Law Council
OF AUSTRALIA

National Anti-Corruption Commission Bills 2022

Joint Select Committee on National Anti-Corruption Commission Legislation

14 October 2022

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
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- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council is grateful for the contributions of the following Constituent Bodies in the preparation of this submission:

- The Law Society of the Australian Capital Territory
- The Law Society of New South Wales
- The Law Society of South Australia
- The Queensland Law Society
- The South Australian Bar Association

The Law Council is also grateful for the contributions of its National Criminal Law Committee, National Human Rights Committee in addition to its Federal Litigation and Dispute Resolution Section's Administrative Law Committee and Privileges and Immunities Committee.

Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide this submission to the Joint Select Committee on National Anti-Corruption Commission Legislation (**Committee**) to assist in its inquiry into the National Anti-Corruption Commission Bill 2022 (Cth) (**NACC Bill**) and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (Cth) (**Consequential Bill**)—together, **the Bills**.

2. The Law Council supports the establishment of the National Anti-Corruption Commission (**NACC**). Corruption has corrosive effects on society and serves to undermine democracy and the rule of law. The proposed model clearly seeks to further address Australia's obligations as a signatory to the United Nations Convention against Corruption to develop policies in relation to anti-corruption.[1]

3. The Law Council particularly welcomes that the Bills:

   - give the NACC broad jurisdiction to investigate serious or systemic corrupt conduct across the Commonwealth public sector;
   - provide oversight of the NACC by way of a Parliamentary Joint Committee (**Joint Committee**) and independent Inspector;
   - enable the NACC to operate independently of government and with procedural fairness;
   - promote a consistent approach to processes, powers and requirements when dealing with corruption across law enforcement and the public sector;
   - provide broad referral pathways;
   - emphasise the NACC's preventative and educative functions;
   - exclude the judiciary from the NACC's jurisdiction; and
   - provide for whistleblowing protections, noting intersections with the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) and recognising that broader whistleblowing reforms are understood to be underway.

4. However, the Law Council draws attention to a number of matters with the NACC Bill, particularly in relation to:

   - its ongoing position that hearings should generally be conducted in private, unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest. It further suggests that measures be adopted to increase the likelihood that public hearings can have the requisite degree of fairness;
   - the abrogation of privileges, such as legal professional privilege, when a person is giving an answer or information, or producing a document or thing, under a notice to produce or at a hearing;
   - the approach taken with regards to post-charge coercive powers and post-charge disclosures of information to a prosecutor. Preserving the distinction between the investigative nature of the NACC and the criminal justice process is critical;
   - the need for a 'reasonable suspicion' threshold to be in place for the Commissioner to investigate a corruption issue;

[1] *United Nations Convention against Corruption*, opened for signature 31 October 2003, UN Doc A/RES/58/4 (entered into force 14 December 2005) art 5(1).

- tightening key definitions and removing future corrupt conduct from the definition of a corruption issue;
- the availability of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***), given that transparent and public judicial review for at least substantial interim decisions is a crucial element of oversight to ensure confidence in NACC and its processes; and
- the broader appropriateness of existing safeguards and oversight mechanisms for intrusive search powers afforded to the proposed NACC and other eligible law enforcement and security agencies more generally, particularly with respect to telecommunications interception and surveillance.

5. Accordingly, the Law Council makes the following recommendations to improve the effectiveness and fairness of the proposed NACC:

- The NACC should be required to report on the duration of its investigations in its annual report to Parliament under clause 271, including the reasons for any delays.
- The Joint Committee's functions at clause 177 should include consideration of the timeliness of the NACC's investigations.
- The phrase 'or that could adversely affect' should be deleted from paragraph 8(1)(a) of the NACC Bill.
- Paragraph 8(1)(e), concerning 'corruption of any other kind', should either be deleted from the NACC Bill, or clarified by way of including an exhaustive list of the types of conduct that would be captured.
- The issue of whether a person will engage in corrupt conduct should be removed from the definition of 'corruption issue' (by removing paragraph 9(1)(c)).
- A Federal Judicial Commission should be established as a matter of priority.
- The threshold for mandatory notification of corruption issues by agency heads under clause 33 of the Bill should be amended to reasonable suspicion that the corruption issue involves corrupt conduct that is serious or systemic.
- The threshold for investigation by the Commissioner under sub-clause 41(3) (and sub-clause 55(a)) of the Bill should be amended to reasonable suspicion that the corruption issue involves corrupt conduct that is serious or systemic.
- Hearings should by default be conducted in private, unless the Commissioner considers that a closed hearing would be either unfair to the person or otherwise contrary to the public interest.
- The Bill should be amended to require that procedural fairness guidelines be developed with respect to public hearings. These could take the form of a legislative instrument.
- Clause 98, concerning the non-disclosure notation offence, should be amended in line with section 114 of the *Independent Commission Against Corruption Act 1988* (NSW) (***NSW ICAC Act***). This includes providing an exception for disclosure to registered medical practitioners or registered psychologists.
- The privilege against self-incrimination should only be abrogated to the extent that both a direct use and derivative use immunity apply in civil and criminal proceedings.
- The abrogation of the privilege against self-incrimination in clause 113 should be conditional upon requiring the NACC to demonstrate that all other less coercive avenues to obtain information have been exhausted prior to compelling a person to give evidence in circumstances where the privilege is abrogated.

- Paragraph 113(3)(a), providing for an exception to use immunity for confiscation proceedings, should be removed.
- Clause 113 should be amended so that abrogation of the privilege against self-incrimination does not apply to derivative, as well as direct use, of the answers given in related criminal and civil proceedings.
- Clause 114 should be redrafted to remove the abrogation of legal professional privilege and to provide for an independent third party, such as a court, to determine claims made in relation to legal professional privilege. At the very least, steps should be taken to protect the disclosure of privileged material in investigation reports.
- Clause 115 (which requires a legal practitioner who claims privilege on behalf of a person to provide the name and address of the person) should be removed from the NACC Bill.
- The powers in the Bill to compulsorily question charged persons, or persons against whom charges are imminent, about the subject matter of those charges should be removed.
- The compulsory questioning of a witness should be deferred until the disposition of any charges the witness is facing.
- Post-charge disclosure of investigation and derivative material to the prosecutor should not be permitted.
- Clause 267, concerning authorised officers, should be clarified with respect to 'suitable qualifications or experience'.
- A multifaceted approach to strengthening safeguards within warrant processes concerning journalists is required in the *Crimes Act 1914* (Cth) (***Crimes Act***), having regard to factors such as officer qualifications, the public interest test, the role of a public advocate, and issuing officers.
- Part 8 provisions regarding reasonable opportunity to respond should include minimum notice periods.
- Clause 156 should require the Commissioner to consider whether publication of the report is in the public interest, and if the Commissioner is of this opinion, to publish it.
- The functions of the Inspector under clause 184 should be expanded to include a proactive audit function of the NACC, modelled on paragraphs 57B(1)(a) and (d) of the *NSW ICAC Act* and paragraphs 122(2)(a) and (c) of the *Law Enforcement Conduct Commission Act 2016* (NSW) (***LECC Act***).
- Sub-clause 242(5) should be removed and a clause inserted to allow for the extension of a Commissioner's term for up to two years in the role of a Deputy Commissioner.
- With respect to telecommunications interception and surveillance powers in general (including as exercised by the NACC and law enforcement and security agencies):
    - Only superior court judges should be eligible for appointment as issuing authorities for all types of surveillance warrants. The definitions of issuing authorities in Sections 11, 12, 13 of the *Surveillance Devices Act 2004* (Cth) (***SD Act***) and section 6DB of the *Telecommunications (Interception and Access) Act 1979* (Cth) (***TIA Act***) should be amended accordingly.
    - However, as a minimum, the power to issue warrants authorising the most intrusive surveillance powers should be limited to superior court judges who are appointed in their personal capacities.

  - In the short term, Part 6 Division 3 of the SD Act and Chapter 4A of the *TIA Act* should be amended to confer on the Commonwealth Ombudsman a standing function of review, including the ability to conduct own-motion reviews, in relation to the exercise of electronic surveillance powers to ensure that recurring areas of non-compliance are addressed.
  - In the long term, the Government should consider the Law Council's broader submission on electronic surveillance reform regarding the need to ensure harmonised electronic surveillance thresholds build in necessity and proportionality as conditions that must be fulfilled for a warrant to be issued.
- The amendments to the *ADJR Act* in the Consequential Amendments Bill (Schedule 1, Part 2), excluding review under the *ADJR Act* of a large number of powers of the proposed NACC and NACC Inspector, should be removed. If this is not accepted:
  - judicial review should be available for at least substantial interim decisions of the Commissioner, such as the decision to hold a public hearing; and
  - the exclusion of any powers of the NACC Bill from review under the *ADJR Act* should be clearly and specifically justified.

Introduction

6. The Bills were introduced in the House of Representatives on 28 September 2022, the same day the Committee was established. The Law Council understands that the Committee is due to report on or before 10 November 2022, which has resulted in a period of two and a half weeks for submissions to be provided.

7. As a membership-based organisation, the Law Council has an obligation to consult with its Constituent Bodies, Sections and expert committees on matters of policy. The resulting time restraints have heavily constrained the Law Council's, and these bodies', ability to engage at a detailed level with the legislative and explanatory materials.

8. Some Constituent Bodies of the Law Council have advised that they were unable to make submissions despite having a strong interest in the contents. This is a particularly disappointing outcome with respect to a matter of major national reform which is directed towards achieving integrity and transparency in public governance. As a result, the Law Council has been unable to ascertain the views of the legal profession on a range of features in the Bills, or to a conduct comprehensive analysis of the entirety of the proposals. Its views should be considered preliminary.

9. Nevertheless, the Law Council welcomes the introduction of the Bills and supports their referral to the Committee. It strongly supports the establishment of the NACC and welcomes the Government's design principles underpinning its development,[2] particularly that the NACC should:

    - have broad jurisdiction to investigate serious or systemic corrupt conduct across the Commonwealth public sector;
    - have oversight by way of a Parliamentary Joint Committee and independent Inspector;
    - operate independently of government; and
    - operate with procedural fairness.

10. Other features of the Bill which the Law Council welcomes include:

    - a consistent approach to processes, powers and requirements when dealing with corruption across law enforcement and the public sector;
    - broad referral pathways;
    - the NACC's preventative and educative functions;
    - the exclusion of the judiciary from its jurisdiction, noting the Government has provided in-principle support for the establishment of a Federal Judicial Commission; and
    - provision for whistleblowing protections, noting intersections with the *PID Act* and recognising that broader whistleblowing reforms are understood to be underway.

[2] Attorney-General's Department, National Anti-Corruption Commission (Media Release, 27 September 2022), <https://ministers.ag.gov.au/media-centre/national-anti-corruption-commission-27-09-2022>.

Analysis of the NACC Bill

Part 1—Preliminary

Timeliness of investigations

11. An object of the NACC Bill under subparagraph 3(a)(ii) is 'the timely investigation of corruption issues that could involve corrupt conduct that is serious or systemic.'

12. The Law Council supports the inclusion of timeliness as an objective under the NACC Bill and considers that the timeliness of these processes is an important reputational safeguard while ensuring allegations of corruption do not weigh on a person for an excessive length of time.

13. The Law Council notes that the NACC Bill does not provide for any timeframes by which investigations must be completed. The Explanatory Memorandum states:

> *What constitutes the 'timely' investigation of a particular corruption issue will depend on the scale and complexity of the issue, and all of the circumstances of the case. As such, it would be inappropriate for the NACC Bill to direct the Commissioner towards any particular timeframe for investigations. The question of whether an investigation would be capable of being 'timely' would, however, be a relevant consideration for the Commissioner or Inspector when considering whether to commence or continue a corruption investigation.*[3]

14. The Law Council acknowledges that there would be circumstances in which it is appropriate for the Commissioner to defer the completion of an investigation and the subsequent preparation of the report, for example, pending the outcome of a related criminal, disciplinary or administrative process, so as not to prejudice that process.[4]

15. Ultimately, the length of an investigation will depend on factors such as complexity and resources.

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

17. With respect to *resources*, 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.

[3] Explanatory Memorandum, National Anti-Corruption Commission Bill 2022 and National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (Cth) ('NACC Bills') 56.
[4] Ibid 197.

18. In prolonged investigations, resources should be directed to ensuring communications about progress are provided 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. The Commission's resources are discussed further below.

19. The Law Council suggests that the NACC be required to report on the duration of its investigations in its annual report to Parliament under clause 271, including the reasons for any delays. The Joint Committee on the NACC's functions should also include consideration of the timeliness of the Commission's investigations (clause 177).

Recommendations

- **The NACC should be required to report on the duration of its investigations in its annual report to Parliament under clause 271, including the reasons for any delays.**
- **The Joint Committee's functions at clause 177 should include consideration of the timeliness of the NACC's investigations.**

Part 2—Key concepts

Definition of 'corrupt conduct'

20. Sub-clause 8(1) of the NACC Bill defines 'corrupt conduct' to include:

- any conduct of any person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly:
  - the honest or impartial exercise of any public official's powers; or
  - the honest or impartial performance of any public official's functions or duties;
- any conduct of a public official that constitutes or involves a breach of public trust;
- any conduct of a public official that constitutes, involves, or is engaged in for the purpose of abuse of the person's office as a public official;
- any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official; and
- any conduct of a public official in that capacity that constitutes, involves or is engaged in for the purpose of corruption of any other kind.

21. The Explanatory Memorandum to the Bill provides that:

> *This clause is not intended to establish a new standard of conduct by public officials or alter the relationship between those officials and the public as reflected in Australia's system of representative and responsible government. Rather, this clause is intended to reflect long-standing standards of conduct by public officials and their existing duty, including the duty to act in the public interest.*[5]

[5] Ibid 69.

22. The Law Council has previously taken the view that the appropriate threshold for determining whether an official has engaged in corruption is whether they have engaged in conduct that abuses their office, perverts the course of justice or is engaged in for the purpose of corruption of any kind, provided that this conduct is either systemic or serious.[6]

23. The definition of 'corrupt conduct' in sub-clause 8(1) of the Bill is more expansive than that used in the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (***LEIC Act***),[7] and is also understood to incorporate elements of definitions in the anti-corruption legislation of the States and Territories.

24. The definition of corrupt conduct must also be understood in the context of the requirement in sub-clause 41(3) that the Commissioner must be of the opinion that the corrupt conduct is serious or systemic to warrant NACC investigation.

25. The Law Council generally supports this broad definition, subject to its comments below.

Conduct which 'could adversely affect'

26. The Law Council is concerned that the extension of the definition of 'corrupt conduct' to conduct that 'could adversely affect' the impartial exercise of a public official's powers is speculative. This phrase introduces uncertainty in relation to a key definitional concept in the NACC Bill.

27. The rationale for this phrase is set out in the Explanatory Memorandum:

> *This would ensure that the Commissioner could fully investigate serious or systemic corrupt conduct and transactions between public officials and third parties, as well as attempts by third parties to corrupt public officials.*[8]

28. However, given that sub-clause 8(10) already deems conduct comprising conspiracy or an attempt to commit or engage in conduct covered by sub-clause 8(1) as 'itself corrupt conduct'; the phrase 'could adversely affect' in clause 8(1) seems unnecessary to achieve the objectives set out above.

29. The Law Council considers the concepts of 'attempt' and 'conspiracy' preferable to define the ambit of 'corrupt conduct' because these are widely used concepts in federal, state and territory criminal legal systems and have been the subject of extensive judicial consideration.[9]

30. The potentially indeterminate scope of 'could adversely affect' introduces the risk that a Commissioner's decision may be politicised, with regard to whether particular conduct amounts to 'corrupt conduct' within the meaning of sub-clause 8(1). In this context, it is desirable that the Commissioner has greater objective specification by reference to which key definitional concepts can be ascertained.

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[6] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 13.

[7] *Law Enforcement Integrity Commission Act* 2006 (Cth) ('*LEIC Act*') s 6(1).

[8] Explanatory Memorandum, NACC Bills 69.

[9] By way of illustration, the *Criminal Code Act 1995* (Cth) (***Criminal Code***) specifies that the extension of criminal responsibility for an attempt requires the person's conduct must be more than merely preparatory to the commission of the offence. Subsection 11.1(3) requires intention and knowledge in relation to each physical element of the offence attempted.

Recommendation

- **The phrase 'or that could adversely affect' be deleted from paragraph 8(1)(a) of the NACC Bill.**

'Corruption of any other kind'

31. The Law Council is of the view that 'corruption of any other kind', as included in the NACC Bill, is undefined and circular and would benefit from clarification in order to assist decision-makers and any person who may be subject to the NACC's jurisdiction. It submits that paragraph 8(1)(e) currently has the potential to extend the NACC's jurisdiction into areas that are not contemplated in the Bill and unknown to Parliament.

