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The Committee Secretary
Joint Select Committee on National Anti-Corruption
Commission Legislation
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: NACC@aph.gov.au

Dear Sir/Madam,

***Inquiry into National Anti-Corruption Commission Bill and
National Anti-Corruption Commission (Consequential and Transitional
Provisions) Bill 2022 (Inquiry)***

Who we are

Governance Institute of Australia is a national membership association, advocating for our network of 43,000 governance and risk management professionals from the listed, unlisted, public and not-for-profit sectors.

As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

Our members have primary responsibility for developing and implementing governance frameworks in public listed, unlisted and private companies, as well as the public sector and not-for-profit organisations. They have a thorough working knowledge of the operations of the markets and the needs of investors. We regularly contribute to the formation of public policy through our interactions with Treasury, ASIC, APRA, ACCC, ASX, ACNC and the ATO.

In preparing this submission, Governance Institute consulted our standing Public Sector Governance Committee comprised of members currently and previously employed in governance roles at all levels of government.

Our interest in this area

Public integrity and good governance are closely related, with trust being the vital link between them. Good governance in the public sector means that Government is entrusted by the public to govern in and for the public interest, and not for improper or extraneous purposes. Corruption and other failures of integrity are the opposite of good governance and are symptoms of governance failure. Good governance practices and acting with integrity in the public sector will enhance public trust, while poor governance and a lack of integrity erode it.

Governance Institute's 2021 Ethics Index found that the perception of ethical behaviour on the part of government declined significantly from the previous year and that Federal politicians were among the occupations perceived to be least ethical. It also found a wide gap between the high importance Australians place on ethics in the public sector, and how ethically they believe those in public service do in fact conduct themselves.

Governance Institute has advocated for the establishment of a national integrity body for some time. In our February 2021 Submission commenting on the *Commonwealth Integrity Commission Bill 2021* we outlined the guiding principles our members consider essential for an effective anti-corruption body namely that it: establishes a best practice standard, using other Australian jurisdictions as the comparator, has a broad and comprehensive jurisdiction, with a wide scope of referrals and notifications, is independently funded, with clearly defined powers including the power to hold public hearings, has a strong and clearly defined prevention function and has proper oversight.¹

Comments on the *National Anti-Corruption Commission Bill 2022 (NACC Bill)*

Our members note that the NACC Bill includes many provisions that reflect the principles they consider fundamental to the establishment of an effective anti-corruption body. This submission only addresses our members key issues of concern relating to the NACC Bill. Our members have not considered the *National Anti-Corruption Commission Bill (Consequential and Transitional Provisions) Bill 2022*.

Key issues

Functions of the Commissioner

Our members consider that the scope of the Commissioner's functions in clause 7 of the NACC Bill should be expanded to give the Commissioner power to investigate not only corruption but also maladministration where there might be a 'reasonable suspicion of corrupt conduct'. This is because maladministration may not of itself involve corruption, but in combination with the existence of other factors and on closer investigation may actually involve corruption. In our members' experience there is a delicate balancing act between not going on unwarranted 'fishing' expeditions without sufficient basis for enquiry and being able to look at maladministration which on closer examination may identify the risk of corruption. Our members consider it would be prudent to err on the side of having the power to be able to carry out preliminary reviews of maladministration to avoid the risk of missing instances of investigating corruption and/or being able to refer instances of potential maladministration to relevant bodies.

Our members also consider, given the importance of the prevention function it would be useful to expand the Commissioner's functions to include the ability to conduct and report on public integrity surveys to ascertain perceptions and opinions about experiences of corruption in workplaces and their vulnerability to corruption. There should also be reporting on these surveys given that culture is ultimately the prime prevention mechanism for integrity, prevention and timely detection. It would also be helpful for the Commissioner to have the ability to recommend improvements in governance, because a culture of anticorruption is ultimately created by good governance.

Governance Institute recommends the scope of the Commissioner's functions be expanded to enable investigations of maladministration where there might be a 'reasonable suspicion of corrupt conduct'. The Commissioner's prevention functions should also be expanded to enable the Commissioner to conduct and report on public integrity surveys and to make recommendations for improvements in governance.

Public hearings

Clause 73(2) of the NACC Bill provides for a two-limb test for the holding of public hearings. To be able to hold a public hearing the Commissioner must be satisfied that 'exceptional circumstances justify' a public hearing **and** 'it is in the public interest' to do so. Our members consider there should be a single test for the holding of public hearings – the Commissioner

¹ See Submission Governance Institute of Australia, [Commonwealth Integrity Commission Bill Exposure Draft](#), 12 February 2021.

must be satisfied that it is in the public interest to do so. Our members consider the range of factors to guide the Commissioner's discretion outlined in in Clause 73(3) and the fact that Clause 73(4) does not limit Clause 73(3) act as suitable safeguards on the holding of public hearings.

