RULE OF LAW
INSTITUTE OF AUSTRALIA

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16 October 2022
By email: nacc@aph.gov.au

Dear Senator White,

Submission to the National Anti-Corruption Commission ("NACC") Legislation Committee regarding provisions of the National Anti-Corruption Commission Bill 2022 ("Bill")

The Rule of Law Institute of Australia (" Institute") makes this submission regarding the *National Anti-Corruption Commission Bill 2022.*

The Institute is an independent, voluntary, non-partisan, not for profit organisation formed in 2009 to promote and uphold the rule of law in Australia. Its work is supported by over 1,300 members. The objectives of the Institute include applying the principles of the Magna Carta and promoting good governance in Australia by the rule of law and encouraging transparency and accountability in State and Federal Government.

What is the Rule of Law and Why is it relevant?

As written on the Attorney General of Australia's website[1]:

*The **rule of law** underpins the way Australian society is governed. Everyone- including citizens and government- is bound by and entitled to the benefit of laws.*

The Magna Carta in 1215 recognised the rule of law and the idea that all citizens, including those in power, should be fairly and equally ruled by the law. It promoted the tradition of respecting the law, limiting government power, providing a fair and prompt trial and the protection of human rights that we enjoy in Australia today. Clause 40 of the Magna Carta states:

***To no one** will we sell, to no one will we refuse or delay, right or justice*

[1] https://www.ag.gov.au/about-us/what-we-do/rule-law

This is reflected in Article 9 of the International Covenant on Civil and Political Rights:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

Everyone is required to be dealt with by due process by a judicial body and not outside of the courts by a non-judicial body.

Where corrupt conduct is defined to include a criminal offence, as well as corrupt behaviour, the criminal conduct should be dealt with by a court and not by an administrative body such as ICAC nor by the new Anti-Corruption Commission (NACC).

Where corrupt conduct does not involve a criminal offence, it should be dealt with by an administrative body with none of the trappings or functions of a court.

The Institute considers the Bill should have practices consistent with the rule of law and not inconsistent. For example it should not prohibit a person served with a notice by NACC to produce documents, from informing or discussing the notice with any member of the persons family.

It is confusing to allow a person to be dealt with outside of the judicial process and to then, for example, find that person is guilty of "corrupt conduct," an offence not recognized at law.

Inadequate time for making submission on the Bill

The Bill is 236 pages long. Its provisions are complex and take time to digest and understand.

The Bill took months to prepare but the public is only allowed 9 days to make submissions on its content. It is impossible to give the submission justice within this time frame.

The public might ask what the Bill has to hide and even if it has nothing, this is not the way to give the Bill credibility, respect and trust in the eyes of the public.

This is not the way to achieve transparency.

The Institute apologises if it has not discovered something that is hidden, and it makes recommended amendments which are not adequately addressed and which are without the normal and full explanation.

We will expand on this submission if given adequate time to respond in person.

Attached are two prior submissions on the defects of the NSW ICAC as they are equally relevant to the Bill.

Amendments to the Bill

The Institute recommends that the Bill should be amended to provide for the following:

1. **Where two years has elapsed since the commencement of the investigation without conclusion, the investigation should lapse, unless a Court orders.**

Where two years has elapsed since the commencement of an investigation without conclusion, the investigation should automatically lapse and not continue, unless a court orders.

2. **The NACC should immediately notify the public of the lapsing of any investigation.**

Where the NACC decides not to make an adverse finding against a person it shall immediately notify the public.

Where the NACC decides not to make an adverse finding against a person, it shall

- promptly and publicly apologise to the person concerned
- not take any further investigative action, including notifying an employer or any other person that the person was the subject of investigative action; and
- make all investigative material available to the person, except to the extent ordered by a Court.

3. **A person being investigated should be free to disclose to his or her family that the person is being investigated by the NACC and discuss the matter with them.**

A person should be free to disclose to his/her family that the person is being investigated by the NACC and discuss the matter with them, and that the person has received a notice to produce to the NACC documents and that the person is required to attend a private investigation of the NACC, unless a court otherwise orders.

4. **Members of a person's family should be free to attend a private investigation.**

Members of a person's family should be free to attend a private investigation of the person.

In addition, any person nominated by the person should be free to attend unless a court otherwise orders.