32. The Explanatory Memorandum states that:

> *This limb of the definition would provide the Commissioner with the flexibility to address emerging areas of corruption that may not currently be foreseen, and may not fall within any of the other more specific limbs of the definition.*[10]

33. However, 'corruption' itself is a vague term and necessarily requires defining and limiting in statute. As Justice Gageler stated in *ICAC v Cunneen (**Cunneen**)*,[11] 'the definition of a term is the creation of the most basic building block of a statutory structure.'[12] He remarked that corruption:

> *…connotes moral impropriety in, or in relation to, public administration. It has never acquired a more precise meaning in the language of the law or in ordinary speech.*[13]

There are no comparable provisions to paragraph 8(1)(e) of the NACC Bill in the *Crime and Corruption Act 2001* (QLD) (***Queensland Act***),[14] the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (***Victorian IBAC Act***),[15] or the *NSW ICAC Act*.[16]

34. This phrase does, however, appear in paragraph 6(1) of the *LEIC Act*. While it has not, to the Law Council's knowledge, been subject to judicial interpretation, it has been contemplated by the Integrity Commissioner in relation to investigations conducted by the Australian Commission for Law Enforcement Integrity (**ACLEI**). In the investigation report for Operation Swordfish in 2021, the Integrity Commissioner used the definition of 'corruption' in the Encyclopaedic Legal Dictionary to determine whether the conduct in question constituted 'corruption of any other kind':[17]

> *…a deliberate act of dishonesty, breach of the law, or abuse of public trust or power that undermines or is incompatible with the impartial exercise of an official's powers, authorities, duties or functions.*[18]

[10] Explanatory Memorandum, NACC Bills 75.
[11] (2015) 256 CLR 1.
[12] Ibid [77].
[13] Ibid [76].
[14] *Crime and Corruption Act 2001* (Qld) (*'Queensland Act'*) s 15.
[15] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (*'Victorian IBAC Act'*) s 4.
[16] *Independent Commission Against Corruption Act 1988* (NSW) (*'NSW ICAC Act'*) s 8.
[17] Australian Commission for Law Enforcement Integrity (ACLEI), Investigation Report: Operation Swordfish (2021), <https://www.aclei.gov.au/sites/default/files/documents/2022-09/Public%20Investigation%20Report%20-%20Operation%20Swordfish.pdf> 25.
[18] *Encyclopaedic Australian Legal Dictionary* (Online, LexisNexis, 2020) 'corruption'.

35. Taking Justice Gageler's point and the above definition of 'corruption' into consideration, the Integrity Commissioner in Operation Swordfish did not make any findings of corrupt conduct, as 'the investigation did not determine any gain, financial or other' and the investigation 'did not determine any dishonesty or moral impropriety' associated with the subject's actions.'[19]

36. However, in the context of the NACC Bill as drafted, it is unclear whether the factors identified by the Integrity Commissioner in 2021 fall within the expansive definition of 'corrupt conduct' in paragraphs 8(1)(a)-(d).

37. In interpreting paragraph 8(1)(e), the matters to which a court would have regard would include the Explanatory Memorandum,[20] including its above statements and that:

> *Despite its broad framing, paragraph 8(1)(e) would still only apply to conduct that:*
>
> *constitutes corruption—such as a deliberate act of dishonesty, breach of the law, or abuse of public trust or power that undermines or is incompatible with the impartial exercise of an official's powers, authorities, duties or functions; and is engaged in by a public official, in their capacity as a public official—this limb could not apply to the conduct of any other person or of a public official in their private capacity unrelated to their public functions and duties. For a person, for example an employee of a contracted service provider, who is only a public official in relation to particular activities, the conduct would need to have a connection with those activities to constitute corrupt conduct.*[21]

38. However, it is unclear that the matters identified in the Explanatory Memorandum would not already fall within the conduct described in paragraphs 8(1)(a)-(d).[22] The Law Council suggests that the Committee should inquire further of the Attorney-General's Department regarding what matters might be encompassed under paragraph 8(1)(e) that are not addressed under the remainder of clause 8.

39. Pending this, the Law Council is concerned by the breadth and uncertainty of the phrase 'corruption of any other kind' at paragraph 8(1)(e) and recommends that if it is retained, it should be clarified in the Bill. For example, an exhaustive list of examples of 'corruption of any other kind' that could be expected to be captured under paragraph 8(1)(e) should be included.

Recommendation

- **Paragraph 8(1)(e), concerning 'corruption of any other kind', be either deleted from the NACC Bill, or clarified by way of including an exhaustive list of the types of conduct that would be captured.**

[19] ACLEI, Investigation Report: Operation Swordfish (2021), <https://www.aclei.gov.au/sites/default/files/documents/2022-09/Public%20Investigation%20Report%20-%20Operation%20Swordfish.pdf> 25.
[20] *Acts Interpretation Act 1901* (Cth) s 15AB.
[21] Explanatory Memorandum, NACC Bills 76-77.
[22] Noting, for example, that paragraph 8(1)(a) covers a public official's own conduct, if it has, or could have, the specified adverse effects in relation to the public official's powers, functions or duties: National Anti-Corruption Bill 2022 ('NACC Bill') sub-cl 8(3).

Consideration of past conduct

40. The definition of 'corrupt conduct' under clause 8 would enable the Commissioner to investigate past conduct that in their opinion could involve serious or systemic corrupt conduct, including:

    - conduct that occurred prior to the establishment of the NACC;[23]
    - conduct of a former public official while they were a public official;[24] and
    - misuse of information by a former public official that was acquired in the course of their functions or duties.[25]

41. The Law Council notes that the definition of 'corrupt conduct'—and the NACC Bill more broadly—would not create any retrospective criminal offences or otherwise impose criminal liability on a person retrospectively. There are no limits on past conduct that the NACC can investigate, provided that it meets the above investigation threshold, which is an important threshold.

42. As noted in the Explanatory Memorandum, the definition of 'corrupt conduct' would not establish a criminal offence, and so would not impose retrospective criminal liability for any conduct.[26] However, where the Commissioner conducts an investigation into past serious or systemic corrupt conduct and forms a view that the conduct could have constituted a criminal offence at the time it was committed, the Commissioner could refer that conduct and supporting evidence to the Commonwealth Director of Public Prosecutions (**CDPP**).[27]

43. The Law Council is generally supportive of this approach and notes that most anti-corruption commissions in States and Territories have some degree of power to investigate past conduct.

44. Nonetheless, should the Committee be minded to recommend limiting the NACC Bill's application to past conduct, the Law Council suggests that regard could be had to:

    - including an additional public interest test requirement, consistent with the Law Council's Federal Judicial Commission Policy and its position on past conduct by the judiciary;[28] or
    - the requirement under the *Victorian IBAC Act* that the Commission not investigate prior conduct where the conduct occurred at too remote a time to justify investigation.[29]

Corruption issue—Application to potential future conduct

45. The Law Council notes that the existence of a corruption issue concerning alleged corrupt conduct forms the basis for the NACC's jurisdiction.[30] Along with the definition of 'corrupt conduct', the definition of 'corruption issue' in clause 9 is pivotal in many respects. For example:

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[23] NACC Bill sub-cl 8(4).
[24] Ibid sub-cl 8(5);
[25] Ibid para 8(1)(d).
[26] Explanatory Memorandum, NACC Bills 76.
[27] Ibid.
[28] Law Council of Australia, Principles underpinning a Federal Judicial Commission (Policy Statement, 5 December 2020) < https://www.lawcouncil.asn.au/publicassets/96b2f0e1-de70-eb11-9439-005056be13b5/Principles%20underpinning%20a%20Federal%20Judicial%20Commission.pdf> 6.
[29] *Victorian IBAC Act* para 60(4)(d).
[30] Explanatory Memorandum, NACC Bills 60.

- the NACC's functions include to conduct preliminary investigations into corruption issues or possible corruption issues and to conduct investigations into corruption issues that could involve corrupt conduct that is serious or systemic;[31]
- Commonwealth agency heads must mandatorily refer corruption issues where they suspect that the issue could involve corrupt conduct that is serious or systemic;[32] and
- the NACC may deal with a corruption issue in a range of ways under clause 41, including investigating the corruption issue either alone or jointly (a **corruption investigation**).[33] The NACC may only conduct, or continue to conduct, a corruption investigation if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.[34]

46. Under sub-clause 9(1) of the NACC Bill, a 'corruption issue' is an issue of whether a person:

    - has engaged in corrupt conduct; or
    - is engaging in corrupt conduct; or
    - ***will engage*** in corrupt conduct (emphasis added).

47. The third element of the definition of 'corruption issue', at paragraph 9(1)(c), captures the possibility of future corrupt conduct.

48. As noted, under sub-clause 8(10), the definition of 'corrupt conduct' extends to conduct comprising conspiracy or an attempt to commit or engage in corrupt conduct according to sub-clause 8(1).

49. The Explanatory Memorandum to the NACC Bill states the following:

> *A corruption issue would generally relate to conduct that is alleged to have occurred or to be ongoing. A corruption issue could also arise in the form of a question about whether a person will engage in corrupt conduct at some time in the future. This question may arise, for example, because of concerns that the integrity of a public official has been compromised*.[35]

50. The Law Council notes the requirement that the NACC may only conduct, or continue to conduct, a corruption investigation (investigating the corruption issue either alone or jointly) if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.[36]

51. The interactions between various provisions of the NACC Bill regarding how future conduct is captured, including with respect to the evidence of preparatory conduct required to satisfy various thresholds, may be considered somewhat complex, uncertain and circular. For example:

    - an issue of whether a person will engage in corrupt conduct (including conspiracy or attempt to engage in corrupt conduct) may be dealt with by the NACC;[37] and

[31] NACC Bill paras 17(b)-(c).
[32] Ibid cl 33.
[33] Ibid sub-cls 41(1)-(2).
[34] Ibid cl 46.
[35] Explanatory Memorandum, NACC Bills 81.
[36] NACC Bill cl 46.
[37] Ibid cls 40-41.

- the NACC may investigate a corruption issue (including whether a person will engage in corrupt conduct) if the Commissioner is of the opinion that the issue 'could' involve corrupt conduct (including conspiracy or attempt to engage in corrupt conduct) which is serious or systemic. A range of coercive powers may be exercised under Part 7 if such an opinion exists.

52. The Law Council queries whether it is necessary to include 'will' in the definition of 'corruption issue', given that the definition of 'corrupt conduct' extends to conduct constituting conspiracy or attempt to engage in corrupt conduct. While it understands that the NACC has a preventative function with respect to corruption, there are likely to be significant issues arising from requiring an assessment to be made that a person will engage in such conduct, and with that person being subsequently accused, investigated and potentially penalised for conduct which has not occurred.

Recommendation

- **The issue of whether a person will engage in corrupt conduct should be removed from the definition of 'corruption issue' (by removing paragraph 9(1)(c)).**

Jurisdiction

Public officials

53. Clause 10 of the NACC Bill defines a 'public official' as:

- a parliamentarian, including a Minister (even when the relevant House of Parliament is dissolved and the individual is not a senator or member of the House of Representatives);[38]
- a staff member of a Commonwealth agency;[39] and
- a staff member of the NACC.[40]

54. The Law Council notes that 'staff members' include individuals who are contracted service providers for Commonwealth contracts and their subcontractors.[41] It also notes that a person who is acting for and on behalf of, or as a deputy or delegate of, any of the persons or bodies in clause 10 will be deemed a public official.[42]

55. The Law Council supports the broad definition of 'public official' in the NACC Bill, noting that modern governments extensively outsource many aspects of their functions. It considers that it is appropriate for the NACC to have expansive jurisdiction to investigate Commonwealth ministers, public servants, statutory office holders, government agencies, parliamentarians and the personal staff of politicians.

56. The Law Council also welcomes the consistent approach adopted with regards to law enforcement officers and public officials in the Bill, and considers that uniformity of processes, powers and requirements is important when dealing with corruption in law enforcement and the public sector. It notes that there is scope for significant acts of corruption involving large amounts of money in the administration of contracts and the tendering process across many parts of the public sector.

[38] Ibid cl 7.
[39] Ibid cls 11-12.
[40] Ibid cl 266.
[41] Ibid cl 13.
[42] Ibid sub-cl 10(2).

Third parties

57. While the definition of 'corrupt conduct' in sub-clause 8(1) of the NACC Bill largely focuses on the conduct of public officials, the Law Council notes that the definition would extend to the conduct of other persons (third parties) in two ways:

    - if their conduct adversely affects, or could adversely affect, the honest or impartial exercise of a public official's powers, or the honest or impartial performance of a public official's functions and duties;[43] and
    - if they conspire with another person (whether or not a public official) for that other person to engage in corrupt conduct covered by sub-clause 8(1).[44]

58. The Bill's extension to third parties has a clear focus on how the conduct of the third party affects the public official's exercise of their powers, or performance of their functions or duties. The Law Council considers this to be important. It refers to its above discussion regarding 'could affect the exercise' of the powers.

59. The Explanatory Memorandum provides that:

> *…a person who merely vigorously lobbies a public official to present the merits of the person's position or those of their client would not be covered by the concept of corrupt conduct, where nothing in the conduct or relevant circumstances could be expected to induce or influence a public official to exercise a power dishonestly or partially*.[45]

60. The Explanatory Memorandum goes on to note that a person offering payment or benefit, conditional on a decision-maker exercising a power in a particular way, would likely be considered to adversely affect the honest and impartial exercise of that decision-maker's power.[46]

The judiciary

61. Sub-clause 8(2) provides that the definition of corrupt conduct does not apply in relation to conduct of a member of the judiciary (including a Justice of the High Court, a judge of a court created by the Parliament and a judge of a court of a State or Territory).

62. Sub-clause 8(6) further provides that 'corrupt conduct' does not include conduct engaged in by a staff member of the High Court or of a court created by the Parliament to exercise a power, or perform a function or duty, of a judicial nature.

63. Sub-clause 8(7) provides that conduct is not 'corrupt conduct' under paragraph 8(1)(a) to the extent that it affects the exercise of a power, or the performance of a function or duty, of a judicial nature by a public official who is a staff member of the High Court or of a court created by the Parliament.

64. The Explanatory Memorandum states that:

> *The definition of corrupt conduct would not include conduct engaged in by a staff member of the High Court or of a court created by the Parliament to exercise a power, or perform a function or duty of a judicial nature. Judges would also not be public officials within the NACC's jurisdiction … For example, court registrars' conduct would be excluded from the*

[43] Ibid sub-cl 8(1).
[44] Ibid sub-cl 8(10).
[45] Explanatory Memorandum, NACC Bills 72.
[46] Ibid.

> *NACC's jurisdiction to the extent they are performing their judicial functions or duties. However, if a registrar engaged in corrupt conduct that was unconnected to their judicial functions or duties, their conduct would be within jurisdiction.*
>
> *This exclusion is appropriate to maintain proper separation between the Executive and Judicial branches of government. The NACC would form part of the Executive. Accordingly, it should not interfere with the exercise of judicial power under Chapter III of the Constitution by investigating, referring, or making findings about conduct engaged in only to perform functions or duties, or exercise powers of a judicial nature.*
>
> *Further, the definition would not extend to conduct of any person if it only affected the exercise of power, or the performance of a function or duty, of a judicial nature by a public official who is a staff member of the High Court or of a court created by the Parliament.*[47]

65. In line with its previous advocacy, the Law Council agrees with this approach.

66. However, this exclusion reinforces the importance of establishing a Federal Judicial Commission to investigate misconduct by members of the federal judiciary and to have an ongoing educative role to assist and train members of the judiciary. In this respect, the Law Council welcomes the Australian Government's in-principle support for the establishment of a Federal Judicial Commission, announced on 29 September 2022.[48]

Recommendation

- **A Federal Judicial Commission be established as a matter of priority.**

Part 3—The National Anti-Corruption Commission

Functions

67. The Commissioner has a broad range of functions under clause 17, including to:

- detect corrupt conduct;
- conduct preliminary investigations into corruption issues or possible corruption issues;
- conduct corruption investigations into corruption issues that could involve corrupt conduct that is serious or systemic;
- conduct public inquiries into the risk of corrupt conduct occurring and measures directed at dealing with that risk;
- provide education and information in relation to corrupt conduct and preventing that conduct; and
- collect, correlate, analyse and disseminate general information and intelligence about corrupt conduct.

68. The Law Council supports these functions, which will promote the independence of the NACC, in addition to the following features which are discussed below:

[47] Ibid 77-78.
[48] Law Council of Australia, Integrity of the judiciary essential (Media Release, 29 September 2022) <https://www.lawcouncil.asn.au/publicassets/e497ef6b-cd3f-ed11-9474-005056be13b5/2022%2009%2029%20-%20LCA%20MR%20-%20Integrity%20of%20judiciary%20essential.pdf>.

