



Law Council  
OF AUSTRALIA

# Review of the operation of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019 (Cth)*

Parliamentary Joint Committee on Law Enforcement

21 April 2021

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council gratefully acknowledges the contribution of the Law Society of South Australia and the Law Council's National Criminal Law Committee and National Human Rights Committee to this submission.

## Executive Summary

1. The Law Council of Australia welcomes the opportunity to provide this submission to the review by the Parliamentary Joint Committee on Law Enforcement (**Committee**) of the operation of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* (Cth) (**SOSI Act**). This review is the first Parliamentary inquiry into the amendments, in the absence of referral of the originating Bill to a Parliamentary committee in 2019. This submission addresses matters within paragraphs (a) and (b) of the Committee's terms of reference, namely, whether the SOSI Act has:
  - (a) *appropriately streamlined the process by which the Australian Criminal Intelligence Commission (ACIC) Board determines to authorise the ACIC to undertake a special operation or special investigation; and*
  - (b) *ensured the validity of, at that time, current, former and future special operation and special investigation determinations of the ACIC.*
2. The Law Council expressed concerns about the originating Bill in 2019.<sup>1</sup> It remains concerned that the amendments made to the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) by the SOSI Act have diluted the legal threshold for the making of determinations by the ACIC Board, which authorise the establishment of special investigations or operations.<sup>2</sup> The amended threshold is disproportionately low to the extraordinary coercive questioning powers under the ACC Act ('examinations') which are enlivened by determinations. The Law Council considers that the authorisation threshold should be subject to further statutory parameters, in addition to the requirement that the ACIC Board must consider the investigation or operation is in the public interest.
3. The Law Council also remains concerned that separate measures in the SOSI Act retrospectively validated extant determinations authorising special investigations or operations that would otherwise have been unlawful, and actions taken in reliance on those determinations.<sup>3</sup> Such determinations may still be in effect.<sup>4</sup> The retrospective validation of unlawful action by authorities of the state raises a fundamental tension with the rule of law, especially in the context of exposing individuals to coercive questioning that abrogates the privilege against self-incrimination. Accordingly, the practical application of these amendments requires a high degree of transparency and scrutiny.
4. The Law Council makes three recommendations to enhance statutory safeguards, and provide transparency and assurance about instances of retrospective validation, namely:
  - amending the statutory threshold in section 7C of the ACC Act for authorising special investigations and operations, by including thresholds of necessity and proportionality, which would include consideration of the availability and effectiveness of methods other than examination powers to obtain the desired evidence, such as ordinary police investigative methods;
  - the Committee undertaking an audit of the way in which the provisions of the SOSI Act were applied to retrospectively validate determinations, and actions taken in reliance on them. This should include an examination of the number of determinations validated; whether any such determinations remain in force; the number of examinations conducted in reliance on them; the approach to decision-making by the ACIC Board about whether to rely on the retrospective validation of an affected determination, or revoke and re-issue it; and the approach to renewing determinations that were retrospectively validated; and
  - improving the scrutiny process for any future amendments of a similar kind.

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<sup>1</sup> Law Council, [Act now to bolster government accountability and rule of law](#), media statement, 1 December 2019.

<sup>2</sup> ACC Act, subsection 7C(4A), inserted by item 15 of Schedule 1 to the SOCI Act.

<sup>3</sup> SOCI Act, Schedule 1, items 55 and 56.

<sup>4</sup> ACC Act, paragraph 7C(4G)(b) and subsection 7C(4H) (determinations have a three-year maximum period of effect, but can be re-made in identical terms an unlimited number of times).

