# Submission: National Anti-Corruption Legislation

## Introduction

This is a submission to the Joint Select Committee on National Anti-Corruption Legislation.

The debate on the subject matter of the legislation has been unsatisfactory. It started from the premise a commission is needed, with argument about activities a commission might undertake.

The better approach is to identify problems to be addressed, functions that address those problems and, last of all, where those functions might best be placed.

Such an approach would expose the contradiction at the centre of the current Bill: how can corruption be such a serious issue that it deserves a new commission and a budget of several hundred million dollars for the next few years, yet is not serious enough to be called a crime?

Based on that better approach, this submission recommends alterations to the Bill to establish:

1. corruption as a criminal offence;

2. a corruption court to conduct relevant trials;

3. a commission to conduct prosecutions in such trials and educate about corruption.

These are addressed in sections 1 to 3. Section 4 draws conclusions and some other comments.

Further background will soon be at the jadebeagle.com website.

Comments and corrections are welcome.

## 1. Corruption as a criminal offence

The issue identified in the Bill is: detrimental effects of dishonest activities on public administration and the Australian community.[[1]](#footnote-1)

The underlying problem is: loss of public confidence in Australia’s democratic institutions.

The matter in present question is corruption affecting the public sector.

Former High Court Chief Justice Gleeson identified the essential element of NSW anti-corruption legislation to be deliberate misuse of power which is given for public benefit and is, instead, used for some extraneous and wrongful purpose. That generally accords with Transparency International’s view of corruption.[[2]](#footnote-2)

Such dishonest misbehaviour undermines confidence in democratic institutions. It can damage public trust in government. That is a compelling reason for corruption to be classed as criminal. Treating corruption as anything other than criminal diminishes the importance of upholding democratic institutions.

Gleeson noted the word corruption is a general description applied to a category of criminal offences. He relayed an observation that the public would assume a finding of corrupt conduct meant what it said and was not based on some artificial construct.

That indicates a further compelling reason for corruption to be classed as criminal. The upholding of confidence in democratic institutions relies on public understanding about laws. To the extent laws depart from what is publicly understood because of unusual definitions of words, there is a risk of disquiet – the public feeling ‘tricked’ into allowing what may not have otherwise been accepted.

The public understands corruption to be criminal. Treating it as anything other than criminal is inconsistent with addressing the underlying problem and the objects of the Bill.

## 2. Corruption court

Public exposure of corruption is an effective deterrent to such misbehaviour.

Criminal offences should be tried and determined in courts. Trials and determinations should be, and generally are, public. Such public trials and determinations publicly expose crimes and criminal behaviour. Necessarily, they expose serious allegations of such behaviour. A trial in a criminal court is fully consistent with, and supportive of, public exposure of a crime.

Some trials attract very substantial public and media interest. Allegations and convictions make headlines, lead news broadcasts and occupy much media-based commentary and discussion.

Punishments meted by courts provide important ‘demonstration effects’ discouraging others from misbehaviour.

Some participants in the present debate claim an anti-corruption commission should be given powers to mirror these demonstrations. However, such mirroring would, at best, be tangential to addressing the underlying problem and issue identified in the Bill (section 1, above).

Reputations of individuals will be adversely affected by a corruption finding or even allegation. Proponents of a commission having powers to make corruption inquiries and findings public acknowledge this in comments like:

*‘Reputation is important. But so is the demonstration effect of exposing and punishing official corruption’.*[[3]](#footnote-3)

That comment’s reference to punishing is problematic. In democracies, punishment is an exclusive task for courts. It had been common ground for a Commonwealth anti-corruption commission to not be given punitive powers because it is not to be a court.

The comment about exposure etc. may refer to practical effects e.g., public hearings by a commission into allegations is a punishment in itself. If so, it supports a type of extra-judicial punishment including for matters neither Parliamentary nor other law regard as criminal. That is inconsistent with democratic principles.

Among its many problems, extra-judicial punishment through exposure etc. can and does inhibit criminal trials. Examples include claims made under Parliamentary privilege, contempt of court and trial-by-media delaying proceedings. The seriousness of jeopardy placed on trials - and therefore the undermining of public confidence in democratic institutions - can be associated with the position held by those making exposures and offering extra-judicial opinions on matters the public perceives as criminal.

The comment also is suggestive that an anti-corruption commission’s performance should be measured by ‘demonstration effects’. That implies a view such a commission should seek public attention including via the mass media. One danger of an organisation seeking public attention is an institutional incentive for its focus to skew towards cases of media interest. Another danger is underestimation of the importance of claims of corruption involving the media such as it operating a ‘shadow government’.[[4]](#footnote-4)

While-ever corruption is considered by the public as criminal there is no reason for – and compelling reasons against - an anti-corruption commission being able to hold public hearings or make public findings on corruption. The proper place for such hearings and findings, which will involve public exposure, is the courts.

Given the importance that should be placed on minimising corruption, this implies legislation should establish a corruption court or a corruption division of the Federal court.

## 3. Anti-corruption commission as investigator and prosecutor

Courts hear and determine matters, including allegations about criminality, brought to them by others. Court proceedings involve opposing parties contesting allegations.

Courts do not initiate such contests. They do not initiate prosecutions. They do not undertake investigations to produce evidence to support prosecutors or defendants.

The establishment of a corruption court to deal with allegations of corruption would not address all the functions necessary to deal with corruption. Among the functions it would not address are detection, investigation and initiation of prosecutions. Nor would it address broader education and advice to officials on how to avoid corruption.

Some of those functions may currently be undertaken by police forces and by public prosecutors. Others, like education and advice, are likely not.

