



Law Council  
OF AUSTRALIA

Office of the President

27 October 2022

Senator Linda White  
Chair  
Joint Select Committee on National Anti-Corruption Commission Legislation  
PO Box 6021  
Parliament House  
Canberra ACT 2600

By email: [NACC@aph.gov.au](mailto:NACC@aph.gov.au)

Dear Senator White

### **Supplementary Submission: Inquiry into the National Anti-Corruption Legislation**

The Law Council of Australia appreciates the opportunity to have appeared before the Joint Select Committee on National Anti-Corruption Commission Legislation (**Committee**) on 20 October 2022 in relation to its inquiry into the National Anti-Corruption Legislation.

#### *Investigations into past conduct*

In the course of the Law Council's appearance, the Law Council was asked to consider how the National Anti-Corruption Commission Bill 2022 (Cth) (**Bill**) could better address investigations by the proposed National Anti-Corruption Commission (**NACC**) into past conduct, including any limitations that might reasonably be imposed.<sup>1</sup>

Under the Bill as presently drafted, the definition of 'corrupt conduct' includes conduct that occurred prior to the establishment of the NACC.<sup>2</sup> 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 may refer that conduct and supporting evidence to the Commonwealth Director of Public Prosecutions.

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. Nonetheless, the Law Council suggests that regard could be had to including an additional threshold that would allow the NACC to conduct investigations into past conduct only where there is an identifiable public interest in doing so.

It is noted that the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) requires the Independent Broad-based Anti-corruption Commission (**IBAC**) to be reasonably satisfied that, among other matters, it is in the public interest for the IBAC to

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<sup>1</sup> Joint Select Committee on National Anti-Corruption Commission Legislation, *Proof Committee Hansard* (20 October 2022), at 55.

<sup>2</sup> National Anti-Corruption Commission Bill 2022 (Cth), 8(4).

investigate conduct occurring before its commencement.<sup>3</sup> It also restricts the IBAC's ability to investigate past conduct where that conduct occurred at too remote a time to justify investigation.<sup>4</sup>

The Committee may wish to have regard to such factors.

### Post-charge coercive and information-sharing powers

The Law Council also takes this opportunity to reiterate its concerns regarding the provisions in the NACC Bill relating to post-charge coercive and information-sharing powers. These powers, the relevant thresholds for exercising them and applicable safeguards, have been summarised in the Law Council's primary written submission.<sup>5</sup>

The Law Council restates its view that the powers in the Bill to compulsorily question charged persons, or persons against whom charges are imminent or have been laid, about the subject matter of those charges should be removed.<sup>6</sup> Alternatively, if the powers are not removed, compulsory questioning should be deferred until the disposition of any charges against a person, to preserve the distinction between the investigative nature of the NACC and the criminal justice process.<sup>7</sup>

The Law Council's position is in line with traditional common law protections of the privilege against self-incrimination and the post-charge right to silence as confirmed by the Australian High Court in multiple recent decisions.<sup>8</sup> The rationale for this position is that 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.

The High Court has explained that the compulsory questioning of a witness, in relation to matters substantially overlapping with criminal proceedings, will inevitably be prejudicial to a potential defence and that 'what would otherwise be a wholly accusatorial process' in which the accused can simply test the sufficiency of the prosecution evidence 'is radically altered.'<sup>9</sup>

The Law Council remains concerned that, if the Bill is passed without amendment, the use and disclosure of post-charge investigative and derivative material will be susceptible to challenge and will potentially draw out and delay criminal proceedings. It is possible that, in certain circumstances, criminal trials may even be delayed indefinitely.

By way of illustration, in the decision of *Lee v The Queen* [2014] HCA 20 (**Lee**), the High Court unanimously found that, even where the terms of a statute allow disclosure of compelled examination transcripts to a prosecutor, the court must also consider whether such disclosure would give rise to a miscarriage of justice. Crucially, in *Lee* the Court found publication to the Department of Public Prosecutions (**DPP**) was for a patently improper

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<sup>3</sup> *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), 60(5)(a).

<sup>4</sup> *Ibid*, 60(4)(d).

