



NSWCCL SUBMISSION

JOINT SELECT COMMITTEE ON NATIONAL ANTI- CORRUPTION COMMISSION LEGISLATION

NATIONAL ANTI- CORRUPTION COMMISSION BILL 2022 AND THE NATIONAL ANTI- CORRUPTION COMMISSION (CONSEQUENTIAL AND TRANSITIONAL PROVISIONS) BILL 2022

14 October 2022

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the National Anti-Corruption Commission Legislation Committee's inquiry into the provisions of the *National Anti-Corruption Commission Bill 2022* (Cth) (**Bill**) and the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022* (Cth), which seek to establish the National Anti-Corruption Commission (**NACC**).

Introduction

- 1 NSWCCCL has long advocated for the urgent need for a strong national anti-corruption body and has engaged with the various proposals for such a body over the last decade. In doing so we have built on our close observation of the NSW ICAC and engagement with numbers of reviews of that body; as well as various proposals for a national-anti-corruption body over the last decade.¹ We have made submissions to numbers of inquiries conducted by the NSW Parliamentary Committee on the ICAC, most recently regarding its review of aspects of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**).² We have also watched with interest the development of other anti-corruption bodies at the state and territory level and have closely monitored the operation of such bodies.
- 2 NSWCCCL welcomes this Bill and congratulates the Attorney-General and the Albanese Government for acting quickly to bring this long overdue and urgently needed Bill to the Australian Parliament for consideration and passage in this term of government.
- 3 NSWCCCL's submission primarily relates to four aspects of the Bill:
 - (a) the NACC's power to hold public hearings.
 - (b) the NACC's jurisdiction in relation to investigating the corrupt conduct of third parties;
 - (c) the provisions dealing with claims of legal professional privilege; and
 - (d) funding for and oversight of the NACC.

Summary of NSWCCCL's position

- 4 The NSWCCCL is broadly supportive of the Bill and the proposed design of the NACC. It incorporates most of the elements which we consider essential for a strong and effective national anti-corruption body.

We do, however, have some concerns with the Bill the most important of which is the imposition of an additional and significant constraint on the power of the NACC to hold public hearings even when the Commissioner is satisfied that a public hearing would be in the public interest. This is a surprising and disappointing departure from the position the Government strongly supported while in Opposition.

Positive aspects of the Bill

- 5 The NSWCCCL commends the Government for drafting a Bill which includes most of the elements necessary for a strong and effective national anti-corruption agency. In particular we note these important elements:
 - (a) The Bill provides for public hearings – albeit with an excessive constraint which should be removed and an unnecessary and potentially distorting specification of a default position for private hearings. Public hearings that are deemed to be in the public interest are immensely important to the overall success of the NACC in building community awareness of and confidence in the work of the agency as well as potentially eliciting new information in relation to matters under investigation.

¹ See for example, NSW Council for Civil Liberties, *Submission: Senate Select Committee on a National Integrity Commission*, (27 April 2017) <https://d3n8a8pro7vnm.cloudfront.net/nswcccl/pages/2236/attachments/original/1494889535/NSW_Council_for_Civil_Liberties_submission_select_Committee_NIC_fnl_270417.pdf?1494889535>.

² NSW Council for Civil Liberties, *Review of Aspects of the Independent Commission Against Corruption Act 1988*, Submission No 10 (29 July 2022) <<https://www.parliament.nsw.gov.au/ladocs/submissions/79403/Submission%2010.pdf>>. See also NSW Council for Civil Liberties, *Submission: Inquiry into the Reputational Impact on an Individual Being Adversely Named in the ICAC's Investigations*, Submission No 34 (31 July 2020) <<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2595#tab-submissions>>

