



Parliamentary Joint Committee on the Australian Crime Commission

Inquiry into the Australian Crime Commission
Amendment Act 2007

September 2008

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THE COMMITTEE

Members:

Senator Steve Hutchins (**Chair**)

Mr Jason Wood MP (**Deputy Chair**)

Senator Guy Barnett

Senator Stephen Parry

Senator Helen Polley

Mr Nicholas Champion MP

Mr Stephen Gibbons MP

Mr Christopher Hayes MP

The Hon. Christopher Pyne MP

Secretariat

Dr Jacqueline Dewar, Secretary

Dr Robyn Clough, Principal Research Officer

Ms Monika Sheppard, Senior Research Officer

Mrs Jill Sedaitis, Executive Assistant

Parliament House

CANBERRA

Telephone: (02) 6277 3419

Facsimile: (02) 6277 5866

Email: acc.committee@aph.gov.au

Internet: www.aph.gov.au/senate_acc

Table of contents

THE COMMITTEE	iii
RECOMMENDATIONS.....	ix
ACRONYMS AND ABBREVIATIONS LIST	xi
CHAPTER 1	1
Background to the inquiry into the <i>Australian Crime Commission Amendment Act 2007</i>	1
Power to summons witnesses and obtain documents	1
Recording reasons in writing	2
The Australian Crime Commission Amendment Bill 2007	3
The parliamentary process to amend the Australian Crime Commission Act 2002	4
Passage in the Senate.....	5
Passage through the House of Representatives	6
The Parliamentary Joint Committee on the Australian Crime Commission.....	7
The 42 nd Parliament	8
Conduct of the inquiry	8
Acknowledgments	9
CHAPTER 2	11
Administrative and procedural issues	11
Issuing summonses and notices.....	11
The legal requirements	11
The rationale	12
The statutory safeguards.....	16
A written record.....	16
Reasonable circumstances	18

Effectiveness of the safeguards	19
Failure to comply	21
Effect on safeguards.....	21
Accountability.....	22
Disclosure of summonses/notices.....	24
Reimbursement of expenses	26
The coercive powers – a balancing act.....	27
CHAPTER 3	29
Retrospection and contempt.....	29
Extent of the affectation	29
Summonses and notices.....	29
Derivative information	30
Necessity for parliamentary intervention	31
The retrospective provisions.....	33
The legislative provisions.....	33
Rationale.....	36
'Technicality'.....	37
Right to certainty and retrospective criminal sanction.....	38
International treaty obligations.....	40
Special coercive powers	42
Lack of cooperation at ACC examinations	43
The Trowell Report	44
Parliamentary consideration in 2000/2001	44
Impact of non-cooperation on ACC effectiveness	45
An emerging trend.....	46
Support for a 'contempt power'.....	47
Parliamentary consideration in 2005.....	49
An expedited judicial process.....	50

CHAPTER 4	53
Accountability	53
Oversight	54
The committee	54
The Commonwealth Ombudsman.....	58
Unauthorised disclosure - a possible contempt of the Senate	59
Conclusion	60
Appendix 1	63
Terms of Reference.....	63
Appendix 2	65
Public submissions.....	65
Appendix 3	67
Public hearings and witnesses	67
<i>Canberra, Tuesday 17 June 2008.....</i>	<i>67</i>
Parliament House, Canberra.....	67
<i>Canberra, Tuesday 29 July 2008.....</i>	<i>68</i>
Parliament House, Canberra.....	68
Appendix 4	69
Proposed amendments to Part II, Division 2,	69
Subsection 28(1A) and 29(1A)	69
ZA Subsection 28(1A).....	69
ZB Subsection 29(1A).....	69
Appendix 5	71

RECOMMENDATIONS

Recommendation 1

2.29 The committee recommends that the Australian Crime Commission be required to, without delay, develop and implement a consistent and reliable method for its examiners to promptly and securely record their reasons for decision as required by Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002*.

Recommendation 2

2.30 The committee recommends that the amendment made to Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* by the *Australian Crime Commission Amendment Act 2007* be repealed but that those subsections be amended to ensure that the reasons for the decision must be recorded in writing before the issuing of a summons or notice.

Recommendation 3

2.63 The committee recommends that Part II Division 2 Subsections 28(8) and 29(5) of the *Australian Crime Commission Act 2002* be repealed.

Recommendation 4

2.84 The committee recommends that Part II Division 2 Subsection 29B(4) of the *Australian Crime Commission Act 2002* be amended to include the Commonwealth Ombudsman.

Recommendation 5

3.59 The committee notes that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* deems certain summonses and notices valid thereby protecting any prosecution based on those summonses and notices. The committee recommends that:

- the same practice be adopted in relation to summonses and notices issued subsequent to the *Australian Crime Commission Amendment Act 2007* until now;
- but that henceforth, in line with Recommendation 2, the practice of retrospectively recording reasons for the issue of summonses and notices be immediately discontinued and that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* be repealed.

Recommendation 6

3.102 The committee recommends that the *Australian Crime Commission Act 2002* be amended to include the statutory definition of contempt and the statutory power of referral, plus ancillary provisions, proposed as clauses 34A and 34B in the *National Crime Authority Legislation Amendment Bill 2000* (except that the referral be to the Federal Magistrates Court) for matters arising under Section 30 of the *Australian Crime Commission Act 2002*.

Recommendation 7

3.110 As a corollary of Recommendation 6, or as an alternative thereto, the committee urges the Commonwealth Attorney-General to negotiate with the judiciary an expedited judicial process for matters referred by the Australian Crime Commission under Part II Division 2 Section 30 of the *Australian Crime Commission Act 2002*.

Recommendation 8

4.26 The committee recommends that Part IV Section 61A of the *Australian Crime Commission Act 2002* be amended to require the Minister to cause an independent review of the operation of the *Australian Crime Commission Act 2002* every five years with the first review to be undertaken no later than 1 January 2011.

Recommendation 9

4.30 The committee recommends that the Commonwealth Ombudsman be required to inspect records made by the Australian Crime Commission examiners to ensure full compliance with Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that the Ombudsman report annually to the Parliament on this matter.

Recommendation 10

4.31 The committee recommends that at least once in each year the Commonwealth Ombudsman be required to provide a briefing to the Parliamentary Joint Committee on the Australian Crime Commission about the Australian Crime Commission's exercise of the coercive powers under Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that Part III Section 55AA of the *Australian Crime Commission Act 2002* be amended accordingly.

ACRONYMS AND ABBREVIATIONS LIST

ACC	Australian Crime Commission
ICAC	Independent Commission Against Corruption
ICCPR	International Covenant on Civil and Political Rights
NCA	National Crime Authority
the Minister	Minister for Justice and Customs
the Act	<i>Australian Crime Commission Act 2002</i>
the Amending Act	<i>Australian Crime Commission Amendment Act 2007</i>
the Bill	<i>National Crime Authority Legislation Amendment Bill 2000</i>
the Ombudsman	the Commonwealth Ombudsman
the PJC/committee	Parliamentary Joint Committee on the Australian Crime Commission
the Regulations	<i>Australian Crime Commission Regulations 2002</i>
the Trowell Report	Mr Mark Trowell QC, <i>Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee</i> , March 2007

CHAPTER 1

Background to the inquiry into the *Australian Crime Commission Amendment Act 2007*

1.1 The Australian Crime Commission (ACC) is established under the *Australian Crime Commission Act 2002* (the Act) to combat serious and organised crime. The ACC's role centres on intelligence collection and dissemination, and on criminal investigation.¹ To undertake these functions, the ACC can draw upon coercive powers which enable it to source information which cannot be accessed through traditional policing methods. These coercive powers are similar to those of a Royal Commission.²

1.2 The ACC has four independent examiners who are authorised to use these coercive powers. The coercive powers available to examiners are considerable. A person summonsed before an examiner is compelled to answer questions under oath/affirmation at an examination, and to provide potentially incriminating evidence or documents. A person who fails or refuses to attend an examination, take an oath/affirmation, or answer questions is guilty of an indictable offence, attracting a fine of up to 200 penalty units or imprisonment for a period of up to five years.³

Power to summons witnesses and obtain documents

1.3 Part II Division 2 of the Act allows an examiner to conduct an examination for the purposes of a special ACC operation or investigation.

1.4 Section 28 empowers examiners to summons witnesses to appear before an examiner at an examination to give evidence, and to produce such documents or other things (if any) as are referred to in the summons. That provision also enables an examiner to take evidence on oath or affirmation.

1.5 Section 29 empowers examiners, by notice in writing, to require persons to attend before a specified person, and produce a document or thing that is relevant to a special ACC operation or investigation.

1.6 Section 28 of the Act sets out the procedure by which a summons is issued. In particular, subsection 28(1A) stipulates:

1 Australian Crime Commission, *Annual Report 2006-07*, p. 10.

2 Australian Crime Commission, *Annual Report 2006-07*, p. 11.

3 Section 30 of the *Australian Crime Commission Act 2002*

Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons.⁴

1.7 Similarly, section 29(1) sets out the procedure by which an examiner issues a notice. Subsection 29(1A) states:

Before issuing a notice under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the notice.⁵

Recording reasons in writing

1.8 In August 2007, there was a successful challenge to an examiner's interpretation of subsections 28(1A) and 29(1A).

1.9 In the Supreme Court of Victoria, Justice Smith held that for a summons to be valid, the reasons for its issue must have been recorded in writing prior to the issue of the summons.

It was plain that [the accused] chose to put in issue the question of whether that pre-condition had been satisfied. While the Act significantly qualifies the right to silence there is nothing in the Act which:

- prevents a person charged with the offence in question putting in issue the validity of the examination summons; or
- limits the ways in which that validity may be challenged.

The pre-conditions are no doubt specified because of the significant inroads made to the right to silence and the need to ensure that the power is properly exercised.⁶

1.10 The decision of His Honour Justice Smith called into question the previously established practices of ACC examiners in the issuing of summonses and notices.

1.11 But the government and the Attorney-General's Department took a different view of the judicial decision, describing the requirement to record reasons in writing as 'technical'. And stating that a failure to comply with a 'technical requirement' should not be allowed to jeopardise special ACC operations and investigations.⁷

1.12 This led to the amendment of the Act by the *Australian Crime Commission Amendment Bill 2007* (the Amending Act).

4 Subsection 28(1A) of the *Australian Crime Commission Act 2002*

5 Subsection 29(1A) of the *Australian Crime Commission Act 2002*

6 *ACC v Brereton* [2007] VSC 297 (23 August 2007) at 10.

7 *Australian Crime Commission Amendment Bill 2007*, Explanatory Memorandum, p. 4.

The Australian Crime Commission Amendment Bill 2007

1.13 Although the Amending Act resulted from the Justice Smith decision, the bill had several objectives. In introducing the legislation, Senator Eric Abetz stated that the bill was intended to:

...clarify that an Australian Crime Commission (ACC) examiner can record their reasons for issuing a summons or notice to produce before, at the same times as, or as soon as practicable after, the summons or notice has been issued. The bill will also provide that summonses or notices issued after the commencement of the ACC Act, but prior to the commencement of the bill, are not invalid where reasons were recorded subsequent to their issue. Further, the bill will provide that a summons or notice will not be invalid merely because it fails to comply with technical requirements set out in the Act.⁸

1.14 Two of the primary amendments sought to amend subsections 28(1A) and 29(1A) of the Act to expressly allow an examiner to record reasons for issuing a summons or notice:

- (a) before the issuing of the summons; or
- (b) at the same time as the issue of the summons; or
- (c) as soon as practicable after the issue of the summons.⁹

1.15 Another two primary amendments sought to retrospectively apply the bill to all summonses and notices issued under subsections 28(1) and 29(1), and which would otherwise be invalid because the record referred to in subsections 28(1A) and 29(1A) was made after the summons or notice was issued.¹⁰

The summons [or notice] is as valid, and is taken always to have been as valid, as it would have been if [the] Act had provided that the record could be made after the issue of the summons [or notice].¹¹

1.16 The total effect of the Amending Act was succinctly summarised by the Law Council of Australia as follows:

It removed the requirement for ACC examiners to record in writing their reasons for issuing a summons to appear at an examination or for issuing a notice to produce documents before issuing the summons or notice. Instead the ACC Act now allows examiners to record their reasons:

- (a) before the issue of the summons; or
- (b) at the same time as the issue of the summons; or

8 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 14.

9 Clauses 2 and 7 of the *Australian Crime Commission Amendment Bill 2007*

10 Clauses 10 and 12 of the *Australian Crime Commission Amendment Bill 2007*

11 Subclauses 10(2) and 12(2) of the *Australian Crime Commission Amendment Bill 2007*

(c) as soon as practicable after the issue of the summons.

It inserted a validation provision which provides that even where an examiner has not recorded his or her reasons for issuing a summons, either as soon as practicable after issuing the summons or at all, the summons is nonetheless valid.

It inserted a provision which gives the validation provision retrospective effect. The result is that previously invalid summonses issued prior to the Amendment Act are rendered valid, despite a failure to record written reasons in compliance with the terms of the ACC Act.

It amended sections 28 and 29 of the ACC Act to allow examiners to substitute for each other in the performance of their functions, for example, to allow a person summonsed to appear before a particular examiner to in fact appear before a different examiner, where the first examiner may be on leave or otherwise unavailable.¹²

The parliamentary process to amend the Australian Crime Commission Act 2002

1.17 On 18 September 2007, the Amending Act was introduced into the Senate. The urgency with which this bill was to be considered by the Parliament was evident in the suspension of Standing Orders of the Senate. These require that the initiation of a bill:

is first introduced in the Senate by a Minister in a period of sitting...

and a motion is moved for the second reading of the bill, debate on that motion shall be adjourned at the conclusion of the speech of the senator moving the motion and resumption of the debate shall be made an order of the day for the first day of sitting in the next period of sittings without any questions being put.¹³

1.18 In essence, the suspension of Standing Order 111 ensured that the debate on the bill was not subject to the usual time for consideration before the second reading debate.

1.19 During the first reading debate, Senator Natasha Stott Despoja highlighted concerns in regard to this 'cut-off', and the speed at which the legislation was progressing through the Senate:

This morning the office of the Attorney-General kindly organised and offered my office a briefing. That is still relatively short notice, because we are dealing with a piece of legislation that is being introduced and exempted from the cut-off and that will probably be debated today. The first that my office was aware of this legislation was this morning...I believe that a statement of reasons was tabled in this place yesterday, and I acknowledge

12 Law Council of Australia, *Submission 5*, p. 2.

13 The Senate, *Standing Orders and other orders of the Senate*, September 2006, 111 (5), p. 63.

that, but, regardless of this timeframe, I think the chamber can agree that this is a very fast process.¹⁴

1.20 The government argued that the bill's exemption from the 'cut-off' was justifiable as the legislation dealt with matters of urgency.