- the Commissioner's discretion to deal with corruption issues, including whether to initiate or discontinue an investigation;[49]
- the Joint Committee's requirement to review and report on the NACC's budget and finances;[50] and
- security of tenure for the Commissioner and Deputy Commissioners.[51]

69. In this context, the Law Council also welcomes the separate funding announcement of $262 million over four years for the establishment and operation of the NACC.[52]

70. As previously outlined, the Law Council suggests that 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.

71. Adequate funding is especially required for the NACC's critical educative role and preventative roles, so that it 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 Commission, particularly as the nature of corrupt conduct is continually 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.

72. The Law Council also welcomes the NACC Bill providing an adequate statutory basis for the functions of corruption prevention and anti-corruption education.

Part 4—Protections for disclosers

73. The Law Council believes strong protection of whistleblowers must accompany the establishment of the NACC to encourage, through appropriate protection, reporting of corrupt conduct. It supports the measures in Part 4 of the NACC Bill that are intended to strengthen the protection of whistleblowers, including:

- protection from liability (clause 24);
- protection from reprisal (clause 29);
- criminal offences for taking, or threatening to take, reprisal action (clause 30); and
- protection for journalists' informants (clause 31, and subject to the remarks below).

74. Part 4 would work alongside the existing *PID Act* framework, which provides protections to public officials and former public officials who make public interest disclosures (**PIDs**), as well as other provisions of the NACC Bill and the Consequential Bill. These provisions would (inter alia) ensure that a public official (within the meaning of the *PID Act*) obtains the protections available under the *PID Act* regardless of whether they make a PID internally or a disclosure under the NACC Bill.

75. More broadly, the Law Council considers that the Government should continue to work towards a comprehensive whistleblower regime. In this context, it welcomes the

[49] NACC Bill cl 41.
[50] Ibid para 177(1)(g).
[51] Ibid cls 241-242.
[52] Attorney-General's Department, National Anti-Corruption Commission (Media Release, 27 September 2022), <https://ministers.ag.gov.au/media-centre/national-anti-corruption-commission-27-09-2022>.

Attorney-General's commitment in his second reading speech that he will be, in the coming months, strengthening the *PID Act* to ensure Australia has effective protection of whistleblowers.[53] In this regard, the Law Council considers that reference should be made to the recommendations of the Moss Review[54] and the Australian Law Reform Commission's (**ALRC**) 2009 report, *Secrecy Laws and Open Government in Australia*.[55]

76. The Law Council has previously supported the establishment of a whistleblower protection authority in the same bill establishing a national anti-corruption agency, as proposed by the lapsed Australian Federal Integrity Commission Bill introduced by Dr Helen Haines MP.[56] However, it is open to any alternative proposal to achieve the important function of encouraging, through appropriate protection, reporting of relevant conduct and ensuring appropriate structures are in place within government departments to manage these issues, with necessary oversight.

77. Any consideration of the sufficiency of protections for whistleblowers should further have regard to Australia's ratification of, and compliance with, the United Nations Convention against Corruption (**Convention**).[57] Article 33 provides that:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Journalists

78. Sub-clause 31(2) provides that neither a journalist nor a journalist's employer is required to do anything under the Bill that would disclose the identity of an informant or enable that identity to be ascertained.

79. Sub-clause 31(4) states that clause 31 does not, however, prevent an authorised officer from doing anything the authorised officer would otherwise be able to do in exercising powers under Part 1AA of the *Crimes Act* for the purposes of the Bill.

80. The effect of these powers, and the Law Council's broader concerns that the existing powers of law enforcement (and security) agencies in relation to journalists strike an inadequate balance with other public interest objectives, are discussed below.

Part 5—Referring corruption issues

Voluntary referral

81. Part 5 Division 1 (clause 32) of the NACC Bill would allow any person to voluntarily refer a corruption issue or to provide information about a corruption issue to the Commissioner.

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[53] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 September 2022, 4 (The Hon Mark Dreyfus KC MP, Attorney-General).
[54] Philip Moss AM, Review of the Public Interest Disclosure Act 2013 (15 July 2016) <https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF>.
[55] Australian Law Reform Commission (ALRC), Secrecy Laws and Open Government in Australia (Report 112, December 2009) <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC112.pdf>.
[56] Law Council of Australia, Commonwealth Integrity Commission: Proposed Reforms (Submission to the
[57] *United Nations Convention against Corruption*, opened for signature 31 October 2003, UN Doc A/RES/58/4 (entered into force 14 December 2005).

82. As the Explanatory Memorandum states:

> *This would ensure that all people, including members of the public, are able to refer corruption issues to the Commissioner. This is appropriate to ensure that anyone can refer a potential corruption issue to the Commissioner without limitation.*[58]

83. The Law Council supports this measure and believes that a broad pathway to refer matters to the NACC is necessary. This would maximise the volume of information the NACC is able to receive and consider from discretionary referrals.

84. The experience of State and Territory anti-corruption bodies suggests that 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. This is particularly relevant with respect to determining that 'systemic' corrupt conduct exists.

85. The Law Council also supports the Commissioner's ability to deal with a corruption issue without the need for a referral (as is the case under clause 40).

Mandatory referrals for heads of Commonwealth Agencies

86. Part 5 Division 2 would create mandatory referral obligations for:

- a head of a Commonwealth agency,[59] including specific obligations for the head of an intelligence agency;[60]
- staff members of Commonwealth agencies who have certain responsibilities under the *PID Act*;[61] and
- the Inspector-General of Intelligence and Security (**IGIS**).[62]

87. The obligation on a head of an agency (or relevant staff members) to refer matters to the Commissioner (or alternatively to the IGIS in the case of intelligence agencies) would arise where the person becomes aware that there is a corruption issue:

- that concerns the conduct of a person who is, or was, a staff member of their agency while that person is, or was, a staff member; and
- they suspect the issue could involve corrupt conduct that is serious or systemic.[63]

88. Sub-clause 38(1) provides that a person who is required to refer a corruption issue under Division 2 'must do so as soon as reasonably practicable' after becoming aware of the issue, or 'within such later time as is allowed by the Commissioner'.

89. The Law Council notes, in this context, the particular support of the Law Society of New South Wales (**LS NSW**) for these provisions as drafted. The LS NSW advises that the analogous requirements in the *NSW ICAC Act* have been one of the core aspects of the role of the NSW Independent Commission Against Corruption (**NSW ICAC**). This requirement filters down to impact departmental cultures, as they structure themselves around the prevention and reporting requirements of the new framework. In the LS

[58] Explanatory Memorandum, NACC Bills 104.
[59] NACC Bill cl 33.
[60] Ibid cl 34.
[61] Ibid cl 35.
[62] Ibid sub-cl 35(4).
[63] Ibid cl 33.

NSW's view, erring on the side of reporting also reduces the incidence of the culture of 'turning a blind eye.'

Suspicion threshold

90. The Explanatory Memorandum notes that the requirement for the person to 'suspect' that the issue could involve corrupt conduct that is serious or systemic is a lower threshold than 'belief' or 'knowledge'.[64] It states that:

> *'Suspicion' necessarily connotes the existence of uncertainty and it is immaterial whether the suspected serious or systemic nature of the alleged conduct exists. Further, the test would be subjective, going to the genuinely held suspicions of the person potentially subject to the referral obligation*.[65]

91. The Explanatory Memorandum also clarifies that the mandatory referral obligations would only arise 'when the agency head becomes personally aware of the corruption issue, regardless of how this awareness occurs.'[66] Further, the obligation would apply regardless of when the relevant conduct occurred, including if it was prior to the agency head joining the agency, or prior to the establishment of the NACC.[67]

92. The Law Council notes that mandatory referral provisions impose a positive requirement on certain heads of regulated entities to notify corruption issues, rather than conferring a mere discretion to refer those issues.

93. In this context, and in line with its previous advocacy, [68] the Law Council considers that 'reasonable suspicion' is a more appropriate threshold for mandatory notification of corruption issues by agency heads, in view of the imposition of a statutory requirement to notify (breach of which may expose them to legal liability or disciplinary action) as distinct from a discretion to refer conferred on any other person.

94. Where a positive obligation such as this requirement is imposed, the Law Council recognises that compliance with the obligation must be capable of assessment by reference to a known standard, which would incorporate both a subjective and objective assessment with respect to state of mind. As noted, the 'reasonable suspicion' threshold serves as an important safeguard from an entity head being captured by the requirement to notify in borderline cases and potentially being exposed to legal liability or disciplinary action if this has not occurred.

Recommendation

- **The threshold for mandatory notification of corruption issues by agency heads under clause 33 of the Bill be amended to reasonable suspicion that the corruption issue involves corrupt conduct that is serious or systemic.**

[64] Explanatory Memorandum, NACC Bills 105.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Law Council of Australia, Commonwealth Integrity Commission: 'Reasonable suspicion' thresholds (Supplementary Submission to the Attorney-General's Department, 30 June 2021) <https://www.lawcouncil.asn.au/publicassets/e03033d2-ffe8-eb11-943e-005056be13b5/4029%20%20CIC%20RE%20Reasonable%20suspicion%20thresholds.pdf>.

Vexatious complaints

95. The Bill does not include offences for making vexatious complaints, and the Law Council considers that this is appropriate, given that such offences may deter people from making a referral.[69] The NACC should actively encourage referrals and publicly reassure complainants that their complaints will be examined without any adverse consequences for them, unless the complaints are vexatious.

96. With respect to vexatious complaints, the Law Council notes that the NACC has the discretion not to pursue a complaint and is under no duty to consider whether to deal with a corruption issue.[70] The Law Council suggests that the question of whether the Bill's settings are sufficient to deter vexatious complainants, when balanced with the need to ensure that genuine complainants are not deterred from making legitimate referrals, should be considered as part of the independent review of the NACC Bill under clause 278.

Part 6—Dealing with corruption issues

97. Clause 41 of the Bill provides a broad discretion to the Commissioner with respect to how to deal with corruption issues. This includes a discretion as to whether to initiate an investigation and whether to discontinue an investigation.

Threshold for corruption investigation

98. Under sub-clause 41(3), the Commissioner may conduct a corruption investigation only if they are of the opinion that the issue could involve corrupt conduct that is serious or systemic. The Law Council particularly welcomes the emphasis on corrupt conduct that is 'serious or systemic', in line with its previous advocacy.

99. However, the Law Council considers that while a broad referral pathway should be supported, requiring that the Commissioner reach a state of mind of 'reasonable suspicion' for corruption investigations would be an appropriate safeguard. The coercive investigation powers in Part 7 should be predicated on the Commissioner firstly being satisfied of a reasonable suspicion of a serious or systemic corruption issue.[71]

100. 'Reasonable suspicion' is a common threshold for the state of mind required before a judicial officer may issue a warrant authorising the use of coercive or intrusive powers to gather evidence. Crucially, there is a well-settled body of common law on this test: 'It follows that the issuing justice [or in this case, the Commissioner] needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind.'[72] The test requires both a subjective element and an objective assessment of the grounds giving rise to the subjective belief.

101. There is precedent in some state jurisdictions for this more objective standard with respect to corruption investigations. For example, in Victoria, the Independent Broad-based Anti-corruption Commission (**IBAC**) must not conduct an investigation

[69] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 33-35.
[70] Explanatory Memorandum, NACC Bills 115.
[71] See NACC Bill cl 55.
[72] *George v Rockett* (1990) 170 CLR 104, 112.

'unless the IBAC suspects on reasonable grounds that the conduct constitutes corrupt conduct.'[73]

102. Incorporating a reasonable suspicion threshold for the Commissioner to investigate a corruption issue would also have the function of providing appropriate legislative guidance on the exercise of an important discretion and preserving the effectiveness of the NACC in the context of finite resources. A reasonableness threshold may also provide a useful yardstick to the Commissioner by which to justify their decision to investigate, or not to investigate, given the likelihood of intense politicisation and pressure to investigate particular matters.

103. The Law Council recommends that the Commissioner may only conduct a corruption investigation if they hold a reasonable suspicion that the issue involves corrupt conduct that is serious or systemic.

104. In the event that a reasonable suspicion threshold is not incorporated in the Bill, the Law Council recommends that the Commissioner issue guidance providing greater clarity on the criteria that will be applied in deciding whether to conduct an investigation in relation to particular corruption issues in the context of limited resources.

Recommendation

- **The threshold for investigation by the Commissioner under sub-clause 41(3) (and sub-clause 55(a)) of the Bill be amended to reasonable suspicion that the corruption issue involves corrupt conduct that is serious or systemic.**

Part 7—Investigating corruption issues

105. Part 7 of the Bill provides for a range of significant matters, including coercive powers to be exercised by the Commissioner regarding:

- requiring information documents and things including by issuing direction to agency heads and notices to produce;[74]
- power to hold hearings, and issue summons to persons to attend hearings and answer questions;[75]
- attaching non-disclosure notations to notices to produce or for private hearing summons, contravention of which is an offence; [76]
- power to deliver travel documents;[77]
- arrest of witnesses in limited circumstances where a witness is a 'flight risk;'[78]
- power to issue non-disclosure notations in relation to certain information;[79]
- extensive search powers including entering a Commonwealth agency without a search warrant;[80] and
- search powers pursuant to *Crimes Act* search powers on a partly modified basis under Part IAA.[81]

[73] *Victorian IBAC Act* s 60(2).
[74] NACC Bill cls 57-58.
[75] Ibid pt 7 div 3.
[76] Ibid cl 98.
[77] Ibid cl 89.
[78] Ibid cl 91.
[79] Ibid pt 7 div 4.
[80] Ibid pt 7 div 7 sub-div A.
[81] Ibid pt 7 div 7 sub-div A.

106. Importantly, Part 7 also establishes several new offences to punish non-compliance with the investigatory powers of the NACC, such as:

- failure to comply with a notice to produce;[82]
- producing false or misleading information or documents;[83] and
- failure to attend hearing.[84]

107. A person will also be in contempt of the NACC if they, for instance, fail to: attend a hearing; take an oath or affirmation; answer a question or give information at a hearing.[85]

108. Part 7 of the NACC Bill further provides for:

- private and public hearings to be held;
- the use and disclosure of investigatory and derivative material;
- the retention and return of documents and things; and
- limited privileges and protections.

109. The Law Council supports the Commissioner having the appropriate 'teeth' to conduct effective corruption investigations. It is also essential that adequate safeguards are in place, given the strength of these powers.

Private and public hearings

110. Sub-clause 73(1) of the NACC Bill would require that hearings are to be held in private by default.

111. However, under sub-clause 73(2), the Commissioner would have the discretion to hold a hearing, or part of a hearing, in public if they are satisfied that exceptional circumstances justify holding the hearing, or part of the hearing, in public and it is in the public interest to do so.

112. Sub-clause 73(3) provides a non-exhaustive list of matters to which the Commissioner may have regard in determining whether to hold a hearing, or part of a hearing, in public:

- the extent to which the corruption issue could involve corrupt conduct that is serious or systemic;
- whether certain evidence is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence;
- any unfair prejudice to a person's reputation, privacy, safety or wellbeing that would be likely to be caused if the hearing, or the part of the hearing, were to be held in public;
- whether a person giving evidence has a particular vulnerability, including that they are under the direct instruction or control of another person in a relative position of power; and
- the benefits of exposing corrupt conduct to the public and making the public aware of corrupt conduct.

[82] Ibid cl 60.
[83] Ibid cl 61.
[84] Ibid cl 68.
[85] Ibid cl 82.

113. Clause 74 requires certain evidence to be given in private, including if giving the evidence would disclose:

- legal advice;[86]
- a communication that is protected against disclosure by legal professional privilege;[87]
- section 235 certified information;[88]
- information that the Commissioner is satisfied is sensitive information,[89] which in turn includes information which would prejudice the fair trial of any person or the impartial adjudication of a matter;[90] and
- intelligence information.[91]

114. Clause 77 requires the Commissioner to issue a confidentiality direction under clause 100, prohibiting or limiting the use of investigation material, if all or part of a hearing is held in private. The Commissioner must be satisfied that the failure to give such a direction:

- might prejudice a person's safety;[92] or
- would reasonably be expected to prejudice a witness' fair trial, if the witness has been charged with a relevant offence or such charge is imminent;[93] or
- might lead to the publication of section 235 certified information;[94] or
- might lead to the publication of sensitive information.[95]

'Exceptional circumstances' and public interest test

115. The Law Council notes that the 'exceptional circumstances' plus 'public interest' test for public hearings in the NACC Bill appears to draw upon aspects of section 117 of the *Victorian IBAC Act*. This test requires (inter alia) that the IBAC consider on reasonable grounds that:

- there are exceptional circumstances;
- it is in the public interest to hold a public examination; and
- a public examination can be held without causing unreasonable damage to a person's reputation, safety or wellbeing; and
- the relevant conduct that is the subject of the investigation may constitute serious or systemic corrupt conduct.[96]

116. Subsection 117(4) provides a non-exhaustive list of factors for consideration with respect to the public interest test. There are also factors to which the IBAC may have regard in deciding whether to hold part of an examination in private.[97]

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[86] Ibid sub-para 74(b)(i).
[87] Ibid sub-para 74(b)(ii).
[88] Ibid sub-para 74(b)(iv).
[89] Ibid sub-para 74(b)(iii).
[90] Ibid para 228(3)(k).
[91] Ibid sub-para 74(b)(v).
[92] Ibid para 77(a).
[93] Ibid para 77(b).
[94] Ibid para 77(c).
[95] Ibid para 77(d).
[96] *Victorian IBAC Act* s 117(1).
[97] Factors include whether the conduct relates to an individual or is an isolated incident or systemic in nature; the seriousness of the matter being investigated; and the benefit of exposing to the public, and making the public aware of, corrupt conduct or police personnel misconduct.

