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

Submission made to the Parliamentary Joint Committee on Intelligence and Security
on behalf of

Dr. William A. Stoltz, Policy Director, ANU National Security College

Introduction

I would like to thank the Committee for the opportunity to provide this submission to this important inquiry. For the avoidance of doubt, the views conveyed in this submission are those of the author alone and should not be taken to represent an institutional position on behalf of the National Security College, nor the Australian National University.

While this submission focuses specifically on the National Anti-Corruption Commission's proposed inclusion in *Telecommunications (Interception and Access) Act 1979*, I have lodged a separate submission with the Joint Select Committee on National Anti-Corruption Commission Legislation for their wider inquiry.

This submission draws particular attention to the potential negative effects arising from the NACC's use of the TIA Act's interception powers upon members of the Commonwealth Cabinet; namely the impact such interception could have on Cabinet and national security decision making.

In this submission, I argue that special safeguards need to be established for when an investigation seeks to use interception powers in relation to a Cabinet member or Cabinet and national security information. I suggest such safeguards could include the establishment of new 'serious corruption offences' or imposing additional obligations on the NACC Commissioner and authorising officers to pay due regard for the potential disruptive effect investigations may have on Cabinet decision-making.

Thank you for the opportunity and for the time taken by the Committee and the Secretariat to consider this submission. I regret that I was not able to offer the Committee a more comprehensive submission in the time available.

Sincerely,

Dr. William A. Stoltz

Policy Director

National Security College, ANU

Investigations interacting with Cabinet and national security decision-making

It is essential to the proper functioning of our government that members of Cabinet are able to fulsomely and critically assess all aspects of the policy decisions put before them, free from external pressures or vested interests. For this reason, Cabinet confidentiality - which typically includes a moratorium of twenty years or more on the release of Cabinet documents - is a key tenet of our Westminster system.

Ideally, within the sanctum of Cabinet, the Prime Minister and their ministers are able to scrutinise the efficacy, probity, and legality of all manner of policy options in order to form a consensus around the best possible course of action for the nation. Knowing that these deliberations will be confined to a select group of Cabinet members and public servants, and that they will not be unduly disclosed, facilitates frank deliberations and the creation of contemporaneous records that can be publicly scrutinised at the appropriate time following release by the National Archives of Australia. Of the deliberations that Cabinet members must make, the most sensitive invariably concern matters of national security. The interaction of NACC investigations with the Prime Minister and other Cabinet members must therefore be handled with the greatest care.

Interception of communications relating to active Cabinet deliberations - that is to say, decisions that have yet to be finalised - could cause a serious chilling effect whereby Cabinet ministers refrain from asking for particular advice or creating proper records for fear that doing so could be misconstrued by the NACC.

Even if an investigation concerns a minister's staff or their use of discretionary powers - and therefore not necessarily their interactions with Cabinet or national security decision making - there will still be a high chance that the NACC will engage in incidental interception of Cabinet and/or national security information. Incidental interception and retention by the NACC will take the Cabinet or national security information outside of the select circle of officials for whom it was intended, potentially inadvertently increasing the risk that this sensitive information could be inappropriately disclosed or accessed, including by foreign intelligence services. For this reason it is essential that this Committee be satisfied that the NACC can be reasonably expected to obtain the resources and requisite specialist staff in order to appropriately operationalise these extraordinary powers.

Due to the potential chilling effect on Cabinet confidentiality and the potential risk to national security information, additional safeguards are required prior to the NACC being able to undertake interception activities that could directly or incidentally lead to the collection of Cabinet or national security information.

Further attention needs to be paid to the foreign espionage risk arising from the NACC's potential collection of information on Commonwealth officials, especially Cabinet members. The likely methods of collection available to the NACC will at times be especially invasive, and extreme caution should be taken before allowing them to be used in relation to the Prime Minister or other Cabinet ministers so as to not create unnecessary additional stores of information that would be highly sought after by foreign intelligence services. In particular, in order to circumvent encryption and other communication protections that are now nearly ubiquitous, the NACC will likely have to deploy collection methods to gain access to the devices on which protected communications are occurring. These methods could not only collect sensitive Cabinet and national security information but information that, in the hands of a malicious actor, could be used to compromise the safety and security of members of Cabinet or that of their family, friends or staff.