- (b) NSWCCCL supports the broad definition of 'corrupt conduct', which goes beyond criminal conduct and includes breach of public trust, abuse of office and misuse of information. It is essential to recognise that some forms of corruption may not rise to the level of criminal offences but nevertheless have devastating impacts on public confidence and government integrity.
- (c) The Bill provides the NACC with jurisdiction to investigate allegations of corrupt conduct prior to its establishment. NSWCCCL regards this as a key step towards improving public faith in the proper functioning of the federal government. Without the ability to investigate retrospectively, we consider that both the effectiveness and public confidence in the NACC would be compromised.
- (d) NSWCCCL is in substantial support of the suite of coercive and investigative powers currently provided for in the Bill, save for some concerns as to the broad abrogation of privileges currently provided for by the Bill. NSWCCCL has long been concerned with the appropriate protection of civil and individual liberties from government overreach. However, we consider, for the most part, the Bill strikes an appropriate balance between the rights of individuals and the grave public interest in stamping out corrupt practices.
- (e) The Bill provides that the NACC may commence investigations at its own motion, as well as responding to referrals or complaints, including from anonymous sources. This is critical to the independence of the NACC and its ability to act as an effective check on corruption. Without such a power, the NACC could not be considered a properly independent body.
- (f) The NSWCCCL considers that transparency is crucial in ensuring public support for the NACC and in restoring public confidence in government integrity. The NSWCCCL is encouraged that the Bill provides for public reporting where the NACC decides it is in the public interest to do so or where public hearings have been held.

Matters of Concern

Seven other matters of concern within the Bill which NSWCCCL will be seeking to address by recommending appropriate amendments encompass:

- (a) **Excessive constraint on power to hold public hearings.** As noted, of primary concern is the addition of 'exceptional circumstances' as a constraint on public hearings. State anti-corruption bodies have adopted a range of approaches to public hearings, balancing the need to safeguard individual rights against the need for transparency and public exposure of corruption. Experience has shown that public hearings result in a more effective body and greater transparency. The NSWCCCL urges that the Bill be amended to allow public hearings when such hearings would be in the public interest and proposes some alternatives to the current position in the NACC Bill.
- (b) **Exclusion of third-party corruption unless their conduct leads to wrongdoing by a public official.** Corruption in the public sphere goes far beyond conduct that leads to wrongdoing by a public official. The jurisdiction of the NACC should be expanded to allow it to investigate and address corruption which affects the integrity of public administration and public confidence, even if it does not affect the probity or propriety of a public official. This broader jurisdiction is essential to address the wide suite of corrupt practices which can distort the proper function of government, to remedy the detrimental impact of such practices on public confidence, and to ensure that processes such as procurement are untainted by corruption.
- (c) **The extent of the abrogation of legal professional privilege currently proposed in the Bill.** The NSWCCCL agrees that, given the remit of the NACC and its vital importance in restoring public trust, it is appropriate for the NACC to have investigatory powers similar to those of a Royal Commission. However, it is concerned by the broad abrogation of legal professional privilege currently proposed in the Bill. The ability to obtain independent legal advice based on frank disclosure to a lawyer is a fundamental right; such a broad abrogation of this principle is not justified in this instance. Some amendments will be proposed.

- (d) **Critical independence issues.** Experience of state anti-corruption bodies shows that establishing appropriate supervision and funding arrangements for anti-corruption bodies is essential to their independence and effectiveness.

The NSWCCCL is particularly concerned by two elements of the current arrangements in the Bill:

- (i) **Potential for disproportionate Government influence over the parliamentary oversight committee.** The parliamentary oversight mechanism under the Bill gives the government of the day disproportionate influence. The Chair of the Joint Committee must be from the Government and has a casting vote. Given the skewed party composition of the Joint Committee, the NSWCCCL urges that the Bill be amended to remain silent on the party affiliation of the Chair.
- (ii) **Lack of ongoing budgetary independence for the NACC.** The Government will retain the final say on the NACC's funding under the Bill as currently proposed. In order to ensure that the NACC is able to fulfill its function without fear of political interference, funding should be determined by an independent tribunal rather than by the government.

Proposed areas for amendment.

Public hearings

- 6 The NSWCCCL's primary concern with the Bill is that the NACC's power to hold public hearings is constrained under s73(2) of the Bill by the requirement that the Commissioner be satisfied that:

- (a) exceptional circumstances justify holding the hearing, or the part of the hearing, in public; *and*
(b) it is in the public interest to do so.

