



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Dr Popple,

### **Inquiry into National Anti-Corruption Commission Legislation**

Thank you for the opportunity to provide input into the inquiry into the National Anti-Corruption Bill 2022 (**Bill**) and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (**Consequential Bill**). The Law Society's Public Law Committee contributed to this submission.

The Law Society is grateful to the Law Council for preparing the tables attached to the memo dated 30 September 2022. Our comments below adopt the numbering used in the tables. We have provided comments only where our views diverge from the Law Council's comment in the tables, or to provide additional information. As a starting point, the Law Society notes the significance of this reform, and our support for the passage of this Bill.

#### **1.4 Application to potential future conduct**

The Law Council's comments note that the Law Council would be unlikely to support "will engage in corrupt conduct" in the definition of "corruption issue" as set out in subclause 9(1)(c).

We understand the rationale of this position, and agree that the approach taken in this subclause is not without problems. While noting that subclause 8(10) extends the definition of corrupt conduct to conspiracy or an attempt to commit or engage in corrupt conduct, we suggest that an alternative approach would be to redraft subclause 9(1)(c) to note that a "corruption issue" includes an issue of whether a person intends to conspire to or attempt to engage in corrupt conduct. In our view, capturing conspiracy and attempts to engage in corrupt conduct is a key aspect of the preventative function (clause 3(c)) of the proposed National Anti-Corruption Commission (**NACC**), which should have the power to investigate even failed attempts to engage in corrupt conduct (for example, in the event that a whistleblower intervenes before the conduct takes place).

## **1.5 Jurisdiction – Third Parties**

The Law Society agrees with the broad definition of “public official”, noting that modern Governments extensively outsource many aspects of their functions.

## **1.7 Voluntary referral**

We agree that there should be broad pathways for referral of matters to the NACC. In the NSW experience, each piece of information on its own may not appear significant, but when taken together may be critical in determining whether an investigation should take place.

## **1.8 Mandatory reporting obligations for Heads of Commonwealth agencies**

The Law Society supports the current drafting in Part 5 Division 2 of the Bill. In the NSW experience, the analogous requirements in the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**) have been one of the core aspects of the role of the NSW Independent Commission Against Corruption (**NSW ICAC**). This requirement acts to filter down to change departmental cultures, as they organise themselves around the prevention and reporting requirements of the new framework. In our view, erring on the side of reporting also reduces the incidence of the culture of “turning a blind eye.”

## **1.9 Threshold for investigation**

The Law Society supports the current drafting in Part 6 Division 1 of the Bill. The NACC will be required to form a view on whether the conduct could involve “serious or systemic corrupt conduct” prior to investigation, and in our view, this threshold is high enough that the exercise will itself dispense with concerns in respect of any frivolous or unfounded use of resourcing. In the NSW experience, the process of deciding whether to investigate a matter is an iterative one, and the ICAC Commissioners make their decisions based on a process of probing existing evidence, while also considering available resources.

## **1.10 Public hearings**

The Law Society does not support the current drafting of clause 73. We note “exceptional circumstances” is undefined, and we are of the view that it is a problematic concept, given that “serious or systemic corrupt conduct” should itself be considered exceptional. Further, we suggest that clause 73 as drafted is at odds with the general intent of the Bill, which seeks to, among other things, “educate and provide information about corruption and the detrimental effects of corruption on public administration and the Australian community” (subclause 3(d)).

Crucially, in our experience, clause 73 represents too binary a view of how investigations proceed in practice. In the NSW experience, most hearings are generally held in private, and a small number of hearings are held in public. By the time an investigation has reached the stage where the NSW ICAC Commissioners have determined that a public hearing should be held, it is usually the case that a careful balancing of the risk to reputation versus the public interest in exposure of the matter has already occurred.

We suggest that a right to cross examine witnesses, and an obligation to disclose exculpatory evidence would serve a more protective function in this regard. Clause 80 provides that counsel assisting the NACC, or a person summoned to appear, or any legal representative of a person may examine or cross-examine any witness on any matter the Commissioner considers relevant if the Commissioner thinks it appropriate. However, it does not appear that the Bill provides for an obligation to disclose exculpatory or otherwise relevant evidence to

affected persons. In NSW, the ICAC procedural fairness guidelines deal with the investigation and disclosure of exculpatory evidence, following the passage of the *Independent Commission Against Corruption Amendment Act 2016* (NSW), which introduced s 31B, providing for procedural guidelines for public inquiries. NSW ICAC Commissioners are required to issue these guidelines to NSW ICAC staff (and also counsel assisting the NSW ICAC) relating to the conduct of public inquiries.

