

# Chapter 5

## Accountability

### Introduction

5.1 An essential element of the governance of any public sector body, is a proper accountability regime: public agencies exist to implement public policy and administer legislation, and in doing so, expend considerable amounts of public money. The public is therefore entitled to satisfy itself that these tasks are being performed properly and that best use is being made of those public funds.

5.2 However, agencies such as the ACC have a special accountability burden by reason of the special and extensive powers they are entrusted with.

5.3 This chapter begins with an overview of the accountability regime under which the ACC operates. The chapter then examines several aspects of the operation of these accountability mechanisms.

### *Reviewing the need for accountability of the ACC*

5.4 The special powers of the ACC are the subject of the previous chapter. However, in this context, it is worth considering the implications of these special powers to the ACC's accountability regime. With the passage of time, it is easy to take for granted these extraordinary powers, and it is worth reassessing how far they depart from the protections traditionally afforded to citizens by the criminal law.

5.5 All governments must be bound by the rule of law:

In a government of laws, the existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to be a law unto himself; it invites anarchy.<sup>1</sup>

5.6 However, this requirement is particularly strong for law enforcement agencies, as Commissioner Keelty stated:

integrity is the ACC's stock in trade. ... The ACC, just like a police force, needs to be beyond corruption. The government and the community will have no confidence in the ACC, or indeed the AFP, if we cannot account for the activities of our people.<sup>2</sup>

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1 Brandeis, (1928)

2 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 33

5.7 The AFP submission concluded that:

...the accountability burden placed on the ACC is an onerous one, particularly when compared to other agencies, however the ACC is a Commonwealth agency with a unique role in domestic criminal intelligence and its access to a suite of coercive powers necessitates a correspondingly high level of scrutiny and oversight.<sup>3</sup>

5.8 The Committee also notes the comments of Mr Frank Costigan QC, a former Royal Commissioner, who argued that while we live in a community with great traditions of individual liberty:

we are also living in a community where organised crime has become more sophisticated and more difficult to follow. It is transnational and it is deliberately hiding what it is doing. ... We are living in a community which I think properly recognises that exceptional powers need to be given to try and solve these problems.

5.9 However, he cautions that:

the Parliament has to be constantly aware of the fact that every time you give additional powers you are changing the community you live in, so you have to be constantly alert to whether it is the right way to go.<sup>4</sup>

5.10 It must also be recognised that accountability systems must be based on the worst and most pessimistic assumptions about human behaviour. They cannot be made based on judgements of the merits and integrity of particular incumbents of office. Whilst all the evidence indicates that officers of the ACC, from the CEO down, have maintained the highest standards of transparency and accountability, it may not always be so. As Mr Costigan QC argues:

inevitably the first appointments to it are people of integrity, capacity and intelligence. One is not concerned – certainly with the current composition of the ACC – that there is going to be any corruption or problems. But if you set up the institution, one must never forget that it is a feature of police forces over a significant period that corruption occurs, and we have seen it in Australia. ...

The greater the powers and the greater the secrecy you give to bodies that are involved in those activities, the more important it is that you have appropriate accountability and the more important it is that you introduce into those structures appropriate accountability and appropriate protection of the rights of people who are affected by it.<sup>5</sup>

5.11 The critique that follows should be read in this light.

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3 AFP, *Submission 10*, p. 10

4 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 59

5 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 52

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## Overview of accountability mechanisms

5.12 The ACC is subject to a range of accountability mechanisms, comprising both internal and external bodies. The two matters of greatest public concern relate to the ACC's use of its coercive and investigative powers, and its expenditure of public funds.

### *Internal accountability*

5.13 The ACC has incorporated a number of internal procedures and governance groups that provide the foundations for the proper use of its powers and public funds. Key management groups include: the senior executive team, the Governance Operations Committee (GOC) and the ACC Audit Committee.