The 'exceptional circumstances' requirement should be removed from the Bill and the NACC should be able to hold public hearings consistently with appropriate public interest and fairness safeguards.

Publicity, transparency and curbing corruption

- 7 The power to hold public hearings in proper circumstances is essential to the effective and transparent operation of an anti-corruption body.³ Many commentators have highlighted the capacity of public hearings to:⁴

- (a) expose corruption to the public, which by its very nature is secretive and difficult to detect;
(b) encourage witnesses to come forward with information;
(c) deter others who may seek to engage in corrupt conduct;
(d) allow public scrutiny of the commissions' operations;
(e) increase trust in government and that allegations of corruption are being properly investigated; *and*
(f) educate people about acceptable standards of behaviour in public office.

- 8 Open justice is a fundamental tenet of Australia's legal system because the public needs to see that justice is being done fairly to foster trust in the system. The same principle applies when investigating allegations of corruption in government. As Professor Anne Twomey has recently explained:⁵

If the people see that allegations of corruption against parliamentarians are being considered behind closed doors, they are likely to believe that the participants in the system are 'protecting their own' or behaving in a partisan manner, because they are unable to judge for themselves the level of scrutiny that is being applied.

³ Law Council of Australia, *Law Council submission on the Commonwealth Integrity Commission consultation draft* (18 February 2021) <<https://www.ag.gov.au/sites/default/files/2021-03/38.%20Law%20Council%20of%20Australia.PDF>>, [136].

⁴ The Centre for Public Integrity, *Public hearings shine light on corruption – Sunlight is the best disinfectant* (April 2022) <https://publicintegrity.org.au/research_papers/public-hearings-shine-light-on-corruption-sunlight-is-the-best-disinfectant/>.

⁵ Professor Anne Twomey, *Consultation on the Commonwealth Integrity Commission* (1 February 2021) <<https://www.ag.gov.au/sites/default/files/2021-04/professor-anne-twomey.PDF>>, p 6.

- 9 The NSWCCCL supports the current Bill insofar as it confers discretionary power on the NACC to consider whether, and when, it holds public hearings as part of its investigations under s73, noting the tension between:
- (a) the potential for unfair reputational damage for individuals being publicly investigated without the protection of a fair trial before a court and the rules of evidence; and
 - (b) the public good that flows in many ways from open investigation and exposure of corruption in public hearings.
- 10 However, we consider that the current Bill does not currently strike the right balance and unduly constricts the NACC's ability to hold public hearings.
- Only the public interest criterion is needed***
- 11 The NSWCCCL considers the NACC's discretion as to whether or not to conduct public hearings should be guided by public interest and fairness criteria similar to those in s31 of the ICAC Act. The requirement in the current Bill that there be 'exceptional circumstances' (which appears to be modelled on s117(a) of the Victorian *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (**IBAC Act**)) unnecessarily constrains the ability of the NACC to hold public hearings and should be removed from the Bill. In the context of the IBAC Act, the Victorian Court of Appeal has found the phrase 'exceptional circumstances' requires circumstances that are 'clearly unusual and distinctly out of the ordinary' before a public hearing can be held,⁶ which the NSWCCCL considers too high a threshold.
- 12 Additionally, the NACC may make its findings or reports public where it would be in the public interest to do so⁷ and reports are to be tabled in Parliament where a public hearing has been held.⁸ There does not seem to be an obvious reason to impose an additional barrier to public hearings when the ultimate findings may be published if the Commissioner is satisfied it would be in the public interest.
- 13 The NSW experience on this topic is instructive.⁹ The position under the ICAC Act, in our view, strikes the right balance between individual rights and the public good. The NSW ICAC has publicly exposed more corruption than the Victorian IBAC in the period 2012 to 2020, with NSW holding 42 public inquiries against Victoria's eight.¹⁰ That is not to suggest that NSW ICAC is holding public hearings as a default; the data shows that even without the 'exceptional circumstances' requirement, public hearings only make up a fraction of its investigations (42 from 979 during the period of 2012 to 2020).¹¹
- 14 Moreover, the NSWCCCL considers that the factors in s73(3) of the current Bill are sufficient to guide the NACC's discretion to hold public hearings in a way that protects individual rights and liberties, without the need for an additional 'exceptional circumstances' limitation. Subsections 73(3)(b), (c) and (d) specifically direct the NACC to have regard to a person's reputation, any particular vulnerability, and the potentially confidential nature of certain evidence. These guidelines already enable the NACC to effectively weigh relevant circumstances and the public interest in exposing the matter against the benefits of preserving individual privacy.
- 15 If the Albanese Government is intent upon strengthening the protections in place for individual privacy, and considers that the 'exceptional circumstances' requirement must remain, then NSWCCCL considers that the following would be better options (in order of preference), either:

