

Review of the Crime and Corruption Commission's activities

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Parliamentary Crime and Corruption Committee
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By email: pccc@parliament.qld.gov.au

Re: Review of the Crime and Corruption Commission's Activities

Dear Chair

We thank you for your opportunity to make a submission. In this submission, we make one broad recommendation. We recommend that the CCC Act be changed so that the powers of the Commission to reduce corruption and improve the integrity of the public sector are clearer and more explicit. Some changes would include amendments to both Section 5 and Part 3 of the CCC Act to better support the powers of the CCC in improving integrity and reducing corruption. This would point to powers beyond those of investigation, for instance the power to report to Parliament and educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community. It also would seek to focus the Commission more clearly on public sector corruption.

In making these recommendations, we draw on relevant practice from the last forty years of anti-corruption oversight in Australia as well as the *Fundamental Principles of Australian Anti-Corruption Oversight* ('Fundamental Anti-Corruption Principles') that were agreed upon by all Australian anti-corruption commissions in July 2024.¹

¹ National-Anti-Corruption Commission, *Fundamental Principles of Australian Anti-Corruption Oversight* (Media Release, 31 July 2024) <<https://www.nacc.gov.au/news-and-media/fundamental-principles-australian-anti-corruption-commissions>>.

Anti-Corruption Commissions as Independent Parliamentary Agents of Responsible Government

In Australian democracy, Parliament bears primary responsibility for overseeing the exercise of power by public officials in the executive branch. This system of 'responsible government' requires Parliament to oversee the executive on behalf of the public. This role includes the generation of critical information and publicity that holds the government politically accountable. As the High Court stated in *Egan v Willis* (1998):

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account so that 'the Executive's primary responsibility in its prosecution of government is owed to the Parliament'. . . . It has been said of the contemporary position in Australia that, whilst 'the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people' and that to secure accountability of government activity is the very essence of responsible government.²

Parliament's oversight function also ensures that public officials exercise power in the interests of the public.³

As the executive branch has grown in size and complexity, Australian responsible government has evolved. In particular, Parliament has created independent statutory agents such as anti-corruption commissions (ACCs) to help it oversee the exercise of executive power. These independent statutory agencies – of which the Crime and Corruption Commission (CCC) is one – are part of an evolving Australian constitutional system that allows Parliament to continue to fulfill its constitutional purpose of overseeing the exercise of power by the executive branch.

The appropriate powers of ACCs must be understood in light of their constitutional purpose to ensure responsible government. Responsible government is a constitutional norm that operates primarily through political accountability.⁴ This political accountability relies on providing information to voters about the exercise of public power so that they can assess and potentially sanction those in power by voting against them at the next election. As 'independent parliamentary agents of responsible government', ACCs are neither courts nor prosecutors that focus on punishing individuals for violating the law.

Instead, as agents of political accountability, the primary role of ACCs is to investigate, prevent, and educate parliament and the public on corrupt conduct in the public sector. In their investigatory role, they might (and often do) uncover evidence of criminal conduct. But they do

² *Egan v Willis* (1998) 195 CLR 424, 541 (Gaudron, Gummow and Hayne JJ).

³ See further explanation of this concept in Paul Finn, 'The Forgotten Trust: The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) ch 5; Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government* (1995) vol 1, 1.

⁴ Benjamin Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Bloomsbury Publishing, 2023) 182.

not prosecute or make findings of guilt or innocence; instead, they refer this evidence to the appropriate prosecutorial authorities to determine if criminal prosecution is warranted. Their primary purpose is to scrutinise the exercise of public power and report to Parliament (and the public) on any breaches of the public trust.

