclause 59(1) confers power on the National Integrity Commissioner to issue a direction limiting or preventing the publication of evidence, documents and descriptions of things produced to the National Integrity Commissioner during a hearing. Under subclause 59(1) the National Integrity Commissioner can also prevent or limit the publication of information that could enable the identification of a person who has given evidence at a hearing, or the fact that the person has given, or may be about to give, evidence at the hearing.

The Integrity Commissioner has a discretion whether to issue a direction under subclause 59(1) unless the hearing is being held in private and the National Integrity Commissioner is satisfied that failure to give a direction might prejudice a person's safety or reputation, or the fair trial of a person who has been or may be charged with an offence. In such cases, subclause 59(2) removes the National Integrity Commissioner's discretion and requires him or her to issue a direction under subclause 59(1).

Failure to comply with a direction issued by the National Integrity Commissioner under subclause 59(1) is an offence under subclause (6), punishable by a maximum penalty of 12 months imprisonment.

Under subclause 59(3), the National Integrity Commissioner has a limited ability to vary or revoke a direction given under subclause 59(1). The National Integrity Commissioner cannot vary or revoke a direction if the National Integrity Commissioner is satisfied that doing so might prejudice a person's safety or reputation or the fair trial of a person who has been or may be charged with an offence.

Any variation to, or revocation of, a subclause 59(1) direction must be given in writing.

Court certificate in relation to evidence in respect of which a direction has been given

Where a person has been charged with an offence, before a federal court or a court of a State or Territory, and the court considers it to be desirable in the interests of justice that particular evidence that is the subject of a direction given by the National Integrity Commissioner under subclause 59(1) be made available to the person or a legal practitioner representing the person, the court is empowered to give the National Integrity Commissioner a certificate to that effect. If the National Integrity Commissioner is given a certificate by a court under subclause 59(4), he or she must make the evidence available to the court.

If the National Integrity Commissioner provides evidence to a court pursuant to a certificate issued by the court under subclause 59(4), the court may, after examining the evidence, make the evidence available to the person charged with the offence concerned, or to a legal practitioner representing the person, provided that the court is satisfied that the interests of justice so require (subclause 59(5)). The court makes the final determination whether the evidence should be passed to the defendant, or the defendant's legal practitioner.

Offence

Subclause 59(6) makes it an offence for a person to contravene a direction given to him or her by the National Integrity Commissioner under subclause 59(1).

The offence is punishable by a maximum penalty of 12 months imprisonment.

Subdivision D – Prohibitions against disclosing information about a summons

Clause 60: Disclosure of summons may be prohibited

58. This clause provides that if a summons has been served on a person under clause 52 requiring the person to attend a private hearing, under subclause 60(2) the National Integrity Commissioner has a general discretion (limited by subclauses 60(3)-(5)) to include a notation in the summons preventing or limiting disclosure of information about the summons or any official matter connected with the summons.

Under subclause 60(3) the National Integrity Commissioner will be required to include a notation (no discretion) if the National Integrity Commissioner is satisfied that failure to include a notation would reasonably be expected to prejudice the safety, reputation or fair trial of a person, or an investigation or action taken as a result of an investigation, whether that investigation relates to the hearing or another corruption issue.

If the National Integrity Commissioner has a discretion whether to include a notation in a summons (that is, subclause 60(3) does not apply), subclause 60(4) provides that the National Integrity Commissioner can only include the notation if satisfied that failure to do so might prejudice the safety, reputation or fair trial of a person, or an investigation or action taken as a result of an investigation, whether that investigation relates to the hearing or another corruption issue, or would otherwise be contrary to the public interest. If none of these factors are present, subclause 60(5) provides that the National Integrity Commissioner cannot include a notation in a summons.

Written statement to accompany notation

If a notation is included in a summons, subclause 60(6) requires that the summons must be accompanied by a written statement that sets out the rights and obligations conferred and imposed by clause 61 of the Bill.

Cancellation of a notation

Subclause 60(7) provides that a notation to a summons is cancelled if the National Integrity Commissioner concludes the subject investigation and any criminal proceedings resulting from the investigation have commenced.

If a notation is cancelled, subclause 60(8) requires the National Integrity Commissioner to advise the person that was served the summons of the cancellation in writing.

This clause is designed to prevent a disclosure which could lead to the destruction, or alteration of evidence, intimidation of witnesses etc. Disclosing the mere existence of an investigation may prompt actions of those under investigation, detrimentally affecting the National Integrity Commissioner's outcome. However, a specified circumstance allowing disclosure is likely to be in order to obtain legal advice.

Relationship of notation with Privacy Act

Subclause 60(9) provides that where a notation has been made on a summons, credit reporting bodies are prohibited from making a note about any disclosure of personal information they make about an individual unless the notation is cancelled. This is relevant because credit reporting agencies would otherwise be required to

make a note about that disclosure in the individual's credit information file (subsection 20E(5) of the Privacy Act).

Clause 61: Offences of disclosure

59. This clause provides for offences in relation to disclosure.

Offence

Subclause 61(1) creates a criminal offence where a person who has been served with a summons (under clause 52 of the Bill) that includes a notation (included on the summons under clause 60 of the Bill) and the person discloses the existence of, or any information about, the summons or any official matter connected with the summons. The elements of the offence will only be satisfied if the prosecution can prove that the notation was not cancelled by subclause 60(7) and five years has not passed since the summons was served on the person.

The offence is punishable by a maximum penalty of 12 months imprisonment.

Defence

Subclause 61(2) provides a defence to the offence in subclause 61(1) where the disclosure was made:

- In circumstances permitted by the terms of the notation,
- To a legal practitioner for the purpose of obtaining legal advice or representation in relation to the summons,
- To a legal aid officer for the purpose of obtaining assistance in relation to the summons, or
- Where the person is a body corporate—to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons.

If a defendant wishes to rely on the defence in subclause 61(2), he or she will bear an evidentiary burden in relation to the matters set out in subclause 61(2). This is because of the operation of section 13.3 of the Criminal Code. It is appropriate for the defendant to bear the burden of proving these matters because they are matters that, by their nature, are within the knowledge of the defendant.

Offence

Subclause 61(3) creates a criminal offence where a person who has been served with a summons (under clause 52 of the Bill) that includes a notation (included on the summons under clause 60 of the Bill) and the person discloses the existence of, or any information about, the summons or any official matter connected with the summons. The elements of the offence will only be satisfied if the prosecution can prove that the notation was not cancelled by subclause 60(7) and five years has not passed since the summons was served on the person.

The offence is punishable by a maximum penalty of 12 months imprisonment.

Defence

Subclause 61(4) provides a defence to the offence in subclause 61(3) where the disclosure was made:

- if the person is an officer or agent of a body corporate referred to in paragraph (2)(d):
 - to another officer or agent of the body corporate for the purpose of ensuring compliance with the summons,
 - to a legal practitioner for the purpose of obtaining legal advice or representation in relation to the summons, or
 - to a legal aid officer for the purpose of obtaining assistance under section 74 in relation to the summons, or
- if the person is a legal practitioner—for the purpose of giving legal advice, making representations, or obtaining assistance in relation to the summons, or
- if the person is a legal aid officer—for the purpose of obtaining legal advice or representation in relation to the summons.