## Background to the SOSI Act

5. Despite being described as merely technical,<sup>5</sup> the SOSI Act made significant amendments to the provisions of the ACC Act which authorise the ACIC to initiate ‘special operations’ and ‘special investigations’. The authorisation of special operations and special investigations enliven the ACIC’s coercive questioning powers under Division 2 of Part II of the ACC Act (referred to as ‘examinations’).
6. Examination powers operate to abrogate the privilege against self-incrimination, in respect of persons who are served with summonses under the ACC Act to appear before an ACIC examiner and answer questions, or notices to produce documents or provide other information to an ACIC examiner. Significantly, examination powers can compel people to answer questions about the subject matter of unresolved or imminent criminal charges, or applications for confiscation orders under proceeds of crime legislation, and the ACC Act expressly authorises the subsequent disclosure of such information, including to prosecutors, in prescribed circumstances.<sup>6</sup>
7. The SOSI Act appears to have been an urgent legislative attempt to remediate potentially invalidly authorised ‘special investigations’ or ‘special operations’, consequent upon two High Court challenges.<sup>7</sup> One of these challenges was ultimately successful,<sup>8</sup> and the other was discontinued due to the intervening passage and commencement of the retrospective validation measures in the SOSI Act.<sup>9</sup>
8. While the specific legal issues raised by each challenge were different, in general terms, they appear to have arisen from a common underlying issue—namely, the evident practice of the ACIC Board in issuing determinations in very broad terms. In each case, the impugned determination authorised a special investigation or operation in relation to a broad subject matter-based area, such as ‘money laundering activity’, and included a schedule of possible past, current or potential future offences able to be investigated as part of a special operation or investigation established pursuant to the determination. The written instruments of determination did not describe a particular event or suspected conduct that could be the subject of a special investigation or operation by the ACIC. In the result, it fell to the staff of the ACIC to determine whether a particular event or suspected conduct was covered by the determination, and therefore validly enlivened the ensuing examination powers.<sup>10</sup>
9. In addition to purporting to retrospectively cure defects in all previous determinations authorising special investigations or special operations, and actions taken in reliance on those determinations,<sup>11</sup> the SOSI Act also made separate amendments to the ACC

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<sup>5</sup> The Hon Peter Dutton MP, Minister for Home Affairs, Second Reading Speech, *House of Representatives Hansard*, 28 November 2019, 6345.

<sup>6</sup> ACC Act, section 21E, subsections 25A(6A), 25C-25H and 30(4)-(5).

<sup>7</sup> This was not disclosed in the extrinsic materials to the SOSI Bill, but the urgent basis for the amendments following briefings of an undisclosed kind with the ACIC was noted in the second reading remarks of non-government members. See, for example, Senator the Hon K Keneally, *Senate Hansard*, 5 December 2019, 5275; and Ms R Sharkie, *House of Representatives Hansard*, 3 December 2019, 6754.

<sup>8</sup> *Strickland v CDPP* (2018) 266 CLR 325.

<sup>9</sup> *CXXXVIII v Commonwealth & Ors* [2020] HCATrans 102 (5 August 2020) (discontinuation of appeal).

<sup>10</sup> See the summaries of the relevant determinations set out in the findings of fact in *Strickland v CDPP* (2018) 266 CLR 325 at [20]-[25] (Kiefel CJ, Bell and Nettle JJ); and *CXXXVIII v Commonwealth of Australia* [2019] FCAFC 54 at [57]-[65] (Charlesworth J).

<sup>11</sup> SOSI Act, Schedule 1, items 55 and 56.

Act which diluted, on a prospective basis, the statutory authorisation requirements for all special investigations or operations.<sup>12</sup>

10. In particular, the ACC Act previously required the ACIC Board to consider whether ordinary police methods of investigation into the relevant matters were effective in understanding, disrupting or preventing the specified federally relevant criminal activity.<sup>13</sup> For the ACIC Board to make a determination, at least nine members (including a minimum of two eligible Commonwealth members) must have voted in favour of the proposed determination.<sup>14</sup>

11. The SOSI Act replaced this with the following threshold and voting requirements:

*The only condition for the exercise of the power ... [of the Board to make a determination] is that the Board considers, on the basis of the collective experience of the Board members voting at the meeting when a determination is made, that it is in the public interest that the Board authorise the special ACC operation or special ACC investigation to occur.*<sup>15</sup>