⁶ *R v Independent Broad-Based Anti-Corruption Commissioner* [2015] VSCA 271 [71]. This case was the subject of an appeal to the High Court of Australia in *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, but only in relation to the point regarding the privilege against self-incrimination, not as regards to 'exceptional circumstances'.

⁷ National Anti-Corruption Commission Bill 2022 (Cth), section 156.

⁸ National Anti-Corruption Commission Bill 2022 (Cth), section 155.

⁹ NSW ICAC's ability to hold public inquiries has been considered in a number of reports. See, for example, Mr Bruce McClintock SC, Independent review of the *Independent Commission Against Corruption Act 1988*: Final Report (January 2005); The Hon Murray Gleeson AC (Chair), Mr Bruce McClintock SC, Review of the Jurisdiction of the Independent Commission Against Corruption Report: Independent Panel (30 July 2015); The Hon David Levine AO RFD QC, Report to Premier: Inspector's Review of the ICAC (12 May 2016); Parliamentary Committee on the ICAC, Review of The Independent Commission Against Corruption: Consideration of The Inspector's Reports (Report 2/56, October 2016).

¹⁰ The Centre for Public Integrity, *Public hearings shine light on corruption – Sunlight is the best disinfectant* (April 2022) <https://publicintegrity.org.au/research_papers/public-hearings-shine-light-on-corruption-sunlight-is-the-best-disinfectant/>.

¹¹ Ibid.

- (a) including additional factors in s73(3) of the current Bill directed towards further matters for the Commissioner to consider in relation to holding private hearings, without the excessively high threshold of 'exceptional circumstances'; or
- (b) as an alternative, provide further detail in s73 regarding what matters could constitute an 'exceptional circumstance'. This would ensure better clarity for the public and provide proper guidance for the Commissioner when deciding when to exercise his or her discretion (such as that provided in s31(2)(d) of the ICAC Act, as to 'whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.')

Recommendation 1

The power to hold public hearings should be constrained only by public interest and fairness safeguards. The 'exceptional circumstances' requirement should be removed from the Bill.

Jurisdiction in relation to third party conduct

- 16 In order to be properly effective, anti-corruption bodies must have scope to investigate not only the actions of public officials, but also the conduct of third parties that impair confidence in public administration and government integrity. In the view of the NSWCCCL and other bodies with whom the NSWCCCL concurs in this regard (such as The Centre for Public Integrity), the Bill as currently drafted does not provide the NACC with sufficiently wide jurisdiction.¹²

Current jurisdiction under the Bill

- 17 The NSWCCCL acknowledges that the definition of corrupt conduct currently set out in s8 of the Bill provides some bases for the investigation of third party conduct, including where that conduct adversely affects, or could adversely affect, either directly or indirectly:
- (a) the honest or impartial exercise of any public official's powers as a public official; or¹³
 - (b) the honest or impartial exercise of any public official's functions or duties as a public official.¹⁴
- 18 This goes some way to addressing potential conduct of third parties to improperly influence public officials, for example through bribery. It also has the potential to reduce not only the 'demand' side of corruption at the federal level in Australia – that is, the solicitation or acceptance of improper benefits by Commonwealth officials – but also the 'supply' side of corruption – that is, the offering or giving of improper benefits by third parties to induce corrupt conduct by public officials.

