Parliamentary Joint Committee on the National Crime Authority

Inquiry Into The Australian Crime Commission Establishment Bill 2002

Submission No:6
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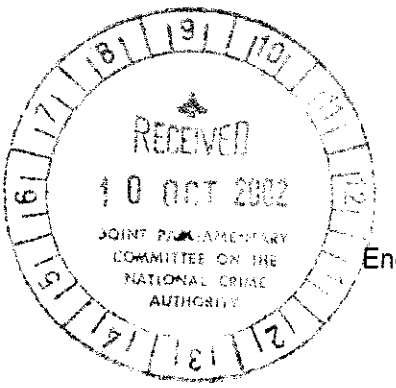

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Ms Maureen Weeks
Secretary
Joint Committee on the National Crime Authority
Parliament House
CANBERRA ACT 2600

2 October, 2002

Dear Ms Weeks

Thank you for the invitation to comment on the Australian Crime Commission Establishment Bill 2002.

Because of ongoing commitments under NSW privacy legislation, I have limited time and resources to comment on the Bill. I would not therefore seek to attend your hearings on the Bill. However there are some aspects of the Bill where I would like to highlight privacy concerns which may inform your further review.

The Bill gives effect to an agreement on Terrorism and Multi-jurisdictional Crime by Commonwealth and State Leaders on 5 April 2002. It amends the existing National Crime Authority Act 1984 to reflect the National Crime Authority's (NCA) conversion into the Australian Crime Commission (ACC), mainly through changes in administrative structure. The staff of the NCA will be retained but their official positions will be redefined in some instances to reflect operational changes.

Scope of Activity

The current NCA Act restricts NCA investigations to references relating to federally relevant criminal activities referred to it by the Federal Minister after consultation with the Inter-Governmental Committee, and relevant offences under State laws which are referred by a State minister. These restrictions are effectively to be repealed. The Bill substitutes a definition of relevant criminal activity to circumscribe the ACC's functions. The scope of this definition is in turn defined by reference to *serious and organised crime*. This definition adds firearms offences and what are described simply as *cybercrime* offences to the kind of offences previously covered by the NCA Act. Presumably this latter is intended to refer to the new computer offences added to the Criminal Code by the Cybercrime Act 2001.

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The lack of clear definition of some of the kinds of offences which would justify intervention by the ACC gives some grounds for concern. In an earlier submission to the Senate Standing Legal and Constitutional References Committee on the Cybercrime legislation, I expressed concern that the manner in which these offences were defined was capable of including a number of relatively minor forms of computer-related misconduct, for example where users manipulated a computer environment to improve legitimate access and with no malicious intent. The lack of definition of such offences in the current Bill can be seen to compound this issue, especially when combined with enhanced intelligence gathering powers.

Application of powers to intelligence gathering

The ACC will also incorporate the Australian Bureau of Criminal Intelligence (ABCI) and Office of Strategic Crime Assessment (OSCA). Currently the ABCI operates as a common Police Service. In the past this has raised issues of lack of accountability for the quality and accuracy of the intelligence the ABCI holds and disseminates. Transferring this function to a Commonwealth agency might be thought to be an improvement, were it not for the lack of accountability mechanisms highlighted in the following section.

As a consequence of this take-over, the Bill authorises ACC officers, with the approval of the Board, to use the coercive investigative powers in the NCA Act for the collection of intelligence information.. The main form in which these coercive powers are exercised in relation to obtaining information is through inquisitorial hearings at which people are required to answer questions. They also include powers to obtain information from Commonwealth agencies, to obtain search warrants including interception warrants (but this is to be limited in relation to intelligence gathering). Current arrangements with States for the NCA to receive relevant intelligence and to exercise powers conferred on it by State laws are continued under the Bill.

Hearings are currently conducted by members of the NCA. The extended hearing powers are to be exercised by newly created positions of examiner, who are to be legal practitioners appointed by the Governor-General on a full-time or part-time basis and taking direction from the CEO of the ACC.

Recent years have seen a growing international trend to expand coercive intelligence gathering powers for law enforcement. This has been given added impetus by the need to respond to international terrorism. There may be a public interest justification for exercising such powers in relation to certain kinds of organised criminal activity which are not otherwise susceptible to investigation. Nevertheless the exercise of such powers challenges received assumptions about a right to privacy which underlie the way our legal system operates, as well as the right against self-incrimination and the presumption of innocence. There is a danger that the mere invocation of a broadly defined public interest will override these legitimate interests of individuals, and that coercive intelligence gathering powers, once

once established, will be extended to a wider range of activities than those where they are justified by special circumstances.