12. No statutory guidance is provided about the matters that must, or may, be considered by the ACIC Board in applying the public interest test in deciding whether to make a determination. This is so notwithstanding that the statutory membership of the 15-member ACIC Board comprises exclusively the heads of law enforcement and intelligence agencies, whose statutory functions are focused on matters of law enforcement and security, and there are no requirements to obtain independent advice about, or undertake consultation with respect to, the human rights implications of enlivening compulsory examination powers.<sup>16</sup>

13. The originating Bill to the SOSI Act was introduced and passed in a highly truncated timeframe.<sup>17</sup> This meant that it was not referred to any general-purpose legislation committee of either House of Parliament for inquiry and advisory report, prior to its debate and passage in the space of three sitting days in December 2019.

14. The Bill was also debated and passed before either the Senate Standing Committee for the Scrutiny of Bills (**Senate Scrutiny of Bills Committee**) or the Parliamentary Joint Committee on Human Rights had tabled their advisory reports concluding their consideration of the originating Bill. The Bill was also debated and passed before the Senate Scrutiny of Bills Committee had received a response from the Minister for Home Affairs to several scrutiny issues that Committee had identified in its initial review of the Bill.<sup>18</sup>

15. The Senate Scrutiny of Bills Committee raised concerns about both the lowering of the discretionary authorisation threshold, and the retrospective validation provisions. It commented that the limited justification provided in the extrinsic materials and

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<sup>12</sup> SOSI Act, Schedule 1, item 15, inserting new subsections 7C(2)-(4K) of the ACC Act. See especially new subsections 7C(4A)-(4C).

<sup>13</sup> ACC Act, former subsection 7C(3) as in force at 9 December 2019.

<sup>14</sup> Ibid, former subsection 7C(4) as in force at 9 December 2019.

<sup>15</sup> Ibid, subsection 7C(4A), inserted by item 15 of Schedule 1 to the SOSI Act.

<sup>16</sup> Ibid, subsection 7B(2).

<sup>17</sup> The Bill was debated and passed by the House of Representatives on 3 December 2019, and was introduced in and debated and passed by the Senate on 5 December 2019.

<sup>18</sup> The Senate Scrutiny of Bills Committee and Parliamentary Joint Committee on Human Rights tabled their reports concluding their respective consideration of the Bill on 5 February 2020. See: Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1/20*, (February 2020), 45-49; and Parliamentary Joint Committee on Human Rights, *Scrutiny Report 1/20*, February 2020, 94.



subsequent correspondence from the Minister for Home Affairs (which was provided after the Bill had been passed and the amendments commenced) did not adequately justify the measures, noting their potential to trespass significantly on rights and liberties.<sup>19</sup> That Committee's requests for adequate information appear to remain unanswered as at April 2021.

## Threshold for making a determination authorising a 'special operation' or 'special investigation'

16. As noted above, item 15 of Schedule 1 to the SOSI Act lowered the threshold in section 7C of the ACC Act for the ACIC Board to issue determinations authorising special investigations or operations into federally relevant criminal activity. (Namely, by removing the requirement to consider and exclude the likely effectiveness of traditional policing methods, via a majority vote of the Board's members; and substituting an overarching public interest assessment, on the basis of the Board's collective experience.)

### Dilution of authorisation threshold

17. The Law Council disagrees with suggestions that these amendments 'strengthened' the previous threshold in section 7C of the ACC Act, on the basis that the public interest threshold now 'enables the Australian Criminal Intelligence Commission Board to consider all relevant matters in authorising a determination, rather than solely the utility of traditional law enforcement or criminal information/intelligence collection methods in the circumstances'.<sup>20</sup>
18. In fact, the previous issuing threshold before the commencement of the SOSI Act imported a valuable proportionality requirement, by requiring the exhaustion or exclusion of less intrusive investigative methods than a compulsory questioning power which abrogated self-incrimination privilege.
19. Moreover, while the ACIC Board was required to consider and exclude the effectiveness of other methods, the previous statutory issuing threshold did not oblige it to make a determination even if satisfied that other investigative methods were ineffective. That is, there was no statutory fetter on the discretion of the ACIC Board to decline to make a determination, if its members considered that there were no other effective investigative methods available, but proceeding to establish a special investigation or operation was nonetheless contrary to the public interest.
20. Hence, in prescribing that an assessment of the public interest is the sole criterion for determining whether to make a determination—and by removing the explicit majority voting requirements governing ACIC Board decisions—the amendments to section 7C of the ACC Act are a clear dilution of the previous issuing threshold.

