

SUBMISSION TO THE JOINT SELECT COMMITTEE ON NATIONAL ANTI-CORRUPTION COMMISSION LEGISLATION

National Integrity Committee

This submission is made on behalf of the National Integrity Committee. We are an independent group of retired judges who have been advocating the need for a Federal Integrity Commission since 2017. The Committee was formed with the assistance of The Australia Institute; however, we remain an independent body acting in the public interest on a pro bono basis.

The Committee would like to congratulate the Government on the draft National Anti-Corruption Bill and, in particular, on giving early effect to this important reform.

We have developed a number of basic principles which we believe are necessary to ensure that, once established, a commission will be effective. In our opinion, those principles are:

1. The Commission must be an independent body, provided with adequate resourcing to enable it to promote integrity and accountability and to prevent, investigate, and expose corruption.
2. It must have a broad jurisdiction, including the ability to investigate any conduct of any person that adversely affects or could adversely affect, the honest or impartial exercise of public administration.
3. It must be granted the full investigative powers of a Royal Commission to undertake its work.
4. It must have the power to hold public hearings.
5. It should be governed by a Chief Commissioner and two Deputy Commissioners appointed by the Governor-General on recommendations from a multi partisan Parliamentary committee. Whenever the numerical representation of the crossbench in the Parliament so warrants, this committee should include a representative of the crossbench.
6. The Chief Commissioner must be a judge or a retired judge of a Supreme Court or the Federal Court or be qualified for such an appointment.
7. The Commission must be empowered to make findings of fact, and, in appropriate cases, findings of corrupt conduct.
8. The Commission must be subject to oversight to ensure that it always acts with absolute impartiality and fairness, and within its charter.

The Commission we envisage would fill a serious gap in Australia's capacity to address corruption. It would investigate with rigour and fairness, and expose without fear or favour, behaviour that deliberately impairs, or could impair, the honesty, impartiality, or efficacy of official conduct wherever it occurs in the federal sphere.

The National Anti-Corruption Commission (NACC) Bill meets many of these principles, including being independent from Government, having broad jurisdiction and having full investigative powers. However, we are concerned about the limitation on the ability to hold public hearings, the composition of the Joint Parliamentary Committee and the role of the Inspector.

The power to hold public hearings

As drafted, the NACC legislation specifies that the Commissioner may decide to hold a public hearing only where there are exceptional circumstances to justify holding the hearing in public and it is in the public interest to do so (s73).

This is too high a threshold and will prevent most public hearings taking place, even where it is clearly in the public interest to do so.

The phrase “exceptional circumstances” should be struck out. The matters which are to be considered in determining the public interest test already include the risk of unfair reputational damage. This should be sufficient protection provided these considerations are made obligatory.

We note that in deciding whether to hold a public hearing, the Commissioner “may” have regard to a number of matters. We suggest that the Commissioner instead “must” consider these matters prior to determining whether to hold a public hearing. If this amendment is made the need for the inclusion of “exceptional circumstances” would not be required.

Alternatively, as in the case of the NSW Independent Commission Against Corruption, a decision to hold a public inquiry must be made by the Chief Commissioner and at least one other Commissioner, to ensure that public hearings are only held when it is in the public interest to do so, and reputations are not unfairly prejudiced.

A Briefing Paper on *The importance of public hearings*, prepared by the Australia Institute, is attached.

Joint Parliamentary Committee

The Commission must be independent of the Government. We note, however, that under the draft legislation the Chair of the Committee must be a member of the Government. The Chair has a deliberative vote and, if votes are equal, a casting vote effectively meaning that the Government of the day will control the Committee (including the ability to appoint the Commissioner and Deputy Commissioners).

To avoid this situation, we strongly recommend that the Committee be able to select any member of the Committee to be Chair. Alternatively, the Chair could be selected on a rotational basis.

Inspector

There will also be an independent Inspector who will investigate complaints made in relation to the conduct or activities of the Commission. The Inspector will also report to the Parliament (s184).

The Inspector’s powers seem to be focused on ensuring the NACC itself remains free from corruption or other ethical issues. While s184(e) does extend the Inspector’s functions to investigating complaints made in relation to the conduct or activities of the NACC, we submit that the Inspector also be responsible for oversight of the performance of the NACC, including how long its inquiries take.

Conclusion

Overall, many aspects of the Bill are very good. Incongruously, however, the “exceptional circumstances” requirement may prevent a public hearing, even if such a hearing is in the public interest.

The role of the Commission is greater than simply detecting and investigating corruption. It is to shine a light on corruption, to seek to educate and deter public officials from engaging in corrupt conduct and ultimately to restore trust and faith in our public institutions and democracy.

By hiding corruption hearings from the public, we will never shine a light on corrupt behaviour and ultimately the Commission will fail to fulfill its most crucial role, to restore public trust in government.

If you require any further information or would like to clarify any of the issues raised in this submission please contact Kathleen O’Sullivan at The Australia Institute at kathleen@australiainstitute.org.au or on 0439 274 448.

Yours sincerely,

The Hon Stephen Charles AO KC, former judge of the Victorian Court of Appeal

The Hon Mary Gaudron KC, former judge of the High Court of Australia

The Hon David Harper AM KC, former judge Victorian Court of Appeal

The Hon Paul Stein AM KC, former judge of the NSW Court of Appeal, former President of the Anti-Discrimination Board

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

The Hon Margaret White AO, former judge of the Queensland Court of Appeal

The Hon Carmel McLure AC KC, former President of the Western Australian Court of Appeal