

## Chapter 2

### Concluded matters

2.1 This chapter considers a response to matters raised previously by the committee.

2.2 Correspondence relating to this matter is available on the committee's website.<sup>1</sup>

### Bills

#### National Anti-Corruption Commission Bill

#### National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022<sup>2</sup>

<b>Purpose</b>	The National Anti-Corruption Commission Bill seeks to create a new Commonwealth anti-corruption agency: the National Anti-Corruption Commission (the Commission). The Commission is intended to serve as an independent agency to investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption  The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 seeks to make changes that would support the establishment of the NACC
<b>Portfolio</b>	Attorney-General
<b>Introduced</b>	House of Representatives, 28 September 2022
<b>Rights</b>	Privacy; fair hearing; liberty; freedom of movement; freedom of expression; effective remedy; rights of persons with disabilities

1 See [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Scrutiny\\_reports](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports).

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, National Anti-Corruption Commission Bill 2022 and National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, *Report 6 of 2022*; [2022] AUPJCHR 52.

2.3 The committee published its advice to Parliament in relation to these bills in [Report 5 of 2022](#). The committee did not request the provision of a response from the minister but did make a series of recommendations.

### Commission's investigative and reporting powers

2.4 In [Report 5 of 2022](#), the committee noted that the proposed National Anti-Corruption Commissioner's investigative and reporting powers engage and limit multiple rights, including the rights to privacy, fair trial, freedom of expression, liberty and freedom of movement. These rights may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.

2.5 With respect to the right to a fair trial, the committee noted that the bill did not appear to contemplate circumstances in which a person who has received a summons or notice that is subject to a non-disclosure notation, and who is a person with disability that may necessitate additional assistance in order for them to understand the notice and to fairly engage in the Commission's process, would be permitted to disclose such a notice or summons for the purposes of obtaining that assistance (for example, to a social worker, an intermediary, or other professional). The committee considered that amending the bill to establish appropriate safeguards in this respect would be prudent, in order to ensure that the proposed framework enables persons with disability to fairly engage with the Commission's processes.

### Minister's response

2.6 The minister advised:

**Recommendation 1** The committee considers that the compatibility of the measure may be assisted were the bill amended to require that if the Commissioner is considering making a non-disclosure notation on a notice to produce or summons and the Commissioner is aware that a person has a disability or other vulnerability that may impact their ability to comply with a non-disclosure notation, they must consider making exceptions to allow the person to obtain any necessary assistance in order that they may engage fairly with the Commission's processes.

#### Agreed.

The Government notes the importance of ensuring that the NACC Bill contains strong procedural fairness and accessibility requirements for people who are engaging with the Commission.

The Government will amend Part 4 Division Subdivision A of the NACC Bill to provide that if:

- the Commissioner includes a non-disclosure notation on a notice to produce or summons, and
- the Commissioner is aware that the person who is the subject of the notice or summons has a disability or vulnerability that could affect

their ability to comply with the notice or summons or otherwise affect their ability to engage with the Commissioner's processes,

then the Commissioner must consider exercising their power under subclause 95(2) to permit the person to disclose information to obtain assistance that is necessary to enable the person to comply with the notice or summons, or to otherwise engage with the Commission's processes.

The Government will also make similar amendments to Part 4 Division 4 Subdivision B of the NACC Bill, which provides for the Commissioner to give directions limiting the use or disclosure of investigation material.

These amendments to the NACC Bill would be in addition to a standing permission for a person who has been issued a notice to produce or summons with a non-disclosure notation to consult a medical practitioner or psychologist for the purpose of seeking mental health support, as recommended by the Joint Select Committee on the National Anti-Corruption Commission Legislation.

**Recommendation 2** The committee recommends that the statement of compatibility be updated to:

- 1) Set out the compatibility of provisions providing for immunity from civil proceedings (clauses 196 and 269) with the right to an effective remedy; and
- 2) Explain why clause 97 would only require the Commissioner to consider cancelling a non-disclosure notation after a period of five years has passed (and not some shorter period of time).

**Agreed.**

The Government will update the Statement of Compatibility in the Explanatory Memorandum to the NACC Bill.

