

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

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

Submission No:17

Hon Michelle Roberts MLA

**Minister for Police and Emergency
Services**

13th Floor Dumas House

2 Havelock Street

WEST PERTH WA 6005

☎ 08 9213 6600 📄 08 9213 6601

E-mail: michelle-

roberts@dpc.wa.gov.au



Government of Western Australia

Hon Michelle Roberts BA DipEd MLA
MINISTER FOR POLICE AND EMERGENCY SERVICES
MEMBER FOR MIDLAND

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

Dear Ms Weeks

INVITATION TO MAKE A SUBMISSION TO THE INQUIRY INTO THE AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

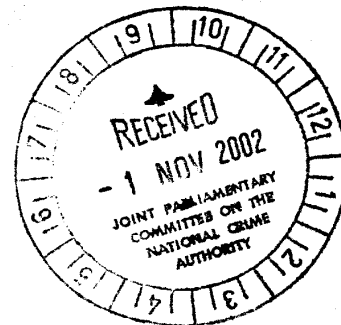
Thank you for your letter of 26 September 2002 inviting submissions to the Parliamentary Joint Committee on the National Crime Authority on the *Australian Crime Commission Establishment Bill 2002*.

Please find enclosed the submission on behalf of the State of Western Australia.

I trust this is of assistance to the inquiry.

Yours sincerely

HON MICHELLE ROBERTS MLA
MINISTER FOR POLICE AND EMERGENCY SERVICES



P:\min\acsd\Weeks ACS Submission

13th Floor Dumas House 2 Havelock Street West Perth Western Australia 6005
Telephone: 08 9213 6600 Facsimile: 08 9213 6601 Email: michelle-roberts@dpc.wa.gov.au

WESTERN AUSTRALIA- COMMENTS ON THE
AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

COMMENTS ON THE
AUSTRALIAN CRIME COMMISSION BILL 2002

WESTERN AUSTRALIA

02-06366b

0892136601

AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

WESTERN AUSTRALIA RESPONSE

BACKGROUND

Following the release by the Commonwealth of the *Australian Crime Commission Establishment Bill 2002 (Cmth) Exposure Draft (the Bill)*, the Western Australia Police Service provided written comment on that draft of the Bill to the State Attorney General. This comment included 12 recommendations a copy of which is attached at appendix 1. An examination of the current draft reveals that, in the main, they appear to have been addressed.

It is not proposed that those that have been addressed be revisited. This submission therefore makes comment on the latest draft of the Bill

COMMENT

The Western Australia Police Service notes that the great majority of issues raised by the States and Territories during negotiations leading up the introduction of the Bill have been addressed in the draft legislation now before Federal Parliament.

This is pleasing and demonstrates the value of dialogue and compromise in achieving the desired outcomes arising out of the Leaders Summit.

In relation to the content of the Bill itself, it is noted that the Intergovernmental Committee (of the ACC) will continue to have an important role in the overseeing and monitoring of operations undertaken as well as the strategic direction of the ACC, without being involved in day-to-day issues. The Intergovernmental Committee (IGC) is also legislatively empowered to have the same role in relation to the Board of the ACC. I am concerned, however about the proposal for the Board rather than the IGC approving references and the use of coercive powers.

The implementation and management of proposed ACC is stated as being cost neutral with the Commonwealth giving an undertaking to provide current levels of funding for the existing agencies. Be that as it may a question still remains regarding the Project "Sagan" funding which has been provided to enable the NCA to conduct covert operations. There appears to be some doubt as to whether the funding will continue when the current budget cycle ends. This issue requires clarification as it is our belief that a reduction in this activity would severely restrict the effectiveness of

WESTERN AUSTRALIA- COMMENTS ON THE
AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

the ACC. Therefore the question of whether this funding and role will continue to be exercised by the ACC needs to be closely examined and resolved.

