

The importance of public hearings

The case against the “exceptional circumstances” test

This paper argues that the “exceptional circumstances” test in the Commonwealth’s National Anti-Corruption Commission Bill 2022 is unhelpful, vague, and counterproductive. The test will impede the ability of the National Anti-Corruption Commission to uncover corruption and misconduct. The test will encourage litigation that stalls inquiries. And, instead of guarding against administrative impropriety, the test will obscure the public’s ability to see for themselves that justice is being done.

Discussion paper

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Introduction

The Commonwealth's National Anti-Corruption Commission Bill 2022 promises to legislate a federal integrity body with the broad investigative powers needed to fill the fundamental institutional gap in Australia's national integrity system. However, a key point of contention among integrity experts is the Bill's legislative test for holding public hearings.¹ Subclause 73(2) of the Bill proposes that hearings must be held in private unless the Commissioner is 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.²

This paper argues that the "exceptional circumstances" test in paragraph 73(2)(a) is unhelpful, vague, and counterproductive. For all these reasons, it ought to be deleted from the Bill.

There are two parts to this paper. Part One identifies the benefits of public hearings. Part Two summarises the problems with the "exceptional circumstances" test.

¹ Brown (2022) *How does the government's long-awaited anti-corruption bill rate? An integrity expert breaks it down*, <https://theconversation.com/how-does-the-governments-long-awaited-anti-corruption-bill-rate-an-integrity-expert-breaks-it-down-189878>; The Australia Institute (2022) *Retired judges welcome landmark integrity bill, but public interest & hearings require protection*, <https://australiainstitute.org.au/post/retired-judges-welcome-landmark-integrity-bill-but-public-interest-hearings-require-protection/>

² National Anti-Corruption Commission Bill 2022, subclause 73(2).
https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6917

The benefits of public hearings

PRINCIPLES

The ability to hold public hearings is an important design principle for an effective anti-corruption commission.³

Public hearings function as an investigative, preventative, and educative tool against corruption and misconduct. They deter people from engaging in corrupt behaviour, encourage witnesses to come forward, and create a culture of public integrity.⁴

Public hearings can also legitimise integrity bodies: they allow the public to see for themselves that justice is being done—and done fairly. As such, they act as a bulwark against concerns of administrative impropriety and overreach.

Put simply, it is very much in the public interest that an anti-corruption commission has the power to hold public hearings.

The following integrity experts agree on these benefits of public hearings:

The proposal to close anti-corruption hearings and repress information on public issues to save those involved from embarrassment demonstrates a fundamental ignorance of democracy. Effective democracy depends on informed voters. In a truly open society, citizens are entitled to full knowledge of government affairs. Information about official conduct does not become any less important because it diminishes official reputations.⁵

—The Hon Tony Fitzgerald AC KC, Commissioner of the Fitzgerald Inquiry and former Federal Court judge

Public examinations are vital to IBAC in fulfilling its primary function of exposing public sector corruption and police misconduct. I consider them an invaluable tool for informing the public sector and the community about the detrimental impacts of corruption and police misconduct, and highlighting ways in which it can be prevented. Public examinations also help deter further wrongdoing, not only for

³ National Integrity Committee (2020) *Public hearings key to investigating and exposing corruption*, p 2, <https://australiainstitute.org.au/report/national-integrity-commission-papers/>

⁴ Aulby (2018) *Out in the open: Federal ICAC with public hearings key to tackling perceived corruption*, p 12, <https://australiainstitute.org.au/post/public-hearings-key-to-tackling-corruption-and-public-trust/>

⁵ McKenzie (2017) *Peter Dutton's Home Affairs ministry will investigate itself for corruption*, <https://www.smh.com.au/politics/federal/peter-duttons-home-affairs-ministry-will-investigate-itself-for-corruption-20170721-gxfwov.html>

potentially corrupt individuals, but also for public sector agencies which are prompted to examine their own processes and activities.⁶

—Stephen O’Bryan KC, former Victorian IBAC Commissioner

There are many people out there in the public arena who will have information that's very important to the investigation. If you conduct the investigation behind closed doors, they never hear of it and the valuable information they have will be lost.⁷

—The Hon Anthony Whealy KC, former judge of the NSW Court of Appeal

CONTRIBUTION TO PUBLIC TRUST

Public hearings also improve public trust and confidence in investigative bodies. The High Court, for example, considered the holding of private hearings by a Commission of Inquiry in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*. In that case, Justice Anthony Mason argued that holding private hearings:

seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy; denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive.⁸

