



28 October 2010

Mr Hamish Hansford
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
Parliament House
CANBERRA ACT 2600

By Email: LegCon.Sen@aph.gov.au

Dear Mr Hansford

INQUIRY INTO THE CRIMES LEGISLATION AMENDMENT BILL 2010

Thankyou for inviting the Law Council to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Crimes Legislation Amendment Bill 2010*.

The Law Council would like to take the opportunity to comment on two aspects of the Bill.

1. Amendment to the *Australian Crime Commission Act 2002* (the ACC Act) to remove the limit on the maximum period of time that a person may serve as an ACC examiner

Currently, subsection 46B(4) of the ACC Act provides that an ACC examiner may be appointed for a period of up to five years and that the sum of an examiner's periods of appointment and reappointment must not exceed 10 years.

Schedule 2, Item 5 of the Bill seeks to amend this section to allow for examiners to be reappointed without any limitation on the maximum period of appointment, (although the five-year limit on each appointment will remain).

According to the Explanatory Memorandum the purpose of this amendment is to enable the ACC to take advantage of the experience that examiners can build up over a long period of time.

The Law Council does not support this amendment and recommends that Schedule 2, Item 5 be removed from the Bill.

The organisational structure and internal procedures of the ACC, as prescribed by the ACC Act, are intended to operate as a safeguard against the misuse or overuse of the ACC's coercive powers.

For example, the ACC's coercive powers may only be used in the context of an intelligence operation or investigation which the ACC Board has specifically determined to be a "special intelligence operation" or a "special investigation".

Further, only the ACC examiners, who are independent statutory officers appointed by the Governor-General, may authorise the use of the coercive powers in a specific circumstance. On each occasion an examiner issues a notice requiring a person to attend and answer questions or a warrant compelling the production of documents, he or she must be satisfied that it is reasonable in the circumstances to use the coercive powers and must record in writing his or her reasons for reaching this conclusion.

When the ACC was first established in 2002, the Government placed significant emphasis on the role of the examiner in ensuring that the ACC's coercive powers were used appropriately. The Explanatory Memorandum which accompanied the *Australian Crime Commission Establishment Act 2002* offered the following assurance:

"The independence of examiners is an important safeguard to the exercise of the coercive powers. While the Board may determine that an operation or investigation is a special ACC operation or investigation and this will result in the coercive powers being available for that operation or investigation, this does not interfere with the statutory discretion of the examiner to determine how, when and why to use those powers once a determination is in place. In addition, while subsection 46A(3) (Item 197) provides that the CEO may allocate an examiner to a particular special ACC operation or investigation, this does not interfere with the statutory discretion of the examiner in exercising his or her powers."

To fulfil their role properly, ACC examiners need to be willing and able to robustly challenge submissions from police that the use of the coercive powers is necessary in any particular circumstance. This requires examiners to bring an objective and independent perspective to assessing ACC operations and investigations.

Under the ACC Act, ACC examiners were initially limited to serving in the position for a maximum of five years.

Limiting the examiners' term of appointment in this way was intended to help safeguard their objectivity and independence.

First, it removed any incentive for examiners to exercise their authority in a manner which might help secure their re-appointment.

Further, it was designed to ensure that the examiners preserved a degree of separateness from the ACC as an institution and did not become entrenched in the ACC's law enforcement culture.

Finally, given the highly secretive environment in which the ACC exercises its coercive powers, enforced turnover in the key examiner role was designed to mitigate against the development of an organisational culture which might tolerate unethical, unlawful or corrupt practices.

However, in 2007, not long before the three examiners then appointed to the ACC reached five years in the role, the Government passed legislation which increased the maximum period of appointment from five to ten years.¹ The amendment received little attention because it was passed as part of the raft of legislation related to the Northern Territory National Emergency Response, notwithstanding that it was in no way relevant to the so called "intervention". The amendment does not appear to have been discussed or

¹ Schedule 2, Part 1, section 32 of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (no 128/2007)

reviewed by the Parliamentary Joint Committee on the Australian Crime Commission prior to or following its enactment.

Now, as the ACC's initial examiners approach ten years in the role, it is proposed to remove any limit on the maximum duration of an examiner's total period of appointment.

The Law Council does not support this amendment. The Law Council submits that the rationale behind capping an examiner's maximum period of appointment remains sound. The need to safeguard the independence and objectivity of ACC examiners is as pertinent now as it was when the ACC Establishment Act was passed in 2002. There is no reason why the ACC's desire for continuity and experience should suddenly be regarded as trumping the need for structural safeguards which mitigate against the misuse and overuse of the coercive powers.