If a defendant wishes to rely on the defence in subclause 61(4), he or she will bear an evidentiary burden in relation to the matters set out in subclause 61(4). This is because of the operation of section 13.3 of the Criminal Code. It is appropriate for the defendant to bear the burden of proving these matters because they are matters that, by their nature, are within the knowledge of the defendant.

Offence

Subclause 61(5) creates a criminal offence where a person who has been served with a summons (under clause 52 of the Bill) that includes a notation (included on the summons under clause 60 of the Bill) and the person makes a record of, or discloses the existence of, or any information about, the summons or any official matter connected with the summons. The elements of the offence will only be satisfied if the prosecution can prove that the notation was not cancelled by subclause 60(7) and five years has not passed since the summons was served on the person.

The restrictions of disclosure are imposed to ensure the quality of investigations and to protect the nature of any proceedings. The offences are aimed at preventing investigative work from being compromised by the disclosure of information that could infer the identity of a witness or the existence of an investigation.

Subclause 61(6) provides that a reference in clause 61 to disclosing the existence of something extends to the disclosure of information from which a person could reasonably be expected to infer its existence.

Subdivision E – Offences in relation to hearings

Clause 62: Offences

60. This clause outlines various offences for failing to comply with a summons served by the National Integrity Commissioner.

Offence for failure to attend hearing

Subclause 62(1) makes it an offence for a person to fail to attend or report from day to day at a hearing if required to do so under a summons.

There is an exception to this offence where the defendant can prove that the National Integrity Commissioner excused him or her from attending the hearing. The defendant will bear an evidentiary burden to prove that he or she was excused if he or she wishes to rely on this exception. The defendant bears the evidentiary burden because of the operation of section 13.3 of the Criminal Code.

The offence is punishable by a maximum penalty of 12 months imprisonment.

Failure to swear an oath or make an affirmation

Subclause 62(2) makes it an offence for a person who is served with a summons to attend a hearing to fail to be sworn or make an affirmation at the hearing.

The offence is punishable by a maximum penalty of 2 years imprisonment.

Failure to answer questions

Subclause 62(2) also makes it an offence for a person who is served with a summons to attend a hearing to fail to answer questions that the National Integrity Commissioner requires the person to answer at the hearing.

This offence is punishable by a maximum penalty of 2 years imprisonment.

Failure to produce a document or thing

Subclause 62(4) makes it an offence for a person to fail to produce a document or thing the person was required to produce under a summons served on them by the National Integrity Commissioner.

This offence is punishable by a maximum penalty of 2 years imprisonment.

Clause 63: Contempt

61. This clause creates three types of offences that support the National Integrity Commissioner's power to control the proceedings of hearings and address improper behaviour. The offences will preserve the integrity and due conduct of proceedings.

Subclause 63(1) makes it an offence for a person to insult, disturb or use insulting language toward another person where that other person is the National Integrity Commissioner. The offence will only be made out if the person can prove that the person knew that the other person was the National Integrity Commissioner, and was holding a hearing in the performance of his or her functions, or the exercise of his or her powers, as the National Integrity Commissioner. This offence is punishable by a maximum penalty of 6 months imprisonment.

Subclause 63(2) makes it an offence for a person to create a disturbance or take part in creating or continuing a disturbance in or near a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry. The offence will only be made out if the prosecution can prove that the person knew that the place is a place where a hearing is being held for the purpose of investigating a corruption issue or conducting a public inquiry. This offence is punishable by a maximum penalty of 6 months imprisonment.

Subclause 63(3) makes it an offence for a person to interrupt a hearing that is being held for the purpose of investigating a corruption issue or conducting a public inquiry. It is also an offence under subclause 63(3) for a person to do an act or thing that, if the hearing were being held in a court of record, would constitute contempt of that court. This offence is punishable by a maximum penalty of 6 months imprisonment.

Clauses 64: Legal professional privilege – answer to question

Clause 65: Legal professional privilege – documents or things

Clause 66: Offences relating to claims for legal professional privilege

62. These clauses contain provisions relating to legal professional privilege in similar terms as clauses 46, 47 and 48 above.

Clause 67: Self-incrimination etc

63. This clause abrogates the privilege against self-incrimination. This means that a person, summoned under clause 52 to answer questions, provide information, documents or things at a hearing cannot refuse to produce the document, information or things on grounds that doing so could incriminate him or her. This clause is in similar terms as clause 49 above.

Clause 68: National Integrity Commissioner may apply for order that witness deliver his or her passport

64. This clause gives the National Integrity Commissioner standing to apply to a Judge of the Federal Court for an order that a person deliver his or her passport to the National Integrity Commissioner. The National Integrity Commissioner can only apply to the Judge if:

- (i) the person has been served with a summons under clause 52 of the Bill to attend a hearing into a corruption investigation or public inquiry, or the person has already attended a hearing in relation to a corruption investigation or public inquiry to give evidence or produce documents or things, and
- (ii) there are reasonable ground for believing that the person may be able to give evidence that is relevant to the investigation or public inquiry, and
- (iii) there are reasonable grounds for suspecting that the person has, in his or her possession, custody or control, a passport issued to him or her, and
- (iv) there are reasonable grounds for suspecting that the person intends to leave Australia.

In applying for an order under subclause 68(1), subclause 68(2) requires that the National Integrity Commissioner give the Judge the information on oath or by affirmation.

This clause is aimed at preserving the evidence of witnesses by assuring their attendance at a hearing to provide information, documents, things or testimony where there is a reasonable suspicion that the witness may leave Australia before providing that evidence.

Clause 69: Court order

65. This clause allows the Federal Court to make an independent decision about whether a person's passport should be submitted to the National Integrity Commissioner.

Clause 70: Applying for a warrant to arrest witness

66. This clause confers power on an authorised officer to apply to a Judge of the Federal Court of Australia, or of the Supreme Court of a State or Territory, for a warrant to arrest a person. An authorised officer can only make an application to a court under subclause 70(1) if he or she has reasonable grounds to believe that the person falls within one of the three categories that follow:

- (i) The person has been ordered to deliver his or her passport to the National Integrity Commissioner (whether or not the person has complied with the order) and is likely to leave Australia for the purpose of avoiding giving evidence at a hearing before the National Integrity Commissioner, or
- (ii) The person has been served with a summons issued under clause 52 and has either absconded or is likely to abscond, or is otherwise attempting, or likely to attempt, to evade service of the summons, or
- (iii) The person has committed an offence under subclause 62(1) or is likely to do so.

In making an application under subclause 70(1), subclause 70(2) requires that the authorised officer give the Judge the information required in subclause 70(1) either on oath, or by affirmation.

Clause 71: Warrant for arrest

67. This clause provides for the issue of a warrant for arrest. If a Judge, while sitting in Chambers, is satisfied on the evidence that there are reasonable grounds for believing that the matters set out in subclause 70(1)(a) or 70(1)(b) or 70(1)(c) are met, subclause 71(1) confers power on the Judge to issue a warrant authorising the authorised officer to arrest the person.

Subclause 71(2) provides that, for the purpose of executing a warrant issued under subclause 71(1), if the authorised officer executing the warrant, or an assisting officer, believes on reasonable grounds that the person to whom the warrant relates is on certain premises, the authorised officer or assisting officer is authorised to break into, and enter, those premises.

However, if the premises are a dwelling house, subclause 71(3) limits the ability of the authorised officer or assisting officer to enter the premises. Subclause 71(3) prohibits the authorised officer executing the warrant, or assisting officer, from entering a dwelling house at any time during the period commencing at 9 pm on a day and ending at 6 am on the following day unless the authorised officer or assisting officer believes on reasonable grounds that it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time.

