

**Parliamentary Joint Committee on the  
National Crime Authority**

**Inquiry Into The Australian Crime  
Commission Establishment Bill 2002**

**Submission No:15**

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**The Hon B Baird MP**  
**Chair**  
**Parliamentary Joint Committee on the National Crime Authority**  
**The Senate (S1107)**  
**Parliament House**  
**CANBERRA ACT 2600**

**Dear Minister Baird**

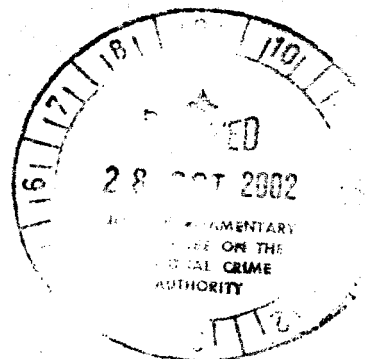
**VICTORIAN GOVERNMENT SUBMISSION TO THE PJC ON THE NCA - INQUIRY  
INTO THE AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002**

I enclose a submission from the State Government of Victoria to the Parliamentary Joint Committee on the NCA in relation to the inquiry into the Australian Crime Commission Establishment Bill 2002. The submission has been prepared in consultation with Victoria Police and I therefore support its contents.

For any further information on this submission please contact Mr Mark Duckworth, Director Government Branch (03 9651 2654) from the Department of Premier and Cabinet. If you require further advice from a Victoria Police perspective please contact Inspector Andrew Crisp (03 9247 6881) from the Victoria Police Legislative Review & Proposals Unit.

**Yours sincerely,**

**Christine Nixon APM**  
**Chief Commissioner**



# STATE GOVERNMENT OF VICTORIA

## SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON THE NATIONAL CRIME AUTHORITY

### INQUIRY INTO THE AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

#### BACKGROUND

1. The Commonwealth legislation to establish the Australian Crime Commission (ACC), the Australian Crime Commission Establishment Bill 2002 (Cth) (the Bill), was introduced into the House of Representatives on 26 September 2002. The Bill was referred on the same date to the Parliamentary Joint Committee on the National Crime Authority for consideration and an advisory report by 6 November 2002.
2. The Commonwealth engaged in extensive consultation with the States and Territories during the drafting of the Bill. The Victorian Government considers that this consultation has been highly constructive and that significant progress has been made in addressing issues raised the States and Territories.
3. Notwithstanding this significant progress, the Victorian Government has some remaining matters it wishes to raise in relation to the Bill. These matters, which have been divided into key issues and other issues, are outlined below.

#### KEY ISSUES

4. Set out below are the key issues the Victorian Government wishes to raise in relation to the Bill.

#### Search warrants

5. The Victorian Government is concerned about the adequacy of the accountability mechanisms in relation to the proposed search powers in the Bill, particularly in relation to the use of search powers in connection with special intelligence operations. These concerns, and proposed amendments to address these concerns, are outlined in more detail below.

#### *Basic principles*

6. The basic principles that should govern Commonwealth legislation dealing with the power of law enforcement officers to enter and search private premises (or land, or a vehicle, etc) without the consent of the occupier have recently been stated by the Senate Standing Committee for the Scrutiny of Bills.<sup>1</sup> The same principles have also been stated in relation to Victorian legislation by the Victorian Parliament Law Reform Committee.<sup>2</sup>

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<sup>1</sup> Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation* (2000).

<sup>2</sup> Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons* (2002).

7. Both Committees favoured a parsimonious approach to the granting of such powers. For example, the Senate Standing Committee stated that:

A power to enter and search should be granted only where the matter in issue is of sufficient seriousness to justify its grant, but no greater power should be conferred than is necessary to achieve the result required.