117. The *NSW ICAC Act*, by comparison, requires that it only be in the 'public interest' to conduct a public inquiry,[98] and provides a non-exhaustive list of factors which are required to be considered when determining this question.[99]

118. There has been some judicial consideration of the exceptional circumstances and public interest test in Victoria, under s 117 of the *Victorian IBAC Act*. Of particular relevance was the decision of *R and M v IBAC*,[100] determined by the Supreme Court of Victoria Court of Appeal and upheld by the High Court of Australia. With respect to 'exceptional circumstances', Priest, Beach and Kaye JJA found that:

- 'as a matter of ordinary usage, in order to be 'exceptional', circumstances must be highly unusual, and quite rare';[101]
- the requirement of 'exceptional' circumstances thus involves both a qualitative distinction between the circumstances which might ordinarily be inquired of, and, in addition, an assessment that those circumstances might be reasonably rare;[102]
- such a construction was supported by the meaning given to the phrase 'exceptional circumstances' in other statutory contexts, such as under Victorian bail legislation. In that context, 'circumstances amounting to exceptional must be circumstances that rarely occur and perhaps could be outside reasonable anticipation or expectation';[103] and
- the IBAC therefore had to determine that the circumstances were exceptional, in the sense that they were clearly unusual and distinctly out of the ordinary.[104]

119. The Court considered that the 'public interest' was a broad concept, necessarily importing at least to some extent, a discretionary judgment. However, a court was not 'at large' in determining whether a particular matter fell within the public interest—rather, the content of the phrase depended on the statutory context in which it was employed.[105] In that context, the non-exhaustive list of factors in subsection 117(4) of the *Victorian IBAC Act* provided some guidance.[106] The Court reviewed the respondent's express consideration of these factors as part of the weighing-up exercise in determining the public interest.[107]

[98] *NSW ICAC Act* s 31(1).
[99] Factors in the *NSW ICAC Act* s 31(2) include 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); and whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.
[100] (2015) VSCA 271 ('*R and M*').
[101] Ibid [67] (Priest, Beach and Kaye JJA).
[102] Ibid.
[103] Ibid [68] (Priest, Beach and Kaye JJA), citing *Owens v Stevens* (Supreme Court of Victoria, Hedigan J, 3 May 1991).
[104] Ibid [72] (Priest, Beach and Kaye JJA).
[105] Ibid [90] (Priest, Beach and Kaye JJA).
[106] Ibid [92] (Priest, Beach and Kaye JJA).
[107] Ibid [92]-[101] (Priest, Beach and Kaye JJA).

Law Council view

120. The Law Council maintains its position that hearings should generally be conducted in private, unless the Commissioner considers that a closed hearing would be unfair to the person or contrary to the public interest.[108] This draws upon the approach under the *Queensland Act*.[109] The Law Council understands that public hearings in Queensland are rare, with zero conducted from 2009 to 2017, and three public investigations conducted since then.[110]

121. The Law Council emphasises that open justice is a fundamental tenet of Australia's justice system and this should be promoted. However, it is worth keeping in mind that the NACC is neither a court, nor is a prosecutorial body. Its objects are to detect and investigate corrupt conduct and after investigation of a corruption issue, to refer persons for criminal prosecution, civil proceedings of disciplinary action.[111]

122. The Law Council also acknowledges the advantage of conducting hearings in private to protect the reputation of those persons concerned.[112] This is a valid concern, particularly where allegations are aired in public without the protection afforded by the rigours of the criminal justice system, including the:

- rules of evidence;
- right to legal representation when charged with a serious crime,[113]
- right to silence and privilege against self-incrimination;
- presumption of innocence in the course of an investigation; and
- standard of proof of beyond reasonable doubt.

123. In comparison, a public anti-corruption hearing incorporates extraordinary powers of compulsion, no right to silence or privilege against self-incrimination, no rules of evidence, no underlying guarantee of legal representation, and no such standard of proof for findings and opinions made by the Commissioner.

124. The Law Council also acknowledges concerns that public hearings conducted by anti-corruption bodies can take on the flavour of a 'show trial' and attract an undue amount of media attention in a forum where the concerned person has limited means of defending themselves against prejudicial material.

125. However, public hearings, in appropriate and confined circumstances, are essential to the effective and transparent operation of an anti-corruption commission. They can play a role in educating the public about corruption, alerting the public to the investigation and encouraging other persons with relevant information to come forward. They can

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[108] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 32.

[109] *Queensland Act* ss 117(1)-(2). Subsection 177(1) provides that generally, hearings are not open to the public. Subsection 117(2) states that a Commission may open the hearing to the public if it considers opening the hearing will make the investigation to which the hearing relates more effective and would not be unfair to a person or contrary to the public interest.

[110] See Crime and Corruption Commission Queensland, Publications (2022) <https://www.ccc.qld.gov.au/publications>.

[111] The Bill, cl 3.

[112] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 31.

[113] *Dietrich v The Queen* (1992) 117 CLR 292.

also hold the NACC to account in respect of the integrity of the investigation itself, and can be seen as critical to maintaining public confidence in the integrity of government.

126. The Law Council submits that the right balance must be struck to ensure that the NACC is able to operate efficiently, fairly, and without inappropriately protecting political sensitivities.

127. With respect to the NACC Bill, the Law Council has received views including:

- ongoing strong support for a default setting of private hearings, noting that public hearings have the potential to do significant harm to a witness's reputation and wellbeing;
  - The legal profession has been acutely aware of particular instances in which severe damage has been caused to individuals in the past (eg, irreparable damage to reputation and careers, self-harm).
- that public interest and exceptional circumstances tests may be unnecessarily complex, noting that the public interest test consists of a careful weighing exercise;
  - The core issue is determining whether there is an issue of public interest and that there is a high threshold protecting against reputational damage;
- the exceptional circumstances test in the context of anti-terrorism bail laws is virtually impossible to satisfy and does not reflect the careful weighing-up exercise required in such matters;
- the LS NSW does not support the Bill's test as drafted:
  - It considers that 'exceptional circumstances' sits at odds with the Bill's objects of educating the community about corruption.
  - Further, its view is that the Bill does not reflect the reality of the NSW experience, in which most hearings occur privately. Where hearings are public, it is usually the case that a careful balancing of the risk to reputation versus public interest in exposure of the matter has already occurred.
  - It supports holding public hearings where it is fair to do so, noting that this is vital for restoring and maintaining trust in government. Additional safeguards to support fairness in public hearings should be considered in this context. A similar position is adopted by the South Australian Law Society's Civil Litigation Committee;
- in contrast, the South Australian Bar supports a NACC model akin to that in South Australia, where proceedings must be heard in private;[114] and
- the Queensland Law Society (**QLS**) strongly supports the presumption against hearings being public at sub-clause 73(1), along with the test at sub-clause 73(2). In this context, it notes that NACC has an investigative—not a court or prosecutorial —role, and that public hearings can have significant and long-lasting adverse consequences for individuals, even in circumstances where the investigation results in no adverse findings or criminal charge. The threshold for public hearings should be sufficiently high to reflect this. The QLS further supports amending sub-clause 73(3) to provide that the Commissioner *must* have regard to the listed factors (while retaining clause 74(4)).

[114] *Independent Commission Against Corruption Act 2012* (SA) s 55.

128. As is clear from the above, reasonable minds differ. However, a unifying concern across the legal profession is to ensure that fairness is at the forefront of any deliberation concerning public hearings. Therefore, having regard to the views received, including with respect to this Bill and over previous years, the Law Council maintains its previous position that hearings should, by default, be conducted in private, unless the Commissioner considers that a closed hearing would be either unfair to the person or otherwise contrary to the public interest.[115] It recognises that the factors outlined at sub-clause 73(3) (to which the Commissioner may have regard in determining whether to hold a hearing in private) include any unfair prejudice to a person's reputation, privacy, safety or wellbeing that would be likely to be caused if the hearing, or the part of the hearing, were to be held in public.[116]

129. However, the Law Council considers that requiring explicit consideration of the fairness of public hearings is necessary and appropriate. It suggests that measures be adopted to increase the likelihood that public hearings can be fair, as discussed below.

130. The Law Council further notes that the criteria to which the Commissioner may have regard under clause 73(3) are valuable considerations in deciding whether to hold a public hearing. While it has not, in the time available, been able to consult more broadly on the QLS's view that these should be mandatory criteria, it suggests that there may be benefit in adopting this position. It would be happy to consult further on this question, noting that it may be more straightforward to list these criteria with respect to determining what is in the 'public interest'.[117]

Fairness of public inquiries

131. The Law Council suggests that a right to cross-examine witnesses and an obligation to disclose exculpatory evidence should be carefully considered in the context of ensuring more protective functions in hearings, particularly in public hearings.

132. Clause 80 provides that counsel assisting the NACC, 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.

133. However, it does not appear that the Bill provides for an obligation to disclose exculpatory or otherwise relevant evidence to affected persons,[118] except that they must be provided with critical information and an opportunity to respond prior to the publication of the report (at a later stage).

134. In NSW, the ICAC procedural fairness guidelines deal with the investigation and disclosure of exculpatory evidence, following an amendment to the *NSW ICAC Act* which introduced section 31B, providing for procedural guidelines for public inquiries. NSW ICAC Commissioners are required to issue these guidelines to NSW ICAC staff

[115] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 32.
[116] Should the Law Council's position be preferred over the wording of clause 73(2) in the Bill, it recognises that further consideration may need to be given how the factors are outlined in clause 73(3), including paragraph 73(3)(c) (unfair prejudice to the person's reputation, etc)..
[117] Noting that as drafted, there may be some complexity involved in determining which of the clause 73(3) criteria go to the 'public interest', and which to 'exceptional circumstances'.
[118] Under sub-clause 64(1), the general nature of the matters in relation to which the Commissioner intends to question the person must be set out in a summons requiring a person to give evidence, although this does not apply if the Commissioner considers that it is likely to prejudice the corruption investigation, and does not prevent the Commissioner from questioning the person in relation to any aspect of any corruption investigation.

(and counsel assisting) relating to key aspects of the conduct of public inquiries, including:

- the investigation of evidence that might exculpate affected persons;
- the disclosure of exculpatory and other relevant evidence to affected persons;
- the opportunity to cross-examine witnesses as to their credibility;
- providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence; and
- any other matter the ICAC considers necessary to ensure procedural fairness.[119]

The ICAC must also arrange for the guidelines to be tabled in both Houses of Parliament and to be published on a website maintained by the Commission.[120]

135. The Law Council considers that a similar set of requirements could apply with respect to the conduct of public hearings. Rather than guidance provided only to NACC staff and counsel assisting the NACC, these could instead be provided for in the NACC Bill as a legislative instrument to which the Commissioners must also have regard.

136. Witness access to legal, as well as mental health and other support services, will also be important to ensure fairness is afforded in practice.

Recommendations

- **Hearings should by default be conducted in private, unless the Commissioner considers that a closed hearing would be either unfair to the person or otherwise contrary to the public interest.**
- **The Bill be amended to require that procedural fairness guidelines be developed with respect to public hearings. These could take the form of a legislative instrument.**

Non-disclosure notations

137. Under sub-clause 95(1) of the Bill, non-disclosure notations are requirements included in a notice to produce or a private hearing summons that prohibits disclosure of information about the notice or summons, or any official matter connected with the notice or summons.

138. Under sub-clause 96(1), the Commissioner must include a non-disclosure notation in a notice to produce or a private hearing summons if the Commissioner is satisfied that not doing so would reasonably be expected to prejudice (for example) a person's safety or reputation, a person's fair trial (if charged or a charge is imminent) or a NACC Bill process (such as a corruption investigation).

139. The Commissioner may also include a non-disclosure notation in a notice to produce or a private hearing summons if satisfied that not doing so 'might' prejudice a person's safety or reputation, or if not doing so would be otherwise contrary to the public interest.[121]

140. Sub-clause 98(1) provides for an offence if a non-disclosure notice is produced, and a person discloses information about the notice or summons, or any official matter

[119] *NSW ICAC Act* s 31B(2).
[120] Ibid s 31B(3).
[121] NACC Bill sub-cl (2).

connected to it, with a penalty of up to five years.[122] Exceptions apply, including where the disclosure is made to a legal practitioner for the purpose of obtaining legal advice or representation in relation to the notice or summons.[123] The clause would not, however, permit family or a person's mental health practitioner to be informed.

141. The Law Council notes that there is no harm element required with respect to the above offence (that is, that the relevant disclosure actually prejudiced a person's safety or reputation, or a NACC Bill process, or was likely to prejudice it). Further, the power to attach a non-disclosure notation in the first place, which attracts the offence, is delegable by the Commissioner to an Acting Executive Level 2 officer or above under sub-clause 276(1) and can be issued on the basis of a fairly low threshold (i.e., 'might' prejudice a corruption investigation).

142. Under section 114 of the *NSW ICAC Ac*t, a comparable offence:

- requires that a person not disclose any information about the notice or summons *that is likely to prejudice the investigation to which it relates* (emphasis added);
- is subject to a maximum penalty of 50 penalty units of 12 months, or both; and
- provides for an exception where disclosure is made to a registered medical practitioner or registered psychologist in relation to the provision by that health practitioner of medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person required to give evidence by a summons.

143. The Law Council recommends that clause 98 be similarly narrowed.

Recommendation

- **Clause 98, concerning the non-disclosure notation offence, should be amended in line with section 114 of the *NSW ICAC Act*. This includes providing an exception for disclosure to registered medical practitioners or registered psychologists.**

Privileges and protections

144. Safeguards are necessary because it is important that there be a balance between robust powers to investigate corruption and the protection of individual rights of those being investigated in accordance with the rule of law principles. The use of coercive powers should be only used in good faith and in exceptional circumstances due to the intrusive nature of their operation, particularly when used in executive rather than judicial processes.

145. Some of the important safeguards that serve to balance the right of an individual against the arbitrary use of coercive powers include:

- protection for the principle of legal professional privilege (i.e., a legal practitioner is not required to give information, answer a question or produce a document that contains a privileged communication made by the legal practitioner in his or her capacity as a legal practitioner); and
- that while a person is not excused from giving information or producing a document, the information given, or the document or thing produced, is not

[122] Ibid sub-cl 98(1).
[123] Ibid para 98(3)(b).

admissible in evidence against the person in criminal proceedings, a proceeding for the imposition or recovery of a penalty, or confiscation proceedings.

146. These two fundamental legal protections for the individual are discussed in further detail below.

Privilege against self-incrimination

147. The Bill will abrogate the privilege against self-incrimination as follows:

- clause 113 provides that a person will not be excused from answering a question or complying with a notice to produce a document or thing on the ground that doing so would tend to expose the person to a penalty; and
- sub-clause 113(2) provides that the answer or information given, or the document or thing produced, is not admissible in evidence against the person in a criminal proceeding, or a proceeding for the imposition or recovery of a penalty, or a confiscation proceeding (**direct use immunity**); and
- sub-clause 113(3) provides certain exceptions to the direct use immunity.