In arresting a person under a warrant issued under subclause 71(1), subclause 71(4) prohibits the authorised officer executing the warrant, or assisting officer, from using more force, or subjecting the person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the person after the arrest.

Under subclause 71 (5) a warrant issued under subclause 71(1) can be executed even if the authorised officer does not have a copy of the warrant in his or her possession at the time that the warrant is executed.

Subclause 71 (6) requires the authorised officer executing a warrant issued under subclause 100(1), or an assisting officer who arrests the person to whom the warrant relates, to inform the person, at the time of the arrest, of the reason for which he or she is being arrested. For the purposes of informing the person under subclause 71(6), subclause 71(7) provides that it is sufficient if the person is informed of the substance of the reason. That is, it is not necessary that this be done in language of a precise or technical nature.

There is an exception to the requirement on an authorised officer or assisting officer under subclause 71 (6) to inform the person, at the time of the arrest, of the reason for which he or she is being arrested. Subclause 71(8) provides that the requirement on an authorised officer or assisting officer under subclause 71(6) to inform the person, at the time of the arrest, of the reason for which he or she is being arrested does not apply if:

- the person should, in the circumstances, know the substance of the reason for which he or she is being arrested, or
- the person's actions make it impracticable for the authorised officer executing the warrant (or an assisting officer making the arrest) to inform the person of the reason for which he or she is being arrested.

Subclause 71(9) provides that nothing in clause 71 prevents the arrest of a person in accordance with any other law (such as the Crimes Act).

Definitions

Subclause 71 (10) sets out particular definitions for the terms 'dwelling house' and 'Judge' for the purposes of the operation of clause 71.

Subclause 71(10) provides that, for the purposes of clause 71, 'dwelling house' includes a conveyance, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night.

Subclause 71(10) provides also that 'Judge' means a Judge of the Federal Court of Australia, or a Judge of the Supreme Court of a State or Territory.

Clause 72: Powers of Judge in relation to person arrested

68. This clause provides for the powers of a Judge in relation to a person arrested. Subclause 72(1) provides that a person who is arrested under a warrant issued under clause 71 must be brought before a Judge as soon as practicable after the arrest.

Following the person being brought before the Judge in accordance with subclause 72(1), subclause 72(2) confers power on the Judge to:

- (a) Grant the person bail on such security as the Judge thinks fit and on such conditions as the Judge thinks are necessary to ensure that the person appears as a witness at a hearing before the National Integrity Commissioner, or

- (b) Order that the person continue to be detained for the purpose of ensuring that the person appears as a witness at a hearing before the National Integrity Commissioner, or
- (c) Order that the person be released.

Where a person is detained under subclause 72(2)(b), subclause 72(3) requires that the person must be brought before a Judge within the time fixed by the Judge on the person's last appearance before a Judge, or if a Judge has not fixed a time, within 14 days after the person was last brought before a Judge.

Subclause 72(4) provides a particular definition of 'Judge' for the purposes of the operation of clause 72. Subclause 72(4) provides that, for the purposes of clause 72, 'Judge' means a Judge of the Federal Court of Australia, or a Judge of the Supreme Court of a State or Territory.

Subdivision G – Miscellaneous

Clause 73: National Integrity Commissioner may retain documents or things

69. This clause allows the National Integrity Commissioner to retain documents or things produced to him or her pursuant to a summons issued under clause 52. Under clause 73, the National Integrity Commissioner will be able to:

- Take possession of a document or thing,
- Make copies of a document or thing,
- Take extracts from a document, and
- Retain possession of a document or thing for as long as necessary for the purposes of the investigation or public inquiry for which the document or thing was requested.

Documents or things obtained pursuant to a summons issued under clause 52 will not be able to be retained indefinitely. Rather, the period of time that the National Integrity Commissioner can retain documents or things is limited to the period for which those documents or things are necessary for the purposes of the investigation or public inquiry for which they were requested.

At all times while the National Integrity Commissioner retains a document or thing obtained pursuant to a summons issued under clause 52, the National Integrity Commissioner must allow persons who would otherwise be entitled to inspect or view the document or thing to inspect or view the document or thing at the times that the person would ordinarily be able to do so (subclause 73(2)). Providing a power of inspection means that the person is not completely deprived of the document or thing.

Clause 74: Person may apply for legal and financial assistance

70. This clause provides for a person who is summoned under clause 52 to attend a hearing may apply to the Attorney-General for assistance in respect of his or her attendance at the hearing, or his or her representation at the hearing by a legal practitioner.

Under subclause 74(2), a person who is not giving evidence at a hearing before the National Integrity Commissioner; and is being represented at the hearing by a legal

practitioner with the consent of the National Integrity Commissioner, may apply to the Attorney-General for assistance in respect of that representation.

Under subclause 74(3), the Attorney-General can authorise the Commonwealth to provide a person who has applied for assistance under subclause 74(1) or (2) with financial or legal assistance in respect of the person's attendance at the hearing or the person's representation at the hearing by a legal practitioner, if the Attorney-General is satisfied that it would involve substantial hardship to the person to refuse the application or the circumstances of the case are of such a special nature that the application should be granted.

Subclause 74(4) provides that Legal or financial assistance may be given unconditionally or subject to such conditions as the Attorney-General determines.

Subclause 74(5) provides that an instrument that determines the conditions on which legal or financial assistance may be given is not a legislative instrument.

Clause 75: Protection of National Integrity Commissioner etc.

71. This clause provides that the National Integrity Commissioner and any Assistant National Integrity Commissioner have the same protection and immunity as a Justice of the High Court whilst performing their duties, obligations and exercising their powers. A legal practitioner assisting the National Integrity Commissioner or representing a person and witnesses before the National Integrity Commissioner have the same protection as the respective roles appearing in the High Court.

Clause 76: Protection of witnesses etc.

72. This clause provides protections for witnesses at a hearing before the National Integrity Commissioner.

Division 4 – Search warrants

Subdivision A - Preliminary

Clause 77: Application to things under the control of a person

73. This clause prescribes that the persons subject to search warrants under the Division will be the "possessor"- a person who has the control of a thing in any place, even if someone else has actual possession or custody of the thing.

Subdivision B – Applying for a search warrant

Clause 78: Authorised office may apply for a search warrant

74. This clause sets out the process for applications for warrants to search premises and persons. The clause makes a distinction between applications for an investigation warrant and applications for an offence warrants.

An investigation warrant will be sought where there is suspicion of evidential material relevant to an investigation of a corruption issue or public inquiry. Along similar lines to section 4 of the *Royal Commissions Act 1902*, subparagraph 78 (1)(b) provides that an investigation warrant to search premises will only be available where the authorised officer has reasonable grounds for believing that if a

person was served with a summons to produce the evidential material it would be concealed, mutilated, lost or destroyed.

An offence warrant will be sought in more definitive circumstances where there is suspicion of evidential material relevant to a particular offence against a law of the Commonwealth.

An authorised officer may apply for a warrant to search premises, carry out an ordinary search or a frisk search of a person.

An authorised officer must give information on oath or affirmation of particulars of applications and outcomes of previous warrants sought or executed on the subject persons or premises in addition to, the grounds of their suspicions and beliefs. The authorised officer must also give information on oath or by affirmation, if and why he or she believes that it may be necessary to use firearms in the execution of the warrant.