The findings of Justice Smith...have significant implications for current investigations/operations of the ACC, including matters that are currently before the courts. The bill ensures that summonses and notices that are being relied upon for current investigations/operations and prosecutions are not invalidated simply because reasons were issued after they were issued. If this is not addressed, it could call into jeopardy evidence taken in a substantial number of matters, including evidence being used in current prosecutions. It is important that this issue is resolved as soon as possible so that matters before the courts are not unduly affected.¹⁵

1.21 The opposition accepted the government's argument, and decided also to support the bill's exemption from the cut-off based on the need to deal with the legislation in the current week.¹⁶ It transpired that this was to be the last sitting week of the federal parliament before the Parliament was prorogued for the 2007 federal election.

1.22 In the House of Representatives, similar concerns were raised regarding the speed of the legislative process:

The Australian Crime Commission Amendment Bill 2007 has been brought on in great haste. This is not the parliament at its best. This is not the government at its best. We as an opposition were first advised of the government's desire to bring this matter before the parliament only on Monday night—late on Monday night, I might add. It was then rushed through the Senate the next day, and here we are on what is probably the last day of sitting of the House of Representatives before the election, facilitating its passage here in the Main Committee rather than in the House of Representatives itself.¹⁷

Passage in the Senate

1.23 The bill was first read in the Senate on 18 September 2007, and was read for a second and third time later that day. Concerns over the speed with which the legislation was introduced and debated are briefly discussed in preceding paragraphs: specific concerns raised during the debates are discussed in subsequent chapters of this report.

14 Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 10.

15 Minister for Justice and Customs, Statement of reasons for introduction and passage in the 2007 Spring Sittings, Australian Crime Commission Amendment Bill, Tabled 17 September 2007.

16 Senator Joe Ludwig, *Senate Hansard*, 18 September 2007, p. 12.

17 Mr Archibald Bevis MP, *House Hansard, Main Committee*, 20 September 2007, p. 120.

1.24 The Amending Act passed with Government and Opposition support. But the debates on the merits of the bill illustrate that the parliamentarians' support was largely pragmatic, the legislation being a direct response to the Justice Smith decision.

1.25 The minor parties did not support the legislation, and more clearly articulated a concern that the government was, to a degree, attempting to rectify errors and inadequacies in the examiners' exercise of the ACC's coercive powers.

1.26 Senator Natasha Stott Despoja displayed some sympathy for the government's position:

The government was caught between a rock and a hard place. It is apparent that for some reason the ACC decided that it did not need to record its reasons—at least prior to any summonses or notices to produce being issued. This was despite the wording of section 28(1A) as it stands, which I think pretty clearly states that written reasons should be recorded...But what does the government do? It attempts to legislate retrospectively to remedy the ACC's problems and incompetence.¹⁸

1.27 And the Australian Greens evinced similar sentiments, with Senator Kerry Nettle declaring:

It is not and should not be the role of this parliament to rush through special legislation to make up for the shortcomings or failings of investigators in particular tax evasion cases.¹⁹

1.28 But Senator Kerry Nettle also took issue with the government's fundamental classification of the record making provisions of subsections 28(1A) and 29(1A) as 'technical requirements':

The recording of reasons is not, as the government says, merely technical but one of the few mechanisms of accountability that there is over the Crime Commission's coercive powers.²⁰

1.29 The Senate Scrutiny of Bills Committee normally comments on every bill introduced into the Parliament. That committee did not have the opportunity to consider and publish a commentary on the Amending Act during the life of the 41st Parliament. In May 2008, the Scrutiny of Bills Committee published its commentary, and where relevant, its comments are referred to in this report.

Passage through the House of Representatives

1.30 The Attorney-General, the Hon. Phillip Ruddock MP, introduced the bill in the House of Representatives for its second reading on 20 September 2007. As in the

18 Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 96.

19 Senator Kerry Nettle, *Senate Hansard*, 18 September 2007, p. 99.

20 Senator Kerry Nettle, *Senate Hansard*, 18 September 2007, p. 99.

Senate, Members of the House took a pragmatic approach toward the bill, and it was debated and passed that same day.

1.31 Emeritus Professor Jim Davis subsequently reflected:

This particular bill had passed through both houses of parliament with what may be regarded in some quarters as commendable speed and in other quarters may be regarded on this particular occasion as distressing speed.²¹

1.32 The ACT Attorney-General, Simon Corbell MLA was clearly in the latter category, telling the Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee):

I cannot accept [potential judicial challenge] as a legitimate rationale for either the amendments themselves, or the haste at which they were rushed through the Parliament, as it implies that the ACC should not be held to account by the Courts for the unlawful use of its powers. Such a proposition offends fundamental principles of the rule of law, which would hold that, if the ACC has acted contrary to law in the exercise of its powers; those actions should be amenable to judicial review.²²

The Parliamentary Joint Committee on the Australian Crime Commission

1.33 Notwithstanding its passage, members of both chambers felt that a parliamentary inquiry into the Amending Act was appropriate and should be held when time permitted in the new parliament.

1.34 Mr Duncan Kerr MP gave voice to the common sentiment:

These measures will pass in this form. I think they do demand the attention of the parliament in the next sitting, whether the government is returned or the opposition becomes the government, because as they are currently framed I do not think they satisfy anybody.²³

1.35 And Mr Archibald Bevis MP foreshadowed:

After the election, should Labor form government, we will be reviewing these provisions and we will be reviewing their implementation and operation within the Australian Crime Commission.²⁴

1.36 In responding to the concerns of the Parliament, the then Minister for Justice, the Hon. David Johnston, agreed that the PJC examine the legislation:

The government does support, as I support, having the maximum degree of parliamentary review of amendments of this kind that is possible. I will

21 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 3.

22 Mr Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2.

23 Mr Duncan Kerr MP, *House Hansard*, 20 September 2007, p. 128.

24 Mr Archibald Bevis MP, *House Hansard*, 20 September 2007, p. 125.

therefore write to the chair of the Parliamentary Joint Committee on the Australian Crime Commission to invite the committee to review these amendments, albeit after the event. If deficiency is found or the degree of protection, safeguards, checks and balances is not found to be sufficient, the government will then consider those findings and seek to address those points raised, whilst seeking to preserve the integrity of the intent of the legislation.²⁵

1.37 The Minister subsequently wrote to the then committee chair, the Hon. Senator Ian Macdonald, referring to his undertaking, and proposing that the PJC consider an inquiry into the Amending Act. However, the PJC was not able to undertake the Minister's request as the 41st Parliament was prorogued shortly after.

The 42nd Parliament

1.38 Shortly after its establishment, the PJC for the 42nd Parliament considered the unattended work of the committee in the previous Parliament. The committee felt that there was a need to undertake the inquiry which had been proposed into the Amending Act.

1.39 The PJC was concerned not only with the substance and expeditious passage of the legislation, but also with the fact that throughout August-September 2007, the committee was neither advised by the ACC of the Justice Smith decision, nor the imminent introduction of the bill. This matter is further discussed in chapter 4 of this report.

1.40 At its private meeting on 17 March 2008, the PJC adopted terms of reference to hold an inquiry into the Amending Act. The terms of reference are provided at Appendix 1.

Conduct of the inquiry

1.41 The committee invited submissions from a wide range of governments, organisations and individuals. Due to the very specific nature of the amendments, only a small number of submissions were received. These are listed at Appendix 2.

1.42 The committee held hearings on 1 May 2008, 17 June 2008 and 29 July 2008.

1.43 The hearing of 1 May 2008 was organised to occur in two sections. The first section occurred in the morning where the committee heard evidence in-camera. This hearing was not open to the public.

1.44 The second section of the hearing was to occur in the afternoon, during which time the committee was to hear evidence in public from a range of organisations and departments. However, due to correspondence which the committee received late that

25 Senator the Hon. David Johnston, Minister for Justice and Customs, *Senate Hansard*, 18 September 2007, pp 99-100.

morning, the PJC felt it prudent not to proceed with the afternoon hearing. The correspondence in question was disclosed the next day in contravention of the Standing Orders of the Senate and the *Parliamentary Privileges Act 1987*, and became the subject of a potential contempt of the Senate. This matter is dealt with later in this report. The adjourned hearing of 1 May 2008 was rescheduled for 17 June 2008.

1.45 A further hearing was held on 29 July 2008 to allow all interested parties an opportunity to participate in the inquiry.

1.46 A list of all witnesses who provided evidence at the public hearings is provided at Appendix 3.

Acknowledgments

1.47 The committee thanks all those who contributed to the inquiry by making submissions, providing additional information, or appearing before it to give evidence.

1.48 The committee especially thanks the Commonwealth Ombudsman, Professor John McMillan and his staff for expeditiously undertaking and reporting on its investigation into the ACC's use of examination powers. The committee found this report to be of assistance to its own investigation.

CHAPTER 2

Administrative and procedural issues

2.1 As early as November 2002, the Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee) expressed its concern with the exercise of coercive powers, acknowledging that such powers are a potent weapon that can significantly affect individuals.¹

2.2 In relation to the Australian Crime Commission (ACC), the committee concluded:

Appropriate safeguards to ensure the proper use (ie to further a special operation/investigation) therefore are required. These safeguards should operate both at the point of authorisation and in the exercise of them.²

2.3 The *Australian Crime Commission Act 2002* (the Act) contains some safeguards. But it was not until 2007 that an issue arose as to whether the ACC and its examiners were complying with those provisions of the Act.

2.4 The PJC therefore resolved on behalf of the Parliament to inquire into the administrative and procedural arrangements of the ACC and its examiners in regard to the issuing of summonses and notices under the Act.

Issuing summonses and notices

The legal requirements

2.5 Subsection 28(1A) of the Act provided that, before issuing a summons, the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. An identical provision existed in respect of a notice: subsection 29(1A).

2.6 In September 2007, Parliament enacted the *Australian Crime Commission Amendment Act 2007* (the Amending Act). Subsections 28(1A) and 29(1A) were amended to allow the examiner to make the written record before, at the same time, or as soon as practicable after the issue of the summons or notice.

2.7 Upon examination, the Senate Scrutiny of Bills Committee expressed the view that these amendments might trespass on personal rights and liberties.³ But it

1 Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 23.

2 Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p. 23.

was not until the PJC conducted its inquiry that the Amending Act that this concern was more thoroughly scrutinised.

The rationale

2.8 In his second reading speech, the then Manager of Government Business in the Senate stated that:

The amendments proposed by the Bill will address situations where summonses or notices need to be issued in urgent situations, or where large numbers need to be issued simultaneously.⁴

2.9 Neither urgency nor volume were sufficient to convince Emeritus Professor Jim Davis that the amendments were justifiable:

To my mind, administrative convenience ought not to be the sort of factor that, in my view, severely limits civil liberties and human rights.⁵

2.10 And the Law Council of Australia questioned the true extent of the alleged problem:

The information provided by the ACC in other forums would suggest that ACC special investigations or operations are for the most part highly structured and methodically planned exercises. The impression is given that, because of the sophisticated and organized nature of the criminal activity under investigation, careful and strategic decisions are made about where and how to obtain information, from whom and in what order.⁶

2.11 In addition, and more significantly:

Even in an urgent case, the Law Council would expect an examiner to require a requesting officer to provide reasons and make a case before the examiner decided to issue a summons. In those circumstances, the obligation to record reasons prior to issuing the warrant should not be unduly onerous because material should already be before the examiner.⁷

2.12 However, the Commonwealth Ombudsman in its report '*Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*', found that:

3 Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 3 of 2008, 14 May 2008, p. 9.

4 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 13.

5 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 3.

6 Law Council of Australia, *Submission 5*, p. 4.

7 Law Council of Australia, *Submission 5*, p. 5. Also, see Liberty Victoria, *Submission 1*, p. 2.

in respect of both summonses and notices, the majority of reasons were recorded after the issuing of the summons or notice.⁸

2.13 The Commonwealth Ombudsman found that, subsequent to the enactment of the Amending Act, 53 per cent of summonses and 57 per cent of notices were having their reasons recorded *post facto*. The Ombudsman noted that, in these instances, the recording of reasons often did not occur 'as soon as practicable': 15 per cent of summonses and 18 per cent of notices had their reasons recorded more than seven days after the issue of the summons or notice.⁹

2.14 The Crime and Misconduct Commission Queensland, relying upon its own experience, queried the difficulty of making a written record before or at the same time as the issue of a summons/notice:

Inquiries made of CMC officers involved in the issuing process, as issuers of or applicants for, notices reveal that no instances have occurred involving the issue of notices without the generation of the record before or contemporaneously with the issue of the notices. Even in urgent circumstances, which arose on a Sunday in the context of a investigation [sic] into suspected terrorist activity, the appropriate record was created before the approval of the Supreme Court was obtained for the issue of an immediate attendance notice.¹⁰

2.15 The Crime and Misconduct Commission Queensland has a simple certification process, but could not envisage what circumstances might lead an agency like the ACC, or its examiners, to have to delay the generation of a record of decision.¹¹

2.16 Nonetheless, and with reference to its own legislation, the Crime and Misconduct Commission Queensland supported the validity of notices issued without a 'record of decision'.

Whilst such an occasion has not arisen in the history of the CMC, the possibility of especially urgent circumstances or some other impediment to usual practice arising cannot be totally excluded.¹²

2.17 The PJC does not believe that it is too difficult to make a simple or basic record of reasons for decision upon issue of a summons/notice, particularly if the material upon which a decision is based is readily available.

8 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 6.

9 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, pp 5-7.

10 Crime and Misconduct Commission Queensland, *Submission 7*, p. 2.

11 Crime and Misconduct Commission Queensland, *Submission 7*, p. 4.

12 Crime and Misconduct Commission Queensland, *Submission 7*, p. 3.

2.18 On this point, Liberty Victoria observed:

If there is time to attend to the paperwork of issuing a summons it is scarcely credible that there will not be time to record the reasons for it.¹³

2.19 But the Attorney-General's Department indicated that the problem was not temporal: examiners cannot always access the ACC's secure network.¹⁴ Implicit in this argument is the notion that examiners cannot find any other means by which to record their reasons for decision, or are not permitted to do so. The PJC does not accept this argument.

2.20 The ACC has told the committee that, prior to the Justice Smith decision:

Operational pressures would have made it impracticable to record more than a brief note as to the reasons before issuing a summons or notice and that would not have adequately served the audit function of written reasons.¹⁵

2.21 The CEO of the ACC, Mr Alastair Milroy also stated that:

It is impractical to record more than a brief note. That is mainly to do with the fact of the cases that they have. Being expected to make notes and write reasons at the time of receiving a notice or even before issuing a notice is impractical. I think that is one of the reasons why the changes to the act were requested.¹⁶

2.22 The PJC acknowledges that it might be inconvenient and disruptive to examiners, and the examination process, to make a detailed written record of reasons for decision prior to issue of a summons/notice. But on this point, the committee agrees with Emeritus Professor Jim Davis. More importantly, the ACC concedes that the making of a 'brief note' is feasible, and this is all that the Act requires.