148. The privilege against self-incrimination means a natural person is not bound to answer any question, or produce a thing or document, if doing so would tend to expose the person to imposition of a civil penalty[124] or conviction for an offence.[125] This principle is enshrined in a statutory context in relation to Court proceedings, however, it is also a fundamental common law right in relation to persons subject to questioning in judicial and other civil proceedings.[126]

149. Furthermore, Article 14(3) of the International Covenant on Civil and Political Rights (**ICCPR**)[127] provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against themselves or to confess to guilt.[128]

150. The privilege against self-incrimination is 'one aspect of the right to silence.'[129] The right to silence entails a broader immunity from being compelled to testify against oneself, and encompasses both incriminating and non-incriminating evidence. Relevantly, in its 2015 report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, the ALRC noted:

> *A statute might require a person to answer questions, thus breaching the right to silence, but allow the person to refuse to give incriminating answers, thus preserving the privilege against self-incrimination.*[130]

151. In this report, the ALRC described the rationale for the privilege against self-incrimination as necessary to preserve the proper balance between the powers of

[124] See also *Bell v Deputy Coroner of South Australia* [2020] SASC 59; John D Heydon, *Cross on Evidence* (LexisNexis, 4th ed, 1991), [15085].
[125] See for example, *Evidence Act 1977* (Qld) s 10; *Evidence Act 1929* (SA) s 18; *Evidence Act 1906* (WA) ss 11, 24; *Evidence Act 1995* (Cth) s 128.
[126] *Reid v Howard* (1995) 184 CLR 1 [8], [15] (Toohey, Gaudron, McHugh and Gummow JJ) and [15] in relation to civil penalties.
[127] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[128] See Human Rights Committee, *General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 21st sess, UN Doc CCPR (13 April 1984).
[129] ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129, December 2015) <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf> 312.
[130] Ibid 312. See further, *Cornwall v The Queen* (2007) 231 CLR 260 [176] (Kirby J).

the state and the rights and interests of citizens, to preserve the presumption of innocence and to ensure that the burden of proof remains on the prosecution.[131]

152. The Law Council has consistently outlined its view that witnesses appearing before any anti-corruption commission should be able to refuse to answer a question or provide information to a Commissioner on the grounds that such information may incriminate the person. To do otherwise would undermine some of the fundamental principles of the criminal justice system, namely the presumption of innocence and the onus of proof always being on the prosecution, and as an essential touchstone of these principles, the right to silence. In *Cornwall v The Queen*,[132] Justice Kirby stated:

> *Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.*[133]

153. The Law Council has previously advocated for including a requirement that any power to abrogate the privilege against self-incrimination be conditioned on requiring the NACC to demonstrate that all other less coercive avenues to obtain information have been exhausted prior to compelling a person to give evidence in circumstances where the privilege is abrogated.[134] The Law Council remains in favour of amendments imposing such a requirement.

154. If the privilege against self-incrimination is to be abrogated under the NACC Bill, the Law Council's position is that it should only be abrogated to the extent to which both a direct use and derivative use immunity apply in both civil and criminal proceedings, as discussed below.

Direct use immunity

155. The Bill provides in sub-clause 113(2) for a direct use immunity preventing self-incriminatory answers, information, or things produced obtained by the Commissioner being admissible in evidence against the person in the context of a criminal proceeding, proceeding for the imposition or recovery of a penalty, or a confiscation proceeding.

156. The provision of the use immunity provides an incentive for witnesses to provide candid information to the NACC to assist with the effective investigation of serious or systemic corruption issues. In its absence, a witness who is compelled to answer a question without any privilege against self-incrimination may be more likely to be untruthful.[135]

[131] Ibid 310.
[132] (2007) 231 CLR 260.
[133] Ibid [176].
[134] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 26.
[135] *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR [118], [127]. See also ALRC, Evidence: Volume 1 (Interim Report 26, 1985) <http://www.austlii.edu.au/au/other/lawreform/ALRC/1985/26.pdf?stem=0&synonyms=0&query=alrc%20evidence> [852], [855], [861].

157. However, the NACC Bill provides for exceptions to direct use immunity in sub-clause 113(3) which permit the use of compelled information in the following circumstances:

- a confiscation proceeding where such a proceeding had not commenced and was not imminent;
- a proceeding for an offence against Part 7 of the Bill;
- a proceeding in relation to false or misleading information or documents under section 137.1 or 137.2 of the *Criminal Code*;
- a proceeding in relation to forgery related offences against section 144.1 or 145.1 of the *Criminal Code*; and
- a proceeding in relation to obstruction of Commonwealth public officials against section 149.1 of the *Criminal Code*.

158. The Law Council is concerned about the extension of the exception to confiscation proceedings which have not commenced at the time the potentially incriminating evidence is provided from the scope of the use immunity.

159. Significantly, the Law Council notes that similar provisions at the state level creating exceptions to the use immunity are narrow, mainly restricted to the contempt and abuse of process rationale discussed above, and do not include confiscation proceedings.[136]

160. The primary Commonwealth mechanism for criminal confiscation action is the *Proceeds of Crime Act 2002* (Cth) (**POCA**). The Law Council has previously expressed concern regarding the extremely wide range of circumstances in which this Act provides for the forfeiture of property and the lack of proportionality in relation to the operation of sections 329 and 330 of the POCA.[137] The High Court has recognised that confiscation proceedings, and statements made as part of those proceedings, can prejudice the right to a fair trial in a related criminal prosecution.[138]

161. Given these concerns, the Law Council is concerned that the proposed exception for confiscation proceedings from the ambit of the use immunity is too broad.

Derivative use immunity

162. The Law Council believes the privilege against self-incrimination may be justifiably abrogated only to the extent that a derivative use immunity is provided. A derivative use immunity would render inadmissible any evidence obtained by prosecutors *as a result* of potentially incriminating evidence obtained by a notice or summons, or in a hearing by the Commission.[139]

163. The proposed provisions do not provide for protection against the 'derivative use' of compelled information. That is, information gathered as a result of answers provided in response to questioning conducted under the coercive powers, which is able to be referred to the CDPP to be used as evidence against the person in subsequent criminal or civil proceedings.

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[136] See *NSW ICAC Act* ss 26(2), 114A(5); *Victorian IBAC Act* s 144; *Queensland Act* s 197.
[137] Law Council of Australia, Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 (Letter to Tim Watling, 14 December 2017) <https://www.lawcouncil.asn.au/publicassets/b39f693d-9c37-e811-93fb-005056be13b5/3384%20-%20Proceeds%20of%20Crime%20Amendment%20Proceeds%20and%20Other%20Matters%20Bill%202017.pdf>.
[138] *Commissioner of the Australian Federal Police v Zhou* (2015) HCA 5.
[139] ALRC, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129, December 2015) <https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_129_final_report_.pdf> 335.

164. The Explanatory Memorandum argues that an important safeguard is that the NACC Bill would preserve the inherent power of the courts to make orders that are necessary to ensure a fair trial of the witness. This could include orders to limit or remove any prejudice from the prosecution's lawful possession or use of derivative (or investigation) material.[140]

165. However, the Law Council is concerned that the approach taken in the Bill may irreversibly prejudice a fair trial. The Court's inherent jurisdiction to make an order that the prosecutor disregard prejudicial derivative material cannot undo the harm of the prosecutor seeing this information. Practically, knowledge of prejudicial material may unconsciously inform a prosecutor's forensic decisions in an unfair manner.

166. The Law Council considers that a witness should be entitled to both direct use and derivative use immunity with respect to any evidence or information that is provided in response to the application of coercive powers by an agency of the Government. Such an approach enables useful information to be obtained, indeed encouraging witnesses to provide full and frank disclosure to the head of the inquiry, while preserving the rights of witnesses to be treated the same as any other witness when it comes to protecting their right to a fair trial.

167. The privilege against self-incrimination should be preserved. To do otherwise would be in breach of the 'companion rule' to the privilege in *Lee v The Queen*,[141] which provides:

> *…an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.*[142]

While it is appropriate that the Commissioner undertake an investigation in line with object 3(a)(ii) of the NACC Bill, but this should not undermine the privilege against self-incrimination and the companion rule.

Recommendations

- **The privilege against self-incrimination should only be abrogated to the extent that both a direct use and derivative use immunity apply in civil and criminal proceedings.**
- **The abrogation of the privilege against self-incrimination in clause 113 be conditioned on requiring the NACC to demonstrate that all other less coercive avenues to obtain information have been exhausted prior to compelling a person to give evidence in circumstances where the privilege is abrogated.**
- **Paragraph 113(3)(a), providing for an exception to use immunity for confiscation proceedings, be removed.**

Legal professional privilege

168. Legal professional privilege protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or professional legal services or for use in current or anticipated litigation. It is a

[140] Explanatory Memorandum, NACC Bills 173.
[141] (2014) HCA 20.
[142] Ibid [32]-[33].

fundamental right that applies to court, administrative and investigative proceedings. In *Baker v Campbell*,[143] Justice Wilson noted that:

> *…adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and privilege is an important element in that protection*.[144]

169. In the same matter, Justice Dawson noted that the proper functioning of our legal system 'depends upon a freedom of communication between legal advisers and clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.'[145] Justice Gibbs added that:

> *The privilege is granted to ensure that the client can consult his lawyer with freedom and candour, it being thought that if the privilege did not exist a man [or, indeed any client] would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.*[146]

Legal professional privilege is 'a practical guarantee of fundamental, constitutional or human rights'.[147] It is a 'bulwark against tyranny and oppression': *Attorney-General for the Northern Territory v Maurice* (***Maurice***)[148] As per Deane J:

> *That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials.*[149]

170. Legal professional privilege is a substantive right of the client and so can only be waived by the client and not their lawyer. When it is asserted by a lawyer, it is the lawyer doing so either in discharge of professional obligations to the client,[68] or, on occasions, on the client's behalf.[150]

The abrogation of legal professional privilege

171. Clause 114 of the NACC Bill abrogates legal professional privilege when a person is giving an answer or information, or producing a document or thing, under a notice to produce or at a hearing. The privilege would be abrogated for any person, including a Commonwealth agency or a company.

172. Specifically, paragraphs 114(1)(a) and (b) provide that a person is not excused from giving information or producing a document or thing on the ground that doing so would:

- disclose legal advice given to a person; or
- disclose a communication that is protected against disclosure by legal professional privilege.

[143] (1983) 153 CLR 52.
[144] Ibid 95.
[145] Ibid 129.
[146] Ibid 66.
[147] *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, [161] (McHugh J).
[148] (1986) 161 CLR 475, 490 (Deane J) ('*Maurice*').
[149] Ibid, citing *Pearse v Pearse* (1846) 1 De G and Sm. 12, 28-29; *Baker v. Campbell* (1983) 153 CLR, 115-116.
[150] *Commissioner of Australian Federal Police v Propend Finance* (1997) 188 CLR 501.

173. Sub-clause 114(2) provides that the abrogation of legal professional privilege would not apply to advice or a communication relating to a person's compliance with a notice to produce or attendance (or reasonably anticipated attendance) at a hearing. Sub-clauses 114(3) and 114(4) also provide that the requirement to disclose legal advice/disclose a communication that is protected against disclosure by legal professional privilege does not apply in relation to a communication made for the purposes of, or in the course of, a person's work as a journalist in a professional capacity.

174. Sub-clause 114(5) provides that the fact a person is not excused from providing information because of legal professional privilege does not affect a *claim* of legal professional privilege that anyone may make in relation to that answer, information, document or thing. The Explanatory Memorandum clarifies that this means that legal professional privilege may be claimed in relation to information disclosed to the NACC at a later time in criminal or civil proceedings.[151]

175. Clause 74 provides that evidence must be given in private if it would involve the disclosure of information covered by legal professional privilege.

176. The Law Council has strong concerns with the proposed abrogation of legal professional privilege enabled by clause 114 and submits that this position should be reconsidered as a matter of priority. As well as abrogating a fundamental common law privilege (in contrast to the Bill's protection of parliamentary privilege under clause 274), this would limit the right to a fair trial under Article 14(1) of the ICCPR.[152]

177. In attempting to justify the abrogation of legal professional privilege, the Explanatory Memorandum to the NACC Bill argues:

> *…it is appropriate to abrogate legal professional privilege in this way due to the significant impact that corrupt conduct can have in eroding the community's trust in public administration. Privileged information can provide valuable insight into conduct, and be important evidence in a corruption investigation. This clause would prevent corrupt actors from relying on legal professional privilege as a shield from investigation by the Commissioner.*[153]

178. Other arguments provided in the Explanatory Memorandum for the abrogation of legal professional privilege include that:

- corrupt actors would be prevented from relying on legal professional privilege 'as a shield' from investigation by the Commissioner;[154]
- the public's confidence in the ability for the NACC and the NACC's oversight and
- legal advice will often be an integral component of a decision-making process that give rise to a corruption issue that, in the Commissioner's opinion, could involve corrupt conduct that is serious or systemic.[155]

179. The Law Council considers that these explanations do not fully grapple with the rationale for legal professional privilege, and that the abrogation of such a fundamental right remains unjustified. The doctrine's purpose is to enhance the administration of

[151] Explanatory Memorandum, NACC Bills 16.
[152] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[153] Explanatory Memorandum, NACC Bills 175.
[154] Ibid.
[155] Ibid.

justice and the proper conduct of cases by promoting full and frank disclosure between the client and the legal practitioner, which allows people to obtain accurate and comprehensive advice about their legal situation. This has the effect of facilitating greater compliance with the law and more effective resolution of legal disputes.

180. In addition, there can be no denying that corrupt conduct can have an eroding effect on the community's trust in public administration. However, that does not make an abrogation of legal professional privilege appropriate. Further, the truism that privileged information can provide valuable insight into conduct does not, of itself, provide a justification—it merely points to a source of information without addressing the comments described above by Justice Deane in *Maurice* or seeking to weigh the impact of the removal of this substantive right. Accordingly, the Law Council is of the view that the proposed disregard for legal professional privilege should not remain in the Bill.

181. Crucially, clause 114 does not appear to appreciate the fact that legal professional privilege will not be available to protect communications between a client and lawyer in the furtherance of wrongdoing. Under the existing law, legal professional privilege is not available on public policy grounds where the relevant communication between the lawyer and client is to facilitate or further the commission of a crime or fraud.[156]

182. In *Bullivant v Attorney-General for Victoria*,[157] Lord Linley considered that a communication with a solicitor by a client who says: "Tell me how to escape from the consequences of an Act of Parliament, although I am brought within it" would indicate an intention to seek help to evade the law by illegal conduct and *would not* be privileged. However, if the client asked how he could do something which would *not* bring him within the scope of such Act, there would be evasion in another sense, but no illegality, and the communication would be privileged.

183. Further, in *Crescent Farm Sports v Sterling Offices*,[158] Justice Goff held that communications made between solicitor and client for the purpose of committing a breach of contract or furthering a conspiracy to commit a breach of contract did not cease to be privileged. He said:

> *I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit*.[159]

184. Relevantly, legislative acknowledgment of legal professional privilege is present in other integrity jurisdictions, including in New South Wales (at the investigation stage) and Queensland, where exclusions from disclosure requirements are provided where legal professional privilege is attached to a communication.[160]

185. The Law Council further queries the approach taken in the Bill, given that legal professional privilege appears to be afforded greater protection in the *LEIC Act*. Under this framework, there are provisions excusing legal practitioners from disclosing

[156] *Baker v Campbell* (1983) 153 CLR 52.
[157] (1901) AC 196, 207.
[158] (1972) CH 553, 565.
[159] Ibid (Goff J).
[160] See *NSW ICAC Act* s 24(2) (protecting legal professional privilege when ICAC requires production of a document or evidence in the course of an investigation); s 37(5) (protecting legal professional privilege when a legal practitioner is required to answer a question or produce a document at compulsory examination or public inquiry). However s 37(2) otherwise abrogates legal professional privilege for a witness summonsed to a compulsory examination or public inquiry. See also *Queensland Act* ss 77-78, and Part 2 of Chapter 4.

privileged communications when served with a notice to give information or produce documents or things, or asked by the Integrity Commissioner at a hearing to answer a question or produce a document or thing, where this would disclose a privileged communication made by, or to, the legal practitioner.[161]

186. However, the relevant *LEIC Act* provisions are subject to a public interest grounds test,[162] which is similar to clause 114 and does not excuse a person from giving information under certain circumstances. However, this appears to be more narrowly directed than clause 114 (e.g., it concerns legal advice given to a Minister or a Commonwealth government agency, or a communication between an officer of a Commonwealth government agency and another person or body, being a communication protected by legal professional privilege). In contrast to the NACC Bill, the starting point in the *LEIC Act* appears to be that legal professional privilege should be respected.

Journalists

187. The Law Council also queries why a carve-out for journalists is contained in sub-clauses 114(3) and 114(4). While the Explanatory Memorandum notes these provisions are 'intended to uphold the public interest associated with a free press',[163] the Law Council is of the view that insufficient justification is provided for this distinction. It is not expressed as protecting journalist sources, just legal advice given to a person acting as a journalist. Further, clause 31 of the Bill provides that neither a journalist, nor their employer, is required to do anything under the Bill that would disclose the identity of an informant or enable that identity to be ascertained.

