

# Anti-corruption bill in need of clarification



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The campaign to stamp out public sector corruption is laudable. But in key areas, the Albanese government's National Anti-Corruption Commission Bill needs surgery.

One of the most troubling elements is the proposal to give the National Anti-Corruption Commission the power to define almost anything as corruption.

This proposal, which is outlined in clause 8(1)(e) of the NACC Bill, is a transfer of power from parliament and an affront to democratic law making. It needs to be removed.

It would enable the NACC to pursue people not for breaches of standards set down in law, but for breaches of standards known only to the commission.

Most of the definition of corruption in the bill gives the misleading impression that the commission would be confined to cracking down on corrupt conduct in circumstances specified by the bill.

There has already been plenty of debate about specific matters the commission will be empowered to pursue, most notably conduct that adversely affects or could adversely affect the honest or impartial exercise of public administration, breaches of public trust, abuse of office, and the misuse of information. But that is just part of the picture.

Far more attention needs to be given to clause 8(1)(e) which extends the definition of corruption – and therefore the commission's jurisdiction – to cover conduct that goes beyond the wrongdoing listed in the bill.

The bill's explanatory memorandum makes this explicit: "This limb of the definition would provide the commissioner with flexibility to address emerging areas of corruption that may not currently be foreseen, and may not fall within any of the other more specific limbs of the definition."

Clause 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 set down in the bill. That excludes anything that undermines the honesty and integrity of public administration while opening the door to the unknown.

What those other forms of corruption might be is a mystery. And they will remain unknown to those who might be hauled before the NACC and held to account for conduct that did not undermine the honesty or integrity of public administration.

That means limits on the jurisdiction of the NACC will be determined by the NACC.

This provision looks like another example of a discredited form of lawmaking known as "Henry VIII clauses" that became all too common during the pandemic. These provisions transfer legislative power from parliament to the executive and the bureaucracy.

They take their name from King Henry VIII of England who, under the 1539 Statute of Proclamations, was invested with the power to issue laws through royal proclamations without consulting parliament. They are the legacy of tyranny.

In their modern form, they refer to an act of parliament that enables regulations to be made or executive action to be taken that modifies the operation of a statute after it has been approved by parliament.

The NSW Bar Association told a 2020 inquiry that while these provisions were not unlawful they had been criticised and should be replaced at the earliest opportunity with legislation considered and passed by parliament.

If the purpose of clause 8(1)(e) is to enable the commission to deal with unforeseen circumstances, this is not the way.

A sensible approach would require any move by the commission to expand its jurisdiction into unforeseen areas to be laid before parliament as a disallowable instrument. That would keep parliament in control.

As the bill stands now, it would empower the NACC to assert that any form of conduct that would otherwise be outside the commission's jurisdiction has magically become its core business.

The boundaries on the commission's reach into the lives of politicians and public servants would cease to exist.

By including this clause, the government is asking parliament to extend the new organisation's jurisdiction into areas that are

not listed in the bill, are unknown to parliament and will not be considered during the inquiry into the bill.

If the purpose of the NACC is to crack down on conduct that adversely affects, or could adversely affect, the honesty and integrity of public administration there is simply no need for clause 8(1)(e). That is already covered by other parts of the bill.

This bill seems intent on allowing the NACC to expand into unknown areas – which is apparent from the fact that this clause empowers the commission to investigate corruption "of any other kind", not merely those forms that are set down in the bill.

Corruption is such a vague term it was never appropriate for use in a statute without cumbersome definitions. But the NACC Bill takes vague lawmaking to a new level.

If this sort of lawmaking catches on, people could soon be punished not just for breaking the law, but for conduct "of any other kind" that some bureaucrat does not like.

Without change, this bill will enable the NACC commissioner to convene a public hearing regardless of any internal opposition from the deputy commissioners; that hearing could then impugn people over conduct that is not unlawful, is not listed as corruption in the NACC Bill and will not be considered by the parliamentary inquiry into this scheme.

For significant parts of society, this proposal would replace the rule of law with a form of arbitrary rule that has no place in free societies.

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