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Our Ref: 10/118902

Mr Hamish Hansford  
Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hansford

Thank you for the opportunity to contribute to the parliamentary inquiry into the *Crimes Legislation Amendment Bill 2010*. The Australian Crime Commission's submission is attached.

If you have any queries in relation to this submission, please contact Kim Ulrick, National Manager Stakeholder Engagement on 02 6243 6781.

Yours sincerely

Karen Harfield  
Acting Chief Executive Officer  
Australian Crime Commission

27<sup>th</sup> October 2010

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## **SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE CRIMES LEGISLATION AMENDMENT BILL 2010**

The Australian Crime Commission (ACC) welcomes the opportunity to comment on the *Crimes Legislation Amendment Bill 2010*.

### The Role and Function of the ACC

As Australia's national criminal intelligence agency, the ACC provides law enforcement and other government agencies with a unique and valuable understanding of serious and organised crime, through intelligence and investigative activity. The ACC's primary objective is to support and complement the law enforcement community and broader government efforts to reduce the threat and impact of serious and organised crime.

In response to the threat posed by serious and organised crime, the ACC is focused on the following priority areas of work:

- high level strategic assessments, including specialist advice on national criminal intelligence priorities,
- criminal intelligence products and national criminal intelligence and information systems, and
- national criminal investigations with our partner agencies.

The ACC's work is supported by a strong value proposition that highlights its unique and specialist capability including:

- national criminal data holding,
- use of coercive powers where traditional law enforcement methods are not successful,
- high quality strategic intelligence products, and
- a national legislative and organisational framework that facilitates collaboration on a range of operational outcomes.

The ACC's role and function are supported by the *Australian Crime Commission Act 2002*. Key activities and priorities are determined and authorised by the ACC Board.

### The Scope of the ACC's Submission

This submission considers schedules 1,2 and 3 of the bill, with a particular focus on the proposed amendments to the *Australian Crime Commission Act 2002* (ACC Act) and the *Telecommunications (Interception and Access) Act 1979*.

## **SCHEDULE 1 — AMENDMENTS RELATING TO ACC DISMISSAL POWERS**

### Part 1 — Amendment to Avenues of Review upon Termination of Employment

#### *Background*

In its report on the ACC Annual Report of 2007–08, the Parliamentary Joint Committee on the ACC (PJC-ACC) recommended 'that the Australian Government review existing arrangements for the suspension and dismissal of Commonwealth law enforcement agency employees believed on reasonable grounds to have engaged in serious misconduct or corruption, and that the Government take action as appropriate, bearing in mind the need to respect the rights of employees'.



The PJC-ACC noted the dismissal power available to the Australian Federal Police (AFP) and stated that 'it is of concern to the committee that ACC employees suspected of serious misconduct or corruption remain within the organisation and may seek to jeopardise investigations, thereby potentially compromising the security of the ACC's operations'.

The ACC CEO currently has the power to dismiss employees for a breach of the APS Code of Conduct (which would include serious misconduct) under section 29 of the *Public Service Act 1999* (PSA). The *Fair Work Act 2009* (FWA) applies to all dismissals of ACC staff employed under the PSA and provides protection where the dismissal was harsh, unjust or unreasonable.

#### *What is proposed*

The proposed amendment to the ACC Act, while more closely aligning the ACC CEO's authority to deal with serious misconduct with those powers available to the AFP Commissioner under the *Australian Federal Police Act 1979* (AFP Act), does not provide for an additional power for terminating employment. The changes are designed only to be used when misconduct by a PSA employee of the ACC significantly impacts on the ability of the ACC to function and the reputation of the ACC as a law enforcement agency.

The bill proposes to amend the ACC Act so that, when the ACC CEO makes a decision to terminate the employment of an ACC staff member under section 29 of the PSA, the ACC CEO will be able to make a declaration (modelled on section 40K of the AFP Act) that the ACC CEO believes that the employee's behaviour:

- amounts to serious misconduct, and
- is having, or is likely to have, a damaging effect on the morale or reputation of the ACC.

The CEO must have reasonable grounds for the beliefs set out in the declaration.

The making of the declaration prevents the terminated employee from applying to Fair Work Australia for review of the decision to terminate his or her employment. However, the employee will be entitled to apply to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) for a review of the decision to make the declaration.

As stated, the proposed amendment does not create a new power to terminate employment. ACC staff are employed under the PSA and therefore an employee will still need to have been found to have breached the APS Code of Conduct and terminated under provisions of the PSA. Only then will the CEO be able to make a declaration that the FWA does not apply to the decision to terminate a person's employment.

#### *Why it is required*

The ACC operates in a unique environment, tackling serious and organised crime at the highest level across Australian jurisdictions. Staff work in positions of trust with access to sensitive criminal intelligence, including intelligence derived from the exercise of coercive powers and telecommunications interception, that other APS officers do not. The ACC Act obliges the ACC to exercise a higher level of rigour in protecting sensitive criminal intelligence. As a result, it is reasonable for the community to expect a higher standard of integrity from ACC staff.

The jeopardy for the ACC lies in the potential organised crime/corruption risk posed by a staff member's misconduct, which may be outside the range of matters normally considered in deciding if a termination of employment was fair under an industrial relations framework (through the FWA). In this regard, it should be noted that the FWA aims 'to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement'

(section 381(1)(c)). Being forced to maintain or re-instate the employment of a person considered to be a corruption risk can impact on the activities that the ACC can undertake and expose the ACC or our partners to significant risk.