Information required regarding previous warrants applied for and/or executed in relation to the same people alerts the issuing officer to a situation of possible harassment and/or lack of reasonable grounds.

Subdivision C – Issues of a search warrant

Clause 79: When search warrants may be issued

75. This clause provides that the issuing officer may issue a warrant if he or she is satisfied that the authorised officer has reasonable grounds to suspect that there is or will be within 72 hours, evidential material on the premises or person which may be concealed, lost, mutilated or destroyed.

Clause 80: Content of warrants

76. This clause sets out the information that is required to be included in a warrant which must include a statement as to whether the warrant is an investigation warrant or an offence warrant. If it is an investigation warrant the warrant must state the corruption issue or public inquiry to which it relates. If it is an offence warrant, the warrant must state the offence to which the warrant relates.

In both cases the warrant must contain a description of the premises or the name and description of the person to be searched, the kinds of evidentiary material that are to be searched for, the name of the authorised officer responsible for execution of the warrant, the period in which the warrant remains in force (which can be no longer than seven (7) days, yet successive warrants may be issued) and the particular hours in which the warrant may be executed. If the warrant is in relation to premises, it must also include authorisation for the necessary seizure of things found to prevent concealment, loss, destruction or use, and whether an ordinary or frisk search of a person at, or near the premises is authorised. Where the warrant is in relation to a person, it must also include whether an ordinary or frisk search is authorised and the authority for the necessary seizure of things found in the person's possession, or in an aircraft, vehicle or vessel the subject person had operated or occupied within 24 hours before the search to prevent the concealment, loss, destruction or use.

Clause 81: Application by telephone etc. and issue of warrant

77. This clause provides that an authorised officer may apply for a warrant by telephone, fax, e-mail or other electronic means where there is urgency or where a delay would in some way frustrate the effective execution of the warrant. These applications must contain all necessary information required from an ordinary warrant application and an application made by these means must be where there is a belief that evidentiary material is, or will be on the subject premises or person within 48 hours (any time longer, up to 72 hours will require an ordinary application).

This clause acknowledges that in practice there may be circumstances where there is a need for urgency and therefore provides for faster process.

Clauses 82: The things authorised by a search warrant in relation to premises

Clause 83: The things authorised by a search warrant in relation to a person

78. This clause set out the powers of an authorised officer in executing a warrant in relation to premises and persons respectively.

In the case of a warrant executed on premises an authorised officer is allowed to enter and search the subject premises and record fingerprints and take samples for forensic purposes. The authorised officer can also seize what is believed to be eligible seizable items, the types of evidential material specified in the warrant and any other things found if there is a belief that seizure is necessary to prevent concealment, loss, destruction or use of what may be evidentiary material. If the warrant allows, the authorised officer may also conduct an ordinary or frisk search of a person who is at, or near the premises.

A search warrant executed in relation to a person allows an authorised officer to search the person in the manner specified in the warrant, being either a frisk or ordinary search. The authorised officer may search all things found in the person's possession, any aircraft, vessel or vehicle operated or occupied by the person within the 24 hours before the search, seize things specified in the warrant, take and record fingerprints and forensic samples, seize other things found if there is a belief that it is evidentiary material and the seizure is necessary to prevent concealment, loss, destruction or use. The search of the person must not be different from that authorised in the warrant.

Clause 84: Restrictions on personal searches

79. This clause provides that a warrant may not authorise a strip or body cavity search as the procedure is too invasive and not necessary for the investigations predicted to be undertaken by the National Integrity Commissioner. This clause protects a person who may be subject to an investigation and subsequently a search under a warrant.

Clause 85: When warrant may be executed etc.

80. This clause further imposes the obligation to adhere to the conditions of the warrant. A warrant must not be executed outside hours specified in the warrant. Items seized may be made available to officers of other government agencies, if necessary for the purpose of investigating or prosecuting an offence.

This clause extends the information sharing clauses of the Bill and promotes co-operation amongst the law enforcement agencies. It will also reduce the duplication in work and minimise delays in investigations should evidence not be accessible from other agencies.

Clause 86: Announcement before entry

81. This clause provides that prior to entering premises under a warrant, an authorised officer must announce that he or she is authorised to enter, and provide any person at the premises with the opportunity to allow the entry. Announcement of entry will not, however, be required if the authorised officer believes that immediate entry is required to ensure either the safety of a person, or the effective execution of the warrant.

This clause ensures the person is given notice and provided with an opportunity to co-operate with the authorised officer in the search. A search with co-operation is often more successful and professional. The occupier of the premises is also entitled to be made aware of the situation.

Clause 87: Availability of assistance and use of force in executing a warrant

82. This clause provides that an authorised officer may obtain the assistance necessary and use a reasonable amount of force whilst executing a warrant. A person who is not an authorised officer must not take part in searching any person.

The authorised officer is given the discretion to use the necessary force needed which allows for the authorised officer to protect him or herself and others assisting in the execution of a warrant. The requirement of having only authorised officers taking part in searches and arrests is to ensure that these procedures are carried out by only those who have been provided with training and fulfilled the requirements to ensure that care, professionalism and due diligence are present.

Subdivision E – Specific provisions about executing a warrant in relation to premises

Clause 88: Application

83. This clause is a formal provision providing that the Subdivision applies where a warrant is executed at premises.

Clause 89: Copy of warrant to be shown to occupier etc.

84. This clause provides that if an occupier or someone representing the occupier is present at the premises, the authorised officer must identify him or herself to the person and make a copy of the warrant available to that person, and/or a person being searched under the warrant.

The person has the right to be informed and it clarifies that the search is legal and all requirements have been fulfilled to allow the procedure to take place.

Clause 90: Occupier entitled to watch search

85. This clause provides that the occupier or someone representing the occupier, is entitled to watch the search, or part thereof (more than one area may be searched at a time), but such right ceases when he or she impedes the search in any way.

This clause provides the occupier with rights but those rights shall not conflict with a search. In circumstances where an occupier can assist in the search by providing instructions as to how to operate a device etc. it will be useful for the authorised officer to have him or her present.

Clause 91: Specific powers available to person executing a warrant

86. This clause provides that an authorised officer may take photographs or video recordings at the premises for a purpose incidental to the execution of the warrant, or with the written consent of the occupier. The authorised officer may temporarily stop the search and leave the premises for up to one (1) hour (or longer with the written consent of the occupier) and then return to the premises and complete the search, only if the warrant is still in force. If the execution of a warrant is stopped by a court order which is later revoked or reversed on appeal, the execution may be completed only if the warrant is still in force.

This clause ensures that under no circumstances should a warrant be executed unless it is valid and in force, regardless of partial execution or court proceedings delaying etc. It prescribes the authorised officer with the onus to re-apply for a new warrant where an existing warrant expires for any reason. The strict provision of this clause is to ensure the admissibility of evidence obtained and further, to protect the Commonwealth from being exposed to an action for damages in relation to premises and persons searched and items seized.

Clause 92: use of equipment to examine or process things

87. This clause provides that an authorised officer may bring any equipment necessary to examine and process things to determine if they may be seized under the warrant. If it is not practicable to examine or process things on the premises, or if the occupier consents, things may be moved to another place. If things are moved, the authorised officer must advise the occupier of the time and place of any examination or processing, and allow him, her or a representative to attend. An authorised officer may operate equipment (other than electronic equipment) to examine or process things to determine if they may be seized, only where the authorised officer or assisting officer believe the examination or processing can be carried out without damaging the equipment or thing.