If the Government is of the view that this amendment is genuinely required to allow the ACC to effectively fulfil its mandate, the amendment should, at the very least, first be considered by the Parliamentary Joint Committee on the Australian Crime Commission, or its likely successor the Parliamentary Joint Committee on Law Enforcement.²

2. Amendment to the ACC Act to allow for the appointment of part-time examiners

Currently, subsection 46B(5) of the ACC Act only allows for the appointment of full-time examiners.

Schedule 2, Item 8 of the Bill seeks to amend subsection 46B(5) in order to allow for the appointment of both full-time and part time examiners.

The Explanatory Memorandum to the Bill explains the rationale behind the proposed amendment as follows:

"The amendments will allow the ACC to utilise full-time examiners as well as part-time examiners. This will allow the ACC to:

- *approach examinations in a more strategic way (for example, by drawing from a pool of examiners as operational needs require);*
- *use different examiners for different purposes depending on the particular type of investigation or operation (for example, utilising different skills depending on the person being examined); and*
- *appoint examiners in different regions of Australia.*

The flexibility which this model provides will help the ACC attract people with the right capabilities to the position of examiner which will better support the work of the ACC and its partner agencies."

The Law Council does not support this amendment in its current form. The Law Council submits that if allowance is to be made for the appointment of part-time ACC examiners then it must only be on a permanent part-time basis with fixed remuneration per annum.

When the *Australian Crime Commission Establishment Bill* was first introduced into parliament in 2002, it included provision for the appointment of part-time examiners.

² The Parliamentary Joint Committee on Law Enforcement Bill 2010 is currently before parliament. The Bill seeks to replace the PJC on the Australian Crime Commission with a new parliamentary joint committee which has oversight of both the ACC and the AFP.

This particular aspect of the Bill attracted considerable criticism when the Bill was reviewed by the Parliamentary Joint Committee on the National Crime Authority. A number of witnesses who appeared before the Committee expressed concern that if examiners were appointed on a part-time basis, and only paid per hour or per diem as needed, this may compromise their independence.³ It was feared that, in order to ensure that they were given work, part-time examiners might be inclined to more readily accede to requests to use the coercive powers. Further, police might have greater opportunity to pick and choose which examiners they used based on who had proven most amenable to past applications.

The Committee reached the view that such concerns were well founded and recommended that the Bill be amended to provide that no part-time examiners be engaged on a per-hour or per-diem basis.⁴

The Government also recognised the validity of the concerns raised about part-time appointments and amended the Bill to provide that examiners must be appointed on a full time basis.

In 2005, the Parliamentary Joint Committee on the Australian Crime Commission reviewed the operation of the ACC Act. In response to a submission from the Attorney-General's Department, the Committee re-considered the need for and desirability of appointing part-time examiners. After reiterating the types of concerns raised when the ACC Establishment Bill was first introduced, the Committee concluded:

"In the absence of any persuasive argument to the contrary, the Committee considers that part-time examiners should not be used by the ACC."⁵

As noted above, the need to safeguard the independence and objectivity of ACC examiners is as pertinent now as it was when the ACC Establishment Act was passed in 2002. While the ACC may desire to maximise the flexibility of its staffing arrangements, this should not be allowed to compromise the procedures which were put in place to ensure that the ACC's extraordinary powers were used sparingly and only when absolutely necessary.

As above, if the Government is of the view that this amendment is genuinely required to allow the ACC to effectively fulfil its mandate, the amendment should, at the very least, first be considered by the Parliamentary Joint Committee on the Australian Crime Commission, or its likely successor the Parliamentary Joint Committee on Law Enforcement.

Yours sincerely

Bill Grant
Secretary-General

³ See Parliamentary Joint Committee on the National Crime Authority Committee Hansard 9 October 2002 (Melbourne) and 14 October 2002 (Canberra) and in particular the evidence of Judge Betty King, Mr Edwin Lorkin, Mr Aziz Melick SC and Mr Christopher Meaney

⁴ Report of the Parliamentary Joint Committee on the National Crime Authority on the *Australian Crime Commission Establishment Bill 2002*, November 2002, at pp27-28 and recommendation 13.

⁵ Report of the Parliamentary Joint Committee on the Australian Crime Commission Act on the Review of the *Australian Crime Commission Act 2002*, November 2005 at para 6.45