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Senator Linda White
Chair
Joint Standing Committee on National Anti-Corruption Commission Bills
Parliament House
CANBERRA, ACT, 2600

Dear Senator,

Please accept this submission into your inquiry on the National Anti-Corruption Commission Bills. Overall, the *National Anti-Corruption Commission Bill 2022* (Cth) appears to be well-considered and applies appropriate powers and protections. Following, however, are some points the Committee may wish to consider.

Definitional clarity

The definition of corrupt conduct is directed largely at public officials and connected to their office as a public official (eg the honest or impartial exercise of a public official's powers 'as a public official' (s 8(1)(a)), 'abuse of the person's office as a public official' (s 8(1)(c)), misuse of information acquired in the person's capacity as a public official (s 8(1)(d)), and 'conduct of a public official in that capacity' for the purpose of corruption of any other kind (s 8(1)(e))). The consequence is that one must not only be able to identify a 'public official', but tie their conduct to their office (including the powers exercisable under that office') in order to identify whether corrupt conduct has occurred for the purposes of the Act. If such a person behaves corruptly in the ordinary sense of the word, but the corrupt action does not occur in relation to their office, then it will not be picked up by the Act as corrupt conduct.

Proposed s 10 defines a public official as including a parliamentarian. The term 'parliamentarian' is defined in proposed s 7 as including a senator, a member and a 'Minister of State'. A 'parliamentary office' is defined as meaning the 'office of

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a parliamentarian'. This is where an ambiguity arises. Is the office of a parliamentarian confined to their parliamentary work (eg their electorate work and work with respect to the chamber and parliamentary committees – see s 6(1)(a) and (b) of the *Parliamentary Business Resources Act 2017* (Cth))? Does it also include the executive office of a Minister of the Crown – which is possible to the extent that 'Minister of State' is included in the definition of 'parliamentarian' in proposed s 7? Does the office of a parliamentarian also include 'party political duties' (see s 6(1)(c) of the *Parliamentary Business Resources Act 2017* (Cth))?

The reason for asking these questions is that most corruption concerning parliamentarians is likely to arise either in relation to the exercise of executive powers (i.e. their ministerial office, rather than that as a parliamentarian) or in relation to party political matters, such as raising political donations. If, for example, a parliamentarian, who was a government backbencher, offered to a mining company to ensure that the government would approve its application for a new mine in exchange for a political donation to the party of $1 million, would this amount to an 'abuse of the person's office as a public official' or would political fund raising be considered outside the office of a parliamentarian, as would any promised exercise of executive power? Equally, could a minister who had corruptly agreed to exercise executive power in favour of a party donor in exchange for a donation, argue that it did not fall within the meaning of 'corrupt conduct' in proposed s 8 because that section is only directed to the minister's abuse of the office of parliamentarian – not his or her executive office and not his or her involvement in party politics? In my view, such matters should be clearly addressed in the legislation so that such points are not argued in litigation in the future, allowing corrupt persons to slide out of the application of the Act.

This then raises the appropriateness of proposed s 8(9). It states that conduct engaged in as part of a political activity (presumably including raising political donations) does not constitute corrupt conduct if it does not 'involve or affect' the exercise of a power, or the performance of a function or duty, by a public official, or the use of public resources. But what about the most common form of corruption – the raising of donations in return for future favourable treatment in the exercise of executive power? Is the promise or intimation of such treatment, even though no such power has yet been exercised and no money yet spent,

enough to 'involve or affect' the exercise of a power by a public official? This needs to be clarified.

Definition of corrupt conduct – dishonest and partial conduct

The definition of corrupt conduct in proposed s 8 addresses dishonest or partial exercises of a public official's powers, functions or duties in circumstances where one person (whether or not a public official) causes another person (who is a public official) to act in that manner. However, unlike the NSW *ICAC Act*, it does not directly address the dishonest or partial conduct of a public official if this has not been caused by another person. One might assume that dishonest and partial conduct by a public official would fall within the scope of 'breach of public trust' or 'abuse of office', but given that those phrases are rather general in nature it would be preferable to make this clear. It appears that proposed s 8(3) is intended to achieve this outcome, but I find it hard to understand as it seems to say that the conduct of a public official must adversely affect the honest or impartial exercise of that public official's powers, functions or duties, which doesn't really make sense. By being dishonest do I adversely affect the honest exercise of my powers? I think this could be cleaned up.