#### *When it would be used*

The changes are designed only to be used in exceptional circumstances where a person's actions significantly impact on the ACC's function and reputation as a law enforcement agency. The CEO would consider invoking the proposed provisions only in cases involving 'serious misconduct', which is defined in proposed s 47A(8) as:

- (a) corruption, a serious abuse of power, or a serious dereliction of duty, by the staff member, or
- (b) any other seriously reprehensible act or behaviour by the staff member, whether or not acting, or purporting to act, in the course of his or her duties as such a staff member.

#### *Governance*

The CEO will be required to report to the Minister for Justice and the ACC Board each time the new power is used. This will ensure that the Minister and the Board have an appropriate level of oversight of the use of the power by the CEO. The making of the declaration will be a reviewable decision under the ADJR Act, to ensure the correct use of the power.

### Part 2 — Use of Lawfully Obtained Telephone Intercepts for Disciplinary Purposes

#### *Background*

The associated amendments to the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) would provide the ACC with similar arrangements to those currently in place for the AFP. The ACC would be able to use and disclose information already lawfully obtained under the TIA Act (for another purpose) where appropriate and necessary in dealing with members of staff who are suspected of engaging in serious misconduct.

#### *What is proposed*

The proposed amendment to the TIA Act will alter the permitted purpose for which existing lawfully obtained information may be used or disclosed to include investigating, reporting on and making employment related decisions about suspected misconduct by ACC employees, and reviews of such decisions. This does not allow the ACC to obtain an intercept warrant for the purposes of a suspected misconduct investigation. However, it permits the ACC to use telecommunications interception information that it or another agency has lawfully obtained if that information is relevant to an internal misconduct matter.

The TIA Act currently provides similar exemptions for the AFP to use and disclose lawfully obtained information in the investigation and making of a decision under the AFP Act in relation to the termination of the employment of an AFP employee.

#### *Why it is required*

It will enable information that has already been legally obtained (through a telephone intercept by the ACC or another agency) to be used in investigating suspected misconduct, where it is relevant to that matter. There have been cases where information gathered through telephone intercepts by another agency has indicated serious misconduct by ACC



employees but that information has then not been available to assist in the investigation of the suspected misconduct.

*When it would be used*

This provision would be used where the ACC has been made aware that lawfully obtained TIA Act information is relevant to the suspected misconduct of a staff member.

*Review*

The bill requires the review of the new provisions contained in Parts 1 and 2 of Schedule 1 after two years of operation to ensure they have operated as the Government intended, to allow the ACC CEO to deal appropriately with the most serious cases of misconduct and corruption.

## **SCHEDULE 2 — AMENDMENTS RELATING TO THE APPOINTMENT OF ACC EXAMINERS**

*What is proposed*

The proposed amendment to the ACC Act will allow for the appointment of part-time examiners. This will be consistent with the Organised Crime Strategic Framework goal of ensuring law enforcement agencies are appropriately equipped to carry out their tasks.

*Why it is required*

Currently, the ACC may only appoint examiners on a full-time basis. This has, on occasions, limited the ACC's ability to effectively manage and conduct examinations. The appointment of both full-time and part-time examiners will allow for greater flexibility in the appointment and utilisation of examiners and ensure the ACC can approach examinations in a more strategic and efficient way. The amendments will also ensure broader geographic cover of examiners as part-time examiners could be appointed in different regions of Australia.

*When it would be used*

Part-time examiners would be used when the workload required extra resources. The ACC currently has four full-time examiners. However, the need for an examiner can fluctuate depending on the status of a particular investigation or operation. As a result, the need for examiners cannot be estimated with any certainty.

*Governance*

The amendments would require the CEO to report to the Minister as soon as practicable after 30 June and 31 December each year on the arrangements the CEO has made in the previous six months for particular examiners to exercise their powers in relation to particular ACC operations/investigations. This would enable the Minister to be informed of the work engaged in by the ACC examiners in each six month period.

The amendments also include appropriate safeguards to guard against any conflicts that may arise between a person's role as a part-time examiner and other employment they may engage in.

## **SCHEDULE 3 — AMENDMENT OF THE CRIMES ACT 1914**

### *General Comment*

The ACC supports all of these amendments, which will contribute to more effective Commonwealth law enforcement by extending powers to new situations, standardising procedures and ensuring that appropriate safeguards are in place in all cases.

### Part 1 — Amendments relating to Search Warrants

ACC members of staff with the powers of a constable under the Crimes Act would use these powers when executing a warrant for the search of a person if an electronic device was found on or in the possession of the person (or in a recently used conveyance) and there was reason to suspect that the device might contain relevant evidence.

### Part 2 — Amendments relating to Seized and Produced Documents and Things

The unified and enhanced rules would be used by the ACC in relation to the return of any documents or things acquired by the ACC by the use of the Part IAA powers of ACC members of staff who are constables under the Crimes Act. The ACC commonly makes use of Crimes Act search warrants in its special investigations.

### Part 3 — Amendments relating to Fingerprints and Photographs

The ACC would use this power when ACC staff members who are constables (members and special members of the AFP and of State/Territory police forces) make arrests for Commonwealth offences and State offences with a federal aspect.

### ACC Contact

Should you require wish to discuss any aspect of this submission further or request any additional information from the ACC, please contact Kim Ulrick, National Manager, Stakeholder Engagement, on (02) 6243 6781.