Requirement to provide identifying details of client

188. Clause 115 requires a legal practitioner who refuses to provide information, documents or things on the grounds that doing so would disclose advice or a communication to which section 114 does not apply (i.e., in circumstances in which the legal practitioner has regard to the exceptions in sub-clauses 114(2), (3) and (4)) to provide the name and address of the person who is able to waive the legal professional privilege concerned. A practitioner who refuses to comply with this requirement would be in contempt of the NACC.[164]

189. The Law Council is concerned by this requirement and notes that this circumstance is presently protected at common law. *Commissioner of Taxation v Coombes* (***Coombes***)[165] provided that there are some circumstances where client legal privilege may attach to details of a client's identity,[166] and such reasoning was endorsed in subsequent cases including *Z v NSW Crime Commission*[167] and the 2018 decision of *John Bridgeman Limited v Dreamscape Networks FZ-LLC*.[168]

190. The Explanatory Memorandum states that:

> *Where a legal practitioner is asked to provide material and is able to claim legal professional privilege, the legal practitioner would be able to withhold the privileged material. In these circumstances, the clause would permit*

[161] *LEIC Act* ss 79, 95.
[162] NACC Bill paras 80(5)(c), 96(5)(d) (which appears to be a mistake, and should refer to 96(5)(c)). See also sub-cls 79(2) and 95(2).
[163] Explanatory Memorandum, NACC Bill 175.
[164] NACC Bill para 82(b).
[165] (1999) 92 FCR 240.
[166] (1999) FCA 842 [31].
[167] (2007) HCA 7 [12].
[168] (2018) FCA 1279 [31].

> *the Commissioner to deal with the client directly, either by requesting their voluntary waiver of the privilege for the purposes of the investigation, or compelling the client to provide the material. It states that whether the client would be required to provide that material would depend on whether the client (as opposed to the practitioner) could rely on legal professional privilege or another protection. For example, if a practitioner's client had sought legal advice about their attendance and, for the purposes of obtaining that advice, had provided incriminating records of their conduct to the practitioner, it is more appropriate that the Commissioner obtain those documents from the client rather than the practitioner. The Commissioner would be free to do so because, in the hands of the client, those documents would generally not be subject to an enduring claim of legal professional privilege. However the client could not be required to provide a copy of any advice they received from their practitioner to assist them to prepare for their hearing because the privilege would be appropriately preserved in relation to that advice to facilitate the fair conduct of the hearing.*[169]

191. A foreseeable effect of clauses 114 and 115 is that potential clients may be discouraged from obtaining legal advice in circumstances where the preservation of their identity is intertwined with the provision of legal advice and/or in respect of NACC proceedings. This may include facilitating better compliance with the NACC. There is also the potential for adverse inferences being drawn about the legal practitioner's client for having sought legal advice from a practitioner with a known speciality.

Determining claims of legal professional privilege

192. Finally, the Law Council suggests that consideration be given to establishing an independent third party, such as a court, to determine claims made in relation to legal professional privilege.[170] For example, the *Victorian IBAC Act* provides for an application to be made pursuant to section 147 to the Supreme Court of Victoria for a determination to be made in relation to any claim of privilege.

193. Such an approach would preserve the public policy benefits of a *Coombes* common law protection where appropriate, while also guarding against its potential abuse. This approach would also guard against clause 115 being used for 'fishing' exercises to confirm the identity and details of persons not otherwise known to the NACC.

Alternative options

194. Noting that the strongly preferred view of the Law Council is that communication attaching legal professional privilege is excluded from disclose requirements, should the proposed abrogation nevertheless be retained, one alternative could be to ensure that privileged information provided in private is not referred to in a corruption investigation report produced under clause 149.

195. While clause 151 allows for the exclusion of certain information (including sensitive information) from investigation reports, it appears unlikely that this would include material subject to legal professional privilege as currently drafted. Clause 227 could potentially be amended to include material subject to legal professional privilege as

[169] Explanatory Memorandum, NACC Bills 177.
[170] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 25.

sensitive information 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 under clause 152).

196. A further option (although less optimal from the perspective of the privilege holder) is to make amendments such that if privileged matter is relevant to an investigation and deemed to be in the public interest to disclose it in an investigation report, then the Commissioner must give a period of notice to the affected party prior to publishing the material in that report, together with reasons why they are satisfied that the statutory requirements for general disclosure (for example, a public interest test provided for in the Bill) have been met. This would at least allow the affected party the opportunity to seek judicial review prior to publication.

Recommendations

- **Clause 114 should be redrafted to remove the abrogation of legal professional privilege and to provide for an independent third party, such as a court, to determine claims made in relation to legal professional privilege. At the very least, steps should be taken to protect the disclosure of privileged material in investigation reports.**
- **Clause 115 (which requires a legal practitioner who claims privilege on behalf of a person to provide the name and address of the person) should be removed from the NACC Bill.**

Post-charge coercive powers

197. Clause 58 of the NACC Bill concerns the power to issue notices to produce, and requires the Commissioner to have 'reasonable ground to suspect' that a person has the information, document, thing relevant to the investigation.

198. An additional threshold applies in a post-charge or post-confiscation application context. That is, sub-clause 58(4) provides that if the notice is a post-charge or a post-confiscation application notice, the Commissioner must also have 'reasonable grounds' to suspect that the information is necessary for the investigation, even though the person has been charged or the confiscation proceeding has commenced or the charge or proceeding is imminent (as defined under clause 132).

199. Similarly, the Commissioner's power to summon a person in clause 63 is subject to an additional threshold in sub-clause 63(3) in a post-charge or post-confiscation context. The Commissioner must, again, have reasonable grounds to suspect that the evidence, information, document or thing is necessary for the purposes of the investigation even though even though the person has been charged or the confiscation proceeding has commenced or the charge or proceeding is imminent.

200. Under sub-clause 63(6), the matters to which the Commissioner may summon a person to give evidence or information, or produce a document or thing, at a hearing include:

- the subject matter of any charge, or imminent charge, against the person; and
- the subject matter of any confiscation proceeding, or imminent confiscating proceeding, against the person.

201. The material, evidence, information, documents, or things given or produced by a person at a hearing or in response to a notice would be investigation material under clause 99. The answers given, or investigation material produced, in that hearing may affect the person's subsequent trial, particularly if the investigation material is provided to the prosecution under clause 105, which provides for the disclosure of post-charge

investigation material and post-charge derivative material (see further discussion below). Sub-clause 106(4) would provide that a person's trial for an offence is not unfair merely because the person has been a witness after being charged with the offence or after such charge was imminent.

202. Notwithstanding the additional thresholds imposed, the Law Council has long opposed proposals to explicitly permit 'post-charge' and 'imminent charge' questioning, and maintains this position in the context of the NACC Bill. In short, the Law Council has been concerned that post-charge questioning limits the right to a fair trial in criminal proceedings, in particular the privilege against self-incrimination. As noted above, Article 14(3) of the ICCPR provides that in the determination of any criminal charge, a person shall be entitled to the right not to be compelled to testify against him or herself or to confess to guilt.[171]

203. Post-charge questioning creates an overwhelming risk that a person who is compulsorily questioned, in detail, as to the circumstances of an alleged offence, is very likely to prejudice their own defence.

204. An accused person should not be forced to divulge their position prior to trial or to assist law enforcement officers in gathering supplementary evidence to aid in a prosecution, because this carries the risk of reversing the presumption of innocence.[172] The High Court has said that such questioning has the potential to 'fundamentally alter the accusatorial judicial process.'[173]

205. The Explanatory Memorandum refers to several safeguards to mitigate the prejudice that a post-charge or post-confiscation application notice to produce or hearing may cause to a witness's right to a fair trial.[174] These include:

- the obligation to include a non-disclosure notation in a notice to produce or a private hearing summons if not doing so would prejudice a fair trial;[175]
- limits on disclosure of investigation material to a prosecutor of a person post-charge under clause 105, to only occur with a court order, where the court is satisfied that it is in the interest of justice to do so;[176]
- restrictions on the disclosure of sensitive information, including that evidence at a hearing must be given in private if it would disclose sensitive information, which includes information that would prejudice the person's fair trial;[177] and
- the obligation on the Commissioner to give a direction about the use of material obtained during an investigation, if failure to do so would prejudice a witness' fair trial, if the witness has been charged or a charge is imminent.[178]

206. Notwithstanding these safeguards and the higher thresholds proposed above for notices to produce and summons to be issued, the Law Council maintains its fundamental concerns regarding post-charge summons and notices to produce.

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[171] See Human Rights Committee, *General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 21st sess, UN Doc CCPR (13 April 1984).
[172] This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will. *Cornwell v R* (2007) 231 CLR 260, [176] (Kirby J).
[173] *X7 v Australian Crime Commission* (2013) 248 CLR 92, [124] (Hayne and Bell JJ, Kiefel J agreeing).
[174] Explanatory Memorandum, NACC Bills 18.
[175] NACC Bill sub-cl 96(1).
[176] Ibid sub-cl 106(1).
[177] Ibid sub-para 74(b)(iii).
[178] Ibid cl 77.

207. High Court decisions flowing from compulsory examination in confiscation cases have effectively held that such proceedings inevitably prejudice a fair trial.[179] The High Court has commented critically on deeming provisions, such as sub-clause 106(4), in other contexts and has granted a stay of the compulsory examination, notwithstanding provisions limiting stays pending the criminal trial and the direct use immunity.[180] While a conclusion that a trial was unfair might not necessarily follow in those circumstances,[181] such a trial would overturn both the privilege against self-incrimination and the principle that the prosecution has to prove its case without the assistance of the defendant. Indeed, the defendant could be compelled to prove the case against him or herself. The Law Council is of the view that these provisions are disproportionate.

208. 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). Preserving the distinction between the investigative nature of the NACC and the criminal justice process is critical. In this context, the Law Council refers to the advice of the LS NSW that in NSW, prosecutions are generally not brought until investigations are concluded.

209. This position would be more in line with the Bill's objects in clause 3, which include to 'enable, *after* investigation of a corruption issue, the referral of persons for criminal prosecution, civil proceedings or disciplinary action'[182] (emphasis added).

210. Accordingly, the Law Council recommends the removal of the power to compulsorily question charged persons, or persons against whom charges are imminent, about the subject matter of those charges. That is, the compulsory questioning of a witness should be deferred until the disposition of any charges the witness is facing.

Recommendations

- **The powers in the Bill to compulsorily question charged persons, or persons against whom charges are imminent, about the subject matter of those charges should be removed.**
- **The compulsory questioning of a witness should be deferred until the disposition of any charges the witness is facing.**

Post-charge sharing of investigation and derivative material to the prosecution

211. The Law Council also raises its discomfort with the NACC Bill's provisions enabling the post-charge disclosure of investigation material and derivative material to the prosecutor of a witness.

212. Under sub-clauses 105(1) and (3), a person or body that may lawfully disclose investigation material[183] and derivative material, may lawfully disclose it to the prosecutor.

213. Sub-clause 105(4) provides that post-charge disclosure of investigation material[184] and post-charge disclosure of derivative material that is obtained from post-charge

[179] *Commissioner of the Australian Federal Police v Zhao* (2015) HCA 5*; Lee v New South Wales Crime Commission* (2013) HCA 39; *Lee v The Queen* [2014] HCA 20.
[180] Ibid.
[181] See *Lee v The Queen* [2014] HCA 20.
[182] NACC Bill para 3(b).
[183] Ibid, Subject to cl 100 (directions about use or disclosure of investigation material): sub-cl 105(2).
[184] Obtained pre- or post-charge.

investigation material may only be disclosed to the prosecutor under a court under made per sub-clause 106(1). The court may make such an order if satisfied that the disclosure is required in the interests of justice and despite any direction given by the Commissioner under clause 100.[185]

214. Table 5 in the Explanatory Memorandum summarises the overall position as:[186]

Material	**Disclosure to prosecutor of witness**
Pre-charge investigation material disclosed pre-charge	Can be disclosed if confidentiality direction allows it
Pre-charge derivative material disclosed pre-charge	No specific limitation on disclosure
Pre-charge investigation material disclosed post-charge	Can only be disclosed with a court order
Pre-charge derivative material disclosed post-charge	No specific limitation on disclosure
Post-charge investigation material	Can only be disclosed with a court order
Post-charge derivative material	Can only be disclosed with a court order

215. Subject to clauses 100 (directions) and 113 (self-incrimination), the prosecutor may use investigation material or derivative material for the purposes of whether to prosecute the witness and prosecuting the witness.[187]

216. In particular, the Law Council considers that post-charge disclosure of investigation and derivative material to the prosecutor should not be permitted. Despite the requirement that a court order be obtained under clause 106, it queries whether post-charge disclosure can ever be considered in the interests of justice, given the principle of equality of arms, which requires that all parties must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.[188]

217. The Law Council recognises the court's inherent power to ensure that the witness's fair trial is not prejudiced by the possession or use of investigation or derivative material by the prosecutor.[189] Nevertheless, clause 105 creates an inherently unfair forensic advantage to the prosecution that fundamentally undermines the principle of a fair trial.

[185] As noted above, cl 100 places an obligation on the Commissioner to give a direction about the use of material obtained during an investigation, if failure to do so would prejudice a witness's fair trial, if the witness has been charged or a charge is imminent.
[186] Explanatory Memorandum, NACC Bills 160.
[187] NACC Bill cl 108.
[188] See Attorney-General's Department, Fair trial and fair hearing rights (Web Page, 2022) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/fair-trial-and-fair-hearing-rights#:~:text=In%20any%20event%2C%20the%20procedures,other%20parties%20to%20the%20proceedings>.
[189] NACC Bill sub-cl 106(3).

Notably, the witness will not be in a position to know of a court application made under clause 106, or to argue what is in the interests of justice.

218. This is particularly the case with post-charge disclosure. A 'bright line' should be drawn once a charge has been laid in respect of a matter before the NACC. At that point, as provided above, the prosecuting authorities should take over from the NACC investigation.

Recommendation

- **Post-charge disclosure of investigation and derivative material to the prosecutor should not be permitted.**

Authorised officers

219. The Bill provides that authorised officers have a range of powers under Part 7, including:

- detaining a person for the purpose of bringing them to court, as directed by the Commissioner;[190]
- applying for a warrant to arrest a person, and arresting the person;[191]
- entering certain places without a search warrant;[192] and
- exercising modified powers under Part 1AA of the *Crimes Act* (e.g., search warrants and stopping and searching conveyances);[193]

220. Under clause 267, such a person must be either a member of the Australian Federal Police (**AFP**), a staff member who is either an AFP or a State/Territory police officer or a staff member 'who the Commissioner considers has suitable qualifications or experience'.

221. The Law Council notes that the above powers are significant and coercive, and notwithstanding the requirement that the Commissioner must be satisfied of a person's qualifications or experience, the latter part of clause 267 is somewhat open-ended and discretionary as to who may exercise them. It suggests that the meaning of 'suitable qualifications or experience'' be clarified.

Recommendation

- **Clause 267, concerning authorised officers, be clarified with respect to 'suitable qualifications or experience'.**

Search powers

Crimes Act Part 1AA - Modified concept of 'evidential material' and modified threshold

222. The NACC Commissioner will have access to existing search powers exercised under Divisions 2, 3 and 5 of Part IAA of the *Crimes Act*, as modified to suit NACC requirements.[194] This modification will occur by extending the definition of 'evidential

[190] Ibid cl 85.
[191] Ibid cls 90, 91.
[192] Ibid cl 117.
[193] Ibid cl 119.
[194] Ibid.

material' and providing for a modified threshold for search warrants to be issued in relation to non-criminal corruption investigations:

- 'evidential material' will extend to, for a 'NACC warrant', a thing relevant to the investigation of a corruption issue which could involve corrupt conduct that is serious or systemic (in addition to a thing relevant to an indictable offence or a thing relevant to a summary offence);[195] and
- there will be an additional tailored threshold which permits warrants to search premises and persons in the context of non-criminal corruption investigations by the NACC.[196]

223. This tailored threshold permits a warrant to be issued where the investigation concerns a corruption issue which could involve corrupt conduct that is serious or systemic, but where no offence, or no specific offence, has been identified. The issuing officer would need to be satisfied by information on oath or affirmation that:

- there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, any evidential material at the premises; and
- there are reasonable grounds for believing that, if a person was served with a summons to produce the evidential material, the material might be concealed, lost, mutilated or destroyed.

224. The Law Council considers that this modified threshold is sensible.

Journalists

225. The Law Council has identified two situations where a journalist or their employer's person or premises could be subject to a NACC search warrant:

- where an authorised officer exercises powers generally under Part IAA of the *Crimes Act* for the purpose of the NACC Bill; and
- where the evidential material relates to an alleged offence against a secrecy provision by a third party.