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## **Contempt of Commission for using insulting language or creating a disturbance**

2.7 The bill would provide that a person is in contempt of the Commission where they engage in certain conduct, including if they:

- insult, disturb or use insulting language towards a Commissioner holding a hearing (paragraph 82(d));
- create a disturbance, or take part in creating or continuing a disturbance, in or near a place that the person knows is being used to hold a hearing (paragraph 82(e));
- obstruct or hinder a staff member of the Commission in the performance of their powers or duties in connection with a hearing (paragraph 82(f)); or

- disrupt a hearing (paragraph 82(g)).<sup>3</sup>

2.8 Prohibiting anyone from using insulting language or creating a disturbance or disruption of a hearing of the Commission engages and may limit the right to freedom of assembly and the right to freedom of expression.

2.9 The committee noted that the statement of compatibility does not identify the engagement of these rights by these provisions. In this regard, though the committee recognises the importance of ensuring that the Commission can undertake its functions, the committee noted that it has historically raised repeated concerns regarding the compatibility of similar contempt provisions relating to Royal Commissions (and other bodies invested with the powers of Royal Commissions),<sup>4</sup> and has recommended their amendment.<sup>5</sup>

2.10 The committee considered that paragraphs 82(d) and (e), in classifying the use of insulting language or creating a disturbance near a Commission hearing, is overly broad. The committee considered the objective of ensuring the Commission's important work is not disrupted could be achieved by other provisions already in the bill that provide that it is a contempt to obstruct or hinder a Commission staff member (including the Commissioner) in the performance or exercise of their functions, powers or duties in connection with a hearing or to disrupt a hearing. The committee considered that, as drafted, clause 82 is not the least rights restrictive way to achieve the stated objectives, and therefore risks disproportionately limiting the rights to freedom of expression and assembly.

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3 Clause 82.

4 See Parliamentary Joint Committee on Human Rights, Royal Commissions Amendment Regulation 2016 (No. 1) [F2016L00113], [Thirty-Eighth Report of the 44th Parliament](#) (3 May 2016) pp. 21-26; Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017, [Report 6 of 2017](#) (20 June 2017) pp. 35-49; Banking and Financial Services Commission of Inquiry Bill 2017, [Report 4 of 2017](#) (9 May 2017) pp. 42-45; Commission of Inquiry (Coal Seam Gas) Bill 2017, [Report 11 of 2017](#) (17 October 2017) pp. 51-52; Murray-Darling Basin Commission of Inquiry Bill 2019, [Report 2 of 2019](#) (12 February 2019) pp. 131-135; National Integrity Commission Bill 2018, National Integrity Commission Bill 2018 (No. 2) and National Integrity (Parliamentary Standards) Bill 2018, [Report 2 of 2019](#) (12 February 2019), pp. 136-145; National Integrity Commission Bill 2018 (No. 2) and National Integrity Commission Bill 2019, [Report 6 of 2019](#) (5 December 2019), pp. 99-116.

5 Parliamentary Joint Committee on Human Rights, National Integrity Commission Bill 2018 (No. 2), [Report 6 of 2019](#) (5 December 2019), pp. 99-116.

## Minister's response

2.11 The minister advised:

**Recommendation 3** The committee considers that the compatibility of the measure with the rights to freedom of expression and peaceful assembly may be assisted were clause 82 of the bill amended to remove paragraphs (d) and (e) (which make it a contempt to use insulting language or creating a disturbance near a Commission hearing).

### Agreed in part.

The Government will amend clause 82 of the NACC Bill to omit paragraph (1)(e) (creating a disturbance near a hearing).

The Government will retain paragraph 82(1)(d) (insults, disturbs or uses insulting language towards a Commissioner during a hearing). Insulting, disturbing or using insulting language towards a Commissioner during a hearing would tend to directly or indirectly obstruct the Commissioner in the conduct of the hearing and, therefore, in the conduct of a corruption investigation. The Government notes that the conduct covered by the paragraph would also likely constitute a contempt of court or, if done in the presence of a House or Committee of the Parliament, a contempt of Parliament. Prohibiting such conduct is necessary to ensure that the Commissioner can conduct a hearing in an effective manner.

**Recommendation 4** The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of clause 82 with the rights to freedom of expression and assembly.

### Agreed.

The Government will update the Statement of Compatibility in the Explanatory Memorandum to the NACC Bill.