2.23 In this regard, the committee notes the comments of the Commonwealth Ombudsman arising from its inspection of the ACC's summonses/notices records:

The recording of those reasons need not be a time consuming task. Although there may at times be reasons that warrant more lengthy delays before reasons are recorded, in general it is difficult for this office to accept that delays of the extent found during this inspection could reasonably be considered to meet the legislative standard.¹⁷

13 Liberty Victoria, *Submission 1*, p. 2.

14 Attorney-General's Department, *Submission 2*, p. 3.

15 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

16 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, pp 23-24.

17 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 6.

2.24 The PJC believes that it is not too impractical or onerous for the examiners to make some form of written record prior to the issue of a summons/notice. This would appear to be best practice for any federal executive agency exercising coercive powers. And the committee is not convinced that urgency was, or is, a significant factor in the issuing of summonses/notices. The issue of volume is further discussed in chapter 3.

2.25 The PJC recognises that the recording of reasons for decision upon issue of a summons/notice would be greatly facilitated by the existence of an appropriate template. And if examiners wished to expand upon that record, and more fully record their reasons for decision for audit purposes, then this can be undertaken subsequent to the issue of the summons/notice.

2.26 The CEO of the ACC, Mr Alastair Milroy, has told the committee that:

I am developing with the Commonwealth Ombudsman a compliance model applicable to the examiner's processing, allowing the Ombudsman to conduct an audit and inspection program.¹⁸

2.27 The PJC commends this initiative, adding that the compliance model should include a template for recording reasons for decision upon issue of a summons/notice. The committee cautions that the compliance model is not an administrative exercise, but an important accountability mechanism. It should therefore comprise carefully considered procedures which minimise the risk of challenge.

2.28 The committee supports recommendations 2, 3, and 4 of the Commonwealth Ombudsman contained in the *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002* report in regard to the recording, and the electronic storage and management of documents accompanying summonses and notices.

Recommendation 1

2.29 The committee recommends that the Australian Crime Commission be required to, without delay, develop and implement a consistent and reliable method for its examiners to promptly and securely record their reasons for decision as required by Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002*.

Recommendation 2

2.30 The committee recommends that the amendment made to Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* by the *Australian Crime Commission Amendment Act 2007* be repealed

18 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 4.

but that those subsections be amended to ensure that the reasons for the decision must be recorded in writing before the issuing of a summons or notice.

2.31 The committee's proposed amendments to Part II Division 2 Subsection 28(1A) and 29(1A) can be found at Appendix 4.

The statutory safeguards

2.32 Subsections 28(1A) and 29(1A) of the Act stipulate two safeguards in the examiners' exercise of the ACC's coercive powers: first, that the examiner must record in writing the reasons for issuing a summons or notice; and second, that before issuing a summons or notice, the examiner must be satisfied that it is reasonable in all the circumstances to do so.

A written record

2.33 The ACC is not the only executive body invested with coercive powers. But the Attorney-General's Department submitted:

Sections 28 and 29 of the ACC Act are more prescriptive than other provisions in relation to the formal requirements and procedural safeguards applicable to the issuing of examination summons and notices to produce by comparable bodies.¹⁹

2.34 The Attorney-General's Department added:

The requirement to record reasons is only present in the legislation applying to the Victorian Chief Examiner...Section 15 of the Major Crime (Investigative Powers) Act 2004 (Vic) provides that the Chief Examiner, in issuing a summons to attend an examination and/or to produce documents is obliged to record reasons for doing so. However, those provisions do not stipulate when the Chief Examiner should record reasons, nor do they specify any consequences for non-compliance with this or any other formal requirement set out under those arrangements.²⁰

2.35 The *Crime and Misconduct Act 2002* (Qld) is another example provided by the Attorney-General's Department. Under that legislation, officers of the Crime and Misconduct Commission Queensland are not required to record reasons for the decision to issue notices (attendance and production). And, unlike a production notice, an issuer is not even required to hold a reasonable belief or suspicion in connection with what is sought under an attendance notice.²¹

2.36 However, this line of reasoning does not persuade the PJC that the ACC is overly prescribed. **The committee believes that a body invested with intrusive**

19 Attorney-General's Department, *Submission 2*, pp 6-7.

20 Attorney-General's Department, *Submission 2*, p. 7.

21 Crime and Misconduct Commission Queensland, *Submission 7*, p. 2.

coercive powers should not be permitted to exercise those powers without appropriate audit and record mechanisms. Some form of checks and balances is required, and this is what is envisaged and supplied in subsections 28(1A) and 29(1A) of the Act.

2.37 As indicated in preceding paragraphs, the PJC believes that the making of a written record is crucial in the process of issuing either a summons or a notice: the requirement to record reasons in writing evidences the examiners' compliance with subsections 28(1A) and 29(1A) of the Act.

The requirement to make a record of the reasons for the issue of a summons or notice is...an essential element in the safeguards that are required for due process in the exercise of coercive powers. The process of recording reasons assists in forming a proper rationale for the issue of the summons or notice. It is also important in view of the multitude of consequences which can flow from that decision.²²

2.38 The Crime and Misconduct Commission Queensland concurred, telling the committee:

The CMC considers it imperative that there be a record created, at or before the time of the issuing of a coercive notice, which has the effect of demonstrating what material was considered by the issuer and what was the issuer's state of mind at the time the decision to issue was made.²³

2.39 But the Law Council of Australia argued that the safeguard has been diminished by granting examiners such a wide latitude in the time for recording of reasons:

If examiners are permitted to record reasons after the issue of the summons, and more particularly after the conduct of the examination or the production of documents, the value of the safeguard is significantly diminished. The perception will arise, and will be difficult to counter, that summonses have been retrospectively justified by what was revealed in the course of an examination, rather than information which was available at the time of issue. **In short, there will be no effective safeguard against fishing expeditions.**²⁴

2.40 Liberty Victoria similarly argued that there should be no doubt about whether a proper basis existed for the issue of a summons at the time it is issued:

22 The Hon. Duncan Kerr MP, *House of Representatives Hansard*, 20 September 2007, p. 126.

23 Crime and Misconduct Commission Queensland, *Submission 7*, pp 2-3.

24 Law Council of Australia, *Submission 5*, p. 4.

The amendment permits the ACC to "fudge" that by issuing summonses when there is no proper basis and later manufacturing one. It thus opens the door to abuses of power by the issue of summonses with no proper basis.²⁵

2.41 More worrisome, as Emeritus Professor Jim Davis observed:

In the simple reading of the words of this amendment act there is no time within which an examiner must necessarily make a written record of the reasons for the issue of a summons.²⁶

2.42 The PJC agrees that the Amending Act has diminished the safeguard, thus increasing the risk of summonses/notices being issued without the proper justification. The PJC does not condone such a risk, and anticipates that Recommendation 2 will alleviate the concern.

Reasonable circumstances

2.43 The requirement for an examiner to be satisfied that it is reasonable in all the circumstances to issue a summons or notice is intended to ensure that this occurs only if:

- there is a reasonable basis for believing that the person who is the subject of the summons or notice has information which will assist the relevant ACC investigation or operation; and
- it is necessary to have recourse to the ACC's coercive powers in order to obtain that information.²⁷

2.44 In the context of coercive powers, this requirement is often referred to as if it were the examiners' only substantive procedural obligation. Indeed, upon introduction of the Amending Act in the Senate, Senator Eric Abetz cited this obligation as evidence of the legislation's due regard for individual rights.²⁸

2.45 And the Attorney-General's Department maintained this view, telling the PJC that the requirement for an examiner to have reasonable grounds for issuing a summons remains challengeable in a court of law.²⁹

25 Liberty Victoria, *Submission 1*, p. 2. Also, see Civil Liberties Australia, *Submission 3*, p. 3. The Commonwealth Ombudsman may have had similar concerns in mind when he recommended that records of reason, once finalised, be retained in an electronic format that cannot subsequently be changed. See: Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008, p. 8.

26 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 2.

27 Law Council of Australia, *Submission 5*, p. 4.

28 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 14.

29 Dr Karl Anderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 12.

The ACC Amendment Act preserves important procedural safeguards that ensure the integrity and fairness of examinations conducted under the ACC Act, and of convictions secured as a result of evidence obtained through those means.³⁰

2.46 The PJC notes that it is not examinations and convictions under review, but the method by which the ACC examination process is commenced. And for this purpose, the Act specifies two procedural safeguards. Having due regard to one safeguard does not excuse the elimination of the second safeguard.³¹

Effectiveness of the safeguards

2.47 The PJC received submissions which argued that examiners have misused or overused the ACC's coercive powers. These submissions were also critical of the Parliament's perceived complicity.

2.48 The Law Council of Australia submitted that the real rationale for the amendments was to rectify problems arising from the examiners' non-compliance with the Act:

It is not open to the examiners to adopt a liberal interpretation of the Act any more than it is open to them to simply disregard the requirements of the Act...**The Amendment Act sent a dangerous message that agencies which ignore the requirements of the law will be shielded from the consequences of their actions through the use of retrospective legislation, and may in fact even be rewarded for their non-compliance with legislation that reduces the safeguards they must comply with in the future.**³²

2.49 And Civil Liberties Australia submitted that:

It appears the Commonwealth has set itself above the law in that it has failed in a substantive way to observe the requirements of Section 28 and then used its privileged position as law maker to rectify its wrong. The Commonwealth failed in its duty to properly exercise the specific safeguards already built into a somewhat draconian piece of legislation. It needs to be remembered that the powers given to this specific Commonwealth agency are sweeping, and set aside some of the most fundamental principles underpinning Australia's jurisprudence.³³

30 Attorney-General's Department, *Submission 2*, p. 6.

31 Also see Senator Natasha Stott Despoja, *Senate Hansard*, 18 September 2007, p. 97.

32 Law Council of Australia, *Submission 5*, pp 7-8.

33 Civil Liberties Australia, *Submission 3*, p. 2.

2.50 Civil Liberties Australia went on to describe the amendments as "ill conceived and inappropriate" and asserted that they would "set a precedent for Commonwealth agencies to rectify their failure to abide by the law."³⁴

2.51 Liberty Victoria was also scathing of the "bad policy" amendments:

A body invested with the far-reaching coercive powers of the ACC should be held to the strictest procedural standards. At a time when sloppy law enforcement has been exposed in cases such as those of Dr Haneef, Vivian Alvarez Solon and Cornelia Rau, it seems extraordinary for the Parliament to relax law enforcement standards in this fashion.³⁵

2.52 The PJC does not believe that the Amending Act was intended to do anything other than address immediate ACC operational difficulties. In particular, the amendments to subsections 28(1A) and 29(1A) were not intended to relax procedural standards, which the committee agrees are appropriate as an accountability mechanism.

2.53 The safeguards which the Parliament incorporated within the Act were initially thought sufficient to protect individual rights. That this might not be the case has only recently become apparent. And the PJC does not condone the whittling away of these safeguards.

2.54 Much of what takes place within the ACC quite properly occurs without the need for transparency. But in law, justice needs to be seen to be done, and the committee believes that this maxim applies equally to the administrative and procedural processes of the ACC, Australia's premier intelligence body into serious and organised crime.

2.55 The requirement to record reasons in writing provides a means for testing whether the examiners have properly exercised the ACC's coercive powers, including having had due regard to statutory safeguards. The PJC strongly cautions the examiners to have recourse to the spirit of the law. And the committee's recommendations will clarify and strengthen the intention and expectations of the Parliament.

2.56 The committee will monitor the appropriateness and effectiveness of the statutory safeguards, with the assistance of the Commonwealth Ombudsman, and hopes that the assessment of Mr Mark Trowell QC is accurate:

My impression is that the ACC is very conscious of the limitations that operate upon it...But I think for the most part they accept—and the examiners really demonstrate this—that they do have those limitations, they

34 Civil Liberties Australia, *Submission 3*, p. 3.

35 Liberty Victoria, *Submission 1*, p. 2.

do attempt to exercise them carefully and with due regard for the process of law.³⁶

Failure to comply

Effect on safeguards

2.57 A third major criticism of the amendments to sections 28 and 29 of the Act concerned the effect of new subsections 28(8) and 29(5). These subparagraphs provide that an examiner's failure to comply with the record making requirements does not affect the validity of a summons or notice.

2.58 The committee notes that these provisions are somewhat unique, with the legislation for most other comparable bodies not specifying consequences for examiners' non-compliance with formal requirements.

Section 82 of the Crime and Misconduct Act 2001 (Qld) provides that failure to give reasons for issuing a notice to attend a hearing does not prevent the Commission from questioning a person about any matter which relates to an investigation or any matter for which the notice was issued. This is the only provision that bears any similarity to the corresponding ACC Act provision.³⁷

2.59 Mr Michael Brereton told the PJC:

The Examiners should not...be allowed to have their failure to comply with the Act to be retrospectively validated, particularly when such failure was crucial to enlivening the jurisdictional basis to issue a Section 28 summons.³⁸

2.60 And the Law Council of Australia argued that it was crucial for examiners to record reasons for issuing a summons/notice.

There is an inherent link between the requirement that an examiner only issue a summons if he or she is satisfied that it is necessary to do so and the requirement that he or she record his reasons in writing. The former is not a substantive requirement and the latter a technicality, as was suggested at the time the Amendment Act was passed. These obligations operate together as a safeguard against misuse of the coercive powers and to deliver a degree of tangible accountability – not just in a systemic sense but in the context of each individual case.³⁹

2.61 Emeritus Professor Jim Davis concurred in relation to the effect of subparagraphs 28(8)(a) and 29(5)(a).

36 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, pp 22-23.

37 Attorney-General's Department, *Submission 2*, p. 7.

38 Mr Michael Brereton, *Submission 11*, p. 5.

39 Law Council of Australia, *Submission 5*, p. 6.

The new paragraph would go much further than merely limiting the effect of [the Justice Smith] decision, and would render ineffective the second sentence of subsection 28(1A), which provides that an examiner must record in writing the reasons for the issue of a summons or notice.⁴⁰

2.62 The PJC is persuaded that subsections 28(8) and 29(5) could negate the safeguards contained in subsections 28(1A) and 29(1A), as well as eliminate a means of accountability. Clearly, the Amending Act was not intended to sanction or authorise the examiners to act with impunity.

Recommendation 3

2.63 The committee recommends that Part II Division 2 Subsections 28(8) and 29(5) of the *Australian Crime Commission Act 2002* be repealed.

