



Submission

Consultation, reform or review details

Title: Commonwealth Integrity Commission Bill – Exposure Draft

Your details

Organisation: University of Melbourne

If you are providing a submission on behalf of an organisation, please provide the name of a contact person.

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- Microsoft Word
- Rich Text Format (RTF)
- txt format.

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Yes No

Your submission:

The University of Melbourne makes the following submission in relation to the Commonwealth Integrity Commission Bill 2020 ("Bill").

There are five issues the University would like to raise in its submission on the Bill, as follows:

1. The inclusion of higher education providers and research bodies as regulated entities;
 2. The definition of staff member of higher education providers;
 3. The scope of corrupt conduct in respect of higher education providers and research bodies;
 4. Procedural fairness considerations; and
 5. Disclosure of legal advice or communications protected by legal professional privilege
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1. Inclusion of higher education providers and research bodies as regulated entities

Under the Bill, a university would be captured pursuant to the definition of higher education provider. While a research body is defined to specifically exclude a higher education provider, a research body in which a university has an ownership interest would be separately regulated as a research body. This would likely place a substantial element of any regulatory compliance onto the entity level due to the obligations placed on the entities (and staff) directly.

The policy rationale for the inclusion of higher education providers and research bodies as regulated entities is unclear. The listed offences in the Bill are for the most part, already offences under an extensive suite of other Acts and therefore these entities are already subject to similar requirements. Importantly, public universities are established as statutory authorities by State parliaments and are already covered by anti-corruption laws of the State.

The addition of the compliance framework proposed under the Bill, will add further regulatory burden to higher education providers which appears unnecessary given the pre-existing framework in place for this sector. This will undoubtably divert resources from the key deliverables of teaching, research and community engagement. Given the already significant regulatory burden imposed on the higher education sector, the regulatory impact analysis should be reviewed, and further consideration given to whether these entities are appropriately included as regulated entities.

2. The definition of staff members of higher education providers

The definition of staff members of higher education providers in the Bill is broad and includes:

- i) The head of the provider;
- ii) An officer or employee of the provider;
- iii) A person who performs services for or on behalf of the provider;
- iv) A secondee to the provider; and
- v) Any other person prescribed by the rules.

Accordingly, the University would not only be liable for the conduct of its employees, but also its secondees, contractors and service providers. This would further add to the burden already associated with the proposed Bill.

3. The scope of corrupt conduct of higher education providers

Under the Bill, corrupt conduct in respect of staff members of higher education providers and research bodies need only constitute a listed offence without anything further being required. These offences include offences under existing legislation, together with new offences created by the Bill.

The threshold to establish corrupt conduct in respect of higher education providers and research bodies is lower than for any other entity proposed to be regulated by the Bill. The other definitions of corrupt conduct included in the Bill narrow the definition by utilising concepts such as ‘abuse of office’ and ‘perversion of the course of justice’.

The broader definition of corrupt conduct in respect of higher education providers and research bodies is concerning as some of the listed offences may not require evidence of a corrupt intent, or indeed ‘intent’ at all (i.e. strict liability basis). In others, there appears to be no materiality/significance threshold. Accordingly, there is a risk that potentially minor or administrative offences could, theoretically, be corrupt conduct for the purpose of the Bill.

4. Procedural fairness considerations

The Bill does not provide sufficient opportunity for a higher education provider or research body to provide input into the process. Importantly, there is currently no opportunity to comment on a draft investigation report (as a whole) prior to publication. While there is an opportunity to be heard in relation to critical opinions and findings, only a statement would be provided to the affected entity setting out that opinion or finding, and if one of the listed exclusions applied, then this opportunity would not be provided at all.

5. Disclosure of legal advice or communications protected by legal professional privilege

Where the Integrity Commissioner requires information or documents to be produced, the Bill removes the right to withhold production on the basis of self-incrimination or legal professional privilege.

While the abrogation of legal professional privilege may be desirable in some instances, blanket removal of such protection in the context of higher education providers and research bodies is concerning.

The Bill specifically provides that the fact that a person has been compelled to produce such information or documents does not otherwise affect a claim of legal professional privilege. However, the practicalities of protecting such information or documents once they are released to the Integrity Commissioner are not identified. There is a risk of inadvertent disclosure or misuse with no consequences prescribed if such an occurrence eventuates.

6. Conclusion

Given the concerns outlined above, the University considers that further consideration should be given to:

- a) The necessity of making higher education providers and research bodies subject to regulation under the Bill;
- b) The need for a comprehensive, independent regulatory impact analysis for the higher education sector;
- c) The broad definition of staff member and whether secondees, service providers and contractors should be included in the definition;
- d) The definition of corrupt conduct for higher education providers and research bodies and whether this should be narrowed to be comparable to others covered under the Bill;
- e) Additional procedural fairness considerations, including the opportunity to comment on a draft report and have those comments taken into account before it is finalised;
- f) The appropriateness of removing the right to claim privilege in respect of higher education providers and research bodies.