It should be noted that if the NACC uses its powers consistent with the methodology of other agencies, it will likely also seek approval to target individuals adjacent to the primary subject(s) of the investigation, such as their family, colleagues, or constituents (in the case of elected officials). There are a number of issues arising from the potential use of these powers against the Prime Minister and other Cabinet ministers in particular. For one, it is unclear what obligations, if any, the Commissioner would be under to notify the AFP or ASIO that they were commencing such operations in relation to a Cabinet member and to consider what impact this could have on the work of the AFP and ASIO in relation to their efforts to protect Cabinet members from physical harm and foreign espionage. For example, where a Cabinet member has been assigned an AFP protective detail it is not apparent that the protective service officers must be notified by the NACC prior to the commencement of interception relating to the Cabinet member.

Furthermore, instead of defining which Commonwealth corruption offences will be serious enough to justify extraordinary powers being used in relation to Cabinet members, the Bills rely on existing definitions of so-called 'serious crime'.¹ This is problematic because these definitions of serious crime weren't drafted to accommodate Commonwealth corruption investigations potentially targeting Cabinet officials or being used to collect Cabinet and national security information. For example, the interception and stored communication warrants available to the Commissioner under the TIA Act can be authorised by a Judge or ATT member without any consideration for the investigation's wider impact on the functioning of Cabinet. This means they could conceivably ignore important considerations about sensitive information and Cabinet government that are unique to the investigation of corrupt conduct at the Commonwealth level.

Investigations into serious crimes that concern Commonwealth corruption arguably should be treated differently from other serious offences. One option would be for the Bills to lay out more specifically that where a Judge or ATT member is considering a NACC warrant they must:

- Be advised as to the likelihood of the investigation interacting with a Cabinet member or their staff; and
- If the investigation will be interacting with these people, the authorising officer must have regard for the investigation's potential to breach Cabinet confidentiality or otherwise disrupt the proper functioning of the Cabinet.

However, this option would rely heavily on the discretion of a Judge or ATT member to make judgements about Cabinet norms and practices, a task they mightn't be naturally suited to given this would not be a question of legality alone.

Another option could be to create a new category of 'serious corruption offences' that lays out types of Commonwealth corruption that are so egregious as to naturally justify the risks investigations may pose to Cabinet and national security information, and other sensitive factors.

A third option could include that where the Commissioner seeks to undertake collection activities that would lead to the direct or incidental collection of Cabinet or national security information, they must first consult with the Governor-General and/or the Chief Justice of the High Court on the potential impact to the proper functioning of Australia's Cabinet. The Governor-General and the Chief Justice of the High Court could be appropriate officials for this role because they are not otherwise covered by the NACC. Also, by virtue of their positions, they will be well-placed to weigh-up the potentially

¹ Interception warrants are available for investigating offences attracting a maximum penalty of 7 years imprisonment or more, while stored communications warrants are available for offences attracting a maximum penalty of 3 years or more.

competing considerations concerning an investigation's impact on the proper functioning of Cabinet, national security, the public interest, and accountable government. The Cabinet Secretary could be a similarly proper source of advice, however they are not a statutory role and are themselves, a member of Cabinet which could create a perceived conflict of interest.

About the Author

Dr. William A. Stoltz

Dr. Stoltz is the Policy Director at the ANU National Security College. He is responsible for mobilising the College's research and resident expertise to influence and inform current public policy debates.

Dr. Stoltz's own research explores options for Australia to shape and influence international security, as well as Australia's policy responses to a breadth of domestic national security challenges.

He holds a PhD and Advanced Masters of National Security Policy from the Australian National University as well as a Bachelor of Arts from the University of Melbourne.