### Expanded application of coercive examination powers

21. While the amendments to section 7C of the ACC Act did not directly amend the ensuing examination powers in Division 2 of Part 2 of that Act, the lowering of the

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<sup>19</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1/20*, (February 2020), 46-47 at [2.6]-[2.8] and 48-49 at [2.11]-[2.18].

<sup>20</sup> The Hon Peter Dutton MP, Letter to the Senate Scrutiny of Bills Committee (undated), reproduced in *Scrutiny Digest 1/20*, (February 2020), Attachment 1, 2.



authorisation threshold has resulted in an expansion of the circumstances in which those examination powers may lawfully be exercised.

22. By extension, this has expanded the circumstances in which individuals can be made liable to examination powers, including the abrogation of the privilege against self-incrimination, and exposure to criminal penalties for non-compliance with obligations to appear at examinations and answer questions, or produce documents or provide other information to ACIC examiners.
23. This expansion of individuals' liability to examination powers—including non-suspects, minors (of any age) and other vulnerable individuals—should also be considered in the context of amendments made to the ACC Act in 2015. Those amendments expressly empowered the ACIC to conduct examinations of persons who have been charged with criminal offences, or against whom charges are imminent, in respect of the subject matter of those charges.<sup>21</sup>
24. For this reason, the Law Council considers that the Statement of Compatibility with Human Rights in respect of the originating Bill incorrectly described the amendments as not engaging any human rights, on the basis that there was no change to the provisions of the examination powers in Division 2 of Part 2 of the ACC Act.<sup>22</sup> In fact, the safeguards contained in the authorisation requirements for a special investigation or operation in section 7C of the ACC Act are central to the proportionate exercise of the ACIC's coercive powers of examination. As noted above, examination powers engage a range of human rights, including the privilege against self-incrimination as a component of the right to a fair trial.
25. The Law Council is concerned that the reduction of the authorisation threshold for the establishment of special investigations and operations has therefore removed a deliberate and targeted safeguard inserted in the original enactment of the ACC Act, and its predecessor, the *National Crime Authority Act 1984* (Cth).<sup>23</sup>

### Construction and application of the public interest test

26. The Law Council is further concerned that an unstructured statutory public interest test, in the specific context of enlivening the coercive examination powers of the ACIC, carries significant practical potential for miscarriage, confusion, and lack of transparency. A determination of whether a proposed exercise of coercive and intrusive powers is in the public interest will necessarily require value judgments to be made in identifying relevant interests affected, and in determining the relative degree of weight that should be given to each of those interests.<sup>24</sup>
27. The relevant decision-makers responsible for the application of this test are the heads of law enforcement and security agencies. There is also no statutory precondition that the ACIC Board must obtain, and consider, external advice in relation to countervailing, non-law enforcement or security interests (for example, in the nature of a public interest monitor role).

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<sup>21</sup> *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth), Schedule 1.

<sup>22</sup> Explanatory Memorandum, SOSI Bill, 19 (Attachment A).

<sup>23</sup> *National Crime Authority Act 1984* (Cth) (repealed), subsection 9(2).

<sup>24</sup> See, for example, *O'Sullivan v Farrer* (1989) CLR 210 at [13] (Mason CJ, Dawson, Brennan and Gaudron JJ): 'the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only in so far as the subject matter and the scope and purpose of the statutory enactments may enable'.