226. These two situations are discussed in further detail below. The Law Council notes that the general protection for the informants of journalists is subject to an exception in the context of search powers:

- sub-clause 31(2) provides a general protection for journalists and their employers to the effect that neither a journalist nor their employer is required to do anything under the NACC Bill that would disclose the identity of an informant; and
- sub-clause 31(4) provides that the protection in sub-clause 31(2) does not apply in the context of anything an authorised officer would otherwise be able to do in exercising powers under Part IAA of the *Crimes Act* for the purpose of the NACC Bill.

[195] Ibid cl 122.
[196] Ibid cl 124: modifies the thresholds in Subsections 3E(1) and (2) of the *Crimes Act* which set out the thresholds for the issue of search warrants in relation to premises and persons respectively. The need for a tailored threshold arises because 'evidential material' is defined in the *Crimes Act* to mean a thing relevant to an *indictable offence or a thing relevant to a summary offence*, including such a thing in electronic form. Without an extension of the concept of evidential material, the NACC would have no power to issue search warrants in relation to non-criminal corruption investigations. Clause 122 expands the definition of evidential material to include a thing relevant to the investigation of a corruption issue which could, in the opinion of the Commissioner, involve corrupt conduct that is serious or systemic.

227. Sub-clause 124(2B) also provides for NACC search warrants to be issued in relation to journalists and their premises where the evidential material relates to an alleged offence against a secrecy provision by a third party. This is subject to the issuing officer considering whether the public interest in issuing the warrant outweighs:

- the public interest in protecting the confidentiality of the identity of the journalist's source; and
- the public interest in facilitating the exchange of information between journalists and members of the public so as to facilitate reporting of matters in the public interest.

228. The Law Council recognises that there is an additional threshold required for a warrant in the particular circumstances envisaged in sub-clause 124(2B). Outside of this, the general search warrant process under Divisions 2, 3 and 5 of the NACC Bill would apply.

229. The Law Council has, more generally, previously raised its concerns that there is insufficient protection of journalists arising from the disproportionate exercise of the investigative powers more generally, having regard to their part in protecting Australia's rights and freedoms through public interest reporting and protecting and maintaining an open government.[197] These issues are engaged by the NACC Bill, but relate to a broader set of circumstances.

230. The Law Council considers that a multifaceted approach to strengthening safeguards within the warrant process concerning journalists is required, and is supportive of methods to promote an adversarial environment in which a greater degree of scrutiny is brought to bear on the grounds advanced for seeking a warrant.

231. Having regard to its previous advocacy on these issues,[198] this includes ensuring:

- that officers are appropriately qualified and trained to seek/execute warrants with respect to journalists (see 'authorised officers' discussion above);
  - The High Court decision in *Smethurst v Commissioner*[199] illustrates the risk of junior police officers making these decisions without adequate supervision or training;

- that all warrants seeking to investigate journalists or their informants should be issued by a superior court of record in the jurisdiction of issue;
  - Under section 3C of the *Crimes Act*, an issuing officer is a magistrate, a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants;

- that any public interest test employed with respect to journalist warrants is appropriately rigorous;
  - E.g., section 180L of the *TIA Act* requires consideration of factors such as interference with personal privacy, the gravity of the matter, the extent to which the documents sought would assist the investigation, and whether

[197] Law Council of Australia, Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press (Submission to the Parliamentary Joint Committee on Security and Intelligence, 7 August 2019) < https://www.lawcouncil.asn.au/publicassets/9964c88a-2abe-e911-9400-005056be13b5/3658%20-%20PJCIS%20Inquiry%20on%20the%20Impact%20of%20the%20Exercise%20of%20Law%20Enforcement%20and%20Intelligence%20Powers%20on%20the%20Freedom%20of%20the%20Press.pdf>.
[198] Ibid.
[199] (2020) HCA 14.

reasonable attempts have been made to obtain the information of documents by other means; and

- that all warrant applications impacting journalists or their informants should be contested by an independent public interest advocate who is a retired judge, practising Senior Counsel or King's Counsel.

232. The Law Council recognises that the above measures engage actors beyond the Bill and NACC. Nonetheless, it encourages Parliament to have close regard to these issues more generally.

Recommendations

- **A multifaceted approach to strengthening safeguards within warrant processes concerning journalists is required in the *Crimes Act*, having regard to factors such as officer qualifications, the public interest test, the role of a public advocate, and issuing officers.**

Part 8—Reporting on corruption investigations

233. Clause 149 of the NACC Bill requires the Commissioner to prepare reports on all completed investigations, which must set out:

- the Commissioner's findings or opinions of the corruption issue;[200]
- a summary of the evidence and other material on which those findings or opinions are based;[201]
- any recommendations that the Commissioner thinks fit to make;[202] and
- if recommendations are made, the reasons for those recommendations.[203]

234. Sub-clauses 149(4) and 149(5) require the Commissioner to state that corrupt conduct has not been engaged in, if they hold this opinion. The Law Council supports these proposed provisions and considers them to be an important safeguard against reputational damage, especially in circumstances where a person gives evidence at a public hearing and is not the subject of any findings or opinions in relation to the corruption investigation.

235. Clause 153 requires the Commissioner to give certain persons a reasonable opportunity to respond before including any expressly or impliedly critical opinions, findings or recommendations in the report. Clause 157 imposes the same obligation on the Commissioner prior to the publication of the report. The Law Council supports these procedural fairness obligations and notes they are in line with the common law natural justice requirements in *Ainsworth v Criminal Justice Commission*[204] with respect to adverse findings, but considers that 'reasonable opportunity' is subject to interpretation and a minimum notice period could be additionally provided.

236. Sub-clause 159(2) provides the Commissioner with discretion to advise a person of the outcome of the investigation, where they have been found not to have engaged in corrupt conduct. Sub-clause 159(3) also provides the Commissioner with discretion to provide the exonerated person with a copy of the whole investigation report, or part of it. The Explanatory Memorandum states that 'the impact of the finding on the person would

[200] NACC Bill para 149(2)(a).
[201] Ibid para 149(2)(b).
[202] Ibid para 149(2)(c).
[203] Ibid para 149(2)(d).
[204] (1992) 175 CLR 564

be less detrimental and it would be appropriate for the Commissioner to have a discretion to decide whether to advise the person, with regard to the relevant circumstances.'[205] The Law Council is of the view that being subject to a NACC investigation and waiting for an outcome can still be detrimental to a person's wellbeing, even if they are ultimately cleared of wrongdoing. It considers that the Commissioner be required to inform an exonerated person of this outcome in a timely way in advance of the publication of any report (regardless of whether it will be made public), subject to, e.g., the risk of prejudice to the investigation etc. It suggests that the Committee inquire into this further.

237. Sub-clause 154(2) requires the Commissioner to provide investigation reports to the Prime Minister if the report relates to the conduct of a Minister. In all other instances, the Minister must be provided the report, in addition to certain other persons depending on the subject of the investigation.

238. Clause 155 requires the Commissioner to table the investigation report[206] in Parliament if the report was given to the Minister or Prime Minister under clause 154(1) and one or more hearings were held in public. The Law Council notes this is consistent with the existing arrangements for the tabling of reports prepared by ACLEI and supports transparent reporting requirements where matters are already in the public domain.

239. Clause 156 enables the Commissioner to publish the whole, or a part of, an investigation report if the Commissioner is satisfied that it is in the public interest, noting this requirement would not apply where the report has been tabled in Parliament and therefore already made public.[207] Unlike the test for public hearings under sub-clause 73(2), there is no 'exceptional circumstances' threshold which is required to be met for the publishing of such report.

240. Clause 156 does rely on the Commissioner's discretion and the Commissioner is not obliged to publish the report. The Law Council considers that it is important for public confidence in the NACC and for the practice (as well as appearance) of transparency that such reports be made public where it is in the public interest to do so. This function may be additionally important in the context of a default setting of private hearings, in which the publication of reports, after the process is complete and the right to respond afforded, may be an important balancing factor. This provision could be strengthened to require the Commissioner to consider whether publication of the report is in the public interest, and if the Commissioner is of such an opinion, to publish it.

241. The Law Council also notes that reporting on corruption investigations serves an educatory function, with the Explanatory Memorandum providing that:

> *Public reporting would also enhance the NACC's educational function by bringing to light the circumstances that contribute to corruption, and the detrimental effects of corruption on public administration and the Australian community*.[208]

Recommendations

[205] Explanatory Memorandum, NACC Bills 206
[206] The requirement to exclude section 235 certified information and sensitive information from an investigation report is set out in clause 151. In that case, a separate protected information report must be prepared, per clause 152.
[207] Explanatory Memorandum, NACC Bills 204.
[208] Ibid 40.

- **Part 8 provisions regarding reasonable opportunity to respond should include minimum notice periods.**
- **Clause 156 should require the Commissioner to consider whether publication of the report is in the public interest, and if the Commissioner is of this opinion, to publish it.**

Part 10—Oversight of the National Anti-Corruption Commission

242. The Law Council welcomes the oversight mechanisms contained in Part 10 of the NACC Bill and considers that these are appropriate to provide assurance to the Government, the Parliament and the public that the NACC is functioning fairly and effectively.

Parliamentary Joint Committee

243. Clause 172 of the Bill provides for the establishment of a Joint Committee to oversee the work of the Commissioner, the NACC and the Inspector.

244. The functions of the Joint Committee under clause 177 include:

- reviewing and approving the Government's appointed nominees for the officers of Commissioner, Deputy Commissioner and Inspector;[209]
- monitoring and reviewing the performance of the Commissioner and the Inspector;[210]
- examining and reporting on trends and changes in corruption;[211] and
- reviewing and reporting on the NACC's budget and finances.[212]

245. The Joint Committee is to report to both Houses of Parliament on whether the NACC has sufficient finances and resources to effectively perform its functions and whether the NACC's budget should be increased to ensure that it will have sufficient finances and resources to do so.[213]

246. The Joint Committee is not authorised to investigate a corruption issue, reconsider a decision or recommendation made by the Commissioner or the Inspector, or review sensitive operational information.[214]

247. The Law Council supports the establishment of such Joint Committee to oversee the NACC and welcomes its functions, noting that similar functions are conferred on comparable Parliamentary Joint Committees, such as the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on the ACLEI.

248. It has, however, received some concern that the composition of the Committee, while permitting representation across the Government, Opposition and Crossbench, is Government-dominated and enables a Government Chair veto.

[209] NACC Bill para 177(1)(a).
[210] Ibid para 177(1)(b).
[211] Ibid para 177(1)(e).
[212] Ibid para 177(1)(g).
[213] Ibid.
[214] Ibid sub-cl 177(3).

Function of the Inspector

249. Clause 182 of the NACC Bill provides that there is to be an Inspector of the NACC who will be an independent officer of the Parliament.

250. The functions of the Inspector under clause 184 include:

- detecting corrupt conduct within, and relating to, the NACC;[215]
- undertaking investigations into NACC corruption issues;[216]
- referring NACC corruption issues to the NACC, Commonwealth agencies and State and Territory government entities;[217]
- investigating complaints regarding the NACC or its staff members; and
- to report, and make recommendations to both Houses of the Parliament on the results of performing these functions.[218]

251. The Law Council welcomes the role of the Inspector and considers that these functions would comprise a key oversight mechanism for the NACC by enabling the Inspector to investigate or otherwise deal with NACC corruption issues and conduct NACC complaint investigations.

252. The Law Council notes that the Inspector's position, as currently drafted, is mostly reactive and investigative, in that it is dependent upon complaints being received. The Bill does not appear to include a proactive audit function of the NACC's operations, unlike the audit functions of the inspectors of the NSW ICAC and the NSW Law Enforcement Conduct Commission (**LECC**), which statutorily enshrine functions:

- to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State;[219] and
- to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.[220]

253. Without a proactive auditing function like those outlined above, the Law Council queries whether the NACC's Inspector's functions can promote systemic corruption prevention effects.

254. In the Law Council's view, the role of the 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. Also, like the NSW ICAC Inspector, the NACC Inspector should be empowered to investigate misconduct and maladministration by NACC staff, which would further ensure that officers of the NACC are performing their public official duties in accordance with their statutory duties and in the public interest.

Recommendation

- **The functions of the Inspector under clause 184 should be expanded to include a proactive audit function of the NACC, modelled on**

[215] Ibid para 184(1)(a).
[216] Ibid para 184(1)(b)-(c).
[217] Ibid para 184(1)(e).
[218] Ibid para 184(1)(h).
[219] *NSW ICAC Act* para 57B(1)(a) and *Law Enforcement Conduct Commission Act 2016* (NSW) ('*LECC Act*') para 122(2)(a).
[220] *NSW ICAC Act* para 57B(1)(d) and *LECC Act* para 122(2)(c).

paragraphs 57B(1)(a) and (d) of the *NSW ICAC Act* and paragraphs 122(2)(a) and (c) of the *LECC Act*.

Part 12—Administrative provisions for the National Anti-Corruption Commission

Appointment and qualifications of the Commissioner

255. Sub-clauses 241(1) and 241(2) of the NACC Bill provide that the NACC Commissioner is to be appointed by the Governor-General, by written instrument, on the recommendation of the Minister, after approval of the appointment by the Joint Committee.

256. The Law Council has previously emphasised that the appointment of any Commissioner for an anti-corruption body should only occur after a rigorous consultation process that is capable of producing an independent appointment that engenders public confidence.[221]

257. With respect to eligibility,[222] consideration could be given to requiring that a judge appointed as a Commissioner should be from a superior court of record, and that a legal practitioner must have been enrolled for more than five years. However, the Law Council recognises that the current eligibility criteria in sub-clause 241 are not dissimilar to a Federal Court judge,[223] for example.

258. Sub-clause 241(4) provides that the Commissioner's appointment term must not exceed five years, and per sub-clause 241(5), this is not subject to renewal. Sub-clause 242(5) provides that a person must not be appointed as a Deputy Commissioner if the person has previously been appointed as the Commissioner.

259. The Law Council is of the view that security of tenure for the Commissioner will ensure its independence and notes that a five-year term is consistent with the Government's Merit and Transparency Policy for statutory appointments.[224]

260. However, the Law Council understands that in the experience of other anti-corruption bodies, such as New South Wales, a term limit can present difficulties, particularly due to the complexity and length of some investigations. It suggests the removal of sub-clause 242(5) and the inclusion of 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 person to conclude any ongoing investigations, together with all the necessary powers to complete their work and provide continuity to the NACC's operations.

Recommendation

- **Sub-clause 242(5) should be removed and a clause be inserted to allow for the extension of a Commissioner's term for up to two years in the role of a Deputy Commissioner.**

[221] Law Council of Australia, Commonwealth Integrity Commission Consultation Draft (Submission to the Attorney-General's Department, 18 February 2021), <https://www.lawcouncil.asn.au/publicassets/61c2c03e-ce74-eb11-9439-005056be13b5/3966%20-%20Commonwealth%20Integrity%20Commission%20consultation%20draft.pdf> 9.
[222] NACC Bill sub-cl 241(3).
[223] *Federal Court of Australia Act 1976* (Cth) s 6. This provision also requires that the person has 'appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Court.'
[224] Explanatory Memorandum, NACC Bills 284.

Part 13—Miscellaneous

Review of operation of the Act

261. Clause 278 of the NACC Bill requires the Minister to cause a review to be undertaken in the first five years of operation of the NACC Bill and the amendments made by the Consequential Bill.

262. Sub-clause 287(4) provides that the review must include an opportunity for members of the public and persons who are, or have been, public officials to make written submissions on the operation of the NACC Act, once in force.

263. The Law Council supports this mechanism for review and considers it critical to the ongoing effectiveness, fairness and longevity of the NACC.

Legal costs

264. Paragraph 280(2)(a) of the NACC Bill provides that the Governor-General may make regulations which may prescribe arrangements for the Commonwealth to provide financial assistance in relation to:

- a person's representation at a hearing by a legal practitioner;[225]
- an application under the *ADJR Act*;[226] or
- any other matter arising under, or in relation to, the NACC Bill.[227]

265. The Law Council is of the view that people who cannot afford to pay their legal costs should not be denied an opportunity to access fair representation at a hearing nor denied an opportunity to review a decision made under the NACC Bill.[228] Accordingly, it supports the statutory enshrinement of financial assistance for legal costs in clause 280.

266. The Law Council considers that there may be existing legal financial assistance models which can be drawn upon, such as those provided in section 27 of the *Australian Crime Commission Act 2002* (Cth), section 103 of the *LEIC Act* and section 32 of the *NSW ICAC Act*. The Law Council would be pleased to give further consideration to an appropriate model at a later stage.

267. Nonetheless, the Law Council emphasises that any funds used to provide such legal assistance relating to the NACC should come from new funding to ensure that the ability for individuals to obtain Commonwealth legal financial assistance under existing statutory and non-statutory schemes is not adversely affected.[229]

[225] NACC Bill sub-para 280(2)(a)(i).
[226] Ibid sub-para 280(2)(a)(ii).
[227] Ibid sub-para 280(2)(a)(iii).
[228] Explanatory Memorandum, NACC Bills 19.
[229] See Attorney-General's Department, Commonwealth legal financial assistance (Web Page, 2022) <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance>.