Third party corruption

- 19 The Bill does not, however, provide the NACC with sufficient jurisdiction to address the wide suite of corrupt practices which may impact the proper functioning of government but which may not necessarily involve wrongdoing by a public official. For example, as noted by The Centre for Public Integrity, the jurisdiction of the NACC would not currently extend to private companies 'colluding to corrupt a procurement process, or apply for a mining permit with false information'.¹⁵ It might also, concerningly, not extend to corrupt or fraudulent conduct in a privatisation process which, given the public interest in the disposition and functioning of public assets and critical infrastructure, is a significant defect in the design of the Bill.
- 20 The Bill would also put the NACC out of alignment with the majority of the state and territory anti-corruption bodies (only the Western Australian Corruption and Crime Commission and the Tasmanian Integrity Commission currently lack the ability to investigate third parties).
- 21 The NSW ICAC may be instructive in this regard. Prior to the High Court decision in relation to the investigation into the Margaret Cunneen case¹⁶, ICAC held the view that the ICAC Act defined as 'corrupt'

¹² The Centre for Public Integrity, 'Media Release – Corruption experts welcome corruption commission' (28 September 2022) <<https://publicintegrity.org.au/media-release-corruption-experts-welcome-corruption-commission/>>.

¹³ National Anti-Corruption Commission Bill 2022 (Cth), section 8(1)(a)(i).

¹⁴ National Anti-Corruption Commission Bill 2022 (Cth), section 8(1)(a)(i).

¹⁵ The Centre for Public Integrity, 'Media Release – Corruption experts welcome corruption commission' (28 September 2022) <<https://publicintegrity.org.au/media-release-corruption-experts-welcome-corruption-commission/>>.

¹⁶ *Independent Commission Against Corruption v Margaret Cunneen & Ors* (2015) 256 CLR 1.

any conduct by a member of the public that could have adversely affected the way that a public official carried out their functions, meaning that ICAC could investigate a person's conduct if it could interfere with or harmfully affect the way a public servant administered the affairs of the State.¹⁷ However, the High Court, in a majority decision, limited ICAC's investigation power to corrupt conduct which could affect the 'probity or propriety' of a public official.

22 This decision was met with widespread concern as it precluded ICAC from the investigation of widespread fraud and corruption adversely affecting public administration from outside sources, which in many cases did not involve corruption or knowledge of any public officer (which is what the Bill requires in its current form).

23 Following a review by Gleeson and McClintock, which recommended an amendment to the ICAC Act to address this shortfall¹⁸, the following sub-section was inserted:

(2A) *Corrupt conduct* is also any *conduct* of any person (whether or not a *public official*) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

- (a) collusive tendering,
- (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
- (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
- (d) defrauding the public revenue,
- (e) fraudulently obtaining or retaining employment or appointment as a *public official*.

24 This amendment was supported by all major parties in the NSW Parliament, reflecting an awareness of community support for the restoration of this power to ICAC.

25 A similar approach has been taken in other states. For example, section 4(1)(da) of the Victorian IBAC Act provides that corrupt conduct includes conduct:

(da) of a person (the **first person**) intended to adversely affect the effective performance or exercise by a public officer or public body of the functions or powers of the public officer or public body and result in the first person or an associate of the first person obtaining:

- (i) a licence, permit, approval, authority or other entitlement under any Act or subordinate instrument; or
- (ii) an appointment to a statutory office or as a member of the board of any public body under any Act or subordinate instrument; or
- (iii) a financial benefit or real or personal property; or
- (iv) any other direct or indirect monetary or proprietary gain that they would not have otherwise obtained.

26 It is important that the NACC have similar power to investigate corrupt behavior by private citizens and businesses which adversely affects public administration.

Recommendation 2

NSWCCL recommends that the NACC should have the power to investigate serious and/or systemic corrupt conduct by a person who is not a public official when the corrupt conduct will have an adverse effect on public administration (rather than just on the conduct of public officials). It should not be a requirement that the conduct affects the honesty or impartiality of a public official in the exercise of an official function.

¹⁷ Phillip Boulton SC, 'A Parallel Architecture Of Justice', Jeff Shaw Memorial Lecture 2015 (June 2015).

