

# Don't let our politicians manipulate the NACC



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There are two ways in which the phone-tapping powers of the proposed National Anti-Corruption Commission are vulnerable to political manipulation. One is due to the past actions of the federal Coalition and one is due to the proposed actions of the current Labor government.

The most serious political risk arises from Labor's plan to give selected judges and members of the Administrative Appeals Tribunal responsibility for authorising phone taps for the new commission.

The Coalition is vulnerable to criticism for its past actions in stacking the AAT with friends. But no matter how blatant that stacking might have been, Labor's plan presents a greater risk that the NACC's use of phone taps and listening devices could be manipulated to suit the government of the day.

Legislation introduced to parliament by Attorney-General Mark Dreyfus would give the holder of his office the right to determine in advance which judges and tribunal members would be responsible for issuing warrants so the NACC can tap phones and plant listening devices.

More significantly, he would also have the power to ensure certain judges and tribunal members would never be asked to issue a warrant for the NACC.

The scheme Dreyfus introduced to parliament would give the Attorney-General authority to bestow this warrant-issuing power by declaring certain judges and tribunal members to be "eligible".

So if the new commission wanted to tap the phones of opposition politicians, and bug certain people, it would be required to seek approval only from those judges and tribunal members who have been approved in advance by the Attorney-General.

There is, of course, no suggestion that this power would be abused by Dreyfus or his Coalition counterpart, Julian Leeser, if the Coalition were to return to office.

But why should the community be asked to place its trust in a proposal to confer great power on a politician without accompanying that power with a system of effective checks and balances?

Because the commission will deal with national security information, there is an argument that those who issue warrants to the NACC should be vetted for security reasons.

But if this commission is to be trusted, the Attorney-General's power over the warrant process needs to be subject to oversight – probably by the parliamentary committee that will oversee the NACC.

If the Attorney-General has good reasons on security grounds for preventing some judges and tribunal members from issuing NACC warrants, those reasons should be shared, in confidence, with that committee.

Without that change, the scheme before parliament guarantees that all warrants issued to the NACC will have the appearance – if not the reality – of being indirectly influenced by the governing party.

Without proper oversight, this power will be a moral hazard for

every future Attorney-General – not all of whom will have the personal integrity of a Dreyfus or a Leeser.

These powers over the warrant process would be vested in the Attorney-General by amendments to the Surveillance Devices Act and the Telecommunications (Interception and Access) Act that are outlined in the explanatory memorandum to the bill that covers transitional arrangements for the NACC.

However, there is another problem.

When it comes to surveillance devices, the explanatory memorandum says the scheme before parliament would even permit the NACC to "use surveillance devices without a warrant for listening to or recording words in limited circumstances".

It says the amendments to the Surveillance Devices Act will allow "a NACC officer who is an SES employee authorised by the commissioner to give an emergency authorisation to use a surveillance device or access data held in a computer".

The Commonwealth Ombudsman would have oversight of the way these powers will be used. But that is cold comfort when the performance of other law enforcement agencies is considered.

Last month the Ombudsman issued a report that criticised 19 law enforcement agencies for "serious compliance issues" over the way they use their powers under the Telecommunications (Interception and Access) Act to obtain "stored communications" such as text messages and emails.

Those agencies included the NSW Independent Commission Against Corruption, whose structure has strongly influenced the design of the NACC.

On September 19, the poor compliance record of these agencies drew concern from Bret Walker SC, who is a former National Security Legislation Mentor.

Walker told Patricia Karvelas on Radio National that the community should be worried by the lack of compliance with the requirements of the legislation.

"This is not paperwork, this is not technicalities, this is the price these agencies pay in order to get these drastic powers. If the safeguards are not observed and the non-observance is not improved, there is a very serious question about whether the agencies that are delinquent in that regard should continue to be able to use these powers at all," Walker said.

The warrants scheme suffers from a familiar weakness.

It proposes to hand power to an individual without checks and balances.

Dreyfus and Leeser are men of integrity. But that is beside the point.

If parliament intends to erode long-held rights by creating an institution that will have coercive power and retrospective jurisdiction the least it should do is insist that it is designed in a way that is, literally, foolproof.

Unless changes are made, it will be clear to the entire community that the NACC's power to tap phone calls and bug politicians will be controlled by those who meet the approval of the politician who happens to be Attorney-General.

This means there will always be a doubt about whether this power is being used for political purposes.

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