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## Accessing information provided to journalists

2.12 The bill establishes that if a person has given information (directly or indirectly) to a journalist, and the journalist reasonably believes that the person providing the information did not want their identity to be disclosed, neither the journalist nor their employer is required to do anything under the bill that would disclose the person's identity or enable it to be ascertained.<sup>6</sup> However, this would not prevent an authorised officer from searching premises, persons, or conveyances

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6 Clause 31.

(such as cars), using modified search powers under Part IAA of the *Crimes Act 1914*.<sup>7</sup> If the evidentiary material being sought related to an alleged offence against a secrecy provision by a person other than the journalist, when issuing a search warrant the issuing officer would be required to weigh the public interest in issuing the warrant against the public interest in protecting the confidentiality of the identity of the journalist's source, and in facilitating the exchange of information between journalists and the public so as to facilitate reporting of matters in the public interest.<sup>8</sup>

2.13 These provisions would provide that, although a journalist or their employer may not be required to provide information that would identify their source themselves, a search warrant may be issued, and neither the journalist nor their employer could lawfully refuse the seizure of material under the warrant on the basis that it could disclose an informant's identity.<sup>9</sup>

2.14 These provisions may therefore limit the right to freedom of expression insofar as they may discourage persons from disclosing information about suspected corruption to journalists in the public interest.

2.15 The committee considered that protecting the confidentiality of journalists' sources is a generally important objective, and one which must be weighed against the bill's overarching objective of addressing serious and systemic corruption. In this regard, the committee considered that, when a search warrant is being sought in relation to a journalist, a requirement to always consider the public interest in protecting the confidentiality of the identity of a journalist's source, and in facilitating the exchange of information between journalists and members of the public so as to facilitate reporting of matters in the public interest, would better protect the right to freedom of expression.

### Minister's response

2.16 The minister advised:

**Recommendation 5** The committee considers that the compatibility of the measure with the right to freedom of expression may be assisted were the bill amended to remove paragraph 124(2A)(b), with the effect that where an issuing officer is considering whether to issue a search warrant to search a journalist or their employer or premises, they must always be required to have regard to the public interest, as set out in subclause 124(2B).

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7 Subclause 31(4). See also clauses 119 and 124. Noting, however, that subclause 117(2) would not permit the exercise of a search warrant in relation to premises occurred by the Australian Broadcasting Corporation (ABC) or Special Broadcasting Service Corporation (SBS).

8 Clause 124(2A)–(2B).

9 See, explanatory memorandum, pp. 102–103.

**Agreed**

The Government is committed to protecting the freedom of the press in Australia. The NACC Bill contains robust safeguards to protect the identities of journalists' sources and uphold the public interest associated with free press.

Substituted paragraph 3E(2A)(b) of the *Crimes Act 1914*, to be inserted by cl 124 of the NACC Bill, would limit the application of the journalistic safeguards for search warrants to circumstances where the Commission is investigating a secrecy offence. In the context of the Commission's work, which may be triggered by media reporting on any kind of corruption, the Government considers that it would be appropriate for that journalistic safeguard to apply more broadly. The Government will amend clause 124 of the NACC Bill to remove substituted paragraph 3E(2A)(b) of the *Crimes Act*.

**Recommendation 6** The committee recommends that the statement of compatibility with human rights be updated to set out the compatibility of these provisions with the right to freedom of expression.

**Agreed.**

The Government will update the Statement of Compatibility in the Explanatory Memorandum to the NACC Bill.

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## Conferral of covert investigative powers on the Commission

2.17 The National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential bill) seeks to repeal legislation<sup>10</sup> establishing the Australian Commission for Law Enforcement Integrity, and to transition its functions to the Commission and thereby grant existing covert investigative powers to the Commission (with some amendments and exceptions).

2.18 As such, the Consequential bill seeks to confer on the Commission (among other powers):

- surveillance devices and computer access powers under the *Surveillance Devices Act 2004*;<sup>11</sup>
- access to telecommunications interceptions, stored communications (for example emails, SMS or voice messages stored on equipment), telecommunications data (metadata) and international production orders

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10 *Law Enforcement Integrity Commissioner Act 2006*.