Clause 93: Use of electronic equipment at premises without expert assistance

88. This clause provides that an authorised officer may operate electronic equipment to see if evidentiary material is accessible, if he or she believes that it can be operated without damage. If evidentiary material is found, the equipment may be seized with any disk, tape or associated device, only if it is not practicable to document, or copy the evidentiary material, or if the possession of such equipment constitutes an offence.

This clause permits an authorised officer to copy all data held on a storage device if some of the data contains evidentiary material. In circumstances where it is not practical to make copies such as a computer where the hard drive contains a large

amount of data, an authorised officer is not required to search through all the data during the execution of the warrant at the premises, and copy only the evidentiary material found at this time. Rather this clause allows the authorised officer to copy all of the data where an initial search uncovers some evidentiary material or where the authorised officer believes it may contain evidentiary material. For example, the most effective way to search a large amount of data may be to load it all to a single device and develop a program to search the data.

Clause 94: Use of electronic equipment at premises with expert assistance

89. This clause provides that if an authorised officer believes that an expert may access evidential material from electronic equipment found at the premises, and the material may be destroyed, altered or interfered with if action is not taken to secure the equipment, the authorised officer may, after notifying the occupant in writing, take steps necessary to secure the equipment, for up to 24 hours to allow it to be operated by an expert. An authorised officer may apply to an issuing officer for an extension of time if it is believed that an expert will not be available within 24 hours. The occupant must be notified of the application for an extension and is entitled to be heard.

This clause allows the authorised officer to follow a procedure which adequately considers the occupier's rights, and allows for evidentiary material to be preserved until processed or examined.

Clause 95: Person with knowledge of a computer or a computer system to assist access etc.

90. This clause provides that an authorised officer may apply to an issuing officer for an order requiring a specified person to provide information or assistance necessary to access data from a computer on warrant premises. The issuing officer may grant the order where there are reasonable grounds to suspect that the specified person can access evidentiary material from the computer, if he or she is suspected of committing the offence stated in the warrant, if he or she is the owner or the lessee, or the employee of the owner or lessee of the computer, and has the relevant knowledge of the computer or the network and the measures applied to protect the data held, or accessible from the computer. A person that fails to comply with such order is liable to six (6) months imprisonment.

This clause intends to secure the access and value of evidentiary material stored in computers on warrant premises. Developments in technology allow computers to store large amounts of data and have complex security measures such as encryption and passwords to protect information. Multi-level password protection is often programmed to delete or alter data when an incorrect password is provided and this clause provides for assistance to ensure that relevant data is not erased or altered by misuse.

Clause 96: Accessing data held on other premises – notification to occupier of those premises

91. This clause provides that when data accessed under clause 93(1) is held on premises other than the warrant premises, the authorised officer must, if it is practicable to do so, notify the occupier of the premises in relation to which the warrant is in force. If the authorised officer intends to continue to access data on

premises other than the warrant premises then this information must also be conveyed to the occupier.

As most business computers are networked to other computers, files on one computer are often accessible by another computer. Accordingly, it is critical that the authorised officers executing a search warrant are able to search material accessible from the warrant premises, irrespective of where the material is physically located. This clause mirrors section 3LB of the *Crimes Act 1914* and includes the term practicable as a discretionary tool for the authorised officer to evaluate the circumstances and consequences of advising the third party.

Clause 97: Compensation for damage to electronic equipment

92. This clause provides that if insufficient care is exercised when either operating, or choosing a person to operate equipment, the Commonwealth must pay reasonable compensation to the owner if the equipment, data or programs are damaged. In determining reasonable compensation, consideration will be given to whether or not the owner, user, their agents or employees provided any appropriate warnings or guidance for the operation of the equipment. If an agreement on reasonable compensation cannot be reached, the owner or user may institute proceedings in the Federal Court.

Clause 98: Copies of seized things to be provided

93. This clause provides that if a document, film, computer file or other thing that can be readily copied is seized, the authorised officer must provide a copy to the occupier if requested.

This clause allows the person to obtain legal advice in relation to copies of material seized while ensuring there can be no dispute as to the state of evidence.

Clause 99: Receipts of things seized under warrant

94. This clause provides for a receipt for items seized or moved under a warrant to be provided by the Authorised to ensure the proper handling and returning of evidence when it is no longer required. This clause ensures there will be no dispute as to an item not being returned as well as keeping records of evidentiary material.

Subdivision F – Specific provisions about executing a warrant in relation to a person

Clause 100: Copy of warrant to be shown to person

95. This clause provides that an authorised officer must identify themselves to a person being searched and a copy of the warrant must be made available to him or her. The person has a right to be informed of the situation, prior to a search commencing. This identification offers an opportunity for the person to co-operate as they are less likely to resist with the officers which will make the search easier on all involved.

Clause 101: Conduct of an ordinary search or a frisk search

96. This clause provides that if practicable, an ordinary or frisk search of a person is to be conducted by a person of the same sex.

Subdivision G – Offences

Clause 102: Making false statements in warrants

97. This clause provides that a person (i.e. an authorised officer) commits an offence if he or she knowingly makes a false or misleading statement in applying for a search warrant and will be liable to two (2) years imprisonment.

This clause intends to ensure that all warrants executed are granted by a Judge or Magistrate on correct information. The reasonable grounds to believe that evidentiary material may be obtained stated in the application must be honest and accurate.

Clause 103: Offence for stating incorrect names in telephone warrants

98. This clause provides that a person commits an offence if he or she states a name of an issuing officer on the form of search warrant that differs to that of the issuing officer who approved the telephone application and will be liable to two (2) years imprisonment.

This clause is to ensure that the approval of a search warrant is in all ways true and correct.

Clause 104: Offence for unauthorised form of warrant

99. This clause provides that in circumstances where a person makes an application for a search warrant by telephone, he or she commits an offence if a matter is stated on the form of search warrant which he or she knows to be a departure from the authority given by the issuing officer and will be liable to two (2) years imprisonment.

This clause intends to serve as a control on the operation of telephone warrants. Potentially, telephone warrants may cause problems with confusion, misinterpretation and honest mistakes arising out of the haste at the time and this clause will ensure that persons applying for telephone warrants do not take advantage of the process.

Clause 105: Offence for executing etc. an unauthorised for of warrant

100. This clause provides that person commits an offence if he or she executes or presents a document purporting to be a search warrant which he or she knows has not been approved, or departs from the approval obtained from an issuing officer and will be liable to two (2) years imprisonment.

This clause intends to prevent authorised officers from failing to fulfil all requirements of a valid search warrant.

Clause 106: Offence for giving unexecuted for of warrant

101. This clause provides that a person commits an offence if he or she gives an issuing officer a form of search warrant which is not the form of search warrant that he or she executed under a telephone application and will be liable to two (2) years imprisonment.

This clause ensures that the telephone application granted is the same as the search carried out. All of these offences carry a criminal penalty making the authorised officers individually liable for their own actions.

Subdivision H – Miscellaneous

Clause 107: Other laws about search, arrest etc. not affected

102. This clause provides that this Division is not intended to limit or exclude the operation of another law of the Commonwealth in relation to the search of persons or premises, arrests or seizures.