In our view, there must be scope for publicly examining aspects of investigations where it is fair to do so, and this is vital for restoring and maintaining trust in government. To this end, we suggest that clause 3 of the Bill include a new subclause that explicitly includes the promotion and maintenance of public trust and confidence in the integrity of government as an object.

We suggest that clause 73 be expanded to reflect a model analogous to how NSW ICAC Commissioners make decisions in respect of public hearings in NSW. In respect of public hearings in NSW, the NSW ICAC must consider:

[...] the public interest, as required under section 31 of the ICAC Act. In making that determination, the Commission is to consider the following: the benefit of exposing to the public, and making it aware, of corrupt conduct; the seriousness of the allegation or complaint being investigated; any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.<sup>1</sup>

The Bill might be redrafted to require that the Commissioner and at least one Deputy Commissioner agree that a hearing should proceed in public. This would provide an additional safeguard to ensuring matters that do proceed to a public hearing have been duly considered.

### **1.11 Covert investigative powers**

We support the current position, and are of the view that it is appropriate that the Commonwealth Ombudsman provides oversight. This is a matter that can be subject to statutory review at the appropriate time.

### **1.14 Legal professional privilege**

We acknowledge both the position taken in the Bill, as well as the position of the Law Council in respect of client legal privilege. In reaching a position on this issue, we suggest it is also important to consider instances of when the government, rather than an individual, might be the client in question.

The Law Society suggests that a middle ground might be found if the clauses of the Bill relevant to legal professional privilege and reporting, are redrafted to reflect a further protection towards the end of the process. We agree with the proposal in the Bill that if legal professional privilege is claimed in relation to material, the material in question is dealt with in private. If the Commissioner determines that the material is not relevant, or that legal professional privilege does not in fact apply, then the matter falls away. However, a difficulty may occur in that if the material is privileged and the Commissioner decides to refer to it in the clause 149 report, although privilege will not have been waived by that disclosure it will be open for all to see and privilege may have been destroyed in practical terms. As we

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<sup>1</sup> NSW Independent Commission Against Corruption, Public hearings and compulsory examinations, online here: <https://www.icac.nsw.gov.au/investigations/investigation-process/public-inquiries-and-compulsory-examinations>.

understand the operation of clauses 149 and 151 the Commissioner is not required to exclude privilege material from the cl 149 report. It does not logically nor necessarily fall within the heads of 'sensitive' information' as identified in cl 227(3)(m), (n) or (o).

One option is to add a paragraph to cl 227 so as to exclude reference to the material and, if it is necessary to refer to it, to do so only in the protected information report (cl 152). A second option (although less optimal from the perspective of the privilege holder) is to make amendments such that if:

- i. the matter is relevant to the investigation,
- ii. legal professional privilege exists; and
- iii. for example, it would be in the public interest to disclose it in the cl 149 report,

then the Commissioner must give a period of notice (say 28 days) prior to publishing the material in that report, together with reasons why they are satisfied that the statutory requirements (which would be provided for in the Bill, eg a public interest test) for general disclosure have been met. This would allow the affected party the opportunity to seek judicial review prior to publication.

We note that clause 156 provides that the Commissioner need not publish a part of a report if it is not in the public interest, and it is arguable that this might provide sufficient protection for privileged material. A third option may be to include a note in clause 156 to provide that legal professional privilege is an example of when it might not be in the public interest to publish. However, this would not overcome the difficulty if the material was contained in the investigation report and that report was tabled in Parliament: cl 155.

We would prefer the first option.

We agree that the clause 114(3) should not apply to journalists if the conduct of the journalist themselves is in question.

### **1.15 Post-charge coercive powers**

In the Law Society's view, once a charge has been laid in respect of a matter before the NACC, then the NACC investigation should cease, and the investigation should be handed over to the prosecuting authorities (analogous to the management of coronial inquests). In our view, preserving the distinction between the investigative nature of the NACC and the criminal justice process is critical. We note that in NSW, prosecutions are generally not brought until investigations are concluded.

### **1.18 Function of the Inspector of the NACC ("NACC Inspector")**

The Law Society continues to support its position, set out in its submission of 15 January 2021 to the Law Council, that the functions of the NACC Inspector should include a proactive audit function (See s 57B(1)(a) and (d) of the ICAC Act and s 122(2)(a) and (c) of the *Law Enforcement Conduct Commission Act 2016* (NSW)). The NACC Inspector's position as currently drafted is mostly investigative and dependent on complaints being received by the NACC Inspector. In our view, the role of the NACC Inspector should be expanded to include a proactive audit function, aimed at preventing the types of conduct that would lead to complaints about the NACC, and at identifying potential areas of misconduct and/or maladministration within the NACC as an agency. Also, like the NSW ICAC Inspector, the NACC Inspector should be empowered to investigate misconduct and maladministration by

NACC staff which further ensures that officers of the NACC are performing their public official duties in accordance with their statutory duties and in the public interest.

