

National Anti-Corruption Commission Bill 2022

Submission to the Joint Select Committee on National
Anti-Corruption Commission Legislation

14 October 2022

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the inquiry of the Joint Select Committee on National Anti-Corruption Commission Legislation ('the Joint Select Committee') into both the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 ('the National Anti-Corruption Commission Bills 2022').
2. For some time now, the ALA has advocated for a national anti-corruption body, as we appreciate the critical importance of having a centralised and independent authority to investigate corruption at a national level.
3. The ALA welcomes the Federal Government's commitment to an independent and well-funded National Anti-Corruption Commission (NACC), which has strong investigative powers, broad jurisdiction, and discretion to initiate inquiries; to which anyone can make a referral regarding a corruption issue, including members of the public; to which the vast majority of Commonwealth agencies *must* refer a corruption issue; and over which there is appropriate oversight, including from the multi-partisan Joint Select Committee and through avenues of judicial review.
4. With regard to the Joint Select Committee's request for concise submissions, the ALA's submission will focus on the National Anti-Corruption Commission Bill 2022 ('the NACC Bill') and will provide further detail on the following aspects of the NACC Bill:
 - Public versus private hearings;
 - Reputational damage safeguards;
 - Whistle-blower protections;
 - Broad powers in section 117(5); and
 - Provision of funding and resources for the NACC.

Public versus private hearings

5. Public hearings are important for transparency, public accountability and open justice. The ALA considers that the ability to hold public hearings is crucial for any anti-corruption commission to be effective and to be seen to be effective.
6. Public hearings can operate as a powerful deterrent, encourage public debate, as well as increase public knowledge of the operation of anti-corruption legislation and investigative processes. Public hearings can also encourage additional witnesses to come forward, sometimes bringing forth evidence that would otherwise not be known, and enhance overall transparency in anti-corruption investigations.
7. The ALA notes that a hearing conducted by the NACC will be in private by default, unless the Commissioner decides to hold that hearing in public.² The decision to hold a hearing in public or in private also has ramifications for how the reporting of a NACC inquiry is handled.³
8. The ALA is prima facie concerned that the bar on hearings being held in public is set high with the 'exceptional circumstances' test, as detailed in section 73 of the NACC Bill. Without additional details on what comprises 'exceptional circumstances', the ALA is concerned that what is deemed in the public interest may be missed under this highly restrictive test.
9. The ALA contends that what is in the public's best interest must be at the forefront of decisions made about the NACC generally, including in relation to whether hearings are open to public. In turn, conducting public hearings will ensure ongoing public trust in the NACC.
10. However, the ALA also acknowledges the shortcomings of public hearings, such as reputational damage for witnesses called to a public hearing to give evidence. The ALA welcomes safeguards to reputational damage in the NACC Bill, as detailed in the next section of this submission.
11. The 'exceptional circumstances' bar will likely be tested in an appellate court once the NACC is operational. If in the meantime the 'exceptional circumstances' test in the NACC Bill is amended to expand the scope for holding public hearings, the ALA is not concerned that there will be an overuse of public hearings.⁴

² National Anti-Corruption Commission Bill 2022, s 73(1).

³ See: National Anti-Corruption Commission Bill 2022, s 168.

⁴ As seen in NSW experience, where the Independent Commission Against Corruption's public interest test has yielded 42 public inquiries, as compared to 979 private examinations, over a seven-year period: The Centre for

12. The ALA appreciates the balance the Federal Government is seeking to strike with these provisions, with consideration no doubt of the models employed by state anti-corruption commissions. However, the ALA considers that the threshold for public hearings under the current form of section 73 under the NACC Bill is too high.

Reputational damage safeguards

13. The ALA commends the safeguards against reputational damage contained in the NACC Bill. Being involved in an anti-corruption inquiry can easily attract reputational damage, even for third parties who give evidence as part of an anti-corruption investigation – such as at an anti-corruption hearing – but who are themselves innocent of corruption.

14. ALA Members have reported that they have acted for individuals who have been called to state anti-corruption inquiries – individuals who are not the subjects of those anti-corruption inquiries but who were providing evidence at anti-corruption hearings as third parties. In one case, for example, the mere publication of a third party’s evidence led to the loss of a contract that witness had with a government agency.

15. Given the importance of safeguards against reputational damage in the context of anti-corruption investigations, the ALA firmly believes that reputational damage must be considered in every instance, especially for witnesses and third parties giving evidence, in the initial stages of NACC investigations and hearings.

16. As such, the ALA supports:

- the inclusion of “unfair prejudice to a person’s reputation” as a factor to which the Commissioner may have regard when determining whether a hearing conducted by the NACC should be held in public;⁵
- the obligation on the Commissioner to include a non-disclosure notation in a notice to produce or a private hearing summons, should the Commissioner be satisfied that there would reasonably be prejudice to “a person’s safety or reputation” without that non-disclosure notation;⁶ and

Public Integrity, ‘Public hearings crucial to investigating corruption’ (Media Release, 27 September 2022) <<https://publicintegrity.org.au/media-release-public-hearings-crucial-to-investigating-corruption/>>.

⁵ National Anti-Corruption Commission Bill 2022, s 73(3)(b).

⁶ Ibid, s 96(1)(a).

- discretion for the Commissioner to include a non-disclosure notation, even if the threshold in section 96(1)(a) is not met but the Commissioner is satisfied that not doing so might prejudice “a person’s safety or reputation”.⁷

17. The ALA also welcomes the inclusion of reputational damage as a consideration regarding the NACC’s reporting on anti-corruption investigations.⁸

18. The ALA notes, however, that the crucial time for protecting reputational damage, especially for innocent third parties and witnesses, is during the initial stages of an anti-corruption investigation. Reputational damage may already have been done by the end of an investigation or by the time of reporting, the ramifications of which are often extremely serious.

Whistle-blower protections

19. The ALA believes that effective whistle-blower protection is critical in promoting integrity, accountability and trust in our public institutions. Thus, the ALA welcomes the protections offered to any person as outlined in Division 2 of the NACC Bill, including an exemption from civil, criminal or administrative liability.⁹ In particular, we commend the extension of these protections to any member of the public.

20. Before the welcome additions of the NACC Bill, the protection of whistle-blowers has relied on the Attorney-General’s discretion to intervene in certain unusual cases.¹⁰ Advocates have long called for a stand-alone whistle-blower authority, such as in Dr Helen Haines’ proposed model,¹¹ or an independent commissioner to protect and promote the fundamental role of whistle-blowers in ensuring accountability.¹²

⁷ Ibid, s 96(2)(a)(i).

⁸ Ibid, s 149(5).

⁹ Ibid, s 24(1)(a).

¹⁰ See: Human Rights Law Centre, ‘Attorney-General must intervene as first ever whistleblower defence hearing begins’ (Media Release, 3 October 2022) <<https://www.hrlc.org.au/news/2022/10/3/attorney-general-must-intervene-as-first-ever-whistleblower-defence-hearing-begins>>; Tom McIlroy, ‘End prosecution of ATO whistleblower, Dreyfus urged’, *Financial Times* (online, 26 July 2022) <<https://www.afr.com/policy/tax-and-super/end-prosecution-of-ato-whistleblower-dreyfus-urged-20220725-p5b49a>>.

¹¹ Australian Federal Integrity Commission Bill 2021 (Cth) div 2, s 17.

¹² Clancy Moore, ‘Australia’s anti-corruption laws are historic – but blanket of secrecy still needs to be lifted’, *The Guardian*, (online, 28 September 2022) <<https://www.theguardian.com/australia-news/commentisfree/2022/sep/28/australias-anti-corruption-laws-are-historic-but-the-blanket-of-secrecy-still-needs-to-be-lifted>>.

21. In 2017, the Parliamentary Joint Committee on Corporations and Financial Services' *Whistle-blower Protections Report* addressed the issues for a comprehensive whistle-blower regime and made recommendations, including the creation of a single Whistle-blower Protection Act covering all areas of Commonwealth regulation and the establishment of an agency empowered to implement the regime such as a Whistle-blower Protection Authority.¹³
22. The ALA believes that whistle-blowers must not only be protected, but encouraged to come forth and make reports of suspected corruption. Anonymous reporting to a Whistle-blower Protection Authority has a number of benefits in the public interest. For example, it serves to encourage the reporting and detection of corrupt conduct particularly where people are fearful of reporting suspected corruption due to recriminations being made against them. A central authority can assist in facilitating another means of referral to the proposed Commission.
23. The ALA therefore encourages the Federal Government to continue to work towards a comprehensive whistle-blower regime to promote the exposure of corrupt conduct and indeed any harmful conduct that would otherwise be difficult to uncover and to investigate all aspects of the treatment of whistle-blowers.
24. The ALA welcomes the opportunity for those who have dealt with anti-corruption commissions to share their experience with the Joint Select Committee, particularly as it relates to the application of the NACC's powers and any further safeguards that may be needed to protect individual rights and freedoms.
25. Corruption has many destructive effects on society and operates to undermine the rule of law. The ALA considers that while the NACC Bill is an historic step in the right direction, additional reform for a Whistleblower Protection Authority has the potential to significantly bolster transparency within Australian institutions; having the ripple effect of restoring Australian's trust in them.

¹³ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, September 2017).

Broad powers in section 117(5)

26. Section 117 of the NACC Bill details the powers of the Commissioner to enter places occupied by Commonwealth agencies without a search warrant. This is followed by a series of exceptions to and qualifications on those powers.

27. The ALA is concerned about one such exemption and the broad powers afforded to the Attorney-General in section 117(5), namely:

Exception—places declared by the Attorney-General

(5) If the Attorney-General is satisfied that carrying on an investigation of a corruption issue at a place might prejudice the security or defence of the Commonwealth, the Attorney-General may, by written notice to the Commissioner, declare the place to be a place to which this subsection applies.

28. This gives the Attorney-General power to designate places occupied by Commonwealth agencies as off limits to the Commissioner and the NACC on security or defence grounds. The ALA is concerned that this would allow the Attorney-General to prevent conduct at places like onshore and offshore detention centres coming under the purview of the Commissioner and the NACC.

29. Further, a declaration made under this section by the Attorney-General is not a legislative instrument.¹⁴ The ALA strongly contends that a lack of Senate oversight for such broad powers is highly problematic.

30. The ALA thus recommends that these powers are clarified and constrained, and that this section is made a legislative instrument in order to attract the appropriate scrutiny.

31. However, the ALA notes our support for the NACC's broad investigative threshold of 'corrupt conduct that is serious or systemic'.¹⁵ The potential for this threshold to capture more indirect (though no less insidious) forms of corruption known as 'elements of grey corruption' (examples include influencing politicians through large donations, "pork-barrelling", hiring expensive lobbyists),¹⁶ is highly commended by the ALA.

¹⁴ National Anti-Corruption Commission Bill 2022, s 117(7).

¹⁵ Ibid, ss 3 and 4.

¹⁶ Yee-Fui Ng, 'Will the National Anti-Corruption Commission actually stamp out corruption in government?', *The Conversation* (online, 5 October 2022) <<https://theconversation.com/will-the-national-anti-corruption-commission-actually-stamp-out-corruption-in-government-191759>>.

Provision of funding and resources for the NACC

32. The ALA welcomes the Federal Government's commitment of \$262 million over four years for the establishment and ongoing operation of the NACC.¹⁷ After the Joint Select Committee has reviewed and reported back to both Houses of Parliament about the sufficiency of NACC funding and resources, the ALA notes that funding and resourcing decisions will ultimately be at the discretion of federal parliamentarians.¹⁸
33. At a state level, there have been calls for independent tribunals to determine funding and resources for state anti-corruption commissions, in order to avoid political interest affecting the operational funding – and thus the functionality – of those anti-corruption commissions.¹⁹
34. The ALA supports the establishment of a national, independent tribunal to determine and authorise funding and resources for the NACC.

Conclusion

35. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Joint Select Committee on National Anti-Corruption Commission Legislation's inquiry into the National Anti-Corruption Commission Bills 2022.
36. The ALA is available to provide further assistance to the Joint Select Committee on the issues raised in this submission.



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¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 2022 (Mark Dreyfus, Attorney-General).

¹⁸ National Anti-Corruption Commission Bill 2022, s 117(g).

¹⁹ See, eg, Royce Millar and Sumeyya Ilanbey, 'Give me independent funding, says anti-corruption chief Robert Redlich', *The Age* (online, 6 August 2022) <<https://www.theage.com.au/politics/victoria/give-me-independent-funding-says-anti-corruption-chief-robert-redlich-20220805-p5b7kc.html>>; Michael McGowan, 'Icac's independence 'threatened' by NSW funding model', *The Guardian* (online, 20 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/20/icacs-independence-threatened-under-nsw-funding-model>>.