28. The above observation is offered in the context of considering, as a matter of policy, the appropriate statutory authorisation threshold for making determinations in relation to special investigations or operations. That authorisation threshold is an important safeguard to the legality and effectiveness of any decisions of the ACIC Board to issue determinations, and thereby the investigation and prevention of serious crime. The statutory threshold is also material to upholding public trust and confidence in the important work of the ACIC. The maintenance of public trust and confidence is integral to upholding the social licence that exists between law enforcement and security agencies and the wider community, whose safety and wellbeing those agencies are entrusted to protect and are empowered accordingly. That includes via the conferral of intrusive powers like compulsory examinations.
29. The Law Council submits that these considerations make it important that section 7C of the ACC Act provides explicit statutory guidance in applying the public interest test, to provide demonstrable assurance and transparency about the rigorous and consistent application of that test by the ACIC Board to each and every decision on a proposed determination that is presented to it for approval. In particular, section 7C should include a non-exhaustive list of the matters that must be considered, as a minimum, in all cases. It should also include specific requirements for the ACIC Board to be satisfied of the necessity and proportionality of the ensuing examination powers in relation to the federally relevant criminal activity specified in the proposed determination (as set out in the Law Council's recommendation 1 below).
30. It will be particularly important to include specific statutory requirements for the ACIC Board to consider, and be satisfied of, the necessity and proportionality, of exposing a person to examination powers in situations that are likely to be most intrusive upon fundamental rights. This includes consideration of whether there is a reasonable possibility, based on facts known at the time the determination is proposed to be made, that any of the following persons may be exposed to compulsory examination, as part of a special operation or investigation authorised under the determination:
- persons who are charged with offences, or in relation to whom charges are imminent (noting that examination powers would expressly abrogate self-incrimination privilege, which exists as a fundamental common law right);
  - vulnerable persons, such as minors or persons with disabilities; and
  - persons who are not suspected of personally engaging in or facilitating the commission of the relevant offence or offences, but are believed to have relevant information.
31. The Law Council emphasises that it is no answer to suggest that it is acceptable to include an unstructured and unguided public interest test in the ACC Act because 'the use of a public interest test is well-established in the exercise of decision-making authority under Commonwealth and state and territory legislation (for example, under the *Public Interest Disclosure Act 2013* (Cth), *Freedom of Information Act 1982* (Cth) and the *Government Information (Public Access) Act 2009* (NSW))'.<sup>25</sup>
32. Rather, as a matter of statutory interpretation, the High Court has held repeatedly that the meaning of a statutory expression (for example, 'the public interest') must be determined by reference to the text, context and purpose of the specific

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<sup>25</sup> The Hon Peter Dutton MP, Letter to the Senate Scrutiny of Bills Committee (undated), reproduced in *Scrutiny Digest 1/20*, (February 2020), Attachment 1, 2.

enactment in which it is used.<sup>26</sup> As a corollary, the High Court has also held that it is generally not appropriate to seek to construe the meaning of an expression used in one Act by reference to the meaning of the same expression as used in another Act, unless it can be clearly established those separate Acts form part of a complementary or substantially similar regulatory regime.<sup>27</sup>

33. The normative policy question of the appropriate statutory threshold for the making of determinations to authorise special investigations or operations should also be informed by the particular powers and liabilities enlivened by those determinations (that is, coercive powers of examination that abrogate self-incrimination privilege including in relation to persons facing unresolved criminal charges). The fact that certain public interest tests exist in wholly unrelated statutory regimes, such as the information disclosure laws cited above, is not a relevant consideration in this necessarily context-specific analysis.