5.14 Key accountability documents include:

- ACC Corporate Plan 2004-07
- ACC Business Plan 2003-2004
- APS Values and Code of Conduct
- ACC Professional Standards and Integrity Management Plan
- ACC risk management plans
- ACC Policy and Procedures

5.15 The ACC is also bound by a detailed set of reporting requirements governing the Annual Report, which are provided by the Department of the Prime Minister and Cabinet. Financial reporting requirements derive from the ACC Act itself, together with the *Financial Management and Accountability Act 1997*.

5.16 The ACC also provides monthly activity reports (of slightly varying content) to the Board, the IGC and the PJC.

5.17 A critical issue for the accountability of the organisation is the management of allegations of misconduct by, or complaints against, ACC staff, contractors or secondees from partner agencies.

5.18 All categories of staff are bound by a common code of conduct, and must go through a vetting process and be cleared to a 'highly protected' level.<sup>6</sup> It is also notable that secondees to the ACC have a dual accountability, in that they are accountable to both the ACC rules and those of their home agency.<sup>7</sup>

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6 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

7 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 28; Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

5.19 Mr Milroy, CEO of the ACC, explained the process for handling cases in which alleged misconduct is discovered:

To give a practical example, if an officer on secondment breached our code of conduct, or was detected in any sort of behaviour that was inappropriate under our terms and conditions, then we would initiate an investigation and immediately advise the commissioner or the head of the agency concerned, and either jointly pursue the investigation or have it investigated by the parent force.<sup>8</sup>

5.20 In addition, immediately a matter is detected, it is the practice of the ACC to advise the PJC, the Board, the Minister, and the Commonwealth Ombudsman and keep them advised on the conduct of the investigation even though this goes beyond the technical requirements of the Act.<sup>9</sup>

5.21 Mr Milroy further noted that his policy has been to not investigate serious matters internally, preferring to engage a suitably qualified external investigator to deal with the matter.<sup>10</sup>

### ***Intergovernmental Committee***

5.22 The IGC is established under section 8 of the Act to monitor the work of the ACC and Board, and in particular, the authorisation of the use of the ACC's coercive powers. This includes a power under sub-section 9(7) to revoke determinations of the Board that authorise the use of such powers. The IGC has met five times since the ACC's inception.<sup>11</sup>

### ***Parliamentary Joint Committee***

5.23 As noted in Chapter 1, the Parliamentary Joint Committee (PJC) on the Australian Crime Commission (ACC) is established under section 53 of the *ACC Act 2002*, and its duties set out in section 55.

5.24 In essence, these duties imply three tasks: to monitor the expenditure of Commonwealth funds by the ACC, to scrutinise the use by the ACC of its investigative and special coercive powers; and to examine the evolving environment of organised crime, particularly with a view to recommending amendments to legislation to ensure the continued effectiveness of law enforcement activities.

5.25 The membership, role and functions of this Committee largely mirror those of its predecessor, the PJC on the National Crime Authority and are set out at the beginning of this report.

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8 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 9

9 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 10

10 Mr Alastair Milroy, *Committee Hansard*, Canberra, 11 October 2005, p. 10

11 ACC, *Submission 14*, p. 20

5.26 In the time since the creation of the NCA, these two supervisory committees of the Parliament have tabled a total of thirty three reports, including the reports on the Annual Reports as well as the results of inquiries into particular areas of criminal activity – for example, Money Laundering, Cybercrime, or the administration of the Authority's or Commission's powers – for example, the reports into the involvement of the NCA in controlled operations or witness protection.

5.27 It should also be noted that the ACC is subject to further parliamentary scrutiny by the Senate Legal and Constitutional Legislation and References Committees, which have general portfolio responsibility for law enforcement, via the Senate Estimates process and more general inquiries.

### ***Commonwealth Ombudsman***

5.28 The Ombudsman's jurisdiction in relation to the ACC is to:

- investigate complaints made about the ACC;
- conduct own motion investigations into a matter of ACC administration, and
- conduct inspections of the ACC's records relating to its use of intrusive powers (such as telecommunications interception, controlled operations and surveillance devices).<sup>12</sup>

5.29 Of particular relevance is section 55AA of the Act, which requires the Ombudsman to brief the Committee each year on the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914*.