5. **A person and his legal practitioner must be given reasonable notice of a private investigation.**

The person and a person's legal practitioner must be given reasonable notice of the holding of any private investigation and have an absolute right to re-examine the person in a private investigation as well as any other person who has given evidence. They should be entitled to receive all investigation information, as well as address the NACC on any matter.

Where a person other than the person being investigated refuses to answer any question put by the person or his/her legal practitioner, the NACC Commissioner should be obliged to ask the question of the person.

6. **Transcript of Private Investigation.**

A transcript of a private investigation must be made by the NACC and made available to the person and the person's legal personal representative at the end of the day's investigation or earlier if available.

7. **Conduct by the NACC.**

The NACC must conduct a private investigation in the utmost good faith and fairness and if it does not do so, it may be subject to complaint to the Australian Federal Police. The complaint will be dealt with by the Australian Federal Police with all the necessary powers to investigate and publish the result.

8. **A question put at a private investigation by NACC may not be put at a public hearing.**

A question may not be put by the NACC at a public hearing if it has already been put at a private investigation.

A question is to be treated as put at a private investigation if the legal practitioner produces to NACC the written opinion of a King's Counsel to that effect.

9. **Referral to Commonwealth Director of Public Prosecutions.**

Where the NACC refers any matter to the Commonwealth Director of Public Prosecutions, it must act in good faith and without prejudice at the same time refer all associated witness statements and documents to it and not omit anything.

If the Commission fails to do so, the Commission shall immediately withdraw the referral and not make any referral against the person again, unless a Court otherwise orders.

This shall not affect any action for damages against the NACC.

NACC must immediately make public what has happened.

10. Preconditions to holding a public hearing.

The decision to hold a public hearing of a person is in most cases the immediate end of the person's career and the person's reputation. It has disastrous consequences, personal and financial for the person and the person's family. This is regardless of whether a Court subsequently finds that the person is not guilty of any criminal conduct.

A decision by the NACC to hold a public hearing can only be made in the following circumstances:

- The NACC Commissioner has first given in writing the reasons why he/she considers there are "exceptional circumstances" and this has not been challenged in the Federal Court
- The person must not have been asked at a private investigation questions that are likely or could be likely to be asked at the public hearing; and
- The adverse consequences of the holding of the public hearing on the person and his family are reasonably likely to be less than not holding the public hearing.

11. The Bill should not operate retrospectively

The Bill operates retrospectively and denies a human right. Retrospectivity should be omitted.

It is a basic human right that a person should not be punished for something that was not unlawful at the time.

12. Tapping the telephones and bugging the home of the Prime Minister.

The NACC should not be able to tap the telephone of the Prime Minister, the Attorney-General, any Premier of a State, any High Court Judge, or any State Judge unless the Inspector has first approved in writing. Likewise, where any of their homes are to be secretly bugged.

13. The staff of the NACC should be subject to the Bill.

The staff of the NACC are not subject to the Bill and therefore above the law.

The Bill should provide that the Australian Federal Police should be free to investigate any conduct of the NACC staff and have all the powers of NACC in investigating anyone else.

14. The Bill does not distinguish corrupt conduct which does not involve criminal conduct.

The NACC needs to make it clear that any finding of corrupt conduct is not a finding of criminal behaviour and that the corrupt conduct under investigation in not criminal.

15. Impossibly Wide Description of Corrupt Conduct

The Bill contains a description of corrupt conduct which is foundational to the operation of the Bill.

For example:

- It includes corrupt conduct as anything which is “improper conduct”
- It includes any conduct which “will engage in corrupt conduct”

- It includes anything which was retrospectively not in the above

15.1 The definition of corrupt conduct in section 8

The problem with this provision is the use of terms that are vague, open-ended and in one particular aspect, unsuitable for elected members of parliament. These shortcomings erode the fairness as well as the effectiveness of the definition as a benchmark for the sort of conduct that parliament wishes to define as corrupt.

Section 8 covers four specific circumstances that are set down in sub-sections 8(1)(a) to 8(1)(d). However sub-section 8(1)(e) has the effect of extending the definition of corrupt conduct beyond the circumstances specified in the four other sub-sections and would allow the NACC to extend its jurisdiction unilaterally without reference to parliament.

This amounts to a transfer of legislative authority from parliament to an agency of the executive and would repeat one of the worst mistakes that took place during the pandemic when parliament agreed that the Biosecurity Act should hand almost unlimited power to the minister for health.