Within the definitions of the Bill, "intelligence operation" is defined as requiring "*federally relevant criminal activity*". In applying this definition to operational contingencies it raises questions as to the affect on the current ability of the Australian Bureau of Criminal Intelligence (ABCI), which is being subsumed within the ACC, to provide intelligence services to States and Territories relative to criminal activities that may not have a direct linkage to those which are "*federally relevant*". It is understood that State offences, which do not have a federal aspect, will require coverage by State and Territory underpinning legislation. The provisions of the proposed section 55A of the ACC Act are intended to constitute Commonwealth consent to the conferral of such State power. This process is resultant from the *Hughes* High Court decision. Clarification is therefore sought to ascertain if the present service provision of intelligence services to the states by the ABCI will be effected by this legislative reform. If this is the case then a legislative solution that ensures continued service at, minimally, the same level is sought.

In relation to the issue of the Commonwealth Minister being enabled to give directions or guidelines to the Board with respect to the performance of the functions of the Board (section 18), however, the Minister cannot give any directions or guidelines in respect of a particular ACC operation/investigation without the approval of a resolution passed by the IGC. This is acceptable to the Western Australia Police Service as it ensures an acceptable level of accountability and distances the Federal Minister from the operational aspect of the ACC.

Proposed sub-section 7A(a), *functions of the ACC*, provides a function for the ACC to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence.

While this sub-section states that the information can be disseminated it is not clear on to whom or what agencies it can be disseminated to. It is recommend that this sub-section should be re-drafted to clearly articulate to whom such information can be released and for what purposes it may be used.

It is recommended that the agencies to which this information can be released include, at a minimum, state police forces and as such needs to be enshrined in the legislation. A reciprocal provision allowing the ACC to receive similar information from outside agencies, including state police forces, and its inclusion on the ACC database should also be included.

The current wording of s.55A of the *National Crime Authority Act 1984(Cmth)* (NCA Act) makes it difficult for some state laws to confer powers or functions on members of staff of the National Crime Authority (NCA). This is because s.55A states that the powers conferred must be of the "*same kind*" conferred by the NCA Act. Strict interpretation therefore throws doubt on the ability of some state legislation to confer such power on members of the NCA.

An example of this is the *Surveillance Devices Act 1998 (WA)* (SD Act) which contains provisions intended to allow members of the NCA to apply for surveillance

WESTERN AUSTRALIA- COMMENTS ON THE
AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

device warrants. Advice from the Commonwealth Government Solicitor's office is that NCA members are unable to operate under the SD Act due to this defect in the NCA Act.

Therefore, where State offences do not have a federal aspect and there is a need to rely on State legislation to confer a power or function (with the Commonwealth's consent to that conferral as set out in section 55A) on members of the ACC, it is recommended that such provisions be clarified to enable the officer to conduct all functions necessary in that role as was the original intent of the legislation and in so doing avoid any complications stemming from legal interpretations.

In the previous submission of this Service comment was made that the Bill should explicitly provide for the conduct of meetings by means other than face to face meetings, similar to those provided by section 8(7) (Inter-Governmental Committee meetings). These provisions allow resolutions of the committee members to be determined by remote means as effectually as if passed at a duly convened meeting of the Board. These amendments are of particular importance to the more remote Services due to travel times and associated imposts.

This agency also made previous comment in regard to the inability of the ACC to conduct intelligence operations without specific authorisation from the Board. This could severely limit the ability of the Commission to undertake preparatory investigative work. This type of work is required to form the basis for an application to the Board to conduct an authorised investigation. It is also a fundamental practical requirement to the purposes of an investigation, which is being conducted by a State or Territory. This State therefore recommends that, the ACC have the capacity to undertake preliminary intelligence activities or "probes" without specific Board authorisation. It is not proposed that the use of coercive powers to obtain information would form part of such activities.

An issue raised in this State's previous submission that has not been addressed is the apparent inability of the CEO of the ACC to direct an examiner to hold an examination similar to the current provision in section 24A of the NCA Act, which currently states;

"For the purposes of a special investigation:

- (a) the Authority may hold hearings of the Authority; and*
- (b) the Chair may, in writing, direct a hearing officer to hold hearings."*

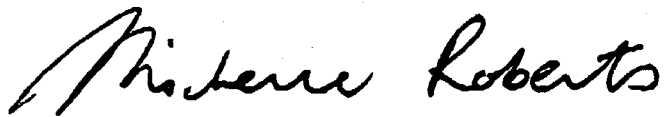
This provision has been amended in the ACC Bill to state;

"An examiner may conduct an examination for the purposes of a special ACC operation/investigation."