5.30 The Ombudsman's submission notes that he has undertaken three own motion investigations in the past 18 months, relating to the ACC's handling of alleged criminal activity by two former secondees; controlled operations conducted by the ACC under state legislation; and the ACC's handling of a registered informant.<sup>13</sup>

### ***Other external accountability***

5.31 In the overall accountability framework, there are two further important external institutions that play a significant part in ensuring the proper administration of the organisation.

5.32 The first of these is the Australian National Audit Office (ANAO), which carries out audits of all Commonwealth government agencies pursuant to the *Auditor General Act 1997*, and reports directly to Parliament. The ANAO aims to assess and improve public sector standards by conducting both performance audits and financial statement audits.<sup>14</sup>

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12 Commonwealth Ombudsman, *Submission 4*, p. 1

13 Commonwealth Ombudsman, *Submission 4*, pp 2-3

14 [www.anao.gov.au](http://www.anao.gov.au) accessed 18 October 2005

5.33 Second are the courts, which affect the ACC in two ways. Decisions made by Examiners during ACC examinations are subject to review by the Federal Court or the Federal Magistrates Court, pursuant to section 5 of the *Administrative Decisions (Judicial Review) Act 1977*.<sup>15</sup> To date, there have been a number of challenges to the exercise of the Examiners' powers, relating to issuing summonses, the approval of a nominated legal representative, and the scope of permissible questioning in an examination. These matters are discussed in greater detail in chapter 4.

5.34 To the extent that matters investigated by the ACC lead to the laying of criminal charges, the Federal Court and State Supreme Courts also test the quality of the evidence produced by the ACC (and its partner agencies) as well as the legality of the means by which that evidence is produced. Defendants in a criminal trial may seek to have evidence excluded from the trial where it can be shown to have been illegally obtained, or to be a privileged communication.

### **Effectiveness of the ACC accountability mechanisms**

5.35 It is evident that the ACC is subject to a complex and multi-faceted integrity system, that involves scrutiny by both internal and external agencies. As Mr Costigan QC observed, the ACC is possibly the most examined agency in the country.<sup>16</sup> The Committee also notes the comments of the Commonwealth Ombudsman that 'the CEO, Mr Milroy, is committed to administrative best practice in the ACC's accountability regime',<sup>17</sup> which includes the pro-active disclosure of any matters arising to the Ombudsman, the PJC and the IGC as noted above.

5.36 Nevertheless, the Committee is mindful that no system is foolproof. As Mr Keelty, Chairman of the Board of the ACC, told the Committee:

No agency can make itself immune from corruption, especially an agency that draws its investigative strength from such a large number of other agencies, as the ACC does.<sup>18</sup>

5.37 The experience of police agencies has demonstrated that problems are almost certain to occur over time. The task of the Committee is to ascertain whether there are any gaps in the present accountability regime that limit the capacity to effectively detect, investigate and prosecute misconduct.

5.38 Evidence to the Committee has raised six areas of possible weakness:

- The lack of proactive investigations
- Limited resources for complaints investigation

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15 Note also section 57 of the ACC Act 2002

16 Mr Frank Costigan QC, *Committee Hansard*, Canberra, 7 October 2005, p. 58

17 Commonwealth Ombudsman, *Submission 4*, p. 3

18 Mr Mick Keelty, *Committee Hansard*, Canberra, 7 October 2005, p. 22

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- Cross-jurisdictional uncertainties
  - Accountability of secondees
  - Gaps in the external procedural scrutiny
  - Weaknesses in the Code of Conduct