Clause 108: Law relating to legal professional privilege not affected

103. This clause provides that this Division does not affect the laws relating to legal professional privilege.

Division 5 – Powers of Arrest

Clause 109: Authorised officers may exercise powers of arrest

104. This clause provides that authorised officers who are not “constables”, will still have the same powers and duties as a constable under Divisions 4 and 5 of Part IIA of the *Crimes Act 1914* for the purpose of investigating corruption issues. These powers and duties include those related to arrest as well as search. The term “constable” is defined in the Crimes Act as meaning a special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

Division 6 – Authorised Officers

Clause 110: Appointment of authorised officers

105. This clause provides that the National Integrity Commissioner may appoint a person in writing to be an authorised officer where, the person is either a member of the AFP or, a staff member of the National Integrity Commission and the National Integrity Commissioner considers him or her to be suitable and qualified for the appointment.

This clause seeks to ensure that authorised officers exercising powers and duties under the Bill possess the upmost of integrity, skills and experiences in investigations and obtaining evidence. Authorised officers are given the powers of arrest and to apply and execute search warrants under the Bill and it is essential that they are experienced, diligent and trustworthy.

Clause 111: Identity cards

106. This clause provides that the National Integrity Commissioner must issue all authorised officers an identity card in the form provided in the Regulations, which includes a recent photograph of the authorised officer, which must be returned to the National Integrity Commissioner immediately upon ceasing to be an authorised officer, a failure to do so is punishable by one (1) penalty unit.

This clause intends to ensure that authorised officers are easily identifiable. In circumstances where authorised officers are executing a search warrant on premises, the identity card can be displayed to occupiers to confirm their authority.

Part 7 – Dealing with evidence and information obtained in investigation or public inquiry

Division 1 – Introduction

Clause 112: Guide to this Part

Division 2 - Dealing with Evidence Obtained in Investigation or Public Inquiry

Clause 113: Evidence of offence or liability to civil penalty

107. This clause provides that if the National Integrity Commissioner obtains admissible evidence rendering a person liable to a criminal or civil penalty under a Commonwealth, State or Territory law, the National Integrity Commissioner must provide the evidence to the Commissioner of the Australian Federal Police in the case of a Commonwealth law, the head of the police force of the State or Territory in the case of a State or Territory law, or an authority or person who is authorised to prosecute the offence or commence civil penalty proceedings under a Commonwealth, State or Territory law.

Clause 114: Evidence that could be used in confiscation proceedings

108. This clause provides that if the National Integrity Commissioner obtains admissible evidence rendering a person liable to proceedings under the *Proceeds of Crime Act 1987*, the *Proceeds of Crime Act 2002* or a corresponding law of a State or Territory, the National Integrity Commissioner must provide the evidence to the Commissioner of the Australian Federal Police in the case of a Commonwealth law, the head of the police force of the State or Territory in the case of a State or Territory law, or an authority or a person who is authorised to commence proceedings under a Commonwealth, State or Territory law.

Clause 115: Evidence of, or information suggesting, wrongful conviction

109. This clause provides that if, during an investigation or public inquiry, the National Integrity Commissioner obtains evidence that a person was wrongly convicted of an offence against a law of the Commonwealth, a State or Territory, he or she must notify the Prime Minister of the evidence. The National Integrity Commissioner must also notify the convicted person that the evidence has been brought to the notice of the Prime Minister.

Part 8 – Independent Parliamentary Advisor

Division 1 – Introduction

Clause 116: Guide to this Part

110. This clause provides an outline of this Part.

Division 2 – Requests for advice

Clause 117: Minister may request advice

111. This clause provides that a Minister may request advice from the Parliamentary Advisor about their compliance with an applicable code of conduct. The request must be in writing and must be about a matter related to the Minister or a family member of the Minister.

Clause 118: Presiding officer or chair of committee may request advice

112. This clause provides that a presiding officer or chair of committee of the House of Representatives or the Senate may request advice in writing from the Parliamentary Advisor about any relevant matter, including the development of a code of conduct for parliamentarians.

Clause 119: Parliamentarian or former parliamentarian may request advice

113. This clause provides that a parliamentarian or former parliamentarian may request advice from the Parliamentary Advisor on matters such codes of conduct, parliamentary allowances, conflicts of interest, and ethical issue or matter of propriety. The request must be in writing and must be about a matter related to the parliamentarian or a family member of the parliamentarian or a person employed or formally employed by the parliamentarian.

Clause 120: Independent Parliamentary Advisor to provide advice in writing

114. This clause provides that the advice provided by the Parliamentary Advisor must be in writing.

Clause 121: Independent Parliamentary Advisor may request additional information

115. This clause provides for the Parliamentary Advisor to request additional information.

Division 3 – Reporting

Clause 122: Annual report

116. This clause provides for the Parliamentary Advisor to provide an annual report at the end of each financial year to the President of the Senate and the Speaker of the House of Representatives.

Division 4 – Better practice guides and fact sheets

Clause 123: Better practices guide and facts sheet

117. This clause provides that the Parliamentary Advisor may promote better practice in relation to matters of conduct, proprietary and ethics by preparing and disseminating guides and fact sheets to Ministers and parliamentarians.

Part 9 – Administrative provisions

Division 1 – Introduction

Clause 124: Guide to this Part

118. This clause provides and outline of the Part.

Clause 125: Appointment of National Integrity Commissioner

Clause 126: General terms and conditions of appointment

Clause 127: Restriction on outside employment

Clause 128: Remuneration

Clause 129: Leave of absence

Clause 130: Resignation

Clause 131: Termination of appointment

Clause 132: Acting appointments

Clause 133: Disclosure of interests

119. These clauses provide for the appointment and conditions of appointment of the National Integrity Commissioner.

Subdivision B – Law Enforcement Integrity Commissioner

Clause 134: Appointment etc. of Law Enforcement Integrity Commissioner

120. This clause provides that the appointment and conditions of appointment of the Law Enforcement Integrity Commissioner are provided for in the *Law Enforcement Integrity Commissioner Act 2006*.

Clause 135: Appointment of Independent Parliamentary Advisor

Clause 136: General terms and conditions of appointment

Clause 137: Engaging in other paid employment

Clause 138: Remuneration

Clause 139: Leave of absence

Clause 140: Resignation

Clause 141: Termination of appointment

Clause 142: Acting appointments

Clause 143: Disclosure of interests

121. These clauses provide for the appointment and conditions of appointment of the Independent Parliamentary Advisor.

Division 3 – Appointment etc of Assistance National Integrity Commissioners

Clauses 144: Appointment of Assistant National Integrity Commissioners

Clause 145: General terms and conditions of appointment

Clause 146: Engaging in other paid employment

Clause 147: Remuneration

Clause 148: Leave of absence

Clause 149: Resignation

Clause 150: Termination of employment

Clause 151: Acting appointments

Clause 152: Disclosure of interests

122. These clauses provide for the appointment and conditions of appointment of Assistant National Integrity Commissioners.

Division 4 – Staff, consultants and delegations

Clauses 153: Staff

Clauses 154: Consultants

123. These clauses provide for the appointment of staff and engagement of consultants by the National integrity Commission.

Clause 155: Delegation—National Integrity Commissioner

124. This clause provides for the delegation of powers by the National Integrity Commissioner, except in relation to holding hearings for the purpose of a public inquiry. Delegations must be in writing and signed by the National Integrity Commissioner.