Accountability

2.64 The Law Council of Australia told the PJC:

One way in which our criminal justice system guarantees compliance with rules of procedure is by making the admissibility of evidence contingent, at least in part, on it having been obtained in compliance with law...it means that compliance with procedural requirements set out in the law is not only monitored at an overarching, systemic level by bodies such as the Commonwealth Ombudsman. Rather, compliance is also monitored and enforced in each and every case by the very individual effected [sic] by the exercise of the power, that is, the person who has the greatest interest in ensuring that procedural safeguards are adhered to.⁴¹

2.65 The essence of this argument was that subparagraphs 28(8)(a) and 29(5)(a) of the Amending Act, by removing the imperative for examiners to record reasons, also removed a level of scrutiny and accountability.

2.66 This was a crucial concern for Mr Robert Richter QC from the Law Council of Australia:

We need safeguards to the exercise of coercive power. The more safeguards the better, especially if they are reasonable safeguards. It seems to me that the safeguards that were contained in the Act did not go as far as we would have liked originally in the sense that there was no outside supervision, as it were, by the courts as to the reasonability of the reasons...We want real accountability so that the notion of accountability is enforced rather than compliance with the law produced by the removal of the accountability. The amendment said,

40 Emeritus Professor Jim Davis, *Submission 8*, p. 1.

41 Law Council of Australia, *Submission 5*, p. 6.

‘Listen, you’re not complying with the law, so we will make it easier for you; we will remove the law.’ That just seems wrong.⁴²

2.67 The ACT Attorney-General, The Hon. Simon Corbell MLA made a similar comment:

Given that the ACC is immune from providing reasons for its decisions under the Administrative Decisions (Judicial Review) Act 1977 (Cth), the practical effect of new sections 28(8) and 29(5) will be to deny a suspect or accused person the means of effectively challenging the lawfulness of a summons issued against them.⁴³

2.68 The PJC notes that two ideas are intertwined in these submissions: first, the non-existence of reasons for decision; and second, the lack of availability of reasons for decision. An examiner's reasons for decision are normally available to a court in judicial proceedings challenging the issue of a summons/notice. Whereas if those reasons have never been created, then they cannot be challenged. The committee shares the Law Council of Australia's concerns, particularly as there are few means by which the examiners' conduct in issuing summonses and notices can be scrutinised.

2.69 The Attorney-General's Department told the PJC that subparagraphs 28(8) and 29(5) are meant to ensure that ACC operations and investigations are not undermined by reason of an examiner's failure to comply with 'technical' requirements.

The amendments do not circumvent substantive procedural obligations, such as the requirements under subsection 28(1A) that the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons and under subsection 28(3) that the summons should, other than in limited circumstances, set out the general nature of the matters in relation to which the examiner intends to question the person.⁴⁴

2.70 If the record making requirements are 'technical', then subclauses 28(8) and 29(5) are primarily inconsequential. But the PJC, for the reasons already indicated and further discussed in chapter 3, strongly rejects this interpretation.

2.71 The committee concurs with the views of the South Australian Attorney-General, The Hon. Michael Atkinson:

...that if a defendant is to be subjected to the rigours of compulsory examination (and all that entails), the prospective examiner should be obliged to record reasons for issuing the process as a measure of accountability to the due process of the law.

42 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 7.

43 The Hon. Simon Corbell MLA, Attorney-General, Australian Capital Territory, *Submission 10*, p. 2.

44 Attorney-General's Department, *Submission 2*, pp 4-5.

The *Australian Crime Commission Amendment Bill 2007* seeks to overthrow this comparatively minimal formal protection. It is no technicality to be discarded on a whim.⁴⁵

2.72 The PJC strongly believes that there must be reasons for decision available for review by those authorities empowered to scrutinise the actions of the examiners in issuing summonses and notices.

Disclosure of summonses/notices

2.73 A related matter which concerned the PJC was the statutory prohibition on the disclosure of information about a summons/notice, or any official matter connected with it.⁴⁶ Subsection 29A(2) allows an examiner to determine whether the necessary notation is included on a summons/notice.

2.74 The committee understands that it might not always be prudent, or desirable, for a person summonsed, or issued with a notice, to be able to disclose that fact. This prohibition extends to a legal practitioner providing legal advice or representation relating to the summons notice or matter.⁴⁷ The PJC understands that there might be sound operational reasons for this extended prohibition.

2.75 But there are two exceptions to the statutory prohibition: first, to communicate with a legal representative; and second, if the 'person' is a body corporate, to an officer or agent of the body corporate. The exceptions do not include other professionals, such as accountants, who might have a detailed knowledge of the matters falling within the scope of the summons/notice. The practical effect of the non-disclosure prohibition is that a person's private matters can be examined by the ACC without that person's knowledge.

2.76 A non-disclosure prohibition is effective until an ACC operation or investigation is concluded and, in certain circumstances, is automatically cancelled by the operation of subsection 29A(4) of the Act. Upon cancellation, the CEO of the ACC is required to notify each person affected by the prohibition. Otherwise, it ceases to be a criminal offence to disclose the service or receipt of a summons/notice five years after issue of that summons/notice.⁴⁸

2.77 The committee has been told that the ACC rarely, if ever, provides the compulsory notification of cancellation required under subsection 29A(5) of the Act. If true, then the committee is concerned with the apparent disregard that the ACC has for this statutory obligation. It is not acceptable to simply allow the prohibition to

45 The Hon. Michael Atkinson MP, Attorney-General, Government of South Australia, *Submission 12*, p. 1.

46 Section 29A of the *Australian Crime Commission Act 2002*

47 Subsections 29B(2) and 29B(3) of the *Australian Crime Commission Act 2002*

48 Subsection 29B(5) of the *Australian Crime Commission Act 2002*

lapse after five years as envisaged by subsection 29B(5) of the Act.⁴⁹ The PJC is very much aware that this approach allows people to continue to believe that they are still subject to a non-disclosure prohibition. The PJC condemns this practice, and recommends that the ACC review its relevant procedures.

2.78 When questioned, the ACC told the committee that:

[Section 29A(1)] guides you before you get to the examination. At the end of the examination, the examiner would have made a non-publication direction under section 25A(9). That would be tailored to suit the matter. They are varied from time to time, but largely that continues. There is a mechanism...where those non-publication directions then link in with the role of a court and the court can effectively set those aside for the purposes of a particular matter. That very rarely happens because we would normally vary the terms of the non-publication direction to facilitate disclosure on subpoena or under disclosure requirements.⁵⁰

2.79 The PJC acknowledges that there are two distinct provisions operating here: sections 29A and 25A. One relates to a summons/notice, the other relates to an examination. And each has a method for protecting confidentiality. One is a prohibition against disclosure of the existence of the summons/notice, the other is a non-publication direction relating to evidence given, or about to be given, to an examiner. The two provisions are not to be confused.

A non-publication direction may, in writing, be varied or revoked, except if to do so would prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.⁵¹

2.80 The CEO of the ACC, Mr Milroy told the committee:

There are requests made for such considerations. And then the paperwork comes to me for consideration whether to lift the non-disclosure order.⁵²

2.81 The committee notes that it is at the CEO's discretion whether to vary or revoke a non-publication direction. And the committee expects such requests to be given due consideration and not dismissed out of hand.

2.82 The committee fully supports the legislative provisions terminating non-disclosure orders, and their associated offences, as well as the interim mechanisms by which persons aggrieved by the issue of a summons/notice can voice a complaint.⁵³

49 This subsection provides that the offence provisions, subsections 29B(1) and 29B(3) of the Act, lapse upon cancellation of a non-disclosure order or five years after issue of the summons/notice, whichever is the sooner.

50 Mr Peter Brady, Legal Adviser, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 20.

51 Subsections 25A(9) - 25A(11) of the *Australian Crime Commission Act 2002*

52 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, pp 20-21.

53 This is primarily by way of judicial review, including under the *Administrative Decisions (Judicial Review) Act (1977)* and the *Judiciary Act 1903*.

2.83 The Commonwealth Ombudsman (Ombudsman) has some oversight of the ACC and its examiners. But the committee suggests that there is some confusion regarding whether the Ombudsman can receive a complaint without the complainant being in breach of a non-disclosure order.

Recommendation 4

2.84 The committee recommends that Part II Division 2 Subsection 29B(4) of the *Australian Crime Commission Act 2002* be amended to include the Commonwealth Ombudsman.

Reimbursement of expenses

2.85 One further matter on which the PJC wishes to comment is that of witness expenses.

2.86 Under section 26 of the Act, a witness appearing before an examiner must be paid the expenses of his or her attendance. The amount payable is determined in accordance with the scale prescribed by Regulation 5 of the *Australian Crime Commission Regulations 2002* (Regulations), and is referenced to the High Court Rules.⁵⁴

2.87 However, this is not the case in relation to witnesses complying with a notice. For a witness producing a document or thing, the CEO of the ACC "may direct" that the witness "shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale."⁵⁵

2.88 The PJC observes that a person complying with a section 29(1) notice will be paid only if the CEO makes a direction, or that person applies to the Commonwealth Attorney-General for assistance (legal or financial) in respect of the appearance before the examiner.⁵⁶ The committee notes that applications to the Attorney-General are not guaranteed to be successful, and, as a document or thing can be produced to a member of the ACC staff, this option might not be available.

2.89 The PJC particularly notes that the prescribed scale covers only 'appearance costs', whereas, with a notice, the real imposition occurs prior to delivery of the requested material. It might take considerable time and expense to collect, collate and copy the requested material, and it might impact upon work commitments and wages.

2.90 The PJC is unclear as to why, in relation to expenses, there should be any distinction between persons served with a summons as opposed to a notice. Both persons are equally compelled to assist the ACC with the conduct of its special investigation or operation.

54 Schedule 2 of the *Australian Crime Commission Regulations 2002*

55 Subsection 26(2) of the *Australian Crime Commission Act 2002*

56 Section 27 of the *Australian Crime Commission Act 2002*

2.91 The committee therefore considers that the High Court Rules relating to summonses should also apply to persons complying with a notice issued under subsection 29(1) of the Act, as they do witnesses appearing before an examiner.

2.92 The PJC suggests that when the Minister next commissions an independent review of the operation of the Act, this issue be examined as one of concern to the Parliament and the broader community.

The coercive powers – a balancing act

2.93 The ACC has been invested with coercive powers, which, aside from Australia's anti-terrorism laws, are unique in allowing an unprecedented level of intrusion into individuals' personal lives.

2.94 The ACC told the PJC:

These powers are critical to the successful disruption of organised criminal activity, dismantling of organised criminal entities and the provision of strategic intelligence based on a unique information collection capability of examinations to scope the involvement of organised crime in infrastructure or industry sectors.⁵⁷

2.95 And the coercive powers have been effective, according to the CEO of the ACC, Mr Alastair Milroy:

What we have seen in the use of the powers is the significant intelligence that you are able to derive from the use of the powers, both from friendly and unfriendly sources or witnesses. The use of the powers in special investigations, be it the homicides that have occurred in Victoria or the drug operations, has been instrumental in getting some significant results, not only for the ACC but for our partners, which has led to a significant number of criminal operations being disrupted and prosecuted.⁵⁸

2.96 The need to gather intelligence and investigate crime on the one hand, and the need to preserve individual rights on the other, is central to the issue of the exercise of coercive powers. Balancing these competing interests is a task which must always be undertaken with caution.

2.97 This inquiry has led the PJC to believe that the Amending Act did not have sufficient regard to the preservation of individual rights, and the safeguards developed by successive parliaments and courts.

2.98 And because the ACC exercises special and intrusive coercive powers in an highly secretive environment, it is vital for these rights and safeguards to be preserved with clear and effective accountability mechanisms.

57 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 8.

58 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 19.

2.99 The PJC believes, as a matter of sound governance and accountability, it is highly appropriate for the ACC, in a timely fashion, to create and maintain comprehensive records of the circumstances in which it exercises the coercive powers vested in it by the Parliament, and the reasons for that exercise.

2.100 A vital corollary is that the ACC and its records must be open to such independent and external review and audits as are determined by the Parliament.

2.101 It is through such mechanisms that the ACC maintains credibility, and the confidence of those who repose faith in the ACC.

CHAPTER 3

Retrospection and contempt

3.1 In August 2007, there was a successful challenge to an examiner's interpretation of subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* (the Act). In the Supreme Court of Victoria, Justice Smith held that for a summons to be valid, the reasons for its issue must have been recorded in writing prior to the issue of the summons.¹

3.2 According to the Australian Crime Commission (ACC), the Justice Smith decision had "potentially extensive prejudicial implications" for its work because "until that time the examiners had routinely recorded reasons after issuing summonses and notices."²

In principle, the judge's comments raise a doubt about the validity of substantially all of the 5,000 summonses and notices issued by the ACC since its establishment in 2003. This poses a significant threat to the enforcement of summonses and notices that had already been issued and to continued use by the ACC and other law enforcement and prosecution agencies of information and material obtained directly or indirectly by means of the coercive powers. Past experience indicated that the ACC targets would make extensive use of Smith J's decision as a precedent if it was allowed to stand.³

3.3 This led to the amendment of the Act by the *Australian Crime Commission Amendment Bill 2007* (the Amending Act). The parliamentary process associated with that legislation is discussed in chapter 1 of this report.

Extent of the affectation

Summonses and notices

3.4 Upon introduction of the Amending Act, the Parliament had been told that as many as 600 summonses/notices and 30 prosecutions could have been affected by the Justice Smith decision.⁴ An exact figure was not then available, and to date, the

1 *ACC v Magistrates' Court of Victoria (at Melbourne) and Michael Richard Brereton* [2007] VSC 297 (23 August 2007)

2 Australian Crime Commission, *Submission 9*, p. 6.

3 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

4 The Hon. Senator David Johnston, *Senate Hansard*, 18 September 2007, p. 102.

Commonwealth Director of Public Prosecutions is not able to provide a more precise figure.⁵

3.5 The Parliamentary Joint Committee on the Australian Crime Commission (PJC/Committee) cannot say whether all of the 600 summonses/notices were crucial to special ACC operations and investigations.

Derivative information

3.6 More significantly, as indicated in paragraph 3.2, Justice Smith's decision may have had an impact on derivative information and material obtained at ACC examinations. Ms Sashi Maharaj QC, Counsel Assisting the ACC, explained:

The Justice Smith view would have led to some extremely serious and adverse implications for virtually all of the investigative work of the ACC...Namely, it opened up the potential for, first, the legality of a substantial amount of evidence collected and disseminated by the ACC...to be challenged in all manner of court proceedings. Second, there is the stultifying of virtually all ACC operations by injunctions so as to prevent it from proceeding any further in respect of such evidence in all current special investigations and intelligence operations. Third, it jeopardises the prosecutions under section 30 dealing with the failure of witnesses to attend and answer questions.⁶

3.7 There are no restrictions within the Act on the use of derivative information and material. Indeed, the examination process is an investigative tool, designed to gather information for the purposes of advancing special ACC investigations and operations.