This is an important point when considering that Australia has seen a two-decade decline in public trust.⁹ According to the 2022 Edelman Trust Barometer, only 52% of Australians state that they “trust government to do the right thing”.¹⁰ In addition, the most recent Australian Election Study, the country’s leading longitudinal analysis of political attitudes, shows only 59% of Australians are “satisfied with the way democracy is working,” down from 86% in 2007.¹¹ Worryingly, 85% of people think at least some federal Members of Parliament are

⁶ Independent Broad-based Anti-corruption Commission (2015) *Annual Report 2014–15*

⁷ Gerathy (2016) *ICAC inspector calls for end to public hearings to stop ‘trashing of reputations’*, <http://www.abc.net.au/news/2016-05-12/icac-inspector-david-levine-calls-for-end-to-publichearings/7409126>

⁸ *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (1982) 152 CLR 25 at 97.

⁹ Leigh (2002) *Explaining distrust: Popular attitudes towards politicians in Australia and the United States*, in *The Prince’s New Clothes: Why do Australians Dislike their Politicians?* UNSW Press.

¹⁰ Edelman (2022) *Trust Barometer 2022 Australia*, <https://www.edelman.com.au/trust-barometer-2022-australia>

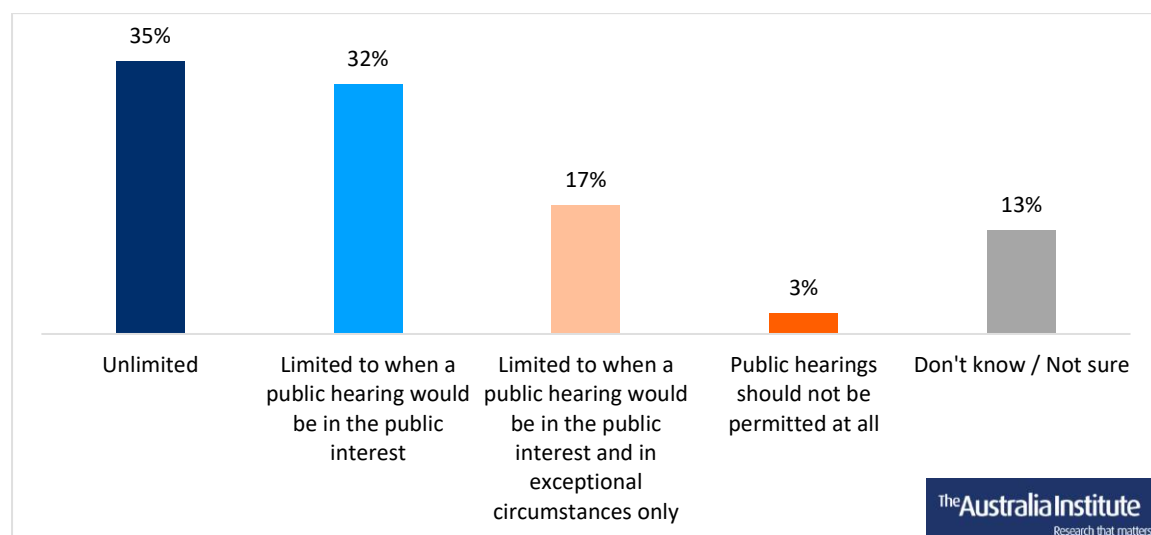
¹¹ Cameron and McAllister (2019) *The 2019 Australian Federal Election: Results from the Australian Election Study*, p 15, <https://australianelectionstudy.org>

corrupt.¹² As Professor Adam Graycar notes, these facts “should worry us”: they are “a wake-up call” that “raises serious questions about the ethical underpinnings of politics in this country.”¹³

POPULAR SUPPORT FOR PUBLIC HEARINGS

Public hearings have popular support in Australia. In October 2022, Australia Institute polling found that four in five Australians want the proposed National Anti-Corruption Commission (NACC) to have the power to hold public hearings (84%), and two in three (67%) say the Commission should be allowed to hold public hearings under more circumstances than the tabled legislation, either when in the public interest (32%) or in unlimited circumstances (35%).¹⁴

Figure 1: Circumstances for NACC public hearings



Source: The Australia Institute (2022) *Only 1 in 5 support ‘exceptional circumstances’ restriction on NACC public hearings*

¹² Knaus (2018) *Overwhelming majority of Australians believe federal politicians are corrupt*, <https://www.theguardian.com/australia-news/2018/aug/21/overwhelming-majority-of-australians-believe-federal-politicians-are-corrupt>

¹³ Graycar (2021) *Australia is out of the top ten in global anti-corruption rankings—why?* <https://theconversation.com/australia-is-out-of-the-top-ten-in-global-anti-corruption-rankings-why-153875>