While this is the worst aspect of the proposed definition of corrupt conduct, other failings are also apparent. Because the definition covers conduct of a criminal and non-criminal nature, the Bill needs to ensure that bringing wrongdoers before a court in a timely manner always takes priority.

It is the Institute's view that these provisions would introduce a degree of vagueness into federal law that could embroil the NACC in controversy. Future disputes about the role of NACC could be minimised by making these changes:

- Removing the "could test" in clause 8(1)(a) which would empower the NACC to apply a speculative standard;

- Changing the wording in section 8(1)(a)(i) and section 8(1)(a)(ii) to insert a requirement for probity instead of a requirement for impartiality; and
- Removing the proposed extension of the NACC's jurisdiction into unknown areas that is outlined in clause 8(1)(e).

These matters are critically important because, as the explanatory memorandum to the Bill says: "The definition of corrupt conduct would be central to the operation of the NACC Bill and to the Commissioner's jurisdiction."

15.2 Section 8(1)(a) - the "could test"

Few would argue with the first part of the definition in section 8(1)(a) that says corrupt conduct is anything that adversely affects the honesty of a public official when discharging public responsibilities. But the second part of section 8(1)(a), which extends the definition to include conduct that "could" have that effect, is speculative. It opens the way for people to be declared corrupt for conduct that has not undermined the honesty and impartiality of public administration. This cannot be what parliament intends.

This part of section 8(1)(a), which is known as the "could test", has been borrowed from the the Independent Commission Against Corruption Act (NSW) and has been criticised in a 2017 report tabled in the NSW parliament by John Nicholson, a former judge of the NSW District Court and, at the time, acting inspector of ICAC.[2] Nicholson wrote that conduct that satisfies the "could test" is much easier to establish than conduct that "constitutes or involves" corrupt conduct. The first only requires a possibility while the second requires an established fact, Nicholson wrote.

The "could test" invites the NACC to speculate about something that, by definition, did not happen but could have happened. It is difficult to see what purpose this serves when section

[2] John Nicholson, acting inspector of ICAC; Report Pursuant to Sections 57B and 77A - Operation Vesta; page 25

10 of the Bill makes it clear that a conspiracy or attempt to engage in the conduct outlined in section 8(1) would amount to corrupt conduct. If section 10 deals with conspiracies to engage in corrupt conduct, that means conspiracies appear to be outside the scope of the "could test".

The "could test" would seem to make it possible for corruption findings to be made in circumstances where there is insufficient evidence to show that corrupt conduct actually took place, there is insufficient evidence to show that a conspiracy to engage in corrupt conduct took place but the Commissioner believes corrupt conduct could take place.

This is like requiring traffic police to issue fines to motorists before they turn on the ignition if a policeman forms a view that a particular motorist "could" exceed the speed limit.

The "could test" would seem to be in conflict with the legislative intent of the Bill, as expressed in section 41(3), that the Commissioner should only conduct investigations that focus on serious or systemic corrupt conduct. It is hard to imagine a circumstance in which a mere possibility would meet this test.

The lack of rigour that is implicit in the "could test" is likely to bring the Commissioner and the law that underpins the Commissioner into disrepute. Reputations would be ruined based on the mere possibility of misconduct, not the reality.

The "could test" should be removed from section 8(1)(a) in order to protect the credibility of the proposed institution by ensuring its powers are not used against those who have done nothing wrong.

15.3 Section 8(1)(a)(i) and section 8(1)(a)(ii) - impartial

These provisions would define corrupt conduct as anything that adversely affects the honest or impartial exercise of a public official's responsibilities. Because public officials are defined

in the Bill to include members of parliament, these provisions need to change. The word "impartial" should be removed and replaced with a term that takes account of the different roles of public servants and politicians.

Members of parliament are not elected to office to be impartial administrators. They are elected to discharge political responsibilities that are not just partisan but frequently intended, on partisan grounds, to create winners and losers. That is the nature of democracy. Some political parties make a virtue of the fact that they serve sectional interests while others assert that they serve a broader national constituency. They all have a duty to influence public policy in ways that serve those interests. They are not elected to become neutral managers. The role of parliamentarians is very different to the role of public servants who are required to discharge administrative responsibilities impartially.