11 See Schedule 1, Part 1, items 188-204.

under the *Telecommunications (Interception and Access) Act 1979* (TIA Act);<sup>12</sup>

- access to the industry assistance framework under Part 15 of the *Telecommunications Act 1997* to obtain reasonable assistance from communications providers to access encrypted information stored on devices to support the Commission's powers;<sup>13</sup>
- the power to authorise and conduct controlled operations under Division 4 Part IAB of the *Crimes Act 1914*;<sup>14</sup>
- the power under Part IABA of the *Crimes Act 1914* to conduct operations designed to test the integrity of staff members of the Australian Criminal Intelligence Commission, the Australian Federal Police and the Department of Home Affairs, using controlled or simulated situations;<sup>15</sup>
- the power to seek information about accounts held by a person of interest to a corruption investigation and to search for and seize tainted property (such as proceeds of an offence) and evidential material (such as benefits derived from commission of an offence), and apply for freezing orders under the *Proceeds of Crime Act 2002*;<sup>16</sup> and
- reciprocal information sharing powers between the Commissioner and relevant agencies.<sup>17</sup>

2.19 The committee noted that granting existing covert investigative powers to the Commission (with some amendments and exceptions), engages and limits multiple human rights, most particularly the right to privacy. The committee noted that the statement of compatibility accompanying this bill acknowledges how the application of these powers to the Commission engages human rights. However, the committee noted that many of the powers stemming from this suite of legislation were enacted prior to the establishment of the committee, and so have not been reviewed by the committee for compliance with Australia's human rights obligations.

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12 See Schedule 1, Part 1, items 206-260.

13 See Schedule 1, Part 1, item 263-270.

14 See Schedule 1, Part 1, items 35-39, 42-46, 48-54 and 56-62.

15 See Schedule 1, Part 1, items 63-88.

16 See Schedule 1, Part 1, items 158-162.

17 See for example, information sharing powers in Schedule 1, Part 1 between the Commissioner (and other staff members of the Commission) and other bodies under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (items 4-10), *Australian Federal Police Act 1979* (items 20 to 33), *Inspector-General of Intelligence and Security Act 1986* (items 117 to 121), *Data Availability and Transparency Act 2021* (items 108 to 111), and *Taxation Administration Act 1953* (items 201-204).

Of those powers that have been reviewed by the committee, the committee noted it has previously raised concerns as to the compatibility of a number of these powers with human rights, particularly the right to privacy. As such, the committee considered conferring such powers on the Commission raises similar privacy concerns to those previously raised.

2.20 Further, the committee considered that without a foundational assessment of legislation such as the TIA Act, the *Surveillance Devices Act 2004* and the *Proceeds of Crime Act 2002*, and the sufficiency of the safeguards provided therein, it was difficult to assess the full human rights implications of the Consequential bill in conferring those powers.

### Minister's response

2.21 The minister advised:

**Recommendation 7** The committee recommends that a foundational human rights assessment of existing covert surveillance powers be undertaken, in particular of the powers in the *Telecommunications (Interception and Access) Act 1979*, the *Surveillance Devices Act 2004*, the *Proceeds of Crime Act 2002* and the *Crimes Act 1914* to assess their compatibility with human rights, in particular the right to privacy

#### Noted.

The Attorney-General's Department is leading a major reform of Australia's electronic surveillance laws in response to recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community*. The reform aims to replace the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Surveillance Devices Act 2004* (SD Act), and parts of the *Australian Security Intelligence Organisation Act 1979* to address technological difficulties, inconsistency and complexity associated with the use of electronic surveillance powers. The compatibility of powers currently provided in the TIA Act and the SD Act will be considered as part of this reform.

A foundational assessment of the compatibility of the powers contained in the *Crimes Act* and *Proceeds of Crime Act 2002* would go substantially beyond the scope of the amendments to those Acts contained in the Consequential Bill. The Government will consider the compatibility of any future amendments to the powers contained in the *Crimes Act* and *Proceeds of Crime Act* in the context of those amendments.

### Committee view

2.22 The committee thanks the Attorney-General for this response. The committee welcomes the Attorney-General's commitment to amend the National Anti-Corruption Commission Bill 2022 in line with the majority of its recommendations.

2.23 The committee also welcomes the Attorney-General's advice regarding the reform of Australia's electronic surveillance laws, and that the human rights compatibility of powers currently provided for in the TIA Act and *Surveillance Devices Act 2004* will be considered as part of this reform.

**Mr Josh Burns MP**

**Chair**