I also note that the Bill takes up the approach of the majority in the *Cunneen* case that actions by a third party (or by a public official, where those actions are not within the scope of his or her office), do not amount to corruption, even if they result in a corrupt advantage flowing to the person, if it occurs as a consequence of deceiving a public official, rather than causing the public official to act in a dishonest or partial manner. This means that MP X, acting outside the scope of his or her parliamentary role and in his or her personal interest, could deceive public servants in relation to the grant of a mining licence or the acquisition of land, and do so on a systemic basis, but still not be found to be have engaged in corrupt conduct, because X did not cause another public official to act dishonestly or partially. I note that in NSW the *ICAC Act* was amended so that such conduct falls within the definition of corrupt conduct. Section 8(2A) was added, which provides:

> (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters--
> (a) collusive tendering,
> (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
> (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
> (d) defrauding the public revenue,
> (e) fraudulently obtaining or retaining employment or appointment as a public official.

Is there a good reason why such matters should not be covered by the Commonwealth Act?

Public Hearings

One of the most concerning aspects of the Bill is the lack of transparency concerning corruption investigations. Proposed s 62 provides that the Commissioner may hold a hearing for the purposes of a corruption investigation, and that subject to other provisions in the Division, the 'hearing may be conducted in such manner as the Commissioner thinks fit'. Proposed s 73(1), however, provides that a hearing 'must' be held in private, unless the Commissioner decides to hold all or part of it in public. The Commissioner may only decide to hold a public hearing if 'the Commissioner is satisfied that: (a) exceptional circumstances justify holding the hearing, or the part of the hearing in public; and (b) it is in the public interest to do so.' As 'exceptional circumstances' is a very high hurdle, it can confidently be predicted that almost all hearings will be in private.

Holding hearings in private then has a flow-on effect for transparency in terms of the publication of the report. Proposed s 154 states that the Commissioner must give the Minister (or the Prime Minister if the report is about the Minister) a copy of the investigation report. Proposed s 155 then states that if the Commissioner has given the Minister (or Prime Minister) an investigation report and one or more public hearings were held in the course of the investigation, then the Minister (or Prime Minister) must table the report in each House within 15 sitting days of its receipt. There is no such obligation where private hearings only were held, which will be the case for the vast majority of investigations. Proposed s 156 then states that the Commissioner 'may' publish the whole or part of an investigation report if the Commissioner has given it to the Minister (or Prime Minister) and the Commissioner is satisfied that it is in the public interest to publish the whole or the part of the report. This suggests that investigation reports into matters that have been the subject of only private hearings may not be published at all, either in Parliament or to the public in general. Even the person who referred the corruption issue may be left in the dark as to the result of the investigation, as proposed s 158 states that the Commissioner 'may' advise the person of the outcome, but there is no obligation to do so. There is also no obligation to advise the person who was being investigated about the outcome of the corruption investigation unless the Commissioner makes a finding that the person has engaged in corrupt conduct (proposed s 159).

The upshot is that the NACC will be a body with great powers that can investigate matters in secret, hold secret hearings and issue secret reports containing secret findings. This will undermine public trust in the NACC and is inconsistent with the principle of transparency.

While it is true that public hearings can damage reputations, even when allegations of corruption are not substantiated, it remains important, where allegations have met a threshold of substantive evidence, and it is in the public interest to do so, for hearings to be able to be held in public. This is important for the following reasons:

- **Trust in the system.** The reason we have an open court principle is that justice must be seen to be done for there to be trust in the fairness of the

system. In a matter as politically sensitive as allegations of corruption, if the public cannot see that the allegations have been fairly tested, then it is unlikely to respect and accept the outcome. If, for example, an allegation of serious corruption is made publicly against a politician from the governing side and the public is merely told that the NACC has investigated and rejected the allegation, many people will conclude that the system is protecting its own. This will be particularly problematic where the allegation has been made publicly, but the investigation into it is done in secret and no report is published. This is likely to undermine the reputation of the NACC, hindering it from fulfilling its important functions.