This submission does not comment on what powers are needed for those functions, other than to observe there are debates about matters such as phone tapping, search warrants, compulsory private questioning of witnesses. Nor does it comment on financial and staff resources required.

The importance of addressing corruption of the public sector – consistent with making it a crime – and the nature of potential corrupt activity suggest such functions should be undertaken by dedicated organisations subject to overview by independent experts on behalf of Parliament.

There are likely synergies between some of those functions, especially between detection and broader education and advice, and between investigation and initiation of prosecutions.

Enabling a corruption investigator to initiate prosecutions is of particular importance to reduce apparently unacceptable delays in corruption proceedings seen, for example, in NSW. Simply, it is needed to overcome the problem that justice delayed is justice denied.[[5]](#footnote-5)

There is substantial merit in such functions being conducted by a single organisation – an anti-corruption commission.

## 4. Other comments and conclusions

### 4.1 Misplaced debate

The issue of corruption of public authorities needs to be taken more seriously than is apparent in the current debate.

The issue is not the powers of an anti-corruption commission. Assuming that to be the issue would be a grave mistake that avoids the challenge corruption poses to democratic principles.

Rather, the question is: what functions are needed? Only after that is answered can there be a proper answer to the question of where those functions should reside.

Unfortunately, my perception is the debate has been distorted to what an anti-corruption commission might do. This is illustrated by arguments to give a commission ‘maximum scope’.

One such argument is to allow a commission to investigate corruption that occurred prior to its commencement. Supposedly this does not infringe principles against retrospective laws because police have similar powers. However, that argument is misleading because the Bill goes beyond investigation of breaches of pre-existing laws and into a creating a new law of corruption.[[6]](#footnote-6)

Another maximum-scope argument is the commission should hold public hearings and make corruption determinations.

Both arguments – retrospectivity and public hearings and determinations - lead to a conclusion that corruption should not be considered a crime. They further lead to a conclusion that the Bill’s purpose of defining corruption – as a type of punishable non-crime - is to give the commission something more to do.

Not only do such conclusions fly in the face of views a commission should deal with ‘serious’ corruption but they, and therefore the arguments behind them, are anathema to the challenge.

Were the focus to shift to functions, the common ground would be seen – corruption should be exposed and should be punished. Then the correct question could be framed: which type of organisations are best positioned – in our democratic traditions – to expose and to punish corruption? The answer: criminal courts.

### 4.2 Other comments

Three other comments should be noted.

First, the public debate reported in the media has ignored objective evidence of performance of existing anti-corruption bodies in the States and of the location of functions of exposure and ‘punishment’ in them. Rather, their mere existence appears posited as proof of success. In that regard, indicators such as the ratio of ‘successful’ prosecutions to other statistics, time lags between investigations and judicial determinations, and the extent to which measured corruption has decreased since those bodies commenced should be publicly analysed prior to acceptance of proposals for the Commonwealth.

Second, it is the impression – perhaps false – that much of the discussion relates to the shallow-end of the (potential) corruption pool. That NSW has, as a result of a Royal Commission, an additional, special, anti-corruption commission for its police force does not appear to be a vote of confidence into arrangements for its Commission. That it took over three decades to bring ‘pork-barrelling’ to prominence, and the little if any reporting of investigations etc. of apparently serious claims involving media influence on politicians and officials, adds to that impression. Any Commonwealth model of corruption fighting should demonstrably deal with the defects that led to such results and impressions.[[7]](#footnote-7)

Third, the concern about corruption of the public sector arises from the deliberate – dishonest - flouting of the law by those most entrusted to uphold it. The present debate has been energised by allegations of pork-barrelling as a form of dishonest spending. However, at the Commonwealth level pork-barrelling may not be the only, perhaps even main, dishonest spending. For example, claims Constitutional requirements for Commonwealth spending have been ignored are far more serious because of their prevalence, scale and Constitutional risk. Such claims strike against core elements of the system of government and have been called democratic decay by Professor Twomey. Parliamentarians would do well to address this in advance of legislating any further anti-corruption activities.[[8]](#footnote-8)

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17 October 2022

1. Bill, s.3d.

   [↑](#footnote-ref-1)
2. Gleeson: <https://www.oiicac.nsw.gov.au/assets/oiicac/reports/other-reports/Independent-Panel-Review-of-the-jurisdiction-of-ICAC-2015-Report.pdf> [↑](#footnote-ref-2)
3. <https://johnmenadue.com/non-believers-the-timid-and-party-rorters-have-got-at-corruption-bill/> [↑](#footnote-ref-3)
4. <https://theconversation.com/right-wing-shock-jock-stoush-reveals-the-awful-truth-about-covid-politics-and-media-ratings-164489> and <https://newsroom.unsw.edu.au/news/law/rational-law-reform-still-possible-shock-jock-world>

   [↑](#footnote-ref-4)
5. ICAC%20prosecution%20outcomes\_web%20table\_1%20June%202022\_FIN.pdf. [↑](#footnote-ref-5)
6. <https://johnmenadue.com/the-nacc-bill/> [↑](#footnote-ref-6)
7. <https://www.australianpolice.com.au/wp-content/uploads/2017/05/RCPS-Report-Volume-1.pdf>; <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/lecca2016353/s9>; <http://www.lecc.nsw.gov.au/what-we-do/who-we-are-and-what-we-value/our-legislation> [↑](#footnote-ref-7)
8. <https://johnmenadue.com/restoring-integrity-to-commonwealth-infrastructure-spending/> [↑](#footnote-ref-8)