Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

14 October 2022

Our ref: LP-MC

Committee Secretariat
Parliamentary Joint Select Committee
National Anti-Corruption Commission Legislation

Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Submitted online and by email: [redacted]

Dear Committee Secretariat,

Parliamentary Inquiry on National Anti-Corruption Commission Bills 2022

Thank you for the opportunity to provide comment on the Parliamentary Inquiry on the National Anti-Corruption Commission Bills 2022 (**Bills**). The Queensland Law Society (**QLS**) appreciates the committee receiving and considering our comments on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS has consistently supported the establishment of a Commonwealth integrity body to assist in the preservation of a strong and independent system of government, which is essential to maintaining public confidence in the administration of justice and the promotion of the separation of powers.[1] As such, we welcome the introduction of the Bills to establish a national anti-corruption commission to address allegations of corruption.

The Society supports the comments made by the Law Council of Australia; particularly those relating to the privilege against self-incrimination, legal privilege and the availability of judicial review. Given the length and complexity of the Bills and the short time frame for consultation, we have limited our comments to two key issues in relation to the National Anti-Corruption Commission Bill 2022 (**Bill**), being: first, the meaning of 'corrupt conduct' and 'corruption issue'; and second, private and public hearings. These comments are informed by our experience in the Queensland context with bodies such as the Crime and Corruption Commission and the

[1] Queensland Law Society, *2022 Federal Election Call to Parties Statement* (2022), 4 -5.

Office of the Independent Assessor. We reserve our position in respect of any aspects of the Bills not addressed in this submission.

Key recommendations

Our key recommendations are as follows:

- Remove subclause 8(1)(e). Alternatively, include an exhaustive list of the conduct that will be captured by this subclause.
- Remove subclause 9(1)(c) to restrict the NACC's investigation of corruption issues to past and present corrupt conduct.
- Amend subclause 73(3) so that the Commissioner must (as opposed to may) have regard to the listed factors.
- Amend clause 74 to include circumstances where the giving of evidence would disclose information that is protected by the privilege against self-incrimination.
- Provide for judicial review of a decision made in relation to whether a hearing should be public or private.

Part 2, Division 1 – Corrupt conduct and corruption issues

Clause 8 Meaning of *corrupt conduct*

QLS accepts the broad definition of corrupt conduct under clause 8 of the NACC Bill is important to ensure the NACC has the capacity to investigate a range of possible corrupt conduct. However, the terminology 'corruption of any other kind' in subclause 8(1)(e) is vague, undefined and circular. The extension of the definition to 'corruption of any other kind' will make it difficult, if not impossible, for a public official to know what conduct will be captured by this category. Accordingly, we recommend this subclause be deleted. Alternatively, if the subclause is to remain, we recommend an exhaustive list of the conduct that will be captured be included in this subclause.

Clause 9 Meaning of *corruption issue*

The Society does not support the inclusion of subclause 9(1)(c) that stipulates a 'corruption issue' includes an issue of whether a person 'will engage in corrupt conduct'. There are significant issues with both requiring the NACC to make that assessment and with someone being accused, investigated and penalised for conduct that has not yet occurred. Including future conduct is ambiguous and wholly speculative. Its investigation, in our view, would be an inappropriate use of both the NACC's power and resources.

Recommendation:

- Remove **subclause 8(1)(e)**. Alternatively, include an exhaustive list of the conduct that will be captured by this subclause.
- Remove **subclause 9(1)(c)** to restrict the NACC's investigation of corruption issues to past and present corrupt conduct.

Part 7, Division 3, Subdivision B – Private and public hearings

Clause 73 Private and public hearings

The Society strongly supports subclause 73(1) which provides a presumption against hearings being public. While we acknowledge that open justice is one of the fundamental attributes of a fair trial,[2] the proposed National Anti-Corruption Commission (**NACC**) is not a court; nor is it a prosecutorial body. Rather, its stated objects are to detect and investigate corrupt conduct, and after investigation of a corruption issue, to refer persons for criminal prosecution, civil proceedings or disciplinary action.[3] Its primary function, therefore, is the *investigation* of corruption. To hold NACC hearings in public would be analogous to the Australian Federal Police broadcasting an interview with a suspect or witness during the course of a criminal investigation.

While public hearings in and of themselves may operate to deter corrupt conduct, they can also have significant and long-lasting adverse consequences for individuals, even in circumstances where the investigation results in no adverse findings or criminal charge. Accordingly, the threshold for public hearings should be sufficiently high to negate them becoming political and media "show trials". We support the test set out in subclause 73(2).

However, we recommend subclause 73(3) also be amended to provide that, in deciding whether to hold a hearing, or part of a hearing, in public, the Commissioner must have regard to the listed factors. Mandatory consideration of these factors will ensure that hearings may be held in public where in the public interest to do so, but only after sufficient consideration has been given to the impact of a public hearing on, for example, a person's safety or particular vulnerability. We also support the retention of subclause 73(4), which will allow the Commissioner to consider other matters relevant to the circumstances at hand.

Clause 74 Evidence that must be given in private

We support the listed circumstances in which evidence must be given in private. However, we consider evidence should also be given in private where a person is compelled to answer questions which would normally invoke the privilege against self-incrimination. The right to claim the privilege against self-incrimination is contained in art 14.3(g) of the *International Covenant on Civil and Political Rights*,[4] which provides that, in the determination of any criminal charge, everyone shall be entitled not to be compelled to testify against themselves or to confess guilt.[5] Nonetheless, the right to claim privilege against self-incrimination is not absolute and may be

---

[2] As the Australian Law Reform Commission has identified, '[t]hat the administration of justice must take place in an open court is a fundamental rule of the common law': Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report, ALRC Report 129, December 2015) 231 [8.53]. Indeed, the High Court has stated that 'the rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances': *Commissioner of the Australian Federal Police v Zhao* (2015) 316 ALR 378, [44] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

[3] National Anti-Corruption Commission Bill 2022 (Cth) 3.

[4] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[5] The High Court has confirmed the influence of art 14 of the ICCPR on the common law: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J).

removed or diminished by statute, 'based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained.'[6]

This public interest must be balanced against the individual's interest in avoiding self-incrimination. Given subclause 113(1) abrogates the privilege against self-incrimination, we consider the giving of evidence *in public* by a person who would normally be entitled to claim such a privilege is very likely to unfairly prejudice any future criminal, civil or disciplinary proceedings against the person. Accordingly, to safeguard procedural fairness and the right to a fair trial, a person should not be compelled to give self-incriminating evidence in a public hearing.

In addition, we consider that decisions made about whether a hearing should be made public should be subject to judicial review, for example, under *the Administrative Decisions (Judicial Review) Act 1977* (Cth).

Recommendations:

- Amend **subclause 73(3)** so that the Commissioner must (as opposed to may) have regard to the listed factors.
- Amend **clause 74** to include circumstances where the giving of evidence would disclose information that is protected by the privilege against self-incrimination.
- Provide for judicial review of a decision made in relation to whether a hearing should be public or private.

If you have any queries regarding the contents of this letter, please do not hesitate to contact QLS Policy via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Kara Thomson
President

[6] Ibid 503 (Mason CJ and Toohey J).