### Significant disparity with thresholds for other intrusive powers

34. The Law Council considers that the authorisation thresholds for other highly intrusive investigative powers conferred on the ACIC (among other Commonwealth investigative agencies) holds substantial persuasive value with respect to the policy question of the appropriate authorisation threshold for the ACIC's special investigations or operations.
35. Notably, the public interest threshold in section 7C of the ACC Act appears to be considerably lower and less precise than many of the existing statutory thresholds for other intrusive powers of the ACIC and other Commonwealth investigative agencies (covering both law enforcement and intelligence agencies). For example:
- the threshold for the ACIC to obtain warrants to intercept telecommunications under subsection 46(2) of the *Telecommunications (Interception and Access) Act 1979* (Cth) requires the issuing authority to be satisfied of specific matters relevant to the proportionality of the proposed interception activities, such as:
    - privacy impacts (noting that privacy is the key human right engaged by interception);
    - the gravity of the conduct constituting the offence or offences being investigated, and how much the information sought to be obtained would assist with that investigation; and
    - the availability and likely effectiveness of other methods to obtain the desired information, and whether reliance on those other methods may prejudice the investigation because of delay or any other reason;
  - the threshold for the ACIC to obtain warrants to access data held in, or accessible from, a computer under section 27C of the *Surveillance Devices Act 2004* (Cth) requires the issuing authority to be satisfied that there are reasonable grounds for suspecting that access to the relevant data is necessary for the purpose of investigating the relevant offence; and to have regard to privacy impacts, the existence of alternative means of obtaining the

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<sup>26</sup> See, for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>27</sup> See, for example, *Yager v R* (1977) 139 CLR 28 at 43 (per Mason J).

relevant information or evidence sought; and the likely evidentiary or intelligence value of that information or evidence; and

- the threshold for the Australian Security Intelligence Organisation to exercise its coercive questioning powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (which are similar to the ACIC's examination powers, but for security intelligence collection) explicitly requires the issuing authority (the Attorney-General) to have regard to other methods (if any) of collecting the relevant intelligence that are likely to be as effective. The higher threshold of necessity applies in the case of applications for warrants to compulsorily question people who have been charged with offences, in relation to the subject-matter of that charge.<sup>28</sup>

## Absence of independent operational oversight of Board decisions

36. Further, it should be noted that decisions of the ACIC Board to issue determinations under section 7C of the ACC Act will not be covered by the significant proposed changes to independent operational oversight arrangements presently before the Parliament in the Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Cth)
37. This Bill proposes to confer oversight functions on the Inspector-General of Intelligence and Security (**IGIS**) in relation to actions of the ACIC that involve the collection, correlation, analysis, production and dissemination of intelligence in the performance of its functions under the ACC Act, but expressly excludes actions of the ACIC Board from this oversight.<sup>29</sup>
38. The Law Council submits that the absence of *ex post facto* independent oversight of the application of the public interest test in section 7C of the ACC Act lends further support to enacting specific statutory guidance about the application of the public interest test to decisions about making determinations, including requirements directed to necessity and proportionality.
39. To avoid doubt, the Law Council acknowledges that decisions of the ACIC Board to make determinations could be the subject of judicial review applications, including via collateral challenges to the subsequent evidential admissibility of information obtained in an examination. However, that remedy is dependent on individuals' decision-making to bring such challenges, which may in turn be influenced by resourcing constraints or other external considerations arising from the individual's personal circumstances, which are unrelated to the substance of the matter.
40. Moreover, judicial review also necessarily only considers the particular factual and legal issue in dispute. In contrast, independent operational oversight focuses on undertaking a systematic assessment of the legality and propriety of the agency's overarching decision-making practices, policies and approaches, as they are deployed in relation to multiple proposed determinations.
41. The two forms of oversight therefore serve discrete purposes, such that the availability of judicial review does not offset the need for independent operational oversight. Accordingly, it follows that the absence of any standing, independent operational oversight jurisdiction in relation to the ACIC Board's application of a

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<sup>28</sup> *Australian Security Intelligence Organisation Act 1979* (Cth), sections 34BA and 34BB.

<sup>29</sup> Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020 (Cth), Schedule 2, item 66, inserting new paragraph 9AA(ba) of the *Inspector-General of Intelligence and Security Act 1986* (Cth) which provides that the oversight functions of the Inspector-General do not include actions of the ACIC Board.

generalised 'public interest test' tends in further support of applying stronger and more precise statutory parameters to the discretionary decision-making power.