¹⁸ The Hon Murray Gleeson AC (Chair), Mr Bruce McClintock SC, *Review of the Jurisdiction of the Independent Commission Against Corruption Report: Independent Panel* (30 July 2015).

Privilege

27 The NACC is intended to operate with broad powers similar to those of a Royal Commission, including to require the production of documents and compel evidence. For the most part, the NSWCCCL considers that such broad powers are appropriate to ensure that the NACC has sufficient powers to fulfil its functions.

28 The NSWCCCL does, however, have concerns about the broad abrogation of legal professional privilege as currently set out in the Bill, which go beyond the powers typically wielded by a Royal Commission.

Legal professional privilege

29 As the High Court has previously stated, legal professional privilege is 'not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity'.¹⁹ In the words of Justice McHugh, 'Australian courts have classified legal professional privilege as a fundamental right or immunity'.²⁰

30 As drafted, s114 of the Bill provides for the abrogation of legal professional privilege in respect of evidence given during hearings or material produced under compulsory notice. We note there are some safeguards in relation to advice given in relation to notices issued by the NACC or appearances before the NACC, and separately for journalists.

31 The Explanatory Memorandum to the Bill states that such a broad abrogation is appropriate to ensure that the NACC has access to information that would otherwise be required to be kept confidential. Such information would:²¹

play a key role in furthering investigations of corruption issues and NACC corruption issues, and in identifying and reducing corruption risks, thereby protecting public order. These measures would also ensure that individuals could not use legal professional privilege to frustrate the Commissioner or the Inspector's ability to conduct thorough and effective investigations or inquiries for the purposes of the NACC Bill.

32 The NSWCCCL acknowledges that there may be certain contexts where the abrogation of legal professional privilege is appropriate. For example, as noted in the Explanatory Memorandum, where the NACC is investigating allegations of corrupt conduct in relation to a procurement or contract management process, any legal advice provided may be key to understanding the factors considered by the relevant decision makers. Similarly, any legal advice provided to a public official which indicates that they may be acting inconsistently with the proper exercise of their powers would be relevant to the NACC if that decision is subsequently investigated.

33 It is common, however, for document production notices to be broadly framed and to pick up documents of limited to no probative value to a particular investigation. Under the current arrangements, for example, third parties or parties ancillary to an investigation could be compelled to disclose confidential legal advice or communications to the NACC regardless of their relevance or otherwise to the subject of the investigation.

34 The NSWCCCL notes that such a broad abrogation has not been found to be necessary in other jurisdictions:

- (a) In NSW, for example, legal professional privilege may be asserted in relation to documents required to be produced by ICAC.²² If, however, a party is called as a witness before ICAC, they may not refuse to answer a question put to them or produce a document in their control on the basis that the answer would disclose legal advice or may be incriminating.²³ This provides a level of protection in relation to initial information gathering processes and in relation to documents which may not be relevant to the ICAC proceeding but allows ICAC to obtain necessary information in a more targeted manner.

¹⁹ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11].

²⁰ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [44].

²¹ Explanatory Memorandum, National Anti-Corruption Commission Bill 2022 (Cth), p 15.

²² *Independent Commission Against Corruption Act 1988* (NSW), section 24.

²³ *Independent Commission Against Corruption Act 1988* (NSW), section 37.

- (b) In Victoria, legal professional privilege may be asserted in relation to documents required to be produced by the IBAC (although the Crown may not assert any privilege in respect of search warrants).²⁴ Disputes about the application of privilege are referred to the Supreme Court of Victoria.²⁵ If a public official is called as a witness before IBAC, the Crown is not entitled to assert any privilege and the public official is not bound by any obligations of secrecy or restriction on disclosure.²⁶

35 The Bill also goes beyond the powers afforded to a Royal Commission under the *Royal Commissions Act 1902* (Cth). The procedures under that Act do not abrogate privilege. Instead, they provide a mechanism for any commission to test that a claim for privilege is properly made, requiring claims to be tested by a court and providing that the commission can inspect a document for the limited purpose of confirming the validity of a privilege claim.