It would be a mistake therefore to apply an inappropriate standard to the different duties of politicians and public servants. The difficulty of attempting to do so is apparent from the fact that the explanatory memorandum to the Bill takes several pages - and refers to several judgements of superior courts - in an attempt to explain how the standard of impartiality would be applied to politicians who are, by definition, partisan. This level of complexity is undesirable if the purpose of the Bill is to send a signal about the standard of conduct that will be considered to be corrupt conduct. That signal should be clear and easily understood without resort to legal advice.

These provisions should be clarified by removing the term "impartial" and replacing it with a term that is broad enough to make allowance for the different roles of public servants and members of parliament. It would be more appropriate, for example, to change the wording of these provisions to state that corrupt conduct is conduct that adversely affects the "probity" of public officials in the exercise of their responsibilities.

The explanatory memorandum, at paragraph 2.20, indicates that the terms honesty and impartiality are collectively considered to be the equivalent of the term "probity". It also

says, at paragraph 2.22, that section 8(1)(a) "would not cover partial conduct by a third party unless that conduct could adversely affect the *probity* of a public official's conduct" [emphasis added].

If the authors of the explanatory memorandum believe the term "probity" explains what is meant by "honest and impartial" why not simply adopt that term in the Bill itself instead of persisting with "impartial" which could change the relationship between members of parliament and their constituents?

The explanatory memorandum asserts, at paragraph 2.8, that section 8 is not intended to establish a new standard of conduct by public officials or alter the relationship between those officials and the public as reflected in Australia's system of representative and responsible government. But if the term "impartial" is retained, the words of the law would prevail. That would place community groups at risk if they sought to persuade members of parliament to make decisions on political grounds that benefit those groups at the expense of others. Despite the stated intention of not altering the relationship between politicians and the community, the explanatory memorandum says, at paragraph 2.10, that the definition of corrupt conduct would extend to third parties if their conduct adversely affects or could adversely affect, the impartial exercise of a public official's powers.

If the term "probity" were used instead, it would more clearly support the goal of not altering the relationship between public officials and community groups. It would also focus more clearly on the need for honesty and integrity. This is a better outcome than requiring politicians to conduct themselves like neutral administrators or declaring community groups to be corrupt for exercising their democratic rights to seek beneficial outcomes from their elected representatives. Community groups would be able to lobby politicians for beneficial changes in public policy without fear of being second-guessed by the commission and declared corrupt.

The imposition of an impartiality test for politicians is at odds with the purpose of representative democracy and would subject members of parliament to standards more appropriate for administrative officers. If the purpose of this provision is to address concern about the past allocation of grants, measures that are more precisely targeted are needed. The imposition of a general "impartiality" standard for politicians would have adverse consequences. It would alter the relationship between community groups and their elected representatives and have a chilling effect on one of the elements of representative democracy. It could also have a disproportionate and unjust impact on supporters of sectional parties such as the Nationals and the Greens who exist for the explicit purpose of securing resources and policy outcomes for their constituents based on politics rather than a managerial approach to public administration.

Empowering NACC to use this provision against politicians and those who lobby them for beneficial outcomes carries the risk that it will be used selectively. A probity test would be less problematic and consistent with the goal of maintaining the current relationship between the community and public officials, including members of parliament.

The electorate, not a commission, is generally best placed to make the political judgement about whether a grants program has been abused. The exception is when such a program is affected by a lack of probity.

15.4 Section 8(1)(b) - breach of public trust; section 8(1)(c) - abuse of office; Section 8(1)(d) - misuse of information

The explanatory memorandum makes it clear that breach of public trust is intended to cover criminal misconduct as well as other incidents of official misconduct.

There is a risk that if the Bill remains unchanged - and does not give priority to the interests of the justice system - it will open the door for parallel proceedings in the NACC and the courts much like the proceedings in NSW that delayed the criminal trial of Eddie and Moses

Obeid and their co-conspirator Ian Macdonald.[3] This risk is apparent for proceedings under all three provisions - breach of trust, abuse of office and misuse of information - which cover the core accusations that were proven against Macdonald and the Obeids. Parliament should be wary of replicating the arrangements that caused the delays in that case.

The Obeids and Macdonald were only convicted last year, long after ICAC in NSW conducted public hearings in 2012 and 2013, generated adverse pre-trial publicity, produced a report that was tabled in parliament and then referred the three men to the Director of Public Prosecutions.