While our members acknowledge there are legitimate concerns about the potential over use of public hearings, they consider they are an important feature of an effective anti-corruption body. As noted in the 2020 Transparency International/Griffiths University Study public hearings can be more effective than closed investigations for exposing wrongdoing and flushing out evidence that may be key to an investigation. They also create higher public awareness of corruption issues and maximise the deterrent effect of being 'caught' by the Commission.²

Governance Institute recommends there should be a single test for holding public hearings – the Commissioner is satisfied that it is in the public interest to do so.

Commission funding

In our February 2021 Submission we highlighted the importance of ensuring that the Commission be guaranteed sustainable funding to preserve its independence. Parliament, not the Executive Government, should be ultimately responsible for determining its funding. Any degree of influence or control over an anti-corruption body's funding, however remote, by the executive branch of Government is a potential threat to its independence.³

In the speech introducing the NACC Bill into Parliament the Attorney General referred to a Government commitment of \$262M over four years for the establishment and ongoing operation of the Commission.⁴ Our members consider that the NACC should have its own separate Parliamentary appropriation that is not tied to any portfolio.

Governance Institute recommends the NACC have its own separate Parliamentary appropriation not tied to any one portfolio.

Clause 235 Attorney General's certificate

In our February 2021 Submission we expressed concern about the Attorney-General having broad powers to prevent documents and other information from being given to or accessed by the Commission under the Commonwealth Integrity Commission Bill Exposure Draft.⁵ Our members note that under Clause 235 of the NACC Bill the Attorney General may give a certificate to prevent the disclosure of certain information that would be contrary to the public interest, and would otherwise be required to be disclosed under the NACC Bill. Certificates may be issued on very broad grounds, including if the information would harm Australia's defence, prejudice relations between the Commonwealth and states and territories, harm national security, prejudice a fair trial or the impartial adjudication of a matter, disclose the deliberations or decisions of Cabinet or one of its committees, or prejudice an investigation or inquiry into a contravention of a civil penalty provision under Commonwealth, state or territory law (with no minimum threshold set for the civil penalty provision).

Governance Institute members continue to question whether such broad ministerial powers are the most appropriate way to deal with difficult issues of national security and other important public interest matters. It would be concerning if the Attorney-General were to have these powers without appropriate safeguards. Appropriate safeguards might include an application by

² See [Australia's National Integrity System: The Blueprint For Action](#) at page 51.

³ See Governance Institute of Australia Submission, 12 February 2021 at page 3.

⁴ See Speech [National Anti-Corruption Commission Bill 2022](#), The Hon Mark Dreyfus KC MP, 28 September 2022.

⁵ See Governance Institute of Australia Submission 12 February 2021 at page 6.

the Minister to a judge of the High Court sitting in Chambers, or some other oversight mechanism that protects secrecy while ensuring ministerial discretion is not unfettered.

Governance Institute recommends the NACC Bill incorporate appropriate safeguards in relation to the Attorney General's ability to issue a certificate under Clause 235.

Whistleblowing

Whistleblowing is a key aspect of fighting corruption and Governance Institute is a long-time supporter of the reform of Australian whistleblower protection laws. We consider the 2019 amendments to consolidate and broaden the protections and remedies for corporate and financial sector whistleblowers in the Corporations Act, were an important first step in improving the Australian regime. We have also consistently advocated for the establishment of a separate Ombudsman or Office of Whistleblowing as an effective advocate for whistleblowers.⁶ This was also one of the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services Report *Whistleblower Protections*.⁷ Governance Institute's members consider that there is an opportunity to enhance the role of the NACC by also giving it a role in relation to whistleblowers which would enhance its ability to fight corruption and fill an important gap in the current Australian whistleblower protection regime.

Governance Institute recommends that that the role of the NACC be enhanced to give it a role in relation to whistleblowers which would enhance its ability to fight corruption and fill an important gap in the current Australian whistleblower protection regime.

If you wish to discuss any of the issues raised in this letter, please contact me or Catherine Maxwell.

Yours faithfully,



Megan Motto
CEO

⁶ See for example, Governance Institute's [submission Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors](#), 10 February 2017 at page 21.

⁷ See [Whistleblower Protections](#), Parliamentary Joint Committee on Corporations and Financial Services, September 2017 at page xiii.