Courts should handle crime, not the NACC

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The Rule of Law Institute of Australia supports moves to crack down on wrongdoing. However the measures in the bill to establish the National Anti-Corruption Commission need improvement.

It is worth noting that some of the most important issues we have identified have also been highlighted by the Law Council of Australia and the Queensland Law Society.

We are concerned about problems with the definition of corrupt conduct and the abrogation of legal professional privilege.

The principles of the rule of law include equal treatment before the law, the presumption of innocence, the prohibition on retrospective punishments and the right to be told in advance what conduct is considered to be unlawful or in this case, corrupt.

Aspects of the NACC Bill undermine these principles by imposing vague standards with retrospective effect.

Chief among them is the proposed definition of corrupt conduct and the fact that the NACC commissioner would be empowered to deal with criminal and non-criminal conduct.

This is at odds with the idea that criminal conduct should be dealt with by courts, not administrative bodies – which is what the NACC will be.

So in order to ensure the NACC does not become a parallel system of justice, the Bill should make it clear that the commission is not entitled to run public hearings and produce reports on matters that could involve criminal wrongdoing – even if those reports are confined to findings of fact.

Because it will not be bound by the rules of evidence there is a risk that some findings of fact would be in conflict with subsequent findings by courts – which would undermine public confidence in both institutions.

The bill should make it clear that criminal conduct falls under the exclusive jurisdiction of the justice system – the Commonwealth Director of Public Prosecutions and the courts – and this takes priority over generating publicity at public hearings.

As the Bill is currently structured, the interests of criminal justice would be sidelined in favour of public hearings whenever the commission considers such hearings are in the public interest and exceptional circumstances are present.

That will inevitably delay judgment day for criminals.

If parliament wishes to eliminate that danger, it needs to make an honest decision about what it is seeking to achieve by establishing this commission.

If the purpose is to run show trials at the cost of delaying criminal justice, the NACC Bill will be resounding success.

But if the goal is to punish the worst aspects of public sector corruption, the Bill needs to recognise that there is only one way of achieving that goal and that is through the justice system.

That means accepting that criminal misconduct should always be referred to the DPP as early as possible – as soon as there is evidence that a crime might have been committed.

It can never be in the public interest for this commission, rather than courts, to run public hearings into matters that could involve criminal conduct – not even in exceptional circumstances. It is not a court.

If parliament ignores this problem, it will mean those who vote for the NACC Bill have more faith in show trials than they do in the real thing.

On the definition of corruption, the "could test" in proposed section 8(1)(a) is speculative, would encourage a lack of rigour and should be removed.

It extends the definition to include conduct that does not adversely affect the honesty or impartiality of a public official but "could" have that effect.

The "could test" invites the NACC to speculate about something that, by definition, did not happen but could happen. It is difficult to see what purpose this serves when another provision deals with attempts and conspiracies to engage in corrupt conduct.

The "could test" would make it possible for corruption findings to be made in circumstances where there is insufficient evidence to show that corrupt conduct actually took place, and there is insufficient evidence to show that a conspiracy or an attempt to engage in corrupt conduct took place.

Public officials, including members of parliament, could still be declared corrupt if the commissioner believes corrupt conduct "could" take place at some point in the future.

The other major concern is the last provision in the definition which extends the definition to include "corruption of any other kind", which opens the door to matters that have not even been considered by parliament.

This is a bridge too far. It would leave the NACC and the community uncertain about the standard of conduct that could be declared corrupt.

Unless this is removed, it would repeat one of the worst mistakes that took place during the pandemic when the Biosecurity Act – a law approved by parliament – handed almost unlimited power to the minister for health. This is not a form of lawmaking that deserves to be replicated.

If the goal is to give the NACC flexibility to deal with unforeseen circumstances, this should be done in a way that does not have the effect of transferring power from the legislature to the executive branch of government.

The principles of the rule of law that will be eroded by the NACC Bill are of fundamental importance.

They form the basis of what is known in this country – and in comparable jurisdictions – as freedom under the law.

These principles are intended to protect human rights by impeding arbitrary rule and regulating the power of the state.

Chris Merritt is vice-president of the Rule of Law Institute of Australia. This article is based on his opening statement on Thursday to the federal parliamentary inquiry into the National Anti-Corruption Commission Bill.