### ***The lack of proactive investigations***

5.39 The experience from royal commission inquiries such as that of Mr Justice Wood into the NSW Police Service, shows that complaint handling alone is not sufficient to unearth systemic corruption or malpractice. Effective anti-corruption activities need to be carried out by an organisation separate from the police agency concerned, and must have proactive investigative powers: extensive physical and electronic surveillance, public and private hearings at which suspect officers are examined, financial and intelligence analysis, coercive powers, and capacity to obtain search warrants.<sup>19</sup> The Commonwealth Ombudsman, responsible for managing complaints against the ACC, himself noted these limitations,<sup>20</sup> while Mr O'Gorman, President of the Australian Council for Civil Liberties (ACCL), argued against any expectation that the Ombudsman perform this role. Referring to an Australian Law Reform Commission Report,<sup>21</sup> he argued that:

You need a body to investigate complaints against police which has in it people who have had a policing background – not ones who jump from the police service to the external complaints body and then go back – who know how to catch police and who know the system better than most.<sup>22</sup>

5.40 Recognition of this fact has resulted in the creation of independent watchdog agencies around Australia, such as the Police Integrity Commission in NSW. The PIC's recent report on 'Operation Abelia' on illegal drug use by some NSW police officers, is a timely example of the nature and scope of the investigations needed to unearth systematic misconduct in a police type agency.<sup>23</sup>

5.41 The Committee notes that the proposed Australian Commission for Law Enforcement Integrity (ACLEI), the legislation for which is expected to be introduced into the Parliament this year, is likely to remedy this issue.

5.42 The Committee looks forward to examining the legislation upon its introduction.

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19 Wood, The Hon. Justice J., *Royal Commission into the New South Wales Police Service*, p. 1

20 Prof. John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 29

21 Australian Law Reform Commission, *Integrity: but not by trust alone. AFP and NCA complaints and disciplinary system*, 82<sup>nd</sup> Report, 2003

22 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 36

23 NSW Police Integrity Commission, *Operation Abelia – Research and investigations into illegal drug use by some NSW police officers*, September 2005

### ***Limitations in complaints investigation***

5.43 Several commentators raised concerns at the practical effectiveness of current complaint handling by both the ACC itself, and the Commonwealth Ombudsman. The AFP Association submission stated that:

Due to its small size the ACC also lacks the resources needed to efficiently and effectively manage allegations of corruption, mismanagement and fraud against the organisation. The ACC has a single internal auditor to cover both financial and performance audit issues. Clearly one officer cannot provide adequate services even to an organisation of the ACC's size. [in contrast]... the AFP has a well resourced Professional Standards Unit ...<sup>24</sup>

5.44 Even where complaints are instead raised with the Commonwealth Ombudsman, Mr O'Gorman of ACCL questioned the extent of his capacity to meet the requirements of investigation:

the general criticism of the Ombudsman's office has been that it is so widely stretched across so many aspects of the bureaucracy that it cannot properly take on the role of investigating the Australian Crime Commission.<sup>25</sup>

5.45 The Committee notes several factors that suggest that current complaint handling resources are adequate. First, as noted above, even in cases where the ACC chooses to investigate an allegation itself, the ACC brings in an external investigator to conduct inquiries into allegations of misconduct. The available resources are therefore wider than the one officer suggested by the AFP Association submission. It is also reasonable to assume that the ACC would engage additional investigators to deal with additional matters as they arise.

5.46 Second, a full assessment of the adequacy of the Commonwealth Ombudsman's investigative resources is probably unnecessary, given that there were only twelve complaints in 2004-05, of which only three necessitated further inquiries.<sup>26</sup>

5.47 Perhaps a more fruitful avenue of inquiry is the matter of which organisation should conduct an investigation: the ACC itself, the ombudsman or the proposed ACLEI.