3.8 The committee expects that the ACC, and its partner agencies, were making full use of derivative information and material, as permitted under the Act. And the Justice Smith decision might therefore have had "potential and adverse practical impacts" upon these law enforcement bodies and their outcomes.⁷ The PJC accepts that this was a genuine concern for the ACC, the government, and the Parliament upon introduction of the Amending Act.

3.9 However, information and material obtained through a summons/notice, which had not been issued in strict compliance with the Act, would not necessarily have been affected by the Justice Smith decision.

3.10 According to Mr Robert Richter QC from the Law Council of Australia:

5 Commonwealth Director of Public Prosecutions, *Submission 6*, pp 2-3.

6 Ms Sashi Maharaj QC, Counsel Assisting, *Committee Hansard*, Canberra, 17 June 2008, p. 10. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

7 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

Judges are very loath to throw out evidence where it is unlawfully obtained because of an honest mistake, because of somebody saying, ‘Well, I honestly didn’t think I was required to put in reasons,’ or whatever. If that is honest, the evidence will not be excluded. I say that from experience. A court moved to exclude unlawfully obtained evidence will be so moved if it is faced with a prosecution or with an investigatory body that has set its face against the law deliberately, and it operates as a sort of punishment. A law enforcement agency, of all agencies, cannot set its face against the law deliberately. It is a cost too high to pay for this democratic community.⁸

3.11 Mr Robert Richter QC added:

We have...two categories. One is a refusal to give evidence, reissue and do it properly. The second is that the evidence has been obtained but the legality of the obtaining is questionable and you go to a court. If the obtaining has been done bona fide through some mistake or misunderstanding or whatever, the evidence will go in. **If the evidence was obtained through a deliberate abuse of power, the evidence will go out and this committee should applaud that in encouraging the rule of law—because convictions obtained by the use of evidence that has been deliberately obtained unlawfully is too high a price to pay for our system.**⁹

3.12 The PJC agrees with the Law Council of Australia that:

The amendment goes beyond [what is necessary]. The reason that the amendment goes beyond that is that it removes the law and it does not need to. We should trust the law. There is a bulwark of law that has been created for these sorts of situations.¹⁰

3.13 But the PJC believes that the ACC examiners were acting upon a reasonable interpretation of subsections 28(1A) and 29(1A), and there is no reason to believe that all the summonses/notices, for which reasons were not recorded prior to issuing, would not have withstood judicial scrutiny.

Necessity for parliamentary intervention

3.14 At the time, members of both chambers were not entirely comfortable with what they were being asked to do. These concerns are described in chapter 1 of this report. But the PJC notes the Hon. Duncan Kerr SC MP's particular concern:

8 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 6. Also see Ms Sashi Maharaj QC, Counsel Assisting, *Committee Hansard*, Canberra, 17 June 2008, p. 19. Also, see *Bunning v Cross* (1978) 141 CLR 54 and *Ridgeway v R* (1995) 184 CLR 19.

9 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, pp 8-9.

10 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 8.

We do not know how many instances there are of examiners under this legislation, where they have a statutory obligation to set down their reasons, who have failed entirely to do that. We do not know what we are approving. We do not know the circumstances. We do not know how many cases there might be. We do not know whether we are being asked to approve something that really is in a sense innocent error or a complete disregard of the parliament's instructions.¹¹

3.15 The committee reiterates that the Amending Act was intended to address immediate ACC operational difficulties. And the PJC notes that it was on this basis and with the information available, that the Amending Act was introduced by the government and passed by the Parliament.

3.16 It would not be acceptable for any law enforcement agency to disregard its statutory obligations, blatantly or otherwise. But the PJC does not believe that the examiners have wilfully failed to comply with their obligations under subsections 28(1A) and 29(1A) to record reasons for decision. The issue is more precisely a question of when those statutory obligations must be observed. And it is in this regard that the committee finds the ACC examiners to have acted outside the spirit of the law.

3.17 The ACC has never agreed with the Justice Smith decision, describing it as "based on wrong reasoning...not supported either by the terms of the [Act] or by the policy behind sections 28 and 29."¹² And this is the fundamental problem.

3.18 Sections 28 and 29 of the Act are open to interpretation, and can be read as:

- before issuing a summons/notice, the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons/notice. A written record of reasons for the decision must also be created (*at some point in time*); or
- before issuing a summons/notice, the examiner must be satisfied that it is reasonable in all the circumstances to issue the summons/notice and (*at that time*) a written record of reasons for the decision must also be created.¹³

3.19 The ACC has always adopted and acted on the first interpretation, whereas the existence of safeguards within the legislation, including subsections 28(1A) and 29(1A), and the Parliament's fundamental concern for individual rights, leads the PJC to conclude that the second interpretation is correct.

11 The Hon Duncan Kerr MP, *House of Representatives Hansard*, 20 September 2007, p. 128.

12 Australian Crime Commission, *Submission 9*, p. 7.

13 Emphases added

3.20 The ruling by Justice Smith exposed the interpretive ambiguity of the legislation. The committee is concerned that this ambiguity was not exposed and rectified much earlier.

3.21 Mr Robert Richter QC from the Law Council of Australia was scathing of the ACC's apparent inability to discern and deal with any ambiguity.

If there was ambiguity, they should have got advice about it. I don't believe they did. If anyone had thought about it, they would have said, 'By the way, what does this require?' and they would have got advice about it...If they had got advice about it, at the very least they would have said, 'There's a possibility that a court is going to say that you need the reason beforehand, so be careful and do it.' So why don't they seek advice on these things?...It is in the ACC's interest to find out at the earliest opportunity whether or not it has acted validly. If there is a challenge to the validity of its actions, it is in its interests to find out whether or not it acted validly rather than to wait for a possible denouement that occurs at trial when it is too late to fix it.¹⁴

3.22 Nonetheless, the Justice Smith decision and the Amending Act have highlighted the existence of the ambiguity, allowing Parliament the opportunity to amend the legislation. The Amending Act has also effectively addressed the ACC operational difficulties which were the catalyst for the legislation. Yet the PJC remains concerned as to whether the Amending Act was appropriate.

The retrospective provisions

The legislative provisions

3.23 Sections 10 and 12 of the Amending Act provided that summonses or notices issued prior to the commencement of these sections, and which would be invalid because the record required by subsections 28(1A) and 29(1A) of the Act was made after the issue of the summonses and notices, are nonetheless valid and taken to always have been valid.

3.24 The PJC has been told that this phrasing is reasonably unique.

3.25 But the Attorney-General's Department assured the committee that:

There are a number of pieces of legislation around that have this sort of dual character. The obligation exists, so parliament is telling the executive that things must be done in a certain way—for example, reasons must be recorded—but then specifies that it is not a consequence of failing to follow that that the resulting decision or action is invalid. In terms of the overarching question about whether these amendments are the appropriate place to draw the line, that is very much a question that will be an

14 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, pp 4 & 7-8.

opportunity for the current minister to review in light of the findings of this committee and the evidence before this committee.¹⁵

3.26 The PJC is not convinced by the logic of this argument, and notes that there could be a significant number of summonses and notices which are captured by these retrospective provisions.

3.27 The number of prosecutions affected by the Justice Smith decision is unclear, but it appears to be diminishing. In September 2007, the Parliament was informed that there were as many as 30 prosecutions affected by the Justice Smith decision but seven months later, the Commonwealth Director of Public Prosecutions informed the PJC that it was conducting approximately 11 prosecutions which may have been affected by Justice Smith's decision.¹⁶ The number of prosecutions appears to have decreased. But the committee notes that prosecution figures are directly related to the number of summonses/notices issued.

3.28 In September 2007, the Parliament was informed that there were as many as 600 summonses and notices affected by the Justice Smith decision. Nine months later, this committee was informed that as many as 3 000 summonses and 2 000 notices may have been affected without the retrospective provisions of the Amending Act.¹⁷

3.29 Mr Robert Richter QC from the Law Council of Australia told the PJC:

There was this ridiculous notion...that the legislation was necessary because the sky would fall in on 3,000 or 800 summonses—or however many other summonses—and that prosecutions would fail. That is complete and absolute nonsense. The reason I say it is complete and absolute nonsense is that for any evidence that was obtained and had been obtained in pursuance of those notices, whilst, if the notices are shown to be invalid and in nullity, they could be said to have been obtained unlawfully, the ordinary rules of admissibility of evidence would still operate...So the kind of panic reaction that was taken was wrong.¹⁸

3.30 The PJC is concerned that the ACC does not appear to be well aware of its own affairs: there is a notable lack of precision in the data. And the committee suggests that this is far from satisfactory. Among other things, it does not assist the PJC or the Parliament to assess the ACC's performance, nor the correct manner in which to deal with the ACC and its legislation. Moreover, in this specific instance, it lends credence to the Law Council of Australia's assertions that:

15 Dr Karl Anderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 13.

16 Commonwealth Director of Public Prosecutions, *Submission 6*, pp 2-3.

17 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 9.

18 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 3.

There was a massive overreaction to [the Justice Smith decision]. It was an unnecessary overreaction and it was a reaction which diluted the kinds of safeguards that existed prior to the amending act...The reason...this committee would never have had any evidence that the sky might have fallen in is that, in all the summonses that they issued, which were issued irregularly, according to Justice Smith anyway, if that judgement applied there was never, I would say, an irremediable aspect of urgency that could not have been remedied by proper notices. **These agencies love to operate in secrecy and they have to, to some extent, but there are some areas where that secrecy should be tested.**¹⁹

3.31 In any event, and as indicated in preceding paragraphs, the PJC does not believe that all summonses/notices issued by ACC examiners prove crucial to special ACC operations and investigations. The committee believes that those summonses/notices, which continued to have a high importance, should have been reissued immediately the Justice Smith decision was announced and on a priority basis.

3.32 The Law Council of Australia supports this view, telling the PJC that:

If those summonses are invalid, they can be reissued validly and then the information obtained. That is for the people who refuse to answer them or to give evidence. I would say that, out of the 800 or 3,000 no more than a handful had refused on that basis...If there is a claim of invalidity of the notice, the ACC can have a look at it and say, 'Okay, we'll give you another one.' There are no cases of urgency that I am aware of where that could not have happened.²⁰

3.33 The PJC notes that, with the introduction of the Amending Act, the ACC examiners may have continued their old practices regarding the recording of reasons for decision. That is, the reasons are not recorded prior to the issuing of a summons/notice.²¹ Not only would this be contrary to the spirit of the Act, but it would therefore also be possible that there were a substantial number of summonses/notices affected by this report.

3.34 The PJC suggests that, upon the tabling of this report in the Parliament, if it has not already done so, the ACC should immediately review its practices in regard to the issuing of summonses/notices and ensure that the reasons for issue are recorded prior to the issuing of summonses/notices.

19 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 2.

20 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 6. Also, see ACC, Additional Information, Answer to Question on Notice, No. 1 (received 11 August 2008).

21 Commonwealth Ombudsman, *Australian Crime Commission: use of certain powers under Division 2, Part II of the Australian Crime Commission Act 2002*, August 2008.

3.35 While it is difficult, if not impossible, to determine how many summonses and notices were truly affected by the Justice Smith decision, the PJC is reasonably assured that, given the application of the retrospective provisions to summonses and notices issued under subsections 28(1) and 29(1) of the Act, respectively, and before the commencement of sections 10 and 12 of the Amending Act, the number of summonses and notices affected by the retrospective provisions will now never increase.

Rationale

3.36 Proponents of the Amending Act have argued that the amendments to subsections 28(1A) and 29(1A) were justified on the basis of legislative ambiguity. More precisely:

The ACC Amendment Act 2007 provides clear guidelines to ACC examiners as to when they are to record their reasons. The Act further clarifies the impact of any failure to comply with the provisions on the validity of a summons.²²

3.37 The PJC agrees that there was ambiguity within the Act, requiring clarification.²³ But the committee does not believe that the Amending Act provided 'clear guidelines', or that the Amending Act provided the correct type of clarification.

3.38 The PJC strongly disagrees with the statement that:

The amending legislation merely provided legislative confirmation that an Examiner may record reasons in writing before, at the time of, or as soon as practicable after the issue of a Summons or Notice.²⁴

3.39 The committee's views on the appropriate time for an examiner to record reasons for a decision to issue a summons or notice are stated in chapter 2 of this report. And the PJC notes that in the proceedings before His Honour Justice Smith, counsel for the ACC conceded:

That the existence of a document recording the reasons of the examiner for issuing the examination summons was a condition precedent to the valid exercise of the power to issue the examination summons.²⁵

3.40 The ACC cannot have it both ways. At best, this concession supports the argument that the legislation is ambiguous. At worst, this concession indicates a

22 Commonwealth Director of Public Prosecutions, *Submission 6*, p. 2.

23 See Appendix 4.

24 ACC, Additional Information, Answer to Question on Notice, No. 2 (received 21 May 2008). Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 5; Attorney-General's Department, *Submission 2*, p. 4; and Crime and Misconduct Commission Queensland, *Submission 7*, p. 5.

25 *ACC v Magistrates' Court of Victoria (at Melbourne) and Michael Richard Brereton* [2007] VSC 297 (23 August 2007) Smith J at para 9.

willingness to interpret the legislation according to the ACC's requirements alone. The committee notes that this latter proposition was the view of several submitters.

'Technicality'

3.41 Ultimately, the ambiguity in sections 28(1A) and 29(1A) could have been, and was, used by persons served with a summons or notice to challenge the examiner's exercise of the coercive powers.

3.42 The government's position was explained by the then Attorney-General, the Hon. Philip Ruddock MP:

We believe that trials for criminal offences should turn on the facts and the evidence—the issues of substance. Some of these offences involve the most significant and severe issues of law breach, and I think the community would see a failure to pursue those matters...as being a real concern if it were only because of a technical reason. If a summons or notice yielding probative evidence were seen to be struck down simply because reasons were not recorded before a summons or notice were issued, but only afterwards, I think the public would see it in that light.²⁶

3.43 And similar comments were voiced in the Senate:

I understand that the retrospective application of these provisions could be detrimental to persons who might otherwise have had scope to challenge the validity of a summons or notice to produce. The Government considers, however, that this is a just and appropriate outcome. It does not consider that a failure to record reasons for issuing a summons or notice prior to issue of the summons or notice should give a person who would otherwise have been convicted of an offence technical grounds to challenge the admissibility of evidence and escape conviction.²⁷

3.44 The PJC agrees that prosecutions should be based on sound and probative evidence. But the committee strongly resists the assertion that a failure to record reasons for the issue of a summons/notice is a technicality, and therefore of little significance.

3.45 Any legislation which can compel an individual to attend an ACC examination is more than a 'technicality'. And the exercise of such coercive powers is more than procedural or administrative in nature. It is a power which must be exercised in strict compliance with the Act, and with due consideration to the individuals concerned.