In considering whether to grant a power to enter and search, Parliaments should take into account the object to be achieved, the degree of intrusion involved, and the proportion between the two - in the light of that proportion, Parliament should decide whether or not to grant the power and, if the power is granted, Parliament should determine the conditions to apply to the grant and to the execution of the power in specific cases.<sup>3</sup>

8. The Senate Standing Committee adopted as a benchmark the entry, search and seizure powers set out in the *Crimes Act 1914* (Cth). The Committee stated that more extensive powers "should be conferred only in exceptional, specific and defined circumstances where Parliament is notified of the exercise of those powers and where those exercising the powers are subject to proper scrutiny".<sup>4</sup>

#### ***What does the proposed Bill do in relation to search warrants?***

9. The Bill significantly expands the circumstances in which a search warrant may be issued. The powers created by the proposed provisions go well beyond the powers contained in the *Crimes Act 1914* (Cth).
10. Currently, the National Crime Authority (NCA) may apply, under section 22 of the *National Crime Authority Act 1984* (Cth) (the NCA Act)<sup>5</sup>, for a warrant to search for things connected with a matter into which the NCA is conducting a special investigation.<sup>6</sup>
11. The proposed amendments<sup>7</sup> will allow the ACC not only to apply for a warrant to search for things connected with a special investigation, but also to apply for a warrant to search for things connected with a special intelligence operation.<sup>8</sup>

#### ***What is the difference between an investigation and an intelligence operation?***

12. "Intelligence operation" is defined in the Bill to mean "the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity". Use of the word "intelligence" to supplement the word "information" in the definition suggests that the collection, correlation, analysis or dissemination of criminal information is different to the collection, correlation, analysis or dissemination of

<sup>3</sup> Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation* (2000), para. 1.32 and 1.33.

<sup>4</sup> Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 2000, *Entry and Search Provisions in Commonwealth Legislation* (2000), para. 1.54.

<sup>5</sup> The NCA can also apply for a search warrant under any other relevant law. For example, if the NCA is investigating an offence under the Commonwealth *Crimes Act 1914*, it may also apply for a search warrant under Part 1AA of that Act.

<sup>6</sup> A "special investigation" is an investigation in relation to which the Inter-Governmental Committee has considered whether ordinary police methods of investigation are likely to be effective.

<sup>7</sup> Proposed sub-section 7C(2), inserted by item 35 of Part 1 of Schedule 1 to the Bill.

<sup>8</sup> Under the proposed *Australian Crime Commission Act 2002*, a special ACC operation is an intelligence operation in relation to which the Board of the ACC has considered whether methods of collecting the criminal information and intelligence that do not involve the use of powers in that Act have been effective.

criminal intelligence. This suggests that "intelligence" has a different character to information, and that it refers to information that is secretly obtained or that has a sensitive or confidential quality.

13. "Investigation" is not defined in the NCA Act or in the Bill. Nevertheless, the Minister's second reading speech for the Bill indicates an intention that an "investigation" is narrower than an "intelligence operations" and that intelligence activities occur at a more preliminary stage. For example, the Minister explained that the ACC's intelligence functions would "allow areas of new and emerging criminality to be identified and investigated" and that it would "provide for investigations to be intelligence driven".<sup>9</sup>
14. The Minister's comments suggest that, in the proposed *Australian Crime Commission Act* 2002 (ACC Act), "investigation" is intended to refer to activities undertaken at a point when it is suspected that an offence has been, is being or is likely to be committed. This would not mean that the activities encompassed by the word "investigation" are limited to the obtaining of evidence for the purposes of a prosecution, as they could also include the taking of action to prevent a suspected offence from being committed. However, in either situation, the word "investigation" must relate to activities undertaken at a stage where some offence is suspected. Otherwise it is difficult to see what is achieved by having the separate concept of "intelligence operation" in the proposed ACC Act.

***How does this difference affect the character of the search powers?***

15. As discussed in paragraph 7 above, when considering whether particular entry, search and seizure powers are appropriate, it is necessary to consider:
  - the object to be achieved;
  - the degree of intrusion involved; and
  - the proportion between the two.

***The object to be achieved***

16. The object to be achieved by the criminal justice system is to maintain social cohesion by deterring people from breaking the criminal law and to punish those who commit offences.
17. The object to be achieved by an investigation can be described as the obtaining of information or evidence revealing that an offence has been committed, details of the offence, the circumstances in which it was committed, the identity of the person or persons who committed it, and so on. This is not an object to be achieved in its own right, but is a lower-order object which facilitates the achievement of the object in paragraph 16.
18. The object to be achieved by an intelligence operation is the obtaining of information to assist in the formulation and planning of investigations. Again, the obtaining of such information or "intelligence" is not an object to be achieved in its own right. It is a lower-order object which facilitates the achievement of the object in paragraph 17, which in turn facilitates the achievement of the object in paragraph 16.