5.48 Experience to date suggests that instances of misconduct are most likely to be discovered by the ACC's own internal processes, and it is appropriate that initial investigations are carried out internally. However, the Committee notes Mr

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24 AFP Association, *Submission 16*, p. 2

25 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 32

26 Commonwealth Ombudsman, *Submission 4*, p. 2. The number of matters investigated as a proportion of total complaints is consistent with the figures provided to the Committee by the NSW ICAC, *Committee Hansard*, Sydney, 9 September 2005, p. 3



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O'Gorman's caution that internal investigations must never displace the role of external investigators. Drawing on his experience with the Crime and Misconduct Commission in Queensland, which handed back the role of investigating all but serious complaints to the Queensland police, he stated:

you can only deal with corruption or misconduct, particularly misconduct, if you have a pattern of picking up errant behaviour by individual police as represented by an unusually large number of complaints or systemic behaviour arising from the activities of particular squads. If you hand back, as the CMC has, all of its investigation powers of complaints against the police to the very police service it is supposed to oversight, where does the pattern and where do the facts that constitute a trend start to come from, are they being analysed and do they emerge? My observation is no.<sup>27</sup>

5.49 Mr O'Gorman further recommends adopting a recommendation of the 1977 Lucas inquiry into enforcement in criminal law in Queensland:

that prosecutors be obliged to report to a complaints mechanism all allegations of misconduct made against police in court so that at least the pattern and the trends that I talked about could be centralised and examined.<sup>28</sup>

5.50 The Committee agrees with this view. While most allegations of misconduct will – appropriately – be investigated within the ACC, it is essential that external bodies have information on all complaints and allegations of misconduct. As noted above, it has been the ACC's practice to inform relevant agencies of all such allegations, and the Committee commends Mr Milroy for this approach. However, there is merit in both formalising this arrangement and in extending the reporting obligation to the Director of Public Prosecutions.

### **Recommendation 7**

**5.51 The Committee recommends that formal arrangements be instituted to confirm the current practice of reporting allegations of misconduct to relevant accountability organisations, including the PJC, the IGC, the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity.**

### **Recommendation 8**

**5.52 The Committee recommends that formal arrangements be put in place to require the Commonwealth Director of Public Prosecutions to notify the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity of any allegations of misconduct by officers of the ACC.**

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27 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 32-33

28 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 33

***Cross-jurisdictional uncertainties***

5.53 A further complex accountability issue arises from the nature of the ACC as a national law enforcement body; this body operates across all Australian jurisdictions, and routinely uses investigative teams comprising officers seconded from various police forces, and as such, has the capacity to access a range of investigative powers. A long standing concern of the Committee has been that this could enable ACC officers to pick the regulatory regime that offers the greatest powers, the widest discretion or the most lax accountability regime.

5.54 This could conceivably occur in matters relating to search warrants, the use of surveillance devices, and controlled operations, and could arise where a state police officer is either seconded to the ACC, or is in a joint task force or investigation.

5.55 At first glance, this may not seem to be a problem, since the actions involved would be lawfully authorised by a relevant statutory authority. However, there are two principal concerns. First, if a decision were made to access investigatory powers under state legislation that has a lower standard of accountability than the equivalent Commonwealth statute, it would amount to a Commonwealth agency operating contrary to the intent of the Commonwealth Parliament.

5.56 Second, where officers seconded to the ACC from a state agency are using powers derived from state legislation but in a Commonwealth context, there is a possibility that neither Commonwealth or state accountability regimes fully capture the use of the power.

5.57 This latter issue was examined in detail in an own-motion investigation by the Commonwealth Ombudsman in relation to controlled operations. According to the Ombudsman's submission:

My own motion investigation into the ACC's assurance framework for controlled operations conducted under state legislation has illustrated the differing legislative regimes across the jurisdictions. Whilst there is no indication that the ACC is choosing to conduct and/or participate in controlled operations authorised under state legislation to take advantage of the different accountability regimes, the ability to do so represents a potential accountability gap.<sup>29</sup>

5.58 The Committee agrees that there is no evidence to suggest any 'mix and match' activities by the ACC to exploit this area. However, as Professor McMillan identifies, there is a potential gap in accountability.

