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FOR CURTIN

National Anti-Corruption Commission Bill

Curtin Community Submission

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Federal Member for Curtin

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Introduction

The National Anti-Corruption Commission Bill 2022 ('the Bill') represents the first integrity commission model introduced in legislation into our Federal Parliament by a major party, after advocacy and legislation from the crossbench for a number of years and a significant campaign from a number of independent candidates in the lead-up to the May 2022 election.

Integrity was a key issue for Curtin in the May 2022 election, with a majority of voters surveyed indicating that it was one of their main drivers in deciding how to vote.

While a National Anti-Corruption Commission (NACC) is only part of the solution to rebuild trust in our government, it is a significant component, and my community commends the current Government for its introduction.

Finding the right model requires a balancing of interests – protecting the rights of individuals, while recognising the need for open investigation, to shine a light on how our governments operate and continually improve our systems to guard against corruption and to safeguard our democracy.

This submission reflects the views of the Curtin community. As well as informal conversations with constituents throughout the election campaign and since the election, the Curtin community has contributed to this submission through two events:

- **Integrity Forum**
On 12 July 2022, 130 Curtin constituents attended a forum to hear from Carmel McLure and Sam Vandongen about key aspects of an anti-corruption commission and the required balancing of interests. They also shared their own views, which fed into a summary document sent to the Attorney General (attached to this submission).
- **Interactive Policy Workshop**
On 13 October 2022, 50 Curtin constituents participated in a policy workshop, facilitated by eight lawyers, to learn more about the proposed model and share what they liked and what raised concerns in relation to key aspects of the Bill.
This submission summarises the feedback received at that event.

Thank you to all members of the Curtin community who have contributed to this submission. I ask the Committee to consider this feedback when identifying refinements to the proposed model to rebuild trust in our governments.

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Federal Member for Curtin

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FEDERAL MEMBER FOR CURTIN

Summary of Recommendations

1. That the phrase “public trust” be defined.
2. That the exemption from investigation be removed for: third parties that are performing delegated functions of public officials; and third parties whose conduct damages government but does not affect the exercise of a public official's powers.
3. That the ‘exceptional circumstances’ test in section 73(2)(a) be removed.
4. That the Commission be required to consider each of the factors included under section 73(3) in determining the public interest of public hearings and these are listed under separate sections.
5. That the review and update of the Public Interest Disclosure Act (2013) is completed before the NACC is operational.
6. That section 17 (Functions of the Commissioner) be expanded to include whistleblower protection.
7. That the term “journalist” be interpreted broadly in the application of the Bill.
8. That the Parliamentary Joint Committee on the National Anti-Corruption Commission is chaired by an Independent MP.
9. That the funding sought by the NACC and the funding allocated by the Government be made public each year.
10. That NACC powers of investigation cover online communication and resources.
11. That the phrase “sensitive information” is defined.

1. Scope of the Commission

1.1 Definition of corrupt conduct

The Bill contains a broad definition of corrupt conduct.

My community supports the broad and flexible definition, its inclusion of non-criminal activity and that it applies to “any person”.

Curtin expressed concern that the requirement for the conduct to be a “breach of public trust” was unclear and could be misinterpreted.

My community also suggested including a more specific definition of corrupt conduct in the Bill was an opportunity to articulate values expected of holders of public office.

Recommendation 1:

That the phrase “public trust” be defined.

1.2 Exclusion of third parties

Third parties may be excluded from investigation in some circumstances: when third parties performing functions of a governmental nature on behalf of or for public officials (e.g. outsourced functions like licence screening); and when third parties whose conduct damages government but does not affect the exercise of a public official’s powers (e.g. external fraud where the government is the victim).

A majority in my community thinks the NACC should be able to investigate third parties that are parties performing functions of a governmental nature on behalf of or for public officials.

Opinions in the community are divided whether the NACC should be able to investigate third parties whose conduct damages government but does not affect the exercise of a public official’s powers.

Recommendation 2:

Amend the Bill so that the NACC can investigate third parties that are performing delegated functions of public officials.

1.3 Application to conduct in the past

The NACC can investigate potential wrongdoing that occurred before the NACCs establishment. My community agreed this was important in the investigation of systemic corrupt conduct.

Some of my community queried the extent to which investigations into historical matters contributed to improving government function in the future. My community emphasised the need for the NACC to be focused on serious and systemic corrupt conduct with a view to system improvement, rather than ‘witch hunts’.

2. Public hearings

Section 73 provides that there are two tests the Commissioner must satisfy to decide to hold a public hearing: a public hearing test and an exceptional circumstances test.

2.1 Public vs private hearings

There were varying views in my community in relation to public hearings.

While many were concerned that public hearings may contribute to the destruction of reputation, risk to whistle-blowers and influence of the media, it is acknowledged that public hearings are part of the transparency required to rebuild trust. Public hearings will increase confidence in the process, encourage people to come forward with allegations and will demonstrate the work of the NACC.

