

## **CLA's response to the Government's proposal for a Commonwealth Integrity Commission**

Civil Liberties Australia (CLA) welcomes the Government's announcement of its intention to establish a Commonwealth Integrity Commission (CIC). Successive Australian governments have squandered Australia's heritage of political and social institutions designed to preserve society's integrity and coherence. CLA believes that a truly independent CIC is a key element of society's ethical infrastructure and a welcome step toward managing Australia's social risk.

However, the model proposed by the Attorney-General Christian Porter fails key criteria that would guarantee its transparency and independence – critical elements required to restore Australians' trust in Commonwealth political institutions. In the absence of a Commonwealth Human Rights Act (HRA), any model for the CIC would also operate without reference to the core values that other advanced democracies believe are necessary to underpin their ethical infrastructure.

### **CLA comments on the proposed CIC legislation**

CLA believes that the aim of a genuinely independent CIC is to ensure that the executive, ministers, members of Parliament and the bureaucracy govern and act for everyone and that they act lawfully and in compliance with standards and norms of ethical conduct when spending our money and acting on our behalf. CLA would support a CIC that meets four key criteria:

1. That the Commission is truly independent – with the capacity to receive complaints from whistle-blowers and conduct its own investigations without interference from executive government;
2. That corrupt conduct is corrupt conduct, and the definition should be the same for everyone covered by the legislation;
3. That the definition of corruption *in* public institutions to be investigated by the CIC includes all those they are corrupted *by* – including members of the private sector; and
4. That, as sunlight is the best disinfectant, all hearings before the CIC are conducted in public, and the outcome of every investigation is publicly available unless the Commission issues public reasoning as to why that will not be the case.

These criteria are broadly consistent with the Beechworth Principles released by the Member for Indi on 18 February 2020 and endorsed by a range of qualified commentators and practitioners in the field of government accountability.

The Government's proposal for a CIC fails all four tests: The CIC will be unable to independently initiate investigations and the scope of the legislation does not include people outside the public sector who improperly influence public decision-making or matters that are not criminal in nature. The investigations the CIC can conduct of politicians and public servants will be severely limited in scope and the outcomes of those investigations will not be public.

It is difficult to see how an integrity commissioner can detect, investigate, report and prevent corrupt behaviour, or collect, correlate, analyse and disseminate information on patterns or trends in corrupt behaviour under this proposal.

CLA understands Attorney-General Porter's expressed concern about procedural fairness and trial by allegation arising from the NSW ICAC, and that the reputations of individuals brought before an integrity commission can be permanently stained by it. Concerns about procedural fairness do not overcome the need for transparency and they can be mitigated through mechanisms like the public interest test applied to witnesses' "rolling right" to request a private hearing proposed by the Member for Indi in her draft Australian Federal Integrity Commission Bill, together with explicit and on the record clearances of wrongdoing of witnesses by the CIC.

Restoring public confidence in our political and public institutions will not result from an entity with limited scope but substantial power operating behind closed doors.

### **The unexamined context of a CIC**

CLA expects that a wide range of commentators will make these points in considerably more detail. CLA strongly supports the introduction of a truly independent CIC as a means to help improve integrity to government decision making; however, CLA believes that any CIC would be improved by reforming the context in which it operates.

In advanced democracies other than Australia, a CIC forms part of a broader ethical infrastructure designed to consciously apply core values and principles to help resolve ethical dilemmas where equally valid virtues compete. The aim of ethical infrastructure is to preserve society's integrity and coherence, and to act as a shock absorber to cushion the effects of change. As the Ethics Centre's Executive Director Dr Simon Longstaff and others have argued, this ethical infrastructure is part of the state's defensive soft power.

Federal executive government in Australia operates at a startlingly low level of external accountability with very few formal controls in place to preserve society's integrity and coherence and the basic freedoms of its citizens. Australians therefore have to rely heavily on the informal components of ethical infrastructure like unwritten conventions and the words and deeds of leaders. We trust that our basic freedoms are adequately protected by the common law and by the good sense of executive government as checked by voters at elections and by Parliament at all other times.

The test for our trust in the effectiveness of this informal ethical infrastructure is the quality of public debate on the executive's policy and behaviour, as that is critical to testing the validity of government planning and action.

This trust has been under sustained attack from populists who argue their view is the will of the people and the only truth and anything external to it is both untrue and immoral. There are substantial short term political benefits in this attack. When populists are in power, it shifts the balance away from the courts and parliament, reducing the checks and balances a pluralist society would normally place on the executive. Without this common ground of ethical infrastructure, populists have reduced public debate to a theatre that trains the electorate to forget the purpose of the courts and parliament in balancing the power of the executive and maintaining society's integrity and coherence.

This has led to an increasing willingness to trade social benefits for benefits to individual populist constituencies and, ironically, feeds the spiral of declining faith in political institutions and leadership and the appeal of populist leaders promising to drain the swamp.

As our informal ethical infrastructure comes under increasing pressure we need to build up the formal ethical infrastructure to support it. A truly independent CIC is very welcome, but it is not a substitute for the universal framework of regulations, standards, commissions, ombudsmen, judicial systems and guidelines that we need to

underpin our society's integrity and coherence and restore Australians' trust in their political institutions. It isn't even where you would start.

Alone amongst advanced democracies, Australia has yet to publicly define the core values it would apply as a society to resolve ethical dilemmas where equally valid virtues compete. These core values need to be cross cultural and timeless and they need to underpin the legal obligations created by the CIC legislation. Advanced democracies other than Australia have human rights legislation that serves this purpose – defining the core values to be applied to their ethical infrastructure, including to their various equivalents to the CIC.

In Australia, the Australian Capital Territory, Victoria and Queensland have already underpinned their ethical infrastructure with human rights legislation based on the Universal Declaration of Human Rights, articulating the governments' obligation to be humane to the powerless and giving individuals a chance to hold public power to account, including the power of a CIC. The NSW ICAC, at the core of the Attorney-General's concern about trial by allegation, has no overarching HRA to which it is accountable.

### **The scale of the missed opportunity in this proposal for a CIC**

It is difficult to overstate the scale of the opportunity missed by this proposal. A CIC that coordinates with other elements of an ethical infrastructure and is accountable to a HRA will:

- Increase trust in government decision making;
- Create a common ground for public debate on executive government's policies and behaviour;
- Provide a base for managing social risk; and
- Enhance government accountability to individuals.

The outcomes of a well-coordinated and effective ethical infrastructure driven by a HRA and incorporating a CIC are measurable. Increasing trust simplifies daily life, builds social capital and lifts societal, governmental and economic sustainability. These outcomes will be important for determining and delivering the changes necessary for a post-COVID return to a stable, sustainable rules-based society.

Governments will need to be more engaged with society as it restructures in the wake of COVID-19 whether they like it or not. As their participation increases, governments that make genuine improvements to ethical infrastructure will reap political benefits through generating a social licence to operate and enhancing their reputation for fairness while better engaging with social risk by effectively targeting social impact mitigation strategies and creating opportunities for shared value with the electorate.

Enacting a truly independent CIC and a national HRA is not all of the answer to rebuilding trust in political institutions in the wake of cynical populism, but it will start to change the culture of government and Australians' perception of it. The government – or opposition – that promises to implement them will have the advantage of demonstrating its accountability credentials to a disengaged electorate at a point where society is poised for substantial change.

CLA does not believe that progress toward sustainable trust in executive government ends with a Commonwealth HRA and a truly independent CIC, but we do strongly believe that the process of restoring sustainable trust is impossible without them.

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