**Recommendation 1—additional conditions on the power to make determinations**

- **Section 7C of the ACC Act should be amended to provide that the ACIC Board cannot make a determination in relation to a special investigation or operation, unless satisfied on reasonable grounds that making the determination is reasonably necessary for, and proportionate to, the purpose of understanding, preventing or disrupting federally relevant criminal activity.**
- **Section 7C should provide an explicit, non-exhaustive list of matters that must be considered and documented in the application of the necessity and proportionality requirements, including the following:**
  - **the availability and effectiveness of other investigative methods;**
  - **the nature and gravity of the federally relevant criminal activity;**
  - **the value of the information sought to be obtained from the enlivenment of examination powers; and**
  - **whether there is a reasonable possibility, based on the information known at the time the determination is proposed to be made, that any of the following persons may be subject to compulsory examination under a special operation or investigation established under the determination (if made):**
    - **persons who are charged with offences, or in relation to whom charges are imminent (noting that examination powers would expressly abrogate self-incrimination privilege vested in such persons);**
    - **vulnerable persons, including minors (of any age) and persons with disabilities; and**
    - **persons who are not personally suspected of engaging in or facilitating the commission of the relevant offence or offences, but may hold relevant information.**

**(In other words, the ACIC Board would be under a positive obligation to consider whether there is a reasonable possibility that examination powers may be exercised in relation to such persons, if the proposed determination were made. If so, it would only be empowered to make the determination if satisfied, on reasonable grounds, that this is necessary, not merely convenient or effective, and proportionate to the purpose of understanding, preventing or disrupting federally relevant criminal activity.)**



## Retrospective validation provisions

42. Items 55 and 56 of Schedule 1 to the SOSI Act operate to provide retrospective validity of:
- the actions of the ACIC Board's actions in issuing determinations to authorise a special operation or investigation; and
  - anything done previously by a person in connection with a special ACC investigation or operation in either the performance of any function, or the exercise of any power subject to the ACC Act, which would otherwise be rendered invalid or ineffective.
43. Amendments of this kind are not merely 'technical in nature',<sup>30</sup> and have profound consequences for the rule of law. They purport to make lawful actions of the state, in the context of criminal investigative powers which override fundamental protections against self-incrimination, which were unlawful at the time they were carried out. Those actions were unlawful because they failed to comply with the express statutory preconditions for their exercise, which were the product of careful and deliberate decision-making by the Parliament in prescribing the statutory scope, limits and applicable safeguards for the ACIC's coercive questioning powers.
44. The Law Council notes that these validation provisions far exceeded the individual determinations that were the subject of litigation in the High Court as at December 2019 (noted above) and apply to any or all determinations and actions purportedly taken under those determinations. As details of all affected determinations and associated actions do not appear to have been provided publicly, it appears that neither the public nor the Parliament have meaningful insight into the number and nature of otherwise unlawful determinations, and associated actions, that have been retrospectively validated by the SOSI Act.
45. Given that the retrospective validation provisions have been in force for over 12 months, having commenced on 10 December 2019, despite the concerns about such retrospective legislation outlined above, it is important that there is transparency and scrutiny about their operation to date. In particular, the Law Council encourages the Committee to seek information from the ACIC in the course of this review about the following matters:
- the number and nature of determinations that were retrospectively validated by item 55 of the SOSI Act (in that they were identified by the ACIC as otherwise being unlawful, or potentially unlawful);
  - the actions taken under each determination that were retrospectively validated by item 56 of the SOSI Act (that is, the conduct of examinations and the subsequent use and dissemination of examination materials); and
  - the decision-making processes of the ACIC and its Board (if any) in relation to:
    - whether an individual, extant determination should be preserved in reliance on the retrospective validation provision in item 55 of the SOSI Act, or whether it should be varied or revoked and re-made with greater particularity or other amendments to strengthen safeguards; and
    - the exercise of power under subsection 7C(4H) to renew otherwise unlawful determinations that were saved by the retrospective validation

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<sup>30</sup> Cf The Hon Peter Dutton MP, Letter to the Senate Scrutiny of Bills Committee (undated), reproduced in *Scrutiny Digest 1/20*, (February 2020), Attachment 1, 1.

provision in item 55, when they expired under subsection 7C(4G).  
In particular, decision-making in relation to whether the terms of those determinations should be amended in any way when renewed; and

- any strengthening of the ACIC's governance and assurance procedures, as a result of the effective lowering of the authorisation threshold and particularisation requirements in determinations authorising special investigations or operations.