The decision to hold a meeting now seems to lie with the examiner and not the CEO when it would seem more appropriate for the CEO to make the judgement in this regard. The recommendation that the CEO have the ability to direct an examiner to hold an examination similar to the Chair's current ability under the NCA Act is again put forward for further consideration.

WESTERN AUSTRALIA- COMMENTS ON THE
AUSTRALIAN CRIME COMMISSION ESTABLISHMENT BILL 2002

In the further development of this Bill the Western Australia Government seeks the opportunity to provide comment on any future drafts.

A handwritten signature in black ink, reading "Michelle Roberts". The signature is written in a cursive, flowing style.

HON MICHELLE ROBERTS MLA

MINISTER FOR POLICE AND EMERGENCY SERVICES

List of Recommendations

RECOMMENDATIONS

Recommendation 1

- *Section 7D be amended to provide that the Board shall meet not less than twice annually; and*
- *at the request of no less than two members of the Board, by notice given to each member of the Board, the Chair shall conduct a meeting within 28 days of the request being made.*

Recommendation 2:

- *Section 7D (4) be amended to reflect that the Chair shall not have any voting rights unless a casting vote is required.*

Recommendation 3:

- *That section 7F be amended to provide for a quorum where there is a simple majority; or alternatively,*
- *Provide for a minimum quorum of seven members; and*
- *Section 7G (3) be amended to provide that any properly constituted meeting of the Board can establish a special team or Task Force, provided that the quorum has been established.*

Recommendation 4:

- *The existing IGC approval mechanism in section 18 (2) of the Act should be retained to ensure the full participation of State Ministers in any decision to direct the Board in the performance of its functions.*

Recommendation 5:

- *The Bill should explicitly provide for the conduct of meetings by means other than face to face meetings and as provided in section 8(7) deem the determinations of those meetings as being as valid and effectual as if passed at a meeting of the Board duly convened.*
- *Alternatively, the Bill should provide that the Commissioner of Police of a State or Territory, or Commonwealth member of the Board, can nominate his or her delegate;*
- *A delegate shall be a person holding the rank of Deputy Commissioner or equivalent rank, or in the case of a Commonwealth member of the Board, the deputy to that position.*

- *In any event, the Bill should provide that a delegate may only attend a maximum of two consecutive Board meetings.*

Recommendation 6:

- *That the Bill restricts the use of coercive powers in intelligence operations to serious and organised crime as defined in section 4 of the NCA Act;*
- *The Board be required, before authorising the use of coercive powers, to consider:*
- *the extent to which less intrusive methods of intelligence gathering (i.e. not using coercive powers) have been used, or could be used, in relation to the matter;*
- *how much information could be obtained through those less intrusive methods; and*
- *whether the use of such methods would be likely to prejudice the Commission's intelligence-gathering function in relation to the matter for which special powers are sought.*

Recommendation 7:

- *That section 7C is redrafted to give the Board the role of issuing directions to investigate but that the references to teams or Task Forces be deleted. Further, that section 7A (b) and (c) should similarly be amended to remove any reference to teams or Task Forces.*

Recommendation 8.

- *The Bill is to provide for the ongoing provisions of intelligence gathering in like manner to that currently enjoyed by the ABCI in liaison with the States and Territories and the Commonwealth, without reference from the Board;*
- *Further, the Commission is to be empowered to undertake investigations and intelligence gathering in its own right for the purposes of informing the Board in respect to it making any subsequent determination in respect to references, or otherwise, where it is essential to its role in assisting the States or Territories in the gathering of intelligence and the investigation of offences.*

Recommendation 9.

- *It is incumbent on the Commonwealth to make a strong case that limiting the exercise of "lower end" coercive powers to examiners would be unworkable. For example, the Commonwealth should provide further details regarding the number of examiners the Commonwealth anticipates will be appointed and the number of notices to produce that examiners would be expected to issue.*

Recommendation 10.

- **The Bill to empower the CEO to direct examiners to conduct examinations into those matters and of those persons that the CEO determines are appropriate, consistent with the operational needs of the Commission.**

Recommendation 11.

- **The appointment of examiners is to be by the Governor-General on the recommendation of the Board.**

Recommendation 12.

- ***That the Commonwealth provides early advice in the spirit of a consultative approach to the appointment of the interim CEO.***