Recommendation 3

The NSWCCCL considers the Bill should be amended to provide additional safeguards for the fundamental right of parties to obtain full and frank legal advice. Such amendments may include the following:

- (a) **Individuals and non-governmental parties be entitled to assert claims of legal professional privilege to resist production of confidential communications with their legal advisor in response to compulsory notices. It may be appropriate that this right be abrogated if an individual is summoned to appear before the NACC, or if that person is a public officer.**
- (b) **In respect of individual corruption allegations, that individual would be entitled to assert legal professional privilege in relation to advice provided to them [in relation to the investigation].**
- (c) **Consideration should be given to establishing an independent third party to determine claims made in relation to legal professional privilege or referring such matters to a court with appropriate jurisdiction, so that spurious privilege claims do not frustrate the ability to conduct investigations.**

Oversight and Funding

36 The NSWCCCL considers that the oversight and funding of the NACC should be more independent than currently provided for in the Bill. Appropriately designed parliamentary oversight and secure funding is essential to preserve the independence of the NACC and to ensure its effectiveness and capacity to combat corruption.

The current arrangement under the Bill

37 The NSWCCCL commends the Albanese Government for committing \$262 million over four years for the establishment and ongoing operation of the NACC. According to the Attorney-General Mark Dreyfus, this funding will ensure that the NACC has the staff, capabilities and capacity to triage referrals and allegations it receives, conduct timely investigations and undertake corruption prevention and education activities.²⁷

38 Under the Bill, a 12-member joint parliamentary committee is to be appointed, to be known as the Parliamentary Joint Committee on the National Anti-Corruption Commission (***Joint Committee***).²⁸

- (a) The Joint Committee is to have equal representation from both houses of parliament. Each house must appoint three members from the Government, two from the Opposition, and one independent or third party member. The Chair of the Committee must be a member of the Government and has a casting vote if the votes are equal.²⁹

²⁴ *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 98.

²⁵ *Ibid*, sections 59L – 59N, section 97, sections 100-101.

²⁶ *Ibid*, section 143.

²⁷ Minister's Second Reading Speech, Parliament of Australia, Hansard (28 September 2022).

²⁸ National Anti-Corruption Commission Bill 2022 (Cth), section 172.

²⁹ *Ibid*, section 173.

- (b) The functions of the Joint Committee include reviewing the NACC's budget and finances, and reporting to both houses of parliament on:³⁰
- (i) whether the NACC has sufficient finances and resources to effectively perform its functions;
 - (ii) whether the NACC's budget should be increased to ensure it will have sufficient finances and resources to effectively perform its functions; and
 - (iii) any other matter arising out of the review that the Joint Committee considers relevant.

39 In NSWCCCL's view, the Government's allocation of \$262 million in new funding to establish the NACC is a welcome starting point, as is the ability of Parliament through the Joint Committee to review and report on funding.

40 However, the proposed model under the Bill falls short of conferring sufficient political and economic independence on the NACC. Given the Chair of the Joint Committee is to be a member of the Government, and the Government will enjoy numerical superiority on the Joint Committee as a whole, the Joint Committee is liable to be controlled by the government of the day. Accordingly, the Government retains a concerning degree of influence over the NACC's resourcing.

41 The Bill should be amended to provide a mechanism that guarantees independent oversight and funding for the NACC. We set out our proposals in relation to each of those matters below.

Independent oversight

42 The NACC must be independent from government, politics and business in order to fulfil its purpose effectively. This is also essential to ensure it is credible and has the trust of the Australian public.

43 Properly designed, a Parliamentary Joint Committee should preserve the political independence of the NACC, while ensuring an appropriate level of parliamentary oversight. But it is important that the Joint Committee be able to operate at arm's length from the government of the day and that its membership be appropriately balanced.

44 The Bill currently requires a Government appointment to the Chair and gives the Chair a casting vote in circumstances where membership of the Joint Committee is already skewed towards the Government. This potentially compromises the Joint Committee's independence by allowing the government of the day to wield disproportionate influence.

45 The NSWCCCL considers this would undermine the NACC's independence from the government (which, in some circumstances, may be involved in, or affected by, an investigation). Accountability and oversight mechanisms should not compromise the independence of the NACC but should instead protect it from inappropriate interference in its operations. The Joint Committee should be designed under the Bill in a way that protects against the risk of government control, not in a way that explicitly entrenches it.