26 The Hon. Philip Ruddock MP, Attorney-General, *House of Representatives Hansard*, 20 September 2007, p. 134.

27 Senator Eric Abetz, *Senate Hansard*, 18 September 2007, p. 14.

3.46 Legal experts submitting to the inquiry were equally forthright in their assessment of the 'technical amendments'.

3.47 Emeritus Professor Jim Davis submitted that there is no such thing as 'technical grounds' for being acquitted of an offence.

If the prosecution is unable to prove that an accused has committed an offence of which he or she is charged, then the accused is entitled to be found not guilty, and to say that someone has "escaped conviction on a technicality" is a misuse of language.²⁸

3.48 And Mr Robert Richter QC from the Law Council of Australia agreed, adding:

No-one has got off on a technicality. It does not happen in serious crime. That has been my experience. You cannot call self-defence a technicality, obviously, and that was the one acquittal I can think of.²⁹

3.49 Emeritus Professor Jim Davis further observed:

Any requirement imposed on an examiner, I suggest, is not simply a technical requirement that can be ignored if it all gets a bit too difficult if there are too many people. Requirements are put in the legislation for a purpose; they ought not to be dispensed with simply for what appears, as I say, to be administrative convenience.³⁰

3.50 The Law Council of Australia concurred:

It is not for the ACC or the Government to declare any...failure to adhere to the law as a mere technicality.³¹

Right to certainty and retrospective criminal sanction

3.51 An important practical effect of sections 10 and 12 of the Amending Act is that persons who have previously failed to comply with an invalid summons are retrospectively liable to serious criminal sanctions.³²

3.52 This common objection was plainly stated by Civil Liberties Australia:

A citizen goes about business and life with the confidence and understanding of what the law is and not what at some time in the future a Parliament may consider it should have been. Citizens and the courts are

28 Emeritus Professor Jim Davis, *Submission 7*, p. 2.

29 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 11.

30 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 3.

31 Law Council of Australia, *Submission 5*, p. 7. Also see Civil Liberties Australia, *Submission 3*, p. 1.

32 Subsections 30(6)-(8) of the *Australian Crime Commission Act 2002*

expected to apply and observe the laws of the land as they are known at the time an action, agreement etc is undertaken. It is unconscionable to change the law retrospectively so an action considered legal at the time is in the future illegal.³³

3.53 And the Law Council of Australia more specifically told the committee:

The fact is that, if there were an invalid summons, it is not a procedural nicety as to whether or not there was a crime committed. If there were an invalid summons...it is not a question of loopholes; it is a question of the foundations of power to require the taking of the oath or to require the giving of evidence. If there is no lawful requirement, there is no crime in refusing...There are crimes that are not retrospective—they are not crimes at the time and they are made into crimes. There was a crime at the time of disobeying a lawful command, as it were. If the command is not lawful, there was no crime...This act says, 'The command was lawful; therefore, there is a crime.' I cannot think of an easier or simpler example of making something retrospective. At the time the person acted, they did so lawfully because there was no proper compulsion of law.³⁴

3.54 The PJC agrees that it is every citizen's right to test the lawful exercise of statutory powers, such as the examiners' issuing of summonses and notices under subsections 28(1) and 29(1) of the Act.

3.55 As noted by Mr Robert Richter QC:

Some people see a reliance on rights as pettifogging, as looking for loopholes and the rest of it. The Law Council of Australia regards adherence to the rule of law as paramount and, if a citizen says, 'You want to use coercive powers on me, show me why I should abide. Show me that you are behaving lawfully.'³⁵

3.56 Sections 10 and 12 of the Amending Act have validated summonses and notices, which would have been invalid. As a result, individuals have not only been deny the right to challenge the lawful exercise of the ACC's coercive powers, but it is now a crime to do so. In addition, any evidence obtained from what was an unlawful summons/notice can now be used to prosecute and convict an individual, who was not necessarily obliged to provide the evidence in the first place.

3.57 In relation to persons who failed to co-operate with the ACC examiners, the committee notes that there is a statutory obligation to co-operate at an examination. The PJC considers this obligation to arise upon service of a valid summons.

33 Civil Liberties Australia, *Submission 3*, p. 2.

34 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 7.

35 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 3.

3.58 The committee considers Sections 10 and 12 of the Amending Act to comprise retrospective legislation, which is inappropriate in all but the most exceptional of circumstances. In relation to substantive offences, the PJC is mindful of the need to prosecute serious and organised crime, and consequently the committee concedes that those summonses and notices validated by the *Australian Crime Commission Amendment Act 2007* should not be jeopardised and should be allowed to stand. However, in line with Recommendation 2 that, before the issue of a summons or a notice, the reasons for issue must be recorded in writing, the committee believes that there is no need for the continuation of Sections 10 and 12 into the future.

Recommendation 5

3.59 The committee notes that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* deems certain summonses and notices valid thereby protecting any prosecution based on those summonses and notices. The committee recommends that:

- **the same practice be adopted in relation to summonses and notices issued subsequent to the *Australian Crime Commission Amendment Act 2007* until now;**
- **but that henceforth, in line with Recommendation 2, the practice of retrospectively recording reasons for the issue of summonses and notices be immediately discontinued and that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* be repealed.**

International treaty obligations

3.60 The issue of retrospectivity was also raised in relation to Article 15 of the International Covenant on Civil and Political Rights (ICCPR) which states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.³⁶

3.61 The ICCPR is a United Nations treaty, which was ratified by Australia on 13 November 1980. As a State Party, Australia is bound by the terms of the Covenant.

3.62 Emeritus Professor Jim Davis considered that Sections 10 and 12 of the Amending Act must contravene this covenant but:

36 International Covenant on Civil and Political Rights, Article 15(1). This is similar to Article 7(1) of the European Convention on Human Rights: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

I am not sure that the ramifications would be all that great...It is a matter in which national governments feel that the protection of the national order is greater than their obligations to international bodies and international covenants.³⁷

3.63 The PJC noted the Attorney-General's Department argument:

There is certainly a number of precedents in Commonwealth law for either ...actual retrospective criminal offences...or, more commonly, retrospective validation of administrative action...there is an important distinction.³⁸

3.64 And later:

The ACC Amendment Act responds to jurisprudence on a specific procedural matter relating to the issuing of a valid summons or notice to appear or produce material in criminal proceedings. The United Nations Human Rights Committee has consistently determined that changes in rules of procedure relating to offences will only be relevant to Article 15 where they affect the nature of the offence in question.

Under section 30 of the ACC Act an offence already existed with respect to a person who fails to comply with a summons or notice. The ACC Amendment Act does not alter the nature of this offence or the constituent elements necessary to prove the existence of an offence in these circumstances.

The effect of a summons or notice under the ACC Act was and remains the creation of an obligation on the person receiving the summons to respond appropriately or risk being charged with an offence.³⁹

3.65 The PJC accepts that subsection 30(6) of the Act does not contravene Article 15 of the ICCPR. This provision makes it an offence for persons properly served with a summons/notice to fail to attend an examination, take an oath/affirmation, refuse/fail to answer a question or produce a document. But this provision was not affected by the Amending Act, and it is not this provision that is at issue: at issue are subsections 28(1A) and 29(1A) of the Act, and sections 10 and 12 of the Amending Act.

3.66 Further, the committee considers the Amending Act to have done more than simply respond to "jurisprudence on a specific *procedural* matter."⁴⁰ As indicated in preceding paragraphs, the PJC considers the provisions in question to have been more properly classified as "actual retrospective criminal offences" rather than "retrospective validation of an administrative action."

37 Emeritus Professor Jim Davis, *Committee Hansard*, Canberra, 17 June 2008, p. 5.

38 Dr Karl Alderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 24.

39 Attorney-General's Department, Additional Information, Answer to Question on Notice, No. 2. (received 15 July 2008)

40 Emphasis added

3.67 The PJC therefore disagrees with the Attorney-General's Department, and agrees with the Law Council of Australia that sections 10 and 12 of the Amending Act contravene Australia's international treaty obligations.

The Law Council considers this retrospectively creating criminal conduct when no criminal conduct occurred...and that is contrary to the covenant.⁴¹

3.68 In amending the Act, the Attorney-General's Department has ignored Australia's obligations in regard to Article 15 of the ICCPR. The PJC strongly believes that the Attorney-General's Department must be more vigilant in regard to Australia's international and human rights obligations when considering legislative change. The committee does not condone any contravention of international obligations, except in the most exceptional circumstances. The circumstances of the Justice Smith decision do not meet this threshold.

Special coercive powers

3.69 Over the past five years one matter in particular has been intermittently raised by the ACC and its examiners as a concern to special ACC operations and investigations: lack of cooperation with the ACC examiners and the ACC hearing process.

Table 1: ACC coercive powers statistics 2003-2007

	2003-04	2004-05	2005-06	2006-07
People charged	203	294	218	176
Charges laid	626	1,665	894	429
Examinations conducted	355	629	605	703
Notices to produce documents issued	453	516	480	604
Summonses issued			705	856

Source: Australian Crime Commission, *Annual Report 2006-07*, pp 8 & 33.

3.70 Undeniably, the number of examinations being conducted by ACC examiners is significant. And while there is a little fluctuation in the statistics, it is apparent that the number of examinations being conducted is on the increase.

3.71 The PJC is aware that the number of examiners appointed under the Act has remained fairly stagnant since the inception of the ACC. However, the CEO of the ACC, Mr Alastair Milroy assured the committee that the examiners encounter no difficulties with the heavy workload.

41 Mr Robert Richter QC, Law Council of Australia, *Committee Hansard*, Canberra, 29 July 2008, p. 16.

There has been a period of time on a weekly basis that the examiners have been required to travel to record their reasons and to ensure that they have sufficient time to read the submissions they are receiving for summonses and to attend pre-examination meetings with the relevant case officers. So I do not believe that they are overutilised because all of them are fairly experienced judicial officers in their own right. We also take into consideration a lot of planning in terms of their use. I have regular meetings with them and look at their current workload. I monitor officially through their coordinator, who keeps statistical records of the number of summonses and the number of notices issued and their travel. Mr Outram is responsible for the programs division, which looks at the intelligence and investigative activities. A weekly or monthly timetable comes forward where he knows exactly which examiner is on which case in which location around the country and what spare capacity they have to be able to do multiple examinations on a matter and the ability to cancel matters and prioritise them. So I would doubt very much that even the current four examiners would indicate that they do not have sufficient time to carry out their duties.⁴²

3.72 But a notable factor adversely affecting and impacting upon the ACC in the performance of its functions is the failure of some witnesses to co-operate at ACC examinations.

Lack of cooperation at ACC examinations

3.73 For the past two financial years, the ACC has reported that:

- In 2005-06, 11 persons were charged on 16 counts: seven for failing to answer questions; two for failing to produce documents; one for failing to take an oath/affirmation; one for failing to attend; and five for giving false/misleading evidence.⁴³
- In 2006-07, three persons were charged on seven counts: six for failing to answer questions; and one for giving false/misleading information.⁴⁴

3.74 The PJC observes that these are not large figures, particularly in view of the number of examinations conducted each year. And the committee notes the advice of ACC Chief Executive Officer, Mr Alastair Milroy:

At the present time, something like 39 persons have been convicted and sentenced for offences under the act—that is, for failing to comply with the

42 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 23.

43 Australian Crime Commission, *Annual Report 2005-06*, Appendix C.

44 Australian Crime Commission, *Annual Report 2006-07*, p. 38.

act in terms of being called before examinations. Twenty-six are facing trial or have been convicted and are awaiting sentencing.⁴⁵

3.75 While the committee considers the volume of uncooperative examinees to be relatively small, there are clearly a number of people who are not cooperating at an ACC examination.

The Trowell Report

3.76 In 2006, the then Minister for Justice and Customs, Senator the Hon. Chris Ellison commissioned an independent review and report on the operation of certain provisions in the *National Crime Authority Act 1984* and the Act (the Trowell Report).⁴⁶

3.77 The terms of reference included the specific issue of whether the Act should be amended to provide the ACC with a 'contempt power' for witnesses not fulfilling their obligations under the Act, namely: refusing to appear; answer questions; and produce documents at an ACC examination.⁴⁷

3.78 The Trowell Report concluded that the Act should be amended to provide that "the ACC be given the power to certify persons for contempt for not fulfilling their obligations under the legislation."⁴⁸

Parliamentary consideration in 2000/2001

3.79 The Parliament has also previously considered this specific response. In 2000, the government proposed to create a contempt regime for the National Crime Authority (NCA) to encourage cooperation and compliance with the Authority's hearing process.⁴⁹

The [*National Crime Authority Legislation Amendment Bill 2000*] would...introduce a contempt regime to enable a court to deal promptly with conduct that interferes with or obstructs the Authority's hearing process. As the Authority does not exercise judicial power, it is not proposed that the Authority would deal with the contempt as if it were a

45 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 12. Also, see ACC, Additional Information, Answer to Question on Notice, Nos. 2 & 3 (received 11 August 2008).

46 The Trowell Report was presented in the House of Representatives on 21 February 2008, and was tabled in the Senate on 11 March 2008.

47 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 3.

48 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 4.

49 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 9 quoting the Attorney-General's Department, *Submission 13*, p. 3.

court. However, the provisions would enable the Authority to apply to the Supreme Court of the State or Territory in which it is holding the hearing for the court to deal with the conduct as if it were contempt of that court.⁵⁰

3.80 The then committee resolved to support the *National Crime Authority Legislation Amendment Bill 2000* (the bill) because to do otherwise would have left a "substantial hole in the range of alternative strategies that the NCA would have available to it to deal with an errant witness."⁵¹

3.81 However, the Senate did not support the proposed contempt regime, and an amendment was passed to strip the relevant provisions from the bill.

Let us make it clear that the NCA is not a judicial body; it is an investigative agency of the federal executive. In our view it is therefore a seriously flawed breach of the separation of powers concept to imply that hindering or obstructing an investigatory body can be equated to contempt of court. On these grounds we reject the inclusion of a contempt regime for the NCA. We believe that it would be prudent to monitor the success of the other provisions, and if the need is still there in, say, five years time then the parliament can revisit the matter.⁵²

3.82 The amended bill, renamed the *National Crime Authority Legislation Amendment Bill 2001*, came into operation on 1 October 2001. It provided increased penalties for persons who did not co-operate with the ACC examiners.⁵³

3.83 However, according to Mr Mark Trowell QC:

The failure to enact the proposed contempt power provision in 2001, has deprived the ACC of what should have been the adjunct to the increase of penalties for not complying with the coercive powers, all of which was intended as a comprehensive strategy to deal with uncooperative witnesses.⁵⁴

Impact of non-cooperation on ACC effectiveness

3.84 The PJC understands that persons who do not comply with a summons/notice, or an ACC examination, create difficulties for the ACC in the performance of its functions. An ACC examiner, Mr William Boulton told the committee:

50 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 9 quoting the Attorney-General's Department, *Submission 13*, p. 2.