- **Vindication.** If an allegation has been made publicly against a person, he or she may not be able to vindicate his or her reputation if the relevant evidence has not been tested in public and the report is not made public. The taint of the corruption allegation will remain, even if a secret investigation has resulted in the allegation being, secretly, dismissed. A person is more likely to be able to achieve the vindication of his or her reputation if the evidence of the allegation is publicly tested and found to be wanting. Proposed s 149(4) states that 'if the Commissioner forms the opinion that a person whose conduct has been investigated has not engaged in corrupt conduct the Commissioner must set out that opinion in the report'. But there is no obligation to table that report in Parliament (if there were no public hearings) or to publish it or even to furnish a copy to the person investigated (unless the Commissioner makes a finding that the person has engaged in corrupt conduct). So a person who has been publicly accused of corruption may not be able to cross-examine witnesses in public proceedings to reveal the flaws or inconsistencies in the allegations, may not be able to give evidence publicly that refutes the accusations and may not even be able to point to the findings of the Commissioner in a report that the person has not engaged in corrupt conduct, if the report is not made public. This is unfair to an innocent person who has been accused of corruption and appears to be a far more serious risk to reputation than the mere fact that a witness gives evidence in public at an investigation hearing. While a witness may request (under proposed s 76) to give particular evidence in private, there appears to be

no mechanism for the person being investigated to request that hearings be held in public.

- **Setting standards.** Corruption flourishes when good people believe that it is simply the 'way things are done' and the 'price of doing business'. If people believe that 'everyone is doing it', that the behaviour is regarded as socially acceptable with a wink and a nod, and that they are personally disadvantaged by not joining in with the same conduct, then they are more likely to behave in a corrupt manner. One of the important features of public hearings is to set a standard of what is not acceptable. If people can see, on the news in the evening, that those who have behaved in a particular way are accused of corruption and their conduct is treated as appalling and unacceptable, they are less likely to engage in such conduct or consider it 'normal' or 'socially acceptable'. In short, public hearings educate the community about the standard of conduct which is unacceptable and therefore reinforce public standards of behaviour, so that corruption is less likely to spread into mainstream conduct.
- **Deterrence.** Public hearings may be effective in deterring corrupt conduct. People who might otherwise have behaved in a similar manner might think twice if they are concerned that they will be publicly called to account and that their neighbours, colleagues and families could see them examined publicly about their behaviour.
- **Additional evidence.** The holding of public hearings alerts people to the existence of a particular corruption inquiry and increases the likelihood that others with evidence about the relevant allegations will come forward and provide it to authorities.
- **Consistency in standards.** Courts hear allegations openly, even though those allegations may damage a person's reputation. So do royal commissions and other inquiries. In Parliament, damaging allegations are frequently made, behind the protection of parliamentary privilege, but no one is suggesting that the proceedings of the Houses take place in secret in order to protect the reputation of those who are criticised. While parliamentary committees sometimes take evidence in camera, this is rare. Why should a Member of Parliament be able to make allegations in the House that a person has engaged in corruption, with little or no evidence, and do so with the protection of parliamentary privilege, while a properly

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constructed Anti-Corruption Commission, applying appropriate rules of procedural fairness and evidence, cannot hold public hearings into allegations, other than in exceptional circumstances? The contradiction in standards is manifest and has not been justified.

Sections 46 and 47

I have some concern that proposed ss 46 and 47 would exclude from the scope of matters the NACC could investigate anything that 'could be' the subject of investigations by the Independent Parliamentary Expenses Authority or the Electoral Commissioner. The words 'could be' open up a wide area. It may be that neither authority has any intention of dealing with the matter, but if so the NACC cannot proceed with an investigation unless the relevant person refers it to the NACC and states that it could involve corrupt conduct that is serious or systemic. There is a risk that serious matters could fall in the gap between agencies, with no one addressing them.

If you would like any further information, please contact me

Yours sincerely,

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