### **1.19 Appointment/qualifications of Commissioner**

The Law Society suggests that a retired judge appointed to the role should be a retired judge of a state or federal superior court of record, particularly in the first term of the NACC's establishment. This might be a matter that can be reviewed as part of a later review of the overall legislation.

We note that a Commissioner can only be appointed for a five year term, and this is not subject to renewal. In the NSW experience, this limitation can present difficulties, particularly as some investigations are complex and very lengthy. We suggest that clause 242(5) be deleted, and that the Bill should include a clause allowing for the extension of a Commissioner's term for up to two years, in the role of a Deputy Commissioner, to allow for that Commissioner to conclude any ongoing investigations, together with all the necessary powers to complete their work.

### **2.1 Availability of judicial review**

The Law Society supports the position set out in the Consequential Bill and notes that the usual common law rights to judicial review will apply.

### **2.2 Consideration of past conduct**

The Law Society does not support imposing any limitations in this regard.

### **2.3 Independence of the NACC**

The Law Society supports the position set out in the Bill.

### **2.5 Non-disclosure notations**

The Law Society supports the position in the Bill. In the NSW experience, if there is a particular concern, affected persons can approach the NSW ICAC for relief.

### **2.7 Timeliness of investigations**

Our view is that introducing statutory timeframes for handing down decisions may not assist in this context and query what remedies would apply, as well as the enforceability (and ultimate utility) of such remedies. We note that a former Chief Commissioner reported, in the NSW context, that the length of an investigation depends on two factors: complexity and resources.<sup>2</sup>

The complexity of an investigation may be difficult to control. The more insidious forms of corruption can be hidden in complex transactions, requiring considerable work to identify and analyse. New witnesses may come forward, for instance after a public hearing. Additionally, the NACC will have to balance minimising delay with procedural fairness. If new evidence comes to light in the course of a hearing, the need for fairness may require the NACC to pause the hearing and take a new line of investigation, adding further complexity and often delay. The other factor that can delay the completion of an investigation and presentation of a public report is a legal challenge brought by a person likely to be adversely named in a hearing and/or

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<sup>2</sup> Committee of the Independent Commission Against Corruption, "Reputational impact on an individual being adversely named in the ICAC's investigations", Report 4/57 (November 2021), [3.45].

public report. The NACC would have no control over the timing and duration of such a disruption to its process.

A flexible resourcing model would allow for variation in the amount directed to different NACC functions as required, particularly during periods of increased referrals that result in urgent investigations. In such circumstances, a flexible funding model would also enable existing investigations to continue and/or conclude within a reasonable timeframe.

In prolonged investigations, resources should also be directed to improving communications about progress to the persons involved, and, in the case of public hearings, to the public. There would be cases, however, where the NACC would be constrained in how much it could disclose, for example where there was a legal challenge and non-publication orders had been made by a court, or where it would be damaging to the investigation to disclose the reason for a delay.

Finally, adequate funding is required for the NACC's critical educative role, so that the NACC can support public authorities to develop policies and processes that reduce the risk of corrupt conduct occurring. Proactive and preventative initiatives should continue to be a key focus of the NACC, particularly as the nature of corrupt conduct is continually changing and evolving. For instance, the public service is becoming more reliant on the use of technology and public/private partnerships to deliver services, both of which provide new opportunities for corruption to occur.

The Law Society suggests consideration of empowering the NACC Inspector to receive complaints about delay.

## **2.9 Legal representation**

The Law Society supports the position in the Bill. If adverse allegations are made by the NACC about a person affected, as a matter of procedural fairness the NACC should not be able to make adverse findings before the person affected has an opportunity to be heard. In this event, that person should be able to avail themselves of legal representation.

If adverse allegations are made by another witness, this may not in fact have any bearing on the investigation unless the NACC wishes to examine the matter at a hearing. In these circumstances the person affected will likely give evidence and therefore may be represented by a legal practitioner.

Thank you for the opportunity to provide comments. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, on 02 9926 0354, or at [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Sonja Stewart', written in a cursive style.

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Sonja Stewart  
**Chief Executive Officer**