Section 30 of the new Act will provide limited protection against self incrimination and where legal professional privilege is at issue. I submit that there is a need for a more comprehensive legislative test applicable to the eliciting of intelligence information which would require an examiner to balance the privacy interest of a witness or other affected person before requiring a witness to answer a question to which they might otherwise object. There would also be a need for some degree of accountability for the manner in which such a discretionary power would be exercised.

Accountability

The role of the Joint Parliamentary Committee is to be continued under the new Bill. While the Joint Committee has historically exercised an important oversight role, I do not believe that its role could reasonably be expected to exhaust the need for accountability which arise from the extended powers in relation to coercive intelligence gathering. Unfortunately other possible channels of accountability are also excluded under the Bill.

The current Bill amends the HREOC, Ombudsman and Privacy Acts to transfer the NCA's exemptions from provisions of these Acts to the ACC. It may be appropriate to review the scope of these exemptions given the expanded intelligence gathering powers I have referred to.

For example, section 7 of the Privacy Act (as amended by the current Bill) define acts and practices under that Act to exclude acts and practices of the NCA or acts and practices by organisations which involve records originating from or received from the ACC. This largely removes the availability of remedies under the Privacy Act which might be thought of as uniquely suited to misuses of information gathered for intelligence purposes.

Section 70(2)(b) of the Privacy Act allows the Attorney-General to give the Privacy Commissioner a certificate to cover the non-supply of information which could prejudice the proper performance of a function of the NCA. Similar restrictions apply to investigations by the Commonwealth Ombudsman and the Human Rights and Equal Opportunity Commission.

Recent amendments to the Privacy Act create a new category of sensitive information which is applicable to non-Government organisations covered by the National Privacy Principles. Sensitive information includes:

(a) information or an opinion about an individual's:

(i) racial or ethnic origin; or

(ii) political opinions; or

(iii) membership of a political association; or

(iv) religious beliefs or affiliations; or
(v) philosophical beliefs; or
(vi) membership of a professional or trade association; or
(vii) membership of a trade union; or
(viii) sexual preferences or practices; or
(ix) criminal record;

that is also personal information; or

(b) health information about an individual.

NPPs 2 and 10 enact more stringent provisions in relation to the collection, use and disclosure of sensitive information. There is no applicable protection of sensitive information for public sector agencies in relation to their compliance with the information protection principles in section 14 of the Act. Yet there is obviously an appreciable risk that some of these kinds of information may be misused in relation to the activities of public sector agencies. For instance there is little point in singling out information about a person's political opinions or affiliation for protection if this protection does not cover the activities of Government where political bias is most likely to occur.

Sensitive information is also likely to figure significantly in the collection and use of information for criminal intelligence, showing up further the lack of effective remedies for aggrieved persons.

By highlighting these deficiencies I do not wish to minimise the need for a limited privacy exemptions for the information resources and activities of the ACC, in common with other law enforcement agencies. However I do consider that the ACCs expanded sphere of activity brings the breadth of current exemptions into question.

Individuals who have legitimate grievances about inaccurate or irrelevant intelligence files or overly intrusive intelligence gathering should not be unreasonably barred from seeking privacy remedies.

Individualised remedies do not exhaust the need for accountability. There should also be a system of record keeping, monitoring and reporting of the exercise of coercive intelligence gathering powers, similar to that which operates under the Telecommunications Interception Act. In this respect, section 61 of the current Act, dealing with the NCA's annual reporting requirements could be seen as not sufficiently prescriptive.

Conclusion

The greater freedom which the ACC will have to define its range of activities and the expansion of its intelligence gathering powers call into question the existing exemptions for the NCA and its records from Federal accountability mechanisms. In particular these changes justify a rethink of the extent to which the ACC should be exempt from privacy laws.

I do not wish to claim confidentiality for the contents of this submission. Please contact John Gaudin of this Office on 02 9268 5581 if you wish to discuss any other issues raised by the submission.

Yours sincerely

Chris Puplick
PRIVACY COMMISSIONER