46 Accordingly, the NSWCCCL considers that s173(1) of the Bill should be amended so that it is silent upon the political alignment of the Chair. This would allow the parliamentary members to elect a Chair from any political party, and would establish a stronger public perception of independence in the oversight of the NACC.

Recommendation 4

NSWCCCL recommends that s173(1) of the Bill should be amended so that it is silent as to the political alignment of the Chair enabling the parliamentary members to elect a Chair from any political party thereby strengthening both the independence of the committee and public perception of independence in the oversight of the NACC.

Secure funding

47 The role of the government in deciding the level of resourcing and funding for the NACC also presents a threat to its independence. Although it is promising that the Albanese Government has committed to an initial multi-year resource allocation, funding should be secure going forwards and as free as possible from political interference for the NACC to have a truly independent status.

³⁰ Ibid, section 177.

- 48 As noted above, under the Bill the Joint Committee has the power to report on the NACC's funding to both houses of parliament. NSWCCCL considers this is a good first step and provides a solid level of funding transparency. However, the ultimate decision on funding remains with the government. The Centre for Public Integrity has rightly warned that such an arrangement could render watchdogs like the NACC 'vulnerable to cuts for biting the hand that feeds them'.³¹
- 49 NSWCCCL considers there is an inherent contradiction in the government of the day controlling the funding of integral scrutiny and accountability agencies such as the NACC when it may also be affected by its investigations. The Bill should accordingly be amended to remove government control and introduce a stronger independent funding model for the NACC.
- 50 In NSWCCCL's view, the Bill should refer funding decisions to an independent tribunal. This could either be:
- (a) the existing Remuneration Tribunal, which is already afforded powers under the Bill to determine the pay of the Inspector,³² the NACC Commissioner³³ and the CEO;³⁴ or
 - (b) alternatively, the Bill could establish a new independent funding tribunal responsible for making decisions or recommendations in respect of the NACC's funding, as proposed by The Centre for Public Integrity. Under this proposal, an appropriately qualified Independent Funding Tribunal would oversee the annual budgets of the NACC alongside other accountability institutions such as the Australian National Audit Office and the Ombudsman.³⁵

Recommendation 5

NSWCCL recommends the Bill be amended to so that decisions as to the NACC's funding are made by an independent tribunal such as the existing Remuneration Tribunal or a specific NACC tribunal.

Concluding Comments

- 51 NSWCCCL considers that overall the NACC Bill strikes an appropriate balance between respecting individual rights and protecting the public from the insidious and corrosive effects of public corruption. It will however be a better and more effective Bill if the flaws – most especially the excessive constraint on public hearings- identified by NSWCCCL and many other informed persons and bodies are remedied by appropriate amendments.
- 52 It is long past time the Australian Government addressed corruption at the federal level through the introduction of an independent, strong, and effective anti-corruption body. We urge the Government and the Parliament to work to these outcomes and ensure the Bill is appropriately amended and passed as quickly as possible.

³¹ The Centre for Public Integrity, *Protecting the integrity of accountability institutions: an independent funding model* (May 2021) <<https://publicintegrity.org.au/wp-content/uploads/2021/05/Briefing-paper-Independent-Funding-Tribunal.pdf>>.

³² National Anti-Corruption Commission Bill 2022 (Cth), section 187.

³³ National Anti-Corruption Commission Bill 2022 (Cth), section 244.

³⁴ National Anti-Corruption Commission Bill 2022 (Cth), section 256.

³⁵ The Centre for Public Integrity, *Protecting the integrity of accountability institutions: an independent funding model* (May 2021) <<https://publicintegrity.org.au/wp-content/uploads/2021/05/Briefing-paper-Independent-Funding-Tribunal.pdf>>.

This submission was prepared by Dr Lesley Lynch on behalf of the New South Wales Council for Civil Liberties. We trust this submission assists the Government in its work and would be pleased to offer further assistance if it would be of use.

Yours sincerely

Josh Pallas
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