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<sup>9</sup> Commonwealth Parliament, House of Representatives, Hansard, 26 September 2002, Mr Williams (Attorney-General) p.6998.

19. Each of these lower-order objects is of social benefit. Nevertheless, the object to be achieved by intelligence operations is further removed from the ultimate object of the criminal justice system than the object to be achieved by investigations.
20. By expanding the entry, search and seizure powers to cover intelligence operations as well as investigations, the proposed provisions necessarily affect the proportion between the object to be achieved and the degree of intrusion, even if the degree of intrusion is the same in intelligence operations as in investigations.

*The degree of intrusion*

21. Because of the secret nature of intelligence operations, search warrants issued in relation to such operations are likely to be executed covertly. It will often be the case that (unless otherwise required by conditions imposed on the warrant) law enforcement officers executing a search warrant issued for an intelligence operation will execute the warrant at a time when the premises are not occupied and in such a manner that the occupants of the premises may never realise that the search has been conducted.
22. Covert searches are likely to be considered by many members of the community as being more intrusive than searches that are conducted openly when the occupier of the premises is present and has an opportunity to object to the search or to the manner in which it is conducted.

*The proportion between the object to be achieved and the degree of intrusion*

23. The proposed provisions alter the proportion between the object to be achieved (which is more distant from the ultimate object of the criminal justice system than the object to be achieved under existing section 22 of the NCA Act) and the degree of intrusion involved (which may be greater under proposed section 22 of the ACC Act than under that section in its current form in the NCA Act).
24. This means that the questions for the Joint Parliamentary Committee are:
  - whether the proposed extension is justified; and
  - if it is justified, what safeguards should apply.

25. In answering these questions, it is important to consider the benchmark provisions in the *Crimes Act 1914*.

***How do the proposed provisions compare with the benchmark provisions in the Crimes Act 1914?***

26. The *Crimes Act 1914* does not permit search warrants to be issued for intelligence operations (as opposed to the investigation of offences) and does not permit search warrants to be executed covertly.

***Is there a justification for the proposed provisions going beyond the benchmark provisions?***

27. The search warrant provision in section 22 of the proposed ACC Act only applies in relation to serious and organised crime. "Serious and organised crime" is defined in the Bill<sup>10</sup> to mean an offence, such as theft, fraud, money laundering, illegal drug dealing, etc:
- that involves two or more offenders and substantial planning and organisation;
  - that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
  - that is committed, or is of a kind that is committed, in conjunction with offences of a like kind.
28. The difficulty of detecting and investigating such criminal activity means that intelligence operations are particularly important.
29. Intelligence operations relating to serious and organised crime are likely to be significantly more effective if they can be conducted in a way that does not alert those in relation to whom information or intelligence is being obtained. For example, if law enforcement officers do not have sufficient evidence to take action against a group of people engaged in serious and organised criminal activity, but those people become aware that they are under scrutiny, they may modify their behaviour to make it more difficult to detect and investigate any offences committed by them.

***If it is appropriate to go beyond the benchmark provisions, what safeguards should apply?***

30. Relevant safeguards can operate at a number of different points.

***Criteria for authorising***

31. The criteria for authorising a search warrant are important because they ensure that, in accordance with the general principle discussed in paragraph 7 above, no greater power to interfere with privacy and property is conferred than is necessary to achieve the result that is required.
32. Proposed sub-section 22(2) creates the power to issue a warrant. Proposed paragraph 22(3)(c) states that an issuing officer shall not issue a warrant under sub-section 22(2) unless he or she "is satisfied that there are reasonable grounds for issuing the warrant". The section does not set out any criteria to which the issuing officer must have regard, nor does it expressly state what may constitute reasonable grounds for the issuing of a warrant.
33. Proposed sub-section 22(4) requires the issuing officer to state which of the grounds in the affidavit supplied by the applicant he or she has relied upon, as well as any other grounds relied on by him or her to justify the issue of the warrant. The grounds in the affidavit given to the issuing officer would presumably have to relate to the conditions set out in

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<sup>10</sup> Schedule 1, Part 1, Item 120 of the Bill.