The High Court explained this role in the early 1990s, describing how the principal functions of NSW's Independent Commission Against Corruption 'involve the investigation of corrupt conduct, the education of the community, public authorities and public officials concerning corrupt conduct and the means whereby it might be eliminated, and the enlisting and fostering of public support in combating corrupt conduct.'⁵ ACCs therefore do not just perform their duties through investigations; they also carry out their anti-corruption work by researching and educating the public and public sector on breaches of the public trust. Principles 7 and 8 of the Fundamental Anti-Corruption Principles demonstrate this purpose, stating that ACCs must have powers to 'make recommendations . . . that relate to addressing corruption vulnerabilities and risks . . . [as well as] give insight into their operations . . . through the ability to report on investigations and make public statements.'⁶ These considerations underpin the recommendation we make for amending the CCC Act.

Recommendation 1. Amending CCC Act to make the corruption and integrity purpose clearer

As independent parliamentary agents, the primary focus of Australian ACCs is suppressing corruption and increasing public confidence in governance. Grant Hoole and Gabrielle Appleby argue that a 'specialised' model that focuses exclusively on this purpose is best.⁷ This specialised focus avoids a situation where additional duties 'confuse the core purpose' of the ACA.⁸

The CCC Act does not create a specialised anti-corruption commission. Instead, it establishes a Crime and Corruption Commission with two key purposes. Its first major purpose is 'to combat and reduce the incidence of major crime.' (Section 4(1)(a)). Its other major purpose is 'to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.' (Section 4(1)(a)). In defining 'corrupt conduct', the CCC includes non-criminal conduct that is a 'disciplinary breach.' (Section 15). These two purposes make the Commission *both* a major crime investigation commission as well as a corruption prevention agency. In playing these two roles, the CCC is empowered to both work with and oversee the police.

⁵ *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

⁶ National Anti-Corruption Commission, *Fundamental Principles of Australian Anti-Corruption Oversight* (Media Release, 31 July 2024) <<https://www.nacc.gov.au/news-and-media/fundamental-principles-australian-anti-corruption-commissions>>.

⁷ Grant Hoole and Gabrielle Appleby, 'Integrity of Purpose: A Legal Process Approach to Designing a Federal Anti-Corruption Commission' (2017) 38 *Adelaide Law Review* 397, 418–20.

⁸ *Ibid* 420.

Combining both functions in one commission has important efficiency benefits. But these benefits also have costs.

First, combining these different purposes in one agency can ‘raise[] unnecessary ambiguity for officials tasked with interpreting and operationalising the legislative framework.’⁹ With these different responsibilities, it can be difficult for the leadership to understand how best to allocate scarce resources.

Second, this combination can also skew the Commission to look for individualised, criminal forms of corrupt conduct. This can lead to less emphasis placed on combatting systemic forms of soft corruption that do not rise to the level of a criminal offence. This failure to focus on more systemic forms of softer corruption will undermine the ability of the CCC to play its central role in holding the executive to account politically for its exercise of political power.

We therefore recommend that the CCC Act be amended to overcome some of these problems and support the anti-corruption purposes and powers of the CCC.

First, changes could be made to Section 5 of the CCC Act which is titled ‘How Act’s purposes are to be achieved.’ This section is currently heavily focused on the major crime part of the Commission’s purpose. Additional sections should be added that focus specifically on ways of reducing corruption and improving integrity in the public sector. This might include explicit reference to importance of the education, broader research, and broad reporting functions of the Commission. These types of amendments would also provide broader support to the important legislative amendments made after the *CCC v Carne* case in the Australian High Court.

Second, additional changes could be made to Part 3 that more clearly describe the ‘corruption functions’ of the CCC. This could include more explicit powers to carry out broad-based research and educate public authorities, public officials and members of the public about corruption. It also might include creating a dedicated police oversight division within the CCC (as has been recommended in Victoria) or, even better, legislating to create a separate and stand-alone police oversight body. NSW practice is instructive on this final point. In 2016, police oversight was taken away from the NSW anti-corruption commission (ICAC) and transferred to a new stand-alone Law Enforcement Conduct Commission (LECC). This was done to ensure more effective police oversight as well as to allow the ICAC to better focus on its anti-corruption purposes.

Yours Sincerely

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⁹ Ibid 420.