



Office of the President

1 November 2022

Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Chair

Review of Item 250 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

The Law Council welcomes this opportunity to provide feedback in relation to the review by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) into Item 250 of the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (**the Consequential Bill**).

Background

Item 250 of the Consequential Bill amends the definition of criminal law-enforcement agency, contained in section 110A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**the TIA Act**), to remove reference to the Australian Commission for Law Enforcement Integrity (**ACLEI**) and insert a reference to the National Anti-Corruption Commission (**NACC**).

In short, the significance of the definition of criminal law-enforcement agency is that a criminal law-enforcement agency may:

- **access stored communications**¹—including the ability to apply for preservation orders in relation to stored communications;² apply for stored communication warrants;³ deal with accessed information;⁴
- **access telecommunications data**⁵—as a criminal law-enforcement agency under paragraph 110A(1)(c) of the TIA Act, the NACC would also be an enforcement agency under section 176A of that Act. As an enforcement agency

¹ Stored communications include communications such as email, SMS, or voice messages stored on a carrier's equipment.

² section 107H of the TIA Act (domestic preservation notices).

³ section 110 of the TIA Act.

⁴ section 138 of the TIA Act.

⁵ Telecommunications data does not include the content of a telecommunications communication but includes its meta-data. This might include the source and destination of a communication, the time and duration of its connection and the location of the equipment used in connection with a communication.

under section 176A, the NACC would be authorised to obtain telecommunications data under Chapter 4 of the TIA Act;⁶ and

- **access telecommunications data pertaining to journalists**—notably, where the NACC seeks telecommunications data that relates to a person who is working in a professional capacity as a journalist, or their employer, for the purpose of identifying an informant, the NACC would require a journalist information warrant under section 180T prior to making an authorisation under Chapter 4 of the TIA Act.

Investigation thresholds

The National Anti-Corruption Commission Bill 2022 (**NACC Bill**) as currently drafted proposes that the Commissioner may only conduct, or continue to conduct, a corruption investigation if the Commissioner is of the opinion that the issue could involve corrupt conduct that is serious or systemic.⁷

As a designated criminal law enforcement agency, a determination by the Commissioner to conduct an investigation has the potential to invoke powers under the TIA Act, which has its own applicable thresholds (see below).⁸

As background, the Law Council has made a number of recommendations to the Joint Select Committee on National Anti-Corruption Commission Legislation (**Joint Select Committee**) in relation to the ability for the Commissioner to commence an investigation.⁹ This includes proposals in relation to:

- providing greater certainty within the proposed definition of ‘corrupt conduct’ in the NACC Bill;¹⁰
- placing limitations on investigations into conduct that occurred prior to the establishment of the NACC;¹¹
- removing from the definition of a ‘corruption issue’ the reference to whether a person *will* engage in corrupt conduct;¹² and
- amending the threshold for investigation by the Commissioner under to a ‘reasonable suspicion’ that the corruption issue involves corrupt conduct that is serious or systemic.¹³

The Law Council refers the PJCIS to its written submission to the Joint Select Committee should it require further details with respect to these threshold matters.

⁶ Relatedly, Items 252-260 seek to ensure that the international production order regime would apply to the NACC consistently with the way in which it currently applies to ACLEI. The Law Council does not comment on this aspect of the Bill on the basis that it is outside the scope of the Terms of Reference of this review.

⁷ NACC Bill, section 41(3).

⁸ For example, Item 228 of the Consequential Bill substitutes NACC for ACLEI in sub-paragraph 6A(1)(c)(ia) of the TIA Act which contains the definition of an ‘investigation of an offence’ to include an investigation of an offence by ACLEI. Item 221 replaces NACC for ACLEI in the definition of ‘prescribed investigation’ which includes a corruption investigation within the meaning of the NACC Bill.

⁹ Law Council of Australia, *National Anti-corruption Commission Bills 2022* (Submission, 14 October 2022) 57-60 <<https://www.lawcouncil.asn.au/resources/submissions/national-anti-corruption-commission-bills-2022>>.

¹⁰ Ibid, 12.

¹¹ Ibid, 16.

¹² Ibid.

¹³ Ibid, 25

Powers under the TIA Act

The Law Council set out its position on proposed covert surveillance powers for the NACC in its submission to the Joint Select Committee.¹⁴ Generally, in relation to the NACC's proposed covert investigative powers, noting that they are currently available to the ACLEI, and that the standard thresholds for their exercise would apply, the Law Council does not object in principle to these powers being exercised by the NACC.