#### **Recommendation 2—audit of application of retrospective validation provisions**

- **As part of the present review, the Committee should obtain information from the ACIC which enables it to audit the number and nature of determinations and associated actions that were validated retrospectively by the SOSI Act, in line with paragraph [45] of this submission.**
- **This information should be disclosed publicly, to the maximum extent possible without prejudicing the operational activities of the ACIC. (For example, as a minimum, aggregated statistics should be released publicly, even if certain details of specific operations or investigations are unable to be released.)**

## Legislative development and scrutiny processes

46. The Law Council welcomes the referral of the SOSI Act to the Committee for the purpose of the present post-enactment review. However, while post-enactment review is valuable in considering how legislation has operated in practice and enabling improvements, this does not diminish the need for scrutiny of proposed legislation prior to its debate and passage.
47. The highly truncated process for the introduction, debate and passage of the measures in the SOSI Act significantly impaired opportunities for the effective Parliamentary scrutiny of the originating Bill, prior to its enactment and commencement.
48. The Law Council is concerned that the limited degree of scrutiny possible in the restricted time available was not proportionate to the significant impact of the retrospective validation provisions or the dilution of the authorisation threshold. The Law Council urges the Parliament to take practical steps to avoid the repetition of this practice in relation to any future legislative proposals of a similar nature.
49. The Law Council acknowledges that there was a desire for urgent remedial action in the circumstances surrounding the SOSI Act. It therefore makes the following suggestions to enhance opportunities for Parliamentary and public scrutiny of such proposals, should similar time critical circumstances arise in future:
  - extrinsic materials to such Bills should provide comprehensive and detailed policy justifications for the proposed measures, so that the Parliament as a whole and the wider public have visibility of, and the ability to scrutinise, the necessity and proportionality of the proposed measures. The provision of private briefings to selected Parliamentarians does not dispense with the need for an adequate degree of information to be provided publicly;



- Statements of Compatibility with Human Rights contained in explanatory memoranda to such Bills should acknowledge and justify the human rights impacts that proposed amendments to authorisation thresholds for a coercive or intrusive power will have on the availability of that power, even if the powers themselves are not directly amended;
- steps should be taken to ensure that such Bills are not debated until all legislative scrutiny Committees have completed their consideration of the Bills (including receipt and consideration of responses to requests to the relevant portfolio Minister for further information) and Parliamentarians have had a reasonable opportunity to consider those reports. This may require the proponents of such Bills to take pro-active steps to engage early with these scrutiny Committees in relation to forthcoming legislative proposals, in order to make arrangements for expedited consideration wherever possible; and
- such time critical Bills should only include those measures which are genuinely and demonstrably urgent, in that there would be serious prejudice to the national interest if they were not included in a Bill slated for urgent consideration and intended passage. Any measures that do not meet this threshold should be included in a subsequent Bill, to be progressed over a longer and more reasonable timeframe. For example, a more constrained Bill could have been introduced on an urgent basis, which included only the measures proposing to retrospectively validate extant determinations of the ACIC Board authorising particular special investigations or operations. In the absence of justification in the extrinsic materials to the originating Bill, there is no apparent reason that the discrete measures proposing to amend the authorisation thresholds for future determinations in section 7C could not have been included in a separate Bill, with a longer timeframe for scrutiny.

### **Recommendation 3—improved legislative development and scrutiny processes**

- **The Law Council urges the Committee to consider recommending that that the Parliament endorses a statement of expectations about future amendments to intrusive or coercive powers conferred on Commonwealth investigative agencies, including the ACIC, which are identified by the proponents of the Bill as urgent measures to preserve the validity of extant operational activity.**
- **That statement of expectation could usefully include the matters outlined at paragraph [49] of this submission.**
- **The Government should ensure that the contents of any statement of expectation are incorporated in Commonwealth legislative design policies, including the Australian Government Legislation Handbook.**