¹⁴ The Australia Institute (2022) *Only 1 in 5 support ‘exceptional circumstances’ restriction on NACC public hearings*, <https://australiainstitute.org.au/post/only-1-in-5-support-exceptional-circumstances-restriction-on-nacc-public-hearings/>

The exceptional circumstances test

BACKGROUND

Eight out of Australia's nine anti-corruption bodies have public hearing powers. Only South Australia's Independent Commission Against Corruption lacks the power to hold public hearings to investigate corruption—a deficiency that has been criticised by its current Commissioner, Ann Vanstone.¹⁵ The other bodies have a legislative test that the Commissioner must satisfy before a public hearing is held.¹⁶

The Commonwealth's National Anti-Corruption Commission Bill 2022 also proposes a legislative test, which is contained in subclause 73(2). This section proposes that hearings must be held in private unless the Commissioner is satisfied that:

- (a) exceptional circumstances justify holding the hearing, or ... part of the hearing, in public; and
- (b) it is in the public interest to do so.¹⁷

The “exceptional circumstances” test imposes unhelpful, vague, and counterproductive restrictions on the National Anti-Corruption Commission's ability to fulfill its legislative objects and expose corruption and misconduct. Only one state commission—Victoria's Independent Broad-based Anti-corruption Commission (IBAC)—imposes a similar test.¹⁸

PROBLEMS

The test is an unhelpful barrier to inquiry

The first problem with the “exceptional circumstances” test is that it acts as an unhelpful barrier to inquiry.

Empirical evidence from the state anti-corruption commissions suggests that restrictive conditions for holding public hearings make integrity bodies less effective at identifying and

¹⁵ Vanstone (2021) *ICAC's ability to hold politicians to account is under threat*,

<https://indaily.com.au/opinion/2021/09/23/icacs-ability-to-hold-politicians-to-account-is-under-threat/>

¹⁶ Aulby (2018) *Different Breeds of Watchdog*, <https://australiainstitute.org.au/report/different-breeds-of-watchdog/>

¹⁷ National Anti-Corruption Commission Bill 2022, subclause 73(2).

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6917

¹⁸ The wording of paragraph 73(2)(a) in the Commonwealth's National Anti-Corruption Commission Bill 2022 appears to draw from Victoria's *Independent Broad-based Anti-corruption Commission Act 2011*.

addressing corruption. Transparency International board member Professor AJ Brown recently wrote that the exceptional circumstances test “has proved a cumbersome barrier” in Victoria.¹⁹

Comparative analysis shows that Victoria’s IBAC has held fewer public hearings and released fewer public reports than the New South Wales Independent Commission Against Corruption (ICAC), despite the former having more funding and staff. The NSW ICAC does not have an “exceptional circumstances” test to hold public hearings, and held 42 public hearings from 2012 to 2021, releasing 44 public reports over this period. Over the same period, the Victorian IBAC held only eight public hearings and released 15 public reports.

In the words of the National Integrity Committee:

Limitations placed on the ability of Victoria’s Independent Broad based Commission to hold public hearings have led to allegations of serious misconduct not being exposed to the public.²⁰

However, it is worth noting that Victoria’s IBAC is responsible for taking complaints about misconduct by Victoria Police personnel. In NSW, most police misconduct is within the jurisdiction of the Law Enforcement Conduct Commission, not the ICAC.²¹ As police misconduct complaints may be reasonably handled differently to public official corruption complaints, a one-to-one comparison of budget, staff and the ratio of private examinations to public hearings between IBAC and ICAC is not possible. Nevertheless, the total number of public hearings and reports made public by each commission is still pertinent.

¹⁹ Brown (2022) *How does the government’s long-awaited anti-corruption bill rate? An integrity expert breaks it down*, <https://theconversation.com/how-does-the-governments-long-awaited-anti-corruption-bill-rate-an-integrity-expert-breaks-it-down-189878>

²⁰ National Integrity Committee (2020) *Public hearings key to investigating and exposing corruption*, p 5, <https://australiainstitute.org.au/report/national-integrity-commission-papers/>

²¹ IBAC (n.d.) *What is police misconduct?*, <https://www.ibac.vic.gov.au/reporting-corruption/what-can-you-complain-about/what-is-police-misconduct>; NSW Police (n.d.) *Report suspected corruption to the ICAC*, https://www.police.nsw.gov.au/online_services/providing_feedback/report_corruption_to_the_icac

Table 1: Comparison of anti-corruption agencies in Victoria and NSW (2012–2021)

Body	NSW	VIC
Investigations commenced	384	193
Private examinations	1,064	373
Public hearings	42	8
Reports made public	44	15
Budget (\$) ²²	32m	54m
Staff (FTE) ²³	108	196