51 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 13.

52 Senator Nick Bolkus, *Senate Hansard*, 8 August 2001, p. 25835.

53 Subsections 29(3A) & (3C), 30(6) & (8) and 35(2) & (4) of the *Australian Crime Commission Act 2002*

54 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 58.

The problem posed by those who commit contempt of the commission is delay. It has been said in the past to the committee that a year or more was elapsing between contempts being committed and the disposal of those cases in the courts. I can tell you now that it is more like 18 months.⁵⁵

3.85 Mr Mark Trowell QC observes that in such circumstances:

The witness has no immediate fear of punishment because it is known that may not happen until 12-18 months later. By that time, the investigation may well have been abandoned...The very reason for imposing a deterrent sentence may well have been diminished or even lost.⁵⁶

3.86 The real problem therefore appears to be, not the number of persons failing to co-operate, but the delay caused by these 'process challenges'. And these delays potentially affect the conduct of a special ACC operation or investigation.

When a witness refuses to submit to an ACC examination it has every potential to result in a derailment of the whole investigative process. The examination will usually occur at an early or critical stage of an investigation where it is designed to be an essential tool in gathering information to further the inquiry.⁵⁷

3.87 The *National Crime Authority Legislation Amendment Bill 2001* does not appear to have addressed these issues. And perhaps Mr Mark Trowell QC's comments in that respect were accurate.

3.88 The PJC does not believe that it is in the interests of justice for 'process delays' to be allowed to continue: it is important for the ACC and its examiners to be able to conduct special investigations and operations without unreasonable hindrance.

An emerging trend

3.89 The PJC notes anecdotal advice from the ACC that certain types of crime group, and the counsel who represent them, are increasingly refusing to co-operate at an ACC examination as part of a deliberate and calculated strategy.

The examiners are increasingly concerned that, over time, that will undermine the effectiveness of the powers in dealing with serious and

55 Mr William Boulton, Examiner, ACC, *Committee Hansard*, Canberra, 6 July 2007, p. 41.

56 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 47. Also, see Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 30 March 2007, p. 8; and Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 12.

57 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 47. There are other effects of delayed judicial proceedings, such as a lack of interest in prosecution, reorganisation of criminal affairs, etc: see Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 19.

organised crime. I am particularly talking about criminals with access to good legal counsel who operate with a degree of sophistication.⁵⁸

3.90 Again, the committee has not been provided with any firm data. But the PJC would be very concerned if the ACC examination process were being challenged with the specific intent to derail an operation or investigation.

3.91 The PJC acknowledges that not all 'process delays' are designed for that purpose, and that some persons challenging the ACC examination process are merely insisting upon their rights.

Support for a 'contempt power'

3.92 Precisely what is reasonably required to enable the ACC and its examiners to effectively perform their functions is the question.

3.93 Law enforcement agencies submitting to the Trowell Report appear to have unanimously supported some form of 'contempt power' for the ACC.

3.94 And Mr Mark Trowell QC argued:

The existing process fails to give sufficient weight to the need, when circumstances require, of an immediate or at least proximate response to a contempt committed against the ACC.⁵⁹

If you have something that you can invoke quickly and effectively and say, 'Right, if you're not going to cooperate, if you're going to take this view, I'm going to cite you for contempt. I'm going to refer it to a judge and you can explain it to the judge,' then the people see that something is actually being done—that the examiner has some power to deal with the matter in a proximate way and efficiently rather than just saying, 'Well, I can worry about this in 12 to 18 months time.' By then the sting has gone.⁶⁰

3.95 The Trowell Report concluded that the Act should be amended to include the relevant provisions of the *National Crime Authority Legislation Amendment Bill 2000*:

34A Contempt of the Authority

A person is in contempt of the Authority if he or she:

- (a) obstructs or hinders the Authority or a member in the performance of the functions of the Authority; or
- (b) disrupts a hearing before the Authority; or

58 Mr Michael Outram, Executive Director, ACC, *Committee Hansard*, Canberra, 9 April 2008, p.13. Also, see Mr Robert Cornall AO, Secretary, Attorney-General's Department, *Estimates Hansard*, 25 May 2006, p. 107.

59 Mr Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, March 2007, p. 54.

60 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 20.

- (c) when appearing as a witness at a hearing before the Authority:
 - (i) refuses or fails to take an oath or make an affirmation; or
 - (ii) refuses or fails to answer a question;when required to do so.

34B Supreme Court to deal with contempt

(1) If the Authority is of the opinion that, during a hearing before the Authority, a person is in contempt of the Authority, the Authority may apply to the **relevant Supreme Court** for the person to be dealt with in respect of the contempt.

(2) The application must be accompanied by an affidavit that sets out:

- (a) the grounds for making the application; and
- (b) evidence in support of the application.

(3) If, after:

- (a) considering the affidavit; and
- (b) hearing or receiving any evidence or statements by or in support of the Authority; and
- (c) hearing or receiving any evidence or statements by or in support of the person;

the Court finds that the person:

- (d) was in contempt of the Authority; and
 - (e) did not have a reasonable excuse for being in contempt of the Authority;
- the Court may deal with the person as if the acts or omissions involved constituted a contempt of that Court.

(4) In this section:

relevant Supreme Court, in relation to a hearing before the Authority, means the Supreme Court of the State or Territory where the hearing is held.⁶¹

3.96 The PJC notes the proposed statutory definition of 'contempt', and the proposed ACC statutory power of referral to the courts. These kinds of proposals were specifically considered by the committee in 2005 when it reviewed the operation of the Act.

61 Part 15 Clause 67 of the *National Crime Authority Legislation Amendment Bill 2000*

Parliamentary consideration in 2005

3.97 At that time, the PJC examined the effectiveness of the ACC's coercive powers, and was told that persons failing to co-operate with ACC examiners and the ACC examination process were continuing to cause problems.⁶²

3.98 The committee considered four possible solutions, notably quoting the Hon. Jerrold Cripps QC, a Commissioner for the Independent Commission Against Corruption (ICAC). Mr Cripps QC told the PJC that ICAC's contempt powers had been removed because:

It was thought those contempt proceedings are appropriate to courts of law but they should not be very readily transposed to administrative tribunals.⁶³

3.99 The PJC agreed, and continues to agree, with this sentiment. The committee does note that what was proposed in the *National Crime Authority Legislation Amendment Bill 2000* was quite different to the contempt powers which were then available to ICAC.

3.100 In view of the ACC's function to combat serious and organised crime, the PJC considers that the ACC examiners should be given assistance to enable them to overcome the difficulties presented by persons who deliberately obstruct the ACC examination process with a view to frustrating special ACC operations and investigations.

3.101 The committee is persuaded that a limited statutory definition of contempt and a statutory power of referral would be appropriate. The PJC notes that such referrals are not without precedent: there are already provisions within the Act for applications to be made to a judge of the Federal Court of Australia.⁶⁴

Recommendation 6

3.102 The committee recommends that the *Australian Crime Commission Act 2002* be amended to include the statutory definition of contempt and the statutory power of referral, plus ancillary provisions, proposed as clauses 34A and 34B in the *National Crime Authority Legislation Amendment Bill 2000* (except that the referral be to the Federal Magistrates Court) for matters arising under Section 30 of the *Australian Crime Commission Act 2002*.

62 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pp 37- 41.

63 The Hon. Jerrold Cripps QC, Commissioner, ICAC, *Committee Hansard*, Sydney, 9 September 2005, p. 5.

64 For example, for search warrants, the surrender of passports, and warrants for the arrest of a witness. See sections 22, 24 and subsection 31(1) of the *Australian Crime Commission Act 2002*, respectively.

3.103 The PJC acknowledges that, in 2005, the committee favoured retention of significant legislative penalties, coupled with an expedited judicial process.⁶⁵ The committee recognises that this is an alternative solution to the operational difficulties presented to the ACC by persons refusing to co-operate with the examination process.

An expedited judicial process

3.104 However, either option will require the development and implementation of an expedited judicial process.

3.105 The PJC was told that, in Victoria:

There is an established liaison between the courts and the Office of Police Integrity, where the chief justice there has been persuaded to give priority to any contempt proceedings issuing from the OPI and appoints a judge who is familiar with the legislation and understands the purpose and the reason for it. That is expedited.⁶⁶

3.106 The committee believes that an expedited judicial process would encourage compliance with ACC examiners at ACC examinations as uncooperative persons would be liable to immediately or proximately suffer the consequences of their actions.

3.107 The PJC considers contempt proceedings to be preferable to a criminal prosecution. The former is more likely to be dealt with expeditiously, and achieve the desired outcome. The committee also considers contempt proceedings to have less impact on individual rights, with the vigilance and dedication of the courts providing a valuable means of checks and balances.

3.108 In this regard, the committee notes the comments of Mr Mark Trowell QC:

Judges generally seem to be reluctant to accept that there should be bodies other than established courts exercising [coercive] powers—that is, powers that the courts themselves do not have—and they are very suspect about the use of these powers.⁶⁷

3.109 The PJC also believes that involving the judiciary in the work of the ACC will promote relations between the two, and invest both bodies with a greater appreciation for the other's role and responsibilities.⁶⁸

65 Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pp 37-41.

66 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 20.

67 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 19.

68 Mr Mark Trowell QC, *Committee Hansard*, Perth, 4 July 2008, p. 25.

Recommendation 7

3.110 As a corollary of Recommendation 6, or as an alternative thereto, the committee urges the Commonwealth Attorney-General to negotiate with the judiciary an expedited judicial process for matters referred by the Australian Crime Commission under Part II Division 2 Section 30 of the *Australian Crime Commission Act 2002*.

3.111 In making this recommendation, the PJC is aware that the Trowell Report, and its recommendations, is still being considered by the government.⁶⁹ The committee looks forward to receiving the government's considered response.

69 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 9 April 2008, p. 17.

CHAPTER 4

Accountability

4.1 The Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee) approached this inquiry with a strong sense of purpose.

4.2 As discussed in this report, the *Australian Crime Commission Amendment Act 2007* (the Amending Act) has been controversial from its inception. And the committee has particular responsibilities in relation to the Australian Crime Commission.

4.3 Part III subsection 55(1) of the *Australian Crime Commission Act 2002* (the Act) states that the PJC's duties include:

- monitoring and reviewing the performance by the Australian Crime Commission (ACC) of its functions; and
- reporting to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the committee, the attention of the Parliament should be directed.¹

4.4 As stated by the Police Federation of Australia, it is fitting that:

Parliament puts in place appropriate oversight by bodies such as the Australian Commission for Law Enforcement Integrity and the Parliamentary Joint Committee on the Australian Crime Commission to ensure that the application of the law is handled appropriately.²

4.5 The passage of the Amending Act in both chambers, three days after the legislation was first introduced in the Parliament, prevented the PJC from exercising its important oversight role.

4.6 But the controversial nature of the legislation was not lost on either members or senators. And the Amending Act was passed on the understanding that the PJC would be required to conduct an inquiry in the 42nd Parliament.

4.7 The PJC notes that in better circumstances, and as per normal practice, the inquiry would have been conducted before passage of the Amending Act.³

1 Subparagraphs 55(1) (a) and (b) of the *Australian Crime Commission Act 2002*

2 Police Federation of Australia, *Submission 4*, p. 2.

3 Liberty Victoria, *Submission 1*, p. 1.

4.8 Be that as it may, the committee has conducted its inquiry, and in fulfilling its duties under section 55 of the Act, two matters have drawn the PJC's attention and further comment.

Oversight

The committee

4.9 Section 59 of the Act concerns the furnishing of reports and information to a number of bodies by the ACC. In relation to the PJC, section 59 provides:

(6A) Subject to subsection (6B), the Chair of the Board:

(a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the PJC) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and

(b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.

(6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.

(6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.

(6D) If the PJC refers the request to the Minister, the Minister:

(a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and

(b) must provide copies of that determination to the Chair of the Board and the PJC; and

(c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.⁴

4.10 These provisions were amendments made to the Act with the enactment of the *National Crime Authority Legislation Amendment Bill 2001*. They were intended to clarify the ability of the PJC to request and receive certain information from the ACC.

This mechanism is designed to ensure that sensitive material is appropriately protected, but in a way that ensures that there is confidence

4 Subsections 59(6A)-(6D) of the *Australian Crime Commission Act 2002*

that, subject to these sensitivities, appropriate disclosure is made to the PJC-NCA.⁵

4.11 The committee notes its contemporaneous comments regarding the *National Crime Authority Legislation Amendment Bill 2001*:

In considering the original NCA Bill in 1984 the Senate replaced the Government's proposals for NCA accountability through the Ombudsman and regular judicial review with the operations of the PJC. In 1985 the then PJC stated that the provisions in the NCA Act were so poorly drafted that, unless they were appropriately amended, there was no point in retaining a parliamentary committee to act as a watchdog over the NCA. The situation was described as a 'charade'.

This Government Bill proposes to continue the charade, by giving to the PJC such qualified powers of access to NCA information as to render the PJC no more capable of scrutinising the NCA's operations than an existing standing committee using standard parliamentary committee powers. In particular the Bill leaves unamended the limitations on the PJC's role in subsection 55(2) and the PJC's rights of access to information under the NCA Act's secrecy provision (section 51), reform for which the Senate's Committee of Privileges called in 1998.⁶

4.12 The committee continues to express concern with the limitations contained in the Act. In particular, the PJC's power to access information assumes that the committee is informed about matters within the ACC, and that this knowledge allows the PJC to request and receive information from the Chair of the ACC Board. This is not always the case, and in such circumstances, the PJC is left with no mechanism to seek information from the ACC.

4.13 Further, subsection 59(6A) does not stipulate when the Chair of the ACC Board must comply with the committee's request, and subsection 59(6B) allows the Chair of the Board a means by which the PJC's request for information can be denied, although there is a means for appeal to the Minister.

4.14 The totality of the provisions does not suggest that the PJC has any special ability to meaningfully oversee the ACC.

4.15 That there is a need for such an ability was demonstrated by recent litigation which challenged the manner in which the examiners were exercising the ACC's coercive powers.

It was not this committee or the ACC Annual Report or the Ombudsman which exposed that in over ninety percent of cases ACC examiners were

5 *National Crime Authority Legislation Amendment Bill 2001*, Explanatory Memorandum, p. 19.

6 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 23. Also, see Senate Committee of Privileges, *70th Report: Questions arising from proceedings of the Parliamentary Joint Committee on the National Crime Authority*, April 1998.

not recording reasons until after the summons was issued. It was [an accused] and his defence counsel who brought that to light.⁷

4.16 In the absence of any statutory requirement, neither the ACC nor the ACC Board had advised the PJC that there was a potential problem with the issuing of summonses and notices. And the committee had therefore not requested information from either of those bodies, or sought to facilitate a considered response.