Division 5 – Public reporting

Clause 156: Annual report

125. This clause provides that the National Integrity Commissioner must give a report to the Prime Minister to be presented in Parliament on the performance of the National Integrity Commissioner's functions during each financial year. The clause prescribes all matters to be addressed in the report.

Clause 157: Reports on investigations and public inquiries

126. This clause provides that the Prime Minister must cause reports given to him or her by the National Integrity Commissioner under clauses 33 or 40 relating to a public hearing, to be laid before each House of Parliament within fifteen (15) sitting days of receipt of the report. The clause further provides that prior to the report being tabled, the Prime Minister must remove all information from the report that could endanger a person's safety, prejudice an investigation or proceedings brought as a result of an investigation, or compromise operational activities or methodologies of the National Integrity Commission.

To avoid doubt, the clause also particularises that a supplementary report is not required to be tabled in Parliament.

Clause 158: Special reports

127. This clause provides that the National Integrity Commissioner may give the Prime Minister a special report on the operation, function and exercise of his or her powers for part of a year to be presented in Parliament. The Prime Minister must cause the report to be laid before each House of the Parliament within fifteen (15) sitting days after receipt.

The National Integrity Commissioner must not disclose any opinions or findings in a special report which are critical of a government agency or person in a report, unless the head of the agency or the person has been given an opportunity to

appear, or have a representative appear before the National Integrity Commissioner to make submissions in relation to the subject matter.

Clause 159: Contents of annual or special report

128. This clause provides that the National Integrity Commissioner may exclude from an annual report prepared under clause 156 or a special report prepared under clause 158 information that is sensitive and it is desirable to exclude, however, in doing so, the National Integrity Commissioner must seek to balance the public interest served and the prejudicial consequences occurring by the disclosure of the information in the report.

Division 6 - Confidentiality Requirements

Clause 160: Confidentiality requirements for National Integrity Commission staff

129. This clause provides that a person who either directly or indirectly, whilst they are, or were a staff member of National Integrity Commission makes record, divulges or communicates any information disclosed or obtained under the Bill, acquired by being a staff member of National Integrity Commission, or in the course of his or her duties as a staff member of National Integrity Commission, is liable to 60 penalty units and/or one (1) year imprisonment, subject to clauses 161 and 162.

Clause 161: Exceptions to confidentiality requirements

130. This clause provides that clause 160 does not prevent a staff member from making records, divulging or communicating information acquired in the performance of his or her duties for the performance of the functions of the National Integrity Commissioner under the Bill. The National Integrity Commissioner is also permitted to disclose information to the Commonwealth Ombudsman, the Ombudsman of a State or Territory, the head of a law enforcement agency, the head of a police force of a State or Territory, the head of an integrity agency or the head of another government agency where the National Integrity Commissioner decides that the information may be more appropriately dealt with by that agency. The National Integrity Commissioner is permitted to disclose information where a corresponding law is in force with a corresponding provision to clause 160 with respect to confidentiality of information acquired by persons within that agency.

This clause provides that the disclosure of information is not prevented by clause 160 where the disclosure is required under another Commonwealth law.

This clause also provides that the National Integrity Commissioner is authorised to disclose information to a particular person where necessary to protect the person's life or safety.

Clause 162: Disclosure by National Integrity Commissioner in public interest etc.

131. This clause provides that the National Integrity Commissioner may disclose information to the public or a section of the public about the performance of his or her functions or an investigation where the disclosure is in the public interest.

The clause provides that prior to disclosing any sensitive information, the National Integrity Commissioner must consider a balance between the public interest and the prejudicial consequences that may result in disclosing the information.

Clause 163: Opportunity to be heard

132. This clause provides that the National Integrity Commissioner must not disclose any opinions or findings which are critical of a government agency or person, unless the head of the agency or the person has been given an opportunity to appear, or have a representative appear before the National Integrity Commissioner to make submissions in relation to the subject matter.

Clause 164: National Integrity Commission staff generally not compellable in court proceedings

133. This clause provides that a person who is, or has been a staff member of National Integrity Commission cannot be compelled to disclose information that was obtained under the provisions of the Bill, which were acquired because of being, or having been a staff member of National Integrity Commission, before any court proceedings or a person authorised to hear, receive and examine evidence.

However, the clause provides that a staff member or former staff member of National Integrity Commission will be compelled to provide evidence in proceedings where either the National Integrity Commissioner, a delegate of the National Integrity Commissioner or a person authorised by the National Integrity Commissioner are party to proceedings in official capacity. Staff members of National Integrity Commission may also be compelled to provide evidence in proceedings brought in carrying out a provision of the Bill or proceedings resulting from an investigation.

Part 10 – Parliamentary Joint Committee on the National Integrity Commission

Clause 165: Definitions

134. This defines key terms used in this Part. The Parliamentary Joint Committee on the National Integrity Commission will be referred to as the ***committee*** and members of the committee will be referred to as a ***member***.

Clause 166: Parliamentary Joint Committee on the National Integrity Commission

135. This clause provides that as soon as is practicable after the first session of each Parliament, a Joint Committee of members is to be appointed by the existing practices of appointing members to serve on joint select committees for both Houses of the Parliament.

The committee will be made up of five (5) members of each House. Members of the committee cannot hold the office of Minister, President, Speaker, Deputy-President or Chair of Committees and will cease to be a member of the committee if he or she obtains one of these offices after their appointment. Either House may appoint one

of its members to fill a vacancy amongst the members of the committee appointed by that House.

Clause 167: Powers and proceedings of the committee

136. This clause requires all matters relating to the powers and proceedings of the committee to be determined by resolution of both Houses of Parliament.

Clause 168: Duties of the committee

137. This clause provides that the committee: is to consider a proposed recommendation for an appointment of the National Integrity Commissioner; must monitor, review and report on the performance of the national integrity commissioner functions and any matter relating to the National Integrity Commission; examine annual and special reports of National Integrity Commission; examine trends in law enforcement in relation to corruption and proposed changes to the National Integrity Commissioner's functions, powers, procedures or the National Integrity Commission structure.

The clause also provides for similar duties for the committee in relation to the Law Enforcement Integrity Commissioner.

To avoid doubt, this clause also provides that the committee is not authorised to investigate a corruption issue or reconsider decisions or recommendations made by the National Integrity Commissioner or by the Law Enforcement Integrity Commissioner.

Clause 169: Committee may approve or reject recommendation for appointment of National Integrity Commissioner

138. This clause provides that if the Prime Minister refers a proposed recommendation for an appointment of the National Integrity Commissioner for approval, the committee must approve or reject the recommendation within 10 sitting days or notify the Prime Minister they need more time to consider the proposed recommendation.

Clause 170: Disclosure to committee by National Integrity Commissioner

139. This clause provides that the National Integrity Commissioner must inform the committee when requested, of the general conduct of National Integrity Commission operations and provide information related to investigations and inquiries. If the National Integrity Commissioner is satisfied that the information is, or includes sensitive information and the prejudicial consequences outweigh the public interest served by providing the information to the committee, the National Integrity Commissioner may also decide not to comply with the committee's request.

In circumstances where the National Integrity Commissioner does not provide requested information to the committee, the committee may refer their request to the Prime Minister, who will then determine whether or not the information is sensitive information, and, if so, whether the prejudicial consequences outweigh the public interest served by providing the information to the committee.