However, the Law Council has for some time raised concerns about the adequacy of thresholds more generally in relation to electronic surveillance, which are again relevant in the context of the proposed NACC. In this regard, the Law Council refers to its detailed submissions in relation to the proposed redesign of Australia's patchwork of electronic surveillance legislation.¹⁵

Specifically, and in the short term, the Law Council has recommended that the TIA Act should be amended to at least address the following issues:

- **Issuing authorities**—Only superior court judges should be eligible for appointment as issuing authorities for all types of surveillance warrants, and section 6DB of the TIA Act should be amended accordingly. Alternatively, as a minimum, the power to issue warrants authorising the most intrusive surveillance powers should be limited to superior court judges who are appointed in their personal capacities;¹⁶
- **Oversight**—Chapter 4A of the TIA Act should be amended to confer on the Commonwealth Ombudsman a standing function of review, including the ability to conduct own-motion reviews, in relation to the exercise of electronic surveillance powers to ensure that recurring areas of non-compliance are addressed.¹⁷
- **Necessity and proportionality**—In the context of any amalgamation of TIA Act electronic surveillance warrant types, recommendation 80 of the Richardson Review should be implemented in relation to any new warrant types. Namely, electronic surveillance should only be authorised where it is necessary for, and proportionate to, the purposes of an investigation;¹⁸ and
- **Thresholds**—Under section 116 of the TIA Act, a stored communication warrant may be issued if there are reasonable grounds for suspecting that a particular carrier holds stored communications that the person has made and the information that would be likely obtained in connection with the investigation by the agency of a 'serious contravention'. This threshold is defined by reference to certain offences and their corresponding penalties. The Law Council has previously noted its preference that higher penalty thresholds are established to ensure that these

¹⁴ Ibid, 57.

¹⁵ Law Council of Australia, *Reform of Australia's Electronic Surveillance Framework: Discussion Paper* (Submission to the Department of Home Affairs, 18 February 2022) <<https://www.lawcouncil.asn.au/resources/submissions/reform-of-australias-electronic-surveillance-framework-discussion-paper>>.

¹⁶ Ibid, 33.

¹⁷ Ibid, 41.

¹⁸ Richardson Review, *Unclassified Report*, Vol. 2 (December 2019) 285-288 <<https://www.ag.gov.au/system/files/2020-12/volume-2-authorisations-immunities-and-electronic-surveillance.PDF>>.

extensive powers are used sparingly and only when they are proportionate to the seriousness of the offence.¹⁹

In the long term, and in the context of the proposed redesign of Australia's patchwork of electronic surveillance legislation, the Law Council encourages broader consideration of its submission on electronic surveillance reform regarding the need to ensure that harmonised electronic surveillance thresholds build in necessity and proportionality as conditions that must be fulfilled for a warrant to be issued.

Journalist Information Warrants

The Law Council refers the PJCIS to its earlier submission to this Committee regarding the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press (**PJCIS Press Freedom Report**).²⁰

In general, the Law Council's position is that warrants should only be issued in relation to journalists and media organisations where they are authorised by a judge of a superior court of record.²¹ Further, the role of the public interest advocate for the purposes of Journalist Information Warrants sought under Chapter 4, Part 4-1, Division 4C of the TIA Act should be strengthened by including further transparency and accountability mechanisms.²²

While the Law Council appreciates that this inquiry is not the appropriate forum to consider all of the recommendations in the PJCIS Press Freedom Report, the Law Council highlights those recommendations relating to strengthening of the role of the public interest advocate for the purposes of Journalist Information Warrants sought under Chapter 4, Part 4-1, Division 4C of that Act, namely:

- **Setting out qualifications in primary legislation**—setting out minimum qualifications for public interest advocates in primary legislation;²³
- **Power to request information**—authorising the public interest advocate to clarify elements of the warrant application provided by a law enforcement agency to enable the case to be built in their submission;²⁴ and
- **Additional recordkeeping and reporting requirements**—additional information should be collected and included in the Minister's annual report on the use of the TIA Act including, for example, the number of cases where a public interest advocate contested a warrant application, the number of cases where a public interest advocate attended the hearing of a verbal application for a warrant, and the number of cases where a warrant was not issued after being contested by a public interest advocate.²⁵

¹⁹ Law Council of Australia, *Reform of Australia's Electronic Surveillance Framework: Discussion Paper* (Submission to the Department of Home Affairs, 18 February 2022), 21

²⁰ Law Council of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Submission to the Parliamentary Joint Committee on Security and Intelligence), 7 August 2019 <<https://www.lawcouncil.asn.au/resources/submissions/inquiry-into-the-impact-of-the-exercise-of-law-enforcement-and-intelligence-powers-on-the-freedom-of-the-press>>.

²¹ *Ibid* [32-34].

²² *Ibid* 38-39.

²³ Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (August 2020), 78-83.

²⁴ *Ibid*.

²⁵ *Ibid* 83-85.

Further information

Please contact [REDACTED], Director of Policy on [REDACTED] or at [REDACTED] in the first instance if you require further information or clarification.

Yours sincerely

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Tass Liveris
President