<sup>5</sup> Law Council of Australia, *Submission to the Joint Select Committee on National Anti-Corruption Commission Legislation* (14 October 2022), 44 <<https://www.lawcouncil.asn.au/resources/submissions/national-anti-corruption-commission-bills-2022>>.

<sup>6</sup> *Ibid*, 46.

<sup>7</sup> *Ibid*.

<sup>8</sup> See for example, *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; *X7 v Australian Crime Commission* [2013] HCA 29; *Hammond v The Commonwealth* [1982] HCA 42.

<sup>9</sup> *X7 v Australian Crime Commission* [2013] HCA 29 [71] (Hayne and Bell JJ, Kiefel J agreeing).

purpose, namely the ascertainment of the appellants' defence and described the 'critical question' as being:

*.. not whether the publication was unlawful and wrongful. It is whether, as a result of the prosecution being armed with the appellants' evidence, there has been a miscarriage of justice in the eyes of the law.*<sup>10</sup>

Significantly, the Law Council notes that the relief granted in *Lee* included quashing convictions and ordering a retrial to be conducted by a Crown Prosecutor and instructing DPP solicitor who had not had access to the compulsory examination transcripts. This highlights the risk that permitting use—direct or derivative—and sharing of imminent or post-charge investigation material will cause delays to, and disrupt, the criminal trial process. The Law Council considers that this material should not be permitted under the NACC framework.

Despite the requirement that a court order be obtained under subclauses 105(4) and 106(1) of the Bill, the Law Council queries whether post-charge disclosure can ever be considered in the interests of justice, given both the companion principle (i.e. a person charged with a crime cannot be compelled to assist in the discharge of the prosecution's onus of proof)<sup>11</sup> and the principle of equality of arms (i.e. 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).<sup>12</sup>

The Law Council notes that a risk of a miscarriage of justice undermining a fair trial also extends to the use of compulsory investigative powers arising from confiscation proceedings. In the context of examination powers in relation to civil confiscation, the High Court has approved the reasoning of the Victorian Court of Appeal that, in circumstances where the subject matter of the confiscation matter and criminal charges were 'substantially the same', the confiscation proceedings must be stayed.<sup>13</sup> The Law Council considers that provisions such as clause 109 should also be reconsidered in this context.

The Law Council is conscious that there are multiple aspects of this Bill which, in the time available, it has been unable to consider in detail. In this context, it raises Part 7, Division 8 (interaction with criminal procedure and confiscation proceedings). Subdivision B of Division 8 sets out limited operation powers to ensure the Commission is able to exercise its powers, and entities can still use and share investigative or derivative material in the event that some exercise of those powers, or some uses of that material, are declared invalid by a court. For example, clause 140 provides that the Commissioner's general power to issue notices to produce under clause 58 remains valid even if particular uses of that power were declared by a court to be invalid, including post-charge and post-confiscation application notices to produce.<sup>14</sup>

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<sup>10</sup> *Lee v The Queen* [2014] HCA 20 [28].

<sup>11</sup> *Ibid*, [32]-[33].

<sup>12</sup> 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>>.

<sup>13</sup> *Commissioner of the Australian Federal Police v Zhao* (2015) HCA 5 [17].

<sup>14</sup> See also the Explanatory Memorandum to the Bill, 194 [7.553] onwards.

The Law Council queries why the Bill is being drafted in a manner that anticipates that a court may find parts of it invalid. This approach would appear to underline the need for the Committee to recommend that a 'bright line' be drawn regarding the Commission's investigative role and the role of the prosecution and the courts in criminal charges, by removing the ability to exercise post-charge coercive powers and post-charge information sharing.

Contact

Thank you again for the opportunity for the Law Council to participate in this inquiry. The Law Council would be pleased to provide any further assistance the Committee may require.

Please contact Ms Leonie Campbell, Director of Policy, on (02) 6246 3754 or at [leonie.campbell@lawcouncil.asn.au](mailto:leonie.campbell@lawcouncil.asn.au) in the first instance if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink that reads "Tass Liveris".

**Mr Tass Liveris**  
**President**