The prosecutors, unlike ICAC, needed to prepare a case that complied with the rules of evidence. The indictment was finalised in February, 2020, almost six years after ICAC produced its report in 2013.

So in July last year, when Macdonald and the Obeids were convicted, it concerned events that took place up to 14 years in the past and had been made known to ICAC since the commission received a tip off in February, 2011.

In order to avoid similar delays, the Bill before parliament should make it clear that the NACC is not entitled to run public hearings and produce reports on matters that involve criminal wrongdoing - even if those reports are confined to findings of fact. The Bill should also make it clear that criminal conduct falls under the exclusive jurisdiction of the justice system - the Director of Public Prosecutions and the courts - and takes priority over generating publicity at public hearings and producing findings of fact.

The Bill should require the Commissioner to suspend its investigation and hand all files on particular matters to the Director of Public Prosecutions as soon as it becomes apparent to the commissioner that the evidence shows there is a possibility a crime has been committed. This could take place during a preliminary investigation or during a formal

[3] Those convictions are subject to appeal.

investigation. In order to give effect to the primacy of the justice system, matters of potential criminal conduct should never proceed to a public hearing. The NACC should be required to refer such matters to the DPP at the earliest opportunity after a potential criminal offence becomes apparent.

If misconduct in public office and other forms of criminal misconduct are referred to the DPP as early as possible - as they should be - the question arises as to whether the NACC should be permitted to conduct public hearings into residual abuses which would, of necessity, not be criminal in nature.

The justice system has a legitimate role in dealing with misconduct that amounts to criminal conduct. Yet those responsible for criminal breaches will enjoy more rights before the courts than those responsible for non-criminal breaches who are dealt with by the NACC. Criminal justice makes provision for a full appeal. The NACC Bill does not. Criminal justice respects the privilege against self-incrimination. The NACC Bill does not.

It is inequitable that those accused of less serious misconduct would face harsher treatment than those accused of criminal breaches.

15.5 Section 8(1)(e) - Corruption of any other kind

While this is the last provision in the definition of corrupt conduct it is of primary importance. It needs to be removed for two reasons:

- It would enable the NACC to apply an uncertain standard when determining if corrupt conduct had taken place, and
- It would give the NACC an open-ended jurisdiction that could be expanded into unknown areas without reference to parliament.

Sub-section 8(1)(e) would, if implemented, mean it would be up to the NACC, rather than parliament, to decide what conduct beyond that listed in section 8 is to be considered corrupt. This would leave the NACC and the community uncertain about the standard of conduct that would be declared corrupt. It would also reduce significantly the ability to hold the NACC to account for exceeding the limits on its jurisdiction.

Sub-section 8(1)(e) defines corrupt conduct as "any conduct of a public official" that "constitutes, involves or is engaged in for the purpose of corruption of any other kind". That means corrupt conduct is conduct undertaken for purposes of corruption other than those forms of corruption set down in the bill. That opens the door to the unknown.

The bill's explanatory memorandum, at paragraph 2.47, says this provision is intended to give the NACC the flexibility to address "areas of corruption that may not currently be foreseen, and may not fall within any of the other more specific limbs of the definition".

If the intention is to limit those unknown forms of corrupt conduct to those related to the familiar forms outlined in section 8, that should be made clear in a rewritten provision. At the moment the words of section 8(1)(e) seem intended to give the NACC authority to expand into new areas of what it considers to be corruption.

The provision appears after the other components of the definition and says corrupt conduct is "any conduct of a public official in that capacity that constitutes, involves or is engaged in for the purpose of corruption of *any other kind*". [Emphasis added]

If the goal is to give the NACC flexibility to deal with unforeseen circumstances, this should be done in a way that leaves parliament in control. There should be no doubt that parliament remains supreme regardless of the fact that the NACC has been empowered to investigate members of parliament.

This could be addressed by giving the NACC permission to make submissions to parliament seeking urgent amendments to deal with unforeseen circumstances. Another option would be to give the NACC authority to make draft regulations and have them laid before parliament as disallowable instruments.

As it stands now, this provision is an improper transfer of legislative power. It should be removed and replaced by a mechanism that does not require parliament to surrender control.

General

The Attorney-General is congratulated on the swiftness with which he has brought forward the Bill, however this enthusiasm will quickly dissipate when the contents of the Bill are understood, and if the above recommendations are not made.

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Rule of Law Institute of Australia

16 October 2022