4.17 This had lead Mr Duncan Kerr MP, the then deputy chair of the committee, to observe:

I have some discontent with the fact that, as the deputy chair of the Parliamentary Joint Committee on the Australian Crime Commission, which has oversight of the Australian Crime Commission, the committee was not advised that this issue was one requiring attention. It is, I think, a matter of grave concern that the Australian Crime Commission and its board failed to come before the parliamentary committee which was established by legislation to supervise the work of the Australian Crime Commission. The parliamentary committee was not advised of the fact that there was a substantive issue arising which might affect a substantial number of the inquiries and examinations conducted under the legislation. In fact, we found out about this, as the shadow minister says, by the introduction of a piece of legislation into this parliament on Monday. That is an extraordinary thing. That is an extraordinary and contemptuous way to deal with the parliamentary oversight body established under legislation.⁸

4.18 Mr Chris Hayes MP, also a member of the PJC, noted:

Under section 55 [of the Act] the committee has a specific role. There are various obligations. It is part of the counterweight of balance because of the coercive nature of this very special law enforcement body. This body has extreme powers. Its powers are akin to a royal commission and, at the time of its being set up, the parliament in its wisdom decided, as was the case with the [National Crime Authority], that there would be a measure of parliamentary oversight and that it would be done through a parliamentary joint committee.⁹

4.19 The CEO of the ACC, Mr Alastair Milroy explained the ACC's failure to notify the PJC as follows:

My only comment there is that there was a considerably tight time frame and there were certain actions taken to try to brief as many as possible. But the Attorney-General's Department, of course, did take the lead to drive the process and initiate some consultation.¹⁰

7 Law Council of Australia, *Submission 5*, p. 6.

8 Mr Duncan Kerr MP, *House Hansard*, 20 September 2007, p. 83.

9 Mr Chris Hayes MP, *House Hansard*, 20 September 2007, p. 130.

10 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 21.

4.20 Dr Karl Alderson, from the Attorney-General's Department, expanded on Mr Alastair Milroy's response:

In terms of the process that was followed, those decisions are very much ones for the minister and the government of the day to decide. Ministers and governments make choices between a sort of broader consultation and narrower one moving more quickly. The process that was followed was one that was judged by the minister and government at the time as being the appropriate one.¹¹

4.21 It is extremely disappointing to the PJC that the ACC at no time sought to notify its parliamentary oversight committee. The PJC believes that the ACC had an obligation to notify the committee, even if the executive did not believe that there was any need to notify the Parliament.

4.22 The PJC believes that the Act should not need to specify every occasion on which the ACC, and/or its Board, report to the PJC and the Parliament. Some matters, such as the one mentioned, are of such importance that they must be reported to the PJC in a timely and appropriate fashion, and as a matter of course. In future, the PJC expects that all matters reasonably requiring its attention will be so notified.

4.23 The PJC notes similar, albeit more generic, comments from Senator Bishop during its inquiry into *The future impact of serious and organised crime on Australian society*:

The ACC governance model, in terms of accountability, is primarily to its stakeholders viz, from the CEO to the Board, from the Board to the Intergovernmental Committee (IGC), and thence to ministers...

The Committee's role does not seem to be part of that hierarchy. I suggest a clarification of the Committee's role, which, in light of this current inquiry, may be far more limited than previously realised...

Considering the terms of reference set out in Section 55 of the Act it would seem that while the ACC is not accountable to the Committee, the Committee is accountable to the Parliament for assessment of the way in which the ACC operates and the function it performs nationally in accordance with its charter.

Hence in taking evidence during this inquiry, important questions are declined on the basis that this is a matter for government policy...

Within this role as "systemic mentor" of the ACC model, it may be necessary for the Committee to approach its work with a modus operandi than might otherwise be the case with parliamentary committees. This will entail continuing development of the special relationship of trust with the ACC, and mutual respect for the complementary responsibilities. None of this, however, should preclude the Committee from operating as a

11 Dr Karl Alderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 21.

watchdog of the parliament, including regular assessment of the operational performance of the ACC model within its legislative charter.¹²

4.24 The PJC's terms of reference for this inquiry do not encompass the broader issues of whether the role of the committee, and the powers granted to it, are sufficient. However, in light of the preceding paragraphs, the committee suggests that these are significant matters which should be re-examined, and that there is a need for regular review of the operation of the Act.

4.25 In making this suggestion, the committee notes that section 61A of the Act does not include periodic reviews of the Act. The PJC believes that legislation that governs an agency such as the ACC, and which grants that agency substantial powers, including intrusive coercive powers, should be regularly reviewed so as to ensure its appropriateness and effectiveness.

Recommendation 8

4.26 The committee recommends that Part IV Section 61A of the *Australian Crime Commission Act 2002* be amended to require the Minister to cause an independent review of the operation of the *Australian Crime Commission Act 2002* every five years with the first review to be undertaken no later than 1 January 2011.

The Commonwealth Ombudsman

4.27 In addition to the PJC, the Commonwealth Ombudsman (the Ombudsman) provides some oversight of the ACC. In relation to this inquiry, the committee was interested in the Ombudsman's ability to inspect ACC records in relation to controlled operations.¹³

4.28 Controlled operation records inspections are conducted only for the purposes of Part IAB of the *Crimes Act 1914*, under which the inspections are authorised. But the committee believes this accountability mechanism might be relevant to summonses and notices issued under subsections 28(1) and 29(1) of the Act.

4.29 In chapter 2 of this report, the committee discussed and noted concerns with the record making requirements of subsections 28(1A) and 29(1B) of the Act. The committee has made suggestions and recommendations in support of the safeguards contained in those provisions. As a result, the ACC may in future generate records relating to the ACC's exercise of its coercive powers. But even if they do not, the PJC suggests that examiners' records should be open to inspection by an independent and external body.

12 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, pp 111-112.

13 Section 15UB of the *Crimes Act 1914*

Recommendation 9

4.30 The committee recommends that the Commonwealth Ombudsman be required to inspect records made by the Australian Crime Commission examiners to ensure full compliance with Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that the Ombudsman report annually to the Parliament on this matter.

Recommendation 10

4.31 The committee recommends that at least once in each year the Commonwealth Ombudsman be required to provide a briefing to the Parliamentary Joint Committee on the Australian Crime Commission about the Australian Crime Commission's exercise of the coercive powers under Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that Part III Section 55AA of the *Australian Crime Commission Act 2002* be amended accordingly.

Unauthorised disclosure - a possible contempt of the Senate

4.32 The second matter upon which the PJC wishes to comment is an incident which occurred during the inquiry.

4.33 At its hearings on 1 May 2008, the committee received urgent and private correspondence. After consideration of that correspondence, the PJC decided to adjourn the public hearing on the grounds that a matter before the courts could be adversely affected should the hearing proceed. The committee resolved to accept the correspondence as a confidential committee document. However, on 2 May 2008, the nature and content of the confidential correspondence was disclosed in a media article.

4.34 The Senate clearly articulates the rules regarding the unauthorised disclosure of confidential documents in Parliamentary Privilege Resolution 6, 25 February 1988.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;

(b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.¹⁴

4.35 The 122nd Report of the Senate Committee of Privileges sets out the importance of protecting sources of information, and ensuring that the work of the Parliament and its committees is not interfered with:

The Committee of Privileges, and the Senate, have always taken the view that the highest duty of any house of a parliament is to protect its sources of information...This is reflected in the Parliamentary Privileges Act, which separately specifies interference with witnesses and release of in camera evidence as the only two criminal offences under that Act.¹⁵

4.36 The purpose of the prohibition against unauthorised disclosure is primarily the protection of persons giving information to committees. But the prohibition also covers persons about whom information may be given, or who may be adversely affected by the findings and conclusions of a parliamentary committee.

4.37 In the first instance the PJC chose to investigate the source of the unauthorised disclosure in order to establish whether a case for contempt of the Senate could be found. The Chair of the PJC, Senator Stephen Hutchins, wrote to all those who had access to the correspondence in question seeking to establish the source of the unauthorised disclosure.

4.38 The correspondence in response to Senator Stephen Hutchins' request for information did not identify the source of the unauthorised disclosure. The PJC was disappointed that, for some, semantic vaguer was employed to avoid providing the information sought by the committee. An example of this is at Appendix 5. The PJC decided not to refer the matter to the Committee of Privileges as a possible contempt of the Senate. But the committee cautions against interpreting this decision as a tacit sanction of this or any other unauthorised disclosure.

Conclusion

4.39 In 2007, the then Minister for Justice and Customs, Senator, the Hon. David Johnston assured the Parliament that, on review by the PJC:

If deficiency is found or the degree of protection, safe-guards, checks and balances is not found to be sufficient, the government will then consider those findings and seek to address those points raised, whilst seeking to preserve the integrity of the intent of the legislation.¹⁶

14 The Senate, *Standing Orders and other orders of the Senate*, September 2006, p. 110.

15 Senate Committee of Privileges, 122nd Report, June 2005, p. 37.

16 Senator the Hon. David Johnston, Minister for Justice and Customs, *Senate Hansard*, 18 September 2007, p. 100.

4.40 The committee has reviewed the Amending Act and found most of its provisions to be highly problematic. The Amending Act grants examiners latitude in the recording of reasons for the issue of summonses/notices beyond what is necessary. And the Amending Act validates summonses/notices whose issue does not comply with statutory requirements. Further, the Amending Act retrospectively applies those provisions to prevent legal challenge to summonses/notices which were issued in contravention of the legislation.

4.41 The committee acknowledges that the Act may have been ambiguous. But the PJC is concerned that the legislation has clearly attempted to safe-guard individual rights while allowing the ACC coercive powers to effectively fulfil its function. And it appears that the statutory safe-guards have been consistently read down and diminished. The committee considers the Parliament to have indicated its intention that a balance be struck, and is disappointed that in practice this has not been the case, a situation that has been exacerbated by the Amending Act.

4.42 The committee acknowledges the circumstances in which the Amending Act passed into law, and its effectiveness in immediately addressing ACC operational difficulties. But the PJC by no means wishes to condone such a dangerous precedent, finding that such legislation has no proper place among the laws of the Commonwealth. In the words of Niccolo Machiavelli,

One should never allow an evil to run on out of respect for the law, especially when the law itself might easily be destroyed by the evil.¹⁷

4.43 The PJC has therefore made recommendations which it considers will restore some balance to the Act.

Senator Stephen Hutchins

Chair

17 Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 3, Chapter III.

Appendix 1

Terms of Reference

Pursuant to the Committee's duties set out in paragraph 55(1) (b) of the *Australian Crime Commission Act 2002*,

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

the Committee will inquire into the *Australian Crime Commission Amendment Act 2007* with particular reference to:

- (a) the administrative and procedural arrangements of the ACC and ACC examiners in regard to the issuing of section 28 summons and section 29 notices;
- (b) the appropriateness and effectiveness of the amendments to the *Australian Crime Commission Act 2002* made by the *Australian Crime Commission Amendment Act 2007*;
- (c) the appropriateness of the retrospective application of the *Australian Crime Commission Amendment Act 2007* and the number of summons effected by this retrospectivity;
- (d) whether any further amendments are merited to the provisions of the *Australian Crime Commission Act 2002* governing:
 - i. the issuing of section 28 summons and section 29 notices, and
 - ii. the consequences of any failure to comply with those provisions;and
- (e) any other related matters.

Appendix 2

Public submissions

- 1 Liberty — Victorian Council for Civil Liberties Inc
- 2 Australian Government Attorney-General's Department
- 2A Australian Government Attorney-General's Department
- 2B Australian Government Attorney-General's Department
- 2C Australian Government Attorney-General's Department
- 3 Civil Liberties Australia
- 4 Police Federation of Australia
- 5 Law Council of Australia
- 5A Law Council of Australia
- 6 Commonwealth Director of Public Prosecutions
- 7 Crime and Misconduct Commission Queensland
- 8 Emeritus Professor J L R Davis
- 9 Australian Crime Commission
- 9A Australian Crime Commission
- 10 The Hon. Simon Corbell MLA, Attorney-General
ACT Legislative Assembly
- 11 Mr Michael Brereton prepared by Michael Abbott QC
- 12 The Hon. Michael Atkinson MP, Attorney-General
Government of South Australia

Appendix 3

Public hearings and witnesses

Canberra, Tuesday 17 June 2008

Parliament House, Canberra

Committee Members in attendance

Senator Stephen Hutchins (Chair)

Mr Jason Wood MP (Deputy Chair)

Senator Guy Barnett

Senator Helen Polley

Mr Stephen Gibbons MP

Witnesses

Commonwealth Attorney-General's Department

Dr Karl Alderson Assistant Secretary, Criminal Law Branch

Ms Elsa Sengstock, Principal Legal Officer, Criminal Law Branch

Australian Crime Commission

Mr Alastair Milroy, Chief Executive Officer

Mr Kevin Kitson, Executive Director, Strategic Outlook and Policy

Mr Michael Outram, Executive Director, Criminal Intelligence and Investigation Strategies, Programs Division

Ms Sashi Maharaj, QC, Counsel Assisting

Mr Peter Brady, Senior Legal Adviser

Emeritus Professor Jim Davis — private capacity

Canberra, Tuesday 29 July 2008

Parliament House, Canberra

Committee Members in attendance

Senator Stephen Hutchins (Chair)

Senator Guy Barnett

Senator Stephen Parry

Witnesses

Law Council of Australia

Mr Robert Richter QC

Ms Helen Donovan

Appendix 4

Proposed amendments to Part II, Division 2, Subsection 28(1A) and 29(1A)

ZA Subsection 28(1A)

Repeal the subsection, substitute:

(1A) Before issuing a summons under subsection (1), the examiner must:

- (a) be satisfied that it is reasonable in all the circumstances to do so; and
- (b) record in writing the reasons for the issue of the summons.

ZB Subsection 29(1A)

Repeal the subsection, substitute:

(1A) Before issuing a summons under subsection (1), the examiner must:

- (a) be satisfied that it is reasonable in all the circumstances to do so; and
- (b) record in writing the reasons for the issue of the summons.

Appendix 5



MP/PS
6 June 2008

Dr Jacqueline Dewar
Secretary
Parliamentary Joint Committee on the
Australian Crime Commission
Parliament House
CANBERRA ACT 2600
Fax No: 6277 6866

Dear Madam

The Australian Financial Review article by Matthew Drummond, 2 May 2008 entitled "Brereton demands hearing"

I am the solicitor for Fairfax Media Limited, publisher of The Australian Financial Review. Your letter of 15 May 2008 to Mr Matthew Drummond has been referred to me.

No person advised Mr Drummond of the content of, or provided him with a whole or partial copy of the letter you describe.

Yours faithfully


MARK POLDEN