5.59 There has not been sufficient time within this review to fully address the detail of this complex issue and as such, it is one that the Committee will return to in the future. The Committee endorses the Ombudsman's suggestion that the ACC continue to develop its administrative systems 'to capture the highest standard of

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29 Commonwealth Ombudsman, *Submission 4*, p. 4

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transparency in the period while these powers are being harmonised, and maintain those standards in the future.'<sup>30</sup>

5.60 However, this harmonisation process could take many years, and it is important that uncertainties in this matter do not remain unresolved. For this reason, the Committee would go further than the Commonwealth Ombudsman, and considers that clear benchmark obligations be set. In order to ensure this clarity, the Commonwealth standard should be used.

## **Recommendation 9**

**5.61 The Committee recommends that the CEO of the ACC direct, in the ACC Policy and Procedures, that in any case where the ACC procedurally has a choice of regulatory regime for the use of investigatory powers, it adopts as a matter of practice, the Commonwealth protocols.**

### *Accountability of secondees*

5.62 The accountability of secondees from other police forces and partner agencies is a significant one: of the total ACC staff of 518, 117 are seconded police, with a further 54 attached to various taskforces.<sup>31</sup> Two matters arise in relation to secondees from other agencies.

5.63 First, complexities of accountability arise from the fact that secondees have access to the powers of both the ACC and their home agency, as well as being bound by both integrity regimes.

5.64 Professor McMillan notes in relation to the former, that:

It is my understanding that while on secondment, law enforcement officers are both a member of the ACC and their 'home' law enforcement agency. As this arrangement allows secondees to exercise powers and functions of both the ACC and their home law enforcement agency, it is important that secondees:

- (a) Are conscious of which agency's powers and functions they are relying on, and
- (b) Ensure that they comply with the relevant agency's policies, practices and procedures.<sup>32</sup>

5.65 This matter also raises the wider issue of differing accountability regimes across jurisdictions which is discussed below.

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30 Commonwealth Ombudsman, *Submission 4*, p. 4; see also Prof McMillan, *Committee Hansard*, Canberra, 11 October 2005, pp 26-27

31 ACC Annual Report 2003-04, pp 132-133

32 Commonwealth Ombudsman, *Submission 4*, p. 4

5.66 Second, it must be considered whether this dual accountability of secondees constitutes a strength or a weakness of the system. Ideally, it would mean that the highest of the two standards in any case would be the effective one. Alternatively, there is the concern that conduct may somehow slip between the two regimes.

5.67 Professor McMillan gave a practical example of how these matters can occur:

In one of the own-motion reports referred to in the submission that became a fairly high-profile public issue about the conduct of two state secondees to the commission, against whom allegations of corruption had been made, one of our findings in our own-motion investigation was that the commission, as well as investigating how those events occurred, should also look closely at the activities of the commission staff who had been supervising these two officers. As it transpired, two of the staff who had been in a supervisory position moved back to state offices. The commission responded to our recommendation by saying that the commission had transferred the response follow-up responsibility back to the state police forces.<sup>33</sup>

5.68 This concern was put to Assistant Commissioner Walshe, who is the Officer in Charge of the Victoria Police Ethical Standards Department. His strong view was that of there were to be investigations undertaken of Victoria Police on secondment to the ACC, then Victoria Police would like to participate, but that the ACC should be allowed to complete its investigation relative to the issues that concern it.<sup>34</sup> Similarly, in relation to the Commonwealth Ombudsman, Mr Walshe stated that the Victoria Police would co-operate fully, providing evidence as required.<sup>35</sup>

5.69 There is also the practical matter of properly addressing performance issues after the seconded has returned to their home law enforcement agency:

Recent reports from my office have discussed the need for management systems between the ACC, the ACC Board and the agencies seconding their members to the ACC to develop and implement a performance management structure that is able to deal effectively and efficiently with performance issues. In my view, the absence of these structures can create an 'accountability gap' within which neither the ACC, nor the seconding body, will necessarily assume responsibility to address performance issues.<sup>36</sup>

5.70 Professor McMillan gave an example of a related matter:

One of our tasks in the inspection role is to ensure that documentation is signed and recorded and files are