2.2 Remove the “exceptional circumstances” test

My community believes that the requirement for exceptional circumstances AND the public interest test created an unnecessarily high bar for public hearings.

My community wants to see hearings in public when it is in the public interest. Most responders said that the factors listed in section 73(3) mean that a public interest test would be adequate.

They said an additional exceptional circumstances test is unnecessary, is not consistent with open investigations desired by the public and opens the section to legal challenge and delaying tactics.

Recommendation 3:

That the ‘exceptional circumstances’ test in section 73(2)(a) be removed.

2.3 Definition of public interest

My community believes that the factors to be considered in the public interest test, as listed under section 73(3), need to be considered by the NACC in deciding whether a hearing should be public.

Including each as a separate section, to be considered as part of the public interest test, would give appropriate emphasis to these factors once the exceptional circumstances test is removed.

Recommendation 4:

That the Commission be required to consider each of the factors included under section 73(3) in determining the public interest of public hearings and these are listed under separate sections.

3. Whistle-blower protections

Division 2 of the Bill includes specific whistle-blower protections which are like those contained in *the Public Interest Disclosure Act 2013 (Cth)*.

3.1 Extent of protections

Curtin is supportive of the inclusion of whistle-blower protections in the legislation.

My community said it was essential that the review and update of the *Public Interest Disclosure Act* (2013) is completed before the NACC is operational.

Recommendation 5:

That the review and update of the Public Interest Disclosure Act (2013) is completed before the NACC is operational.

3.2 Whistle-blower Commissioner

My community is concerned there is no dedicated commissioner for whistle-blowers. In the absence of a dedicated commissioner, the Commissioner could also serve in this role.

Recommendation 6:

Section 17 (Functions of the Commissioner) should be expanded to specifically include whistle-blower protection.

3.3 Journalists

My community is supportive of the protections afforded to journalists but has concerns as to whether non-professional writers or writers on non-traditional media platforms would also be covered.

Recommendation 7:

That the term “journalist” be interpreted broadly in the application of the Bill.

4. Oversight and Appointments

4.1 Oversight

The requirement for the Parliamentary Joint Committee on the National Anti-Corruption Commission (the “Committee”) to provide oversight of the NACC is outlined in Part 10 of the Bill.

A large proportion of my community is concerned that the Chair of the Committee is a Government representative, as this may politicise the function. My community suggested the Chair of the Committee be an Independent MP.

This is particularly relevant if the Chair of the Committee has the deciding vote.

Recommendation 8:

That the Parliamentary Joint Committee on the National Anti-Corruption Commission is chaired by an Independent MP.

4.2 Appointment

Part 12 of the Bill states the Governor General appoints the Commissioner, Deputy Commissioners and Inspector on recommendation of the Minister. The Parliamentary Joint

Committee on the National Anti-Corruption Commission (the “Committee”) has the right of veto over the appointment.

My community supports the requirement for a Commissioner to be a retired judge and be enrolled as a legal practitioner for at least 5 years. They are supportive of any measures to make the NACC bipartisan and non-political.

They are also supportive of the additional check and balance provided by the Committee’s ability to veto the appointment.

5. Resourcing

My community was concerned that the efficacy of the NACC may be reduced in the future, by starving it of resources. Whilst it was acknowledged that it is difficult to guarantee funding at a particular level into the future, this could be addressed through transparency.

Recommendation 9:

That the funding sought by the NACC and the funding allocated by the Government be made public each year.

6. Process

6.1 Commencing Inquiries

Provisions relating to the commencement of inquiries are found in Part 5, Division 1, 2 and 3; and Part 6, Division 1, Section 40 of the Bill.

My community is supportive of the mandatory referral pathways of Commonwealth Departments set out in the NACC.

My community expressed concerns about voluntary referrals to the Commissioner through public pathways due to there being no evidentiary threshold requirement of corrupt conduct and whether this will produce vexatious claims of corrupt conduct. But it is also acknowledged that as an ex-Judge, the Commissioner is likely to apply a materiality threshold in investigation decisions.

6.2 Powers of Investigation

Part 7 of the Bill states that the Commissioner will have a broad range of powers to investigate *serious or systemic corruption*.

My community supports the broad application of investigation powers as an essential element. They believe that investigative powers should apply to all platforms (including online communication and social media) and supported the application of the powers to past conduct.

Some concerns were raised about the process for issuing search warrants.

Recommendation 10:

That NACC powers of investigation cover online communication and resources.

6.3 Procedural fairness

The Bill does include some safeguards against the powers outlined in Part 7, including exclusion of sensitive information, opportunity to be heard, right to legal representation and the opportunity for judicial review.

My community believes it is important to strike a balance between the exposure and prevention of corruption and protecting against undue damage to a person's reputation. Some concerns have been expressed that the safeguards may not be broad enough to protect an individual from trial by media, reputational damage or politicisation of issues.

My community seeks a definition of "*sensitive information*" and an understanding of whether sensitive information would be excluded in entirety, or only during public hearings.

Recommendation 11:

That the phrase "sensitive information" be defined.