Clause 171: Disclosure to committee by Law Enforcement Integrity Commissioner

140. This clause is an equivalent provision to clause 170, in relation to the Law Enforcement Integrity Commissioner.

Clause 172: Disclosure to committee by Minister

141. This clause provides that the Minister must comply with a request from the committee in relation to an investigation of an ACLEI corruption issue by a special investigator, unless the information would contravene a certificate under section 149 of the *Law Enforcement Integrity Commissioner Act 2006*.

Clause 173: Ombudsman to brief committee about controlled operations

142. This clause provides for the Ombudsman to brief the committee about the Law Enforcement Integrity Commissioner's involvement in controlled operations.

Part 11 – Miscellaneous

Clause 174: Offence of victimisation

143. This clause provides that any person who causes, or threatens to cause detriment to another person (the 'victim') on the basis that the victim refers, notifies or produces documents to the National Integrity Commissioner is liable to two (2) years imprisonment. Where a victim is threatened, whether the threat is express, implied, conditional or unconditional, the prosecution of the offence does not require proof that the victim actually feared the threat would be carried out. The burden is lowered with the intention of pursuing all threats made, regardless of the intensity and to demonstrate that threatening witnesses or those providing assistance to the National Integrity Commissioner is not tolerated.

The clause intends to ensure that persons involved in an investigation by the National Integrity Commissioner can assist in the investigation and be protected from harassment or violence by reason of their involvement.

Clause 175: Legal and financial assistance in relation to applications for administrative review

144. This clause provides that in relation to an application or proposed application to the Federal Court or the Federal Circuit Court for an order of review of a matter arising under the Bill (pursuant to the *Administrative Decisions (Judicial Review) Act 1977*) a person may apply to the Attorney-General for legal and financial assistance.

Where an application for legal and/or financial assistance is made, the Attorney-General may authorise the Commonwealth to provide such assistance, either unconditionally or subject to specified terms, if satisfied that a substantial hardship would be suffered if assistance was refused, or where the circumstances of the case are of a special nature.

The intention of this provision is to attempt to provide an equal access to justice. The assistance can provide resources for representation and minimise a potential disadvantage. Further, the assistance will allow access to legal advice to assess claims and prevent applications being pursued where there is no merit, saving the court's time.

Clause 176: Immunity from civil proceedings

145. This clause provides that a staff member of National Integrity Commission is not liable to civil proceedings in relation to an act or omission done in good faith during the performance, or purported performance of their functions under the Bill.

A person requested by the National Integrity Commissioner to assist a staff member of the National Integrity Commission is not liable to civil proceedings in relation to an act or omission done in good faith during the performance, or purported performance, of assisting the staff member.

In circumstances where information, documents or evidence is produced to the National Integrity Commissioner, a person is not liable to any action, suit, claim or proceeding in relation to the loss, damage or injury suffered by another person as a result of the evidence being provided to the National Integrity Commissioner.

The intention of the clause is to allow staff members of the National Integrity Commission to perform their duties, functions and exercise the powers authorised under the Bill, without the fear of personal liability for any actions they perform.

Clause 177: Immunities from certain State and Territory laws

146. This clause provides that the National Integrity Commissioner, an Assistant National Integrity Commissioner and staff members of National Integrity Commission are not required to obtain a licence or permission under any State or Territory law, for the purpose of doing an act or thing in the course of their respective duties under the Bill. Further, the National Integrity Commission is not required to register any vehicle, vessel, animal or article belonging to the Commonwealth.

The clause intends to prevent National Integrity Commission being restricted in the performance of its duties by imposing different State and Territory regulations. Due to the National Integrity Commission's function of investigating corruption issues nationally, staff members will be qualified under the Commonwealth.

Clause 178: Review of operation of Act

147. This clause provides that the Prime Minister must cause an independent review to be undertaken into the first three years of the operation of the Act. The review must be completed within 6 months after the end of the 3 year period.

Clause 179: Schedules

148. This clause provides that each Act specified in a Schedule to the Bill is amended or repealed as set out in the Schedule.

Clause 180: Regulations

149. This clause provides that the Governor-General may make Regulations prescribing matters required or permitted by the Bill, or which are necessary or convenient to be prescribed.

Schedule 1 – Amendments

Law Enforcement Integrity Commissioner Act 2006

Clause 1 to Clause 5

150. These clauses make consequential amendments to the *Law Enforcement Integrity Commissioner Act 2006*, given the Bill provides for the Law Enforcement Integrity Commissioner to be a part of the National Integrity Commission, including the repeal of the provisions in that Act about the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (Part 14) which have now been subsumed into Part 10 of this Bill.

Ombudsman Act 1976

Clause 6: After subsection 6(15)

151. This clause makes consequential amendments to the *Ombudsman Act 1976* providing for the Ombudsman to refer allegations or information that raise a corruption issue to the National Integrity Commissioner.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

National Integrity Commission Bill 2017

This Bill establishes a new independent statutory agency tasked with ensuring oversight of the Australian Public Service and the Parliament of Australia. The only component of this scheme that touches on human rights are the investigative functions of the Commission. The two sets of rights this bill engages are the right to privacy and reputation and the requirement for minimum guarantees in criminal proceedings.

Overview of the bill

The purpose of the Bill is to establish an independent National Integrity Commission to investigate corruption or maladministration within the Australian public service and the Parliament.

It establishes processes for the investigation of corrupt conduct. It does not create any new criminal offences other than those that arise if a person provides false or misleading evidence or that they refuse an order to appear to give evidence or to provide information to the Commission.

Human rights implications

1. This Bill engages the right to privacy and reputation. A person who is investigated may have their privacy and reputation impacted upon by mere fact of being investigated or summoned to a public hearing, whether or not they are guilty of an offence. However there are wide discretions provided to the Commissioner to choose whether to hold inquiries in public or in private. The impacts upon the privacy and reputation of a person will be central to the Commissioner using these powers under Parts 5, 6 and 7.
2. The capacity 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.
3. 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. As clause 31 provides, this right can be suspended when the offering of a right of procedural fairness would compromise an investigation or any related action.
4. The power to compel the production of documents, information and obtain search warrants also have the capacity to impact on the right to privacy, however these powers are limited by law. The ability to keep a document or item is limited to the time reasonably necessary for the purposes of the investigation. Application for a warrant is consistent with existing procedures under Australian law and is further protected by clauses 102 to 106 which will attach strict controls to an applicant for a warrant.
5. The bill also engages the requirement for minimum guarantees in criminal proceedings. 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.
6. Similarly, legal professional privilege is partially limited by providing the Commissioner with a power to accept or refuse a claim to legal professional privilege as a reason for not providing information. This power is restricted by court orders that determine information as covered by legal professional privilege.
7. The burden of proof is reversed on a person who is believed to have breached the notation requirements on a summons. This is necessary because of the operation of section 13.3 of the Criminal Code. It is appropriate for the defendant to bear the burden of proving these matters because they are matters that, by their nature, are within the knowledge of the defendant.

8. A final provision touching on minimum guarantees in criminal proceedings is that the Commission has the ability to investigate an event retrospectively, namely before the operation of the Commission. This does not have any human rights impact as the criminal act would have been a criminal act under the law as it then existed, it is merely the investigation of that act that is capable of being retrospective.

Conclusion

This bill is compatible with human rights because 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.

Adam Bandt MP