NACC (Consequential and Transitional Provisions) Bill

Covert powers

268. Authorised persons of the NACC will have access to certain covert investigative powers available to other law enforcement agencies under existing legislation. This will occur through the Consequential Bill substituting references to ACLEI in existing law enforcement legislation to the NACC. These covert investigative powers include:

- data surveillance device, listening device, optical device, tracking device, device prescribed by regulation and computer access powers under the *SD Act*; and[230]
- telecommunications interceptions, stored communications, telecommunications data (metadata) and international production orders under the *TIA Act.*[231]

269. Some of the applicable thresholds in relation to key covert warrant types, as set out in existing legislation, are briefly summarised below:

- *surveillance device warrant* - an eligible judge of a Court[232] or a nominated Administrative Appeals Tribunal (**AAT**) member, to whom a law enforcement officer has applied, may issue a surveillance device warrant, in the case of a warrant sought in relation to a relevant offence,[233] if satisfied that there are reasonable grounds for the suspicion founding the application for the warrant;[234]
- *stored communications warrant*—a judge of a court or nominated AAT member, to whom a criminal law-enforcement agency has applied, may issue a warrant if satisfied that there are reasonable grounds for suspecting that a particular carrier holds stored communications that the person has made and the information that would be likely obtained would be likely to assist in connection with the investigation by the agency of a serious contravention[235] in which the person is involved.[236]

270. In relation to the NACC's proposed covert investigative powers, the Law Council does not object in-principle to these being exercised by the NACC, noting that they are currently available to the ACLEI, and that the standard thresholds for their exercise would apply.

271. However, the Law Council has wider concerns about the adequacy of these thresholds in relation to electronic surveillance. In this regard, the Law Council refers to its detailed submissions in relation to the proposed redesign of Australia's patchwork of electronic surveillance legislation.[237] In this wider context of electronic surveillance reform, the Law Council has previously articulated the case for harmonised issuing thresholds for

[230] National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 ('NACC Consequential Bill') sch 1, pt 2 item 188.
[231] Ibid items 205-260.
[232] Appointed in a personal capacity by the Minister.
[233] 'Relevant Offence' is defined in section 6(1) of the *SD Act* to include, by way of example, an offence against the law of the Commonwealth that is punishable by a maximum term of imprisonment of 3 years or more or for life; or an offence against a law of a State that has a federal aspect and that is punishable by a maximum terms of imprisonment of 3 years or more or for life.
[234] *SD Act* s 14(1).
[235] *TIA Act* s 5E defines serious contraventions to mean, for example, a serious offence under the Act, or an offence punishable by imprisonment for a period, or a maximum period of at least 3 years, among other
[236] *TIA Act* s 116(1).
[237] Law Council of Australia, Reform of Australia's Electronic Surveillance Framework: Discussion Paper (Submission to the Department of Home Affairs, 18 February 2022) <https://www.lawcouncil.asn.au/publicassets/892ec930-1595-ec11-944b-005056be13b5/4176%20-%20ESR%20DP.pdf>.

electronic surveillance that enshrine the key requirements of necessity and proportionality and appropriate oversight mechanisms.

272. More immediately, the Law Council is of the view that the NACC acquiring covert surveillance powers refocuses attention on the following issues:

- the appropriacy of issuing authorities; and
- adequacy of oversight mechanisms.

Issuing authorities

273. Significantly, the definition of issuing authority in both the *SD Act* and *TIA Act* enables judges and tribunal members to authorise covert surveillance warrants. For example, section 13 of the *SD Act* allows the Minister to nominate a Deputy President, senior member or member of the AAT to issue warrants under Part 2 Division 1 of the *SD Act*. AAT member appointees must have been enrolled as legal practitioners for not less than 5 years.[238]

274. The Law Council has previously reasoned that electronic surveillance warrants should only be issued by judicial officers, and not by tribunal members. The Law Council considers that a requirement for a judicial officer to authorise the issuance of an electronic surveillance warrant provides a greater degree of independence, both substantive and perceived, in the authorisation process.[239]

275. The Law Council would prefer that only superior court judges are eligible for appointment as issuing authorities for all types of surveillance warrants. However, as a minimum, the power to issue warrants authorising the most intrusive surveillance powers should be limited to superior court judges who are appointed in their personal capacities.[240]

Oversight

276. In this regard, the Law Council refers to the Commonwealth Ombudsman's 2021 report, *Monitoring agency access to stored communications and telecommunications data under Chapters 3 and 4 of the TIA Act*.[241]

277. This report summarises the results of inspections conducted by the Ombudsman under section 186B of the *TIA Act*, examining agencies' records relating to stored communications and telecommunications data for the period 1 July 2019 to 30 June 2020. The report notes non-compliance issues in the following areas in relation to stored communication warrants:

- warrants issued by an ineligible authority;

[238] For example, section 6DB of the *TIA Act* allows the Attorney-General to nominate as an issuing authority a person who holds an appointment to the AAT as deputy President, senior member or members, and an appointee must be enrolled as a legal practitioner and have been so for at least five years.
[239] Law Council of Australia, Reform of Australia's Electronic Surveillance Framework: Discussion Paper (Submission to the Department of Home Affairs, 18 February 2022) <https://www.lawcouncil.asn.au/publicassets/892ec930-1595-ec11-944b-005056be13b5/4176%20-%20ESR%20DP.pdf> 33.
[240] Ibid.
[241] Commonwealth Ombudsman, Monitoring agency access to stored communications and telecommunications data under Chapters 3 and 4 of the TIA Act 1989 (Annual Report, 2021) <https://www.ombudsman.gov.au/__data/assets/pdf_file/0017/114821/Monitoring-agency-access-to-stored-communications-and-telecommunications-data-under-Chapters-3-and-4-of-the-Telecommunications-Interception-and-Access-Act-1979.pdf>.

- e.g., Victoria Police disclosed that stored communications warrants were issued by a member of the AAT who was not appointed under subsection 6DB(1) of the *TIA Act*;[242]

- agencies' data vetting and quarantining processes;
  - the Ombudsman found instances where information obtained outside the scope of a stored communication warrant was stored within internal databases;
  - for example, it found that 'there remained some instances in a specific system used by the NSW ICAC where we were unable to be satisfied that the stored communications were within the parameters of the warrant;'[243] and

- agencies' destruction of stored communications;
  - the Ombudsman found instances of agencies failing to promptly destroy documents certified for destruction.[244]

278. In relation to telecommunication data powers, the Ombudsman found persistent non-compliance issues arising in relation to, for example, record keeping of authorised officer considerations—such as a continued pattern of AFP non-compliance in relation to similar findings in the 2018–2019 report.[245]

279. The Law Council reiterates its long-held position that public confidence in the use of extraordinary electronic surveillance powers by law enforcement agencies depends on faithful adherence to applicable oversight standards and procedural safeguards.

280. At a minimum, it is imperative that the NACC foster a culture of compliance and ensure that ample training is provided to officers administering these powers on applicable oversight standards. It is also worth considering what further safeguards and scrutiny are required with respect to the exercise of covert powers generally, given the Ombudsman's findings.

281. The Law Council has previously made detailed submissions on the shortcomings in the existing oversight arrangements for the exercise of surveillance powers.[246] These shortcomings can be strengthened by amendments to the *TIA Act* and *SD Act*, such as:

- the use of independent and expert issuing authorities, ideally superior court judges (appointed in a personal capacity);
  - it is critical that eligibility of persons able to be appointed as issuing authorities is calibrated at a level commensurate with:
    - the complexity of the factual assessment they are required to make;
    - the highly intrusive and covert nature of the powers they are asked to authorise; and
    - the need for the public to have trust and confidence in the integrity of the authorisation process.

[242] Ibid 15.
[243] Ibid 22.
[244] Ibid 13-14.
[245] Ibid 36.
[246] Law Council of Australia, Reform of Australia's Electronic Surveillance Framework: Discussion Paper (Submission to the Department of Home Affairs, 18 February 2022) <https://www.lawcouncil.asn.au/publicassets/892ec930-1595-ec11-944b-005056be13b5/4176%20-%20ESR%20DP.pdf>.

- amending the issuing thresholds for electronic surveillance powers to consistently and clearly incorporate thresholds of necessity and proportionality into the authorisation criteria for all electronic surveillance powers; and
- additional safeguards to ensure adequate independent oversight of stored communication, telecommunication, and other electronic warrants;
  - for example, the Law Council has previously proposed additional statutory safeguards, including:
    - limiting the maximum duration of warrants;
    - requiring variation or revalidation of warrants in certain circumstances, creating trigger points for further oversight by the issuing authority;
    - and post-warrant reporting obligations for the agency executing the warrant.

282. However, the Law Council appreciates that these changes are ongoing in the context of the Government's consideration of the implementation of the Richardson Review[247] and broader Electronic Surveillance Reform.

283. The Law Council notes the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) will conduct a separate inquiry on Item 250 of the Consequential Bill which amends the definition of 'criminal law enforcement agency' contained in Subsection 110A(1) of the *TIA Act*. The Law Council looks forward to providing more detailed submissions confined to this point in due course.

Recommendations

With respect to telecommunications interception and surveillance powers in general (including as exercised by the NACC and law enforcement and security agencies):

- **Only superior court judges should be eligible for appointment as issuing authorities for all types of surveillance warrants. The respective definitions of issuing authorities in Sections 11, 12, 13 of the *SD Act* and section 6DB of the *TIA Act* should be amended accordingly.**
- **However, as a minimum, the power to issue warrants authorising the most intrusive surveillance powers should be limited to superior court judges who are appointed in their personal capacities.**
- **In the short term, the Law Council recommends that Part 6 Division 3 of the *SD Act* and Chapter 4A of the *TIA Act* be amended to confer on the Commonwealth Ombudsman a standing function of review, including the ability to conduct own-motion reviews, in relation to the exercise of electronic surveillance powers to ensure that recurring areas of non-compliance are addressed.**
- **In the long term, the Law Council recommends the Government consider its broader submission on electronic surveillance reform regarding the need to ensure harmonised electronic surveillance thresholds build in necessity and proportionality as conditions that must be fulfilled for a warrant to be issued.**

[247] Attorney-General's Department, Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community (Web Page, 4 December 2020) <https://www.ag.gov.au/national-security/publications/report-comprehensive-review-legal-framework-national-intelligence-community>.

Availability of judicial review

284. Schedule 1, Part 2 of the Consequential Bill proposes amendment of the *ADJR Act* by adding a new paragraph at the end of Schedule 1, which contains a list of classes of decisions to which the *ADJR Act* does not apply, meaning they are excluded from review by the Federal Court. The new paragraph (zi) of the *ADJR Act* excludes:

- decisions under provisions in Part 6 (dealing with corruption issues);
- Part 7 (investigating corruption issues); and
- decisions under sections 161 and 162 (conducting public inquiries into corruption risks etc), 162, 209 and 210 (dealing with NACC corruption issues) and 213 (investigations by Inspector).

285. The Explanatory Memorandum addresses the proposed exclusion, stating:

> *The provisions of the NACC Bill that would be excluded from the operation of the ADJR Act concern intermediate process steps necessary for the NACC to effectively undertake an investigation into a corruption issue. If a person were able to seek review of decisions made under these provisions, this could significantly impede the NACC's ability to fulfil its statutory functions. Enabling a person to seek review of these intermediate decisions could also cause lengthy delays that could prejudice the NACC Act process.*[248]

286. Other decisions under the NACC Bill would remain justiciable under the *ADJR Act*, including reports made under Part 8.[249]

287. As noted in the Explanatory Memorandum, a person would not be limited from seeking judicial review of the excluded decisions under the *Judiciary Act 1903* (Cth) (***Judiciary Act***) or in the High Court's original jurisdiction under section 75(v) of the Commonwealth Constitution.[250]

Law Council view

288. The Law Council is of the view that judicial review remains an important scrutiny avenue for any statutory authority, not least to ensure that it remains within its jurisdiction and affords procedural fairness.

289. The Law Council considers that the availability of transparent and public judicial review for at least substantial decisions of the NACC is a crucial element of oversight to ensure confidence in the NACC and its process, including as perceived by those who are subject to it.

290. Well known cases illustrate that where judicial review is not sought until after the report of an anti-corruption body is produced, the denial of procedural fairness or damage to reputation has already occurred and cannot be rectified. If review is not available prior to the making of a report, then it is not possible to obtain a court order restraining NACC from exceeding its jurisdiction or denying procedural fairness. As such, the remedies available in judicial review of the report will be of limited practical benefit.[251]

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[248] Explanatory Memorandum, NACC Bill 305.
[249] Ibid.
[250] Ibid.
[251] See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

291. The Law Council considers that if judicial review causes delay to the investigative process, as argued in the Explanatory Memorandum to justify limiting the availability of review under the *ADJR Act*, then the same must be true of review under the *Judiciary Act*.[252] As such, it must be queried whether anything is to be gained or lost by excluding *ADJR Act* review, especially as 'intermediate process steps' (as they are described in the Explanatory Memorandum)[253] are just as capable of being reviewed under the *Judiciary Act* as under the *ADJR Act*.

Part 6—Dealing with corruption issues

292. Not all of the exclusions in the proposed paragraph (zi) of the *ADJR Act* can be accurately described as 'intermediate process steps'. For instance, Part 6 includes the general power in clause 40 of the Commissioner to deal with corruption issues. This is a jurisdiction-conferring provision, rather than a procedural power.

293. In clause 40, the existence of a 'corruption issue' is a condition for the jurisdiction of the Commissioner. In a judicial review challenge to a proposed investigation, the argument would centre on whether the subject matter of the investigation is capable of falling within the definition of 'corruption issue'. At an early stage, review could be sought under subsection 39B(1) of the *Judiciary Act*, but the exclusion prevents an *ADJR Act* challenge. The Law Council queries why such avenue for review should be excluded.

Part 7—Investigating corruption issues

294. While the powers under Part 7 of the NACC Bill may appear to be procedural powers, there are cases where notices, search warrants or examination processes are set aside as ultra vires for lack of specificity. Alternatively, the notice or summons may have been executed in a way that violates fundamental common law rights that have not been expressly abrogated by the empowering legislation of the anti-corruption body.

295. More importantly, exercise of procedural power may trigger a legitimate judicial review challenge to the very jurisdiction of an anti-corruption tribunal. For example, in *Cunneen*,[254] Cunneen succeeded in the argument that the ICAC had no power to issue the summons to her because it had no jurisdiction to investigate the allegation involving her that was identified in the summons.

296. As such, judicial review of an exercise of a procedural power may, in substance, be a challenge to the scope of the body's jurisdiction to investigate a matter—the very kind of matter that courts should be able to check.

Value of ADJR Act review

297. The Law Council considers that in being denied the ability to invoke *ADJR Act* jurisdiction alongside *Judiciary Act* jurisdiction, the applicant loses:

- the ability to seek a statement of reasons for a decision under section 13 (noting there must be a decision that is judiciable under the *ADJR Act*, not just conduct engaged in for the purpose of making a decision;
- the ability to argue any error of law as codified in sections 5, 6 and 7 of the *ADJR Act*, without having to establish that the error constitutes a jurisdictional error; and

[252] Explanatory Memorandum, NACC Bills 305.
[253] Ibid.
[254] (2015) 256 CLR 1.

- the availability of the flexible remedies under sections 15 and 16 of the *ADJR Act* (in circumstances where at general law, relief by certiorari or prohibition may not be available in relation to a recommendatory decision, because it does not affect rights or remove a bar to having an effect on rights).

298. As to the ability to seek a statement of reasons, if it be thought inappropriate for a statement to be required on request in relation to all or some of the currently excluded 'procedural' powers, they can be excluded from that duty by amendment to Schedule 2 to the *ADJR Act*. If a power is not listed in Schedule 1, but is listed in Schedule 2, then it is judiciable, but there is no duty to give a reasons statement on request.

299. As to the ability to argue any error of law and the availability of remedies, it is difficult to see what justification exists for removing these advantages of *ADJR Act* review, when a challenge may, in any event, be brought under the *Judiciary Act*.

Recommendations

- **The amendments to the *ADJR Act* in the Consequential Amendments Bill (Schedule 1, Part 2), excluding review under the *ADJR Act* of a large number of powers of the proposed NACC and NACC Inspector, should be removed.**
- **If this is not accepted:**
  - **judicial review should be available for at least substantial interim decisions of the Commissioner, such as the decision to hold a public hearing; and**
  - **The exclusion of any powers of the NACC Bill from review under the *ADJR Act* should be clearly and specifically justified.**