Source: Annual reports of New South Wales and Victoria's anti-corruption bodies from 2012–21 and state government budgets for 2021–22, compiled in Carr and Hay (2022) *Still toothless: Jurisdictional, funding, and secrecy issues in the Integrity Commission Tasmania*, p 5, <https://australiainstitute.org.au/report/still-toothless/>

The test is vague and open to litigation

The second problem with the “exceptional circumstances” test is its vagueness and legal risk. The difficulty of defining the term may explain why the test acts as a barrier to inquiry. Although the Bill does provide some guidance in subclause 73(3) as to what the Commissioner may regard before holding a public hearing, it does not identify what qualifies as “exceptional circumstances”.

Legal experts are concerned that the test invites legal challenges. As Fiona McLeod AO SC, Chair of the Accountability Round Table, points out, “It’s a lawyer’s picnic waiting to happen.”²⁴

The test means that a person who is under investigation may take issue with a commissioner who seeks to hold a public hearing, and delay the investigation with a court challenge. For this reason, the Hon Margaret White, a former Judge of the Supreme Court of Queensland, notes:

[We] wouldn’t like this positive move towards integrity in public life to be hamstrung by the “exceptional circumstances” condition on the holding of public hearings.²⁵

The “exceptional circumstances” test puts the commissioner in a difficult position. It is an unnecessary grey zone that only adds legal risk and confusion.

²² For the year 2021–22.

²³ For the year 2020–21.

²⁴ Transparency International Australia (2022) *National Anti-Corruption Commission Webinar*, <https://transparency.org.au/australias-new-national-anti-corruption-commission/>

²⁵ Crowe and Thompson (2022) *Advocates push federal government to change rules on public hearings*, <https://www.smh.com.au/politics/federal/advocates-push-federal-government-to-change-rules-on-public-hearings-20220928-p5bljc.html>

The test is counterproductive

Attorney-General Mark Dreyfus has justified the “exceptional circumstances” test as a way of protecting against undue reputational harm.²⁶ This may be a concession to the views of prominent critics of the idea of a federal commission, including former Prime Minister Scott Morrison (who described those advocating for the federal commission as “wanting a kangaroo court”)²⁷ and former Finance Minister Simon Birmingham (who railed against a “star chamber model”).²⁸

However, secrecy can lead to the very outcome that these figures claim to want to avoid. The draft legislation already allows the Commissioner to take into account potential unfair prejudice to a person’s reputation, privacy, safety or wellbeing when deciding whether to hold a public hearing. This consideration from the Commissioner is the best protection against undue reputational harm, rather than a vague “exceptional circumstances” test. As Professor AJ Brown argues, the best response to the risks of public hearings is:

to confront the confusion by identifying, and legislating, more consistent safeguards for the exercise of discretion to hold compulsory hearings—especially public ones—so that factors used to decide the public interest are agreed, understood, and applied.²⁹

²⁶ Dreyfus (2022) *TV interview – ABC Insiders*, <https://ministers.ag.gov.au/media-centre/transcripts/tv-interview-abc-insiders-02-10-2022>

²⁷ McGowan (2022) *Dominic Perrottet says Scott Morrison ‘absolutely’ went too far by calling ICAC a kangaroo court*, <https://www.theguardian.com/australia-news/2022/may/03/dominic-perrottet-says-scott-morrison-absolutely-went-too-far-by-calling-icac-a-kangaroo-court>

²⁸ AAP (2022) *Finance minister repeats ‘star chamber’ ICAC attacks*, <https://thenewdaily.com.au/news/politics/australian-politics/2022/05/03/simon-birmingham-icac/>

²⁹ Brown (2020) *Australia’s national integrity system*, p 14, <https://transparency.org.au/australias-national-integrity-system/>

Conclusion

Public hearings are a key function of an integrity commission for many reasons, including those of investigative efficiency, educative value, preventative power, and legitimacy. Most Australians want the National Anti-Corruption Commission (NACC) to have the power to hold public hearings, either in unlimited circumstances or whenever it is in the public interest. Seeing justice done will likely improve the confidence Australians have in the NACC.

However, the “exceptional circumstances” limitation is an unreasonable restraint on the NACC’s ability to hold public hearings, and the experience of state and territory commissions suggests it will result in fewer public hearings being held than would otherwise be the case. The test is also of dubious efficacy: the term “exceptional circumstances” is vague and will encourage stalling litigation, and the draft legislation already encourages the NACC Commissioner to consider reputational risks when deciding whether to hold a public hearing. Ultimately, the “exceptional circumstances” test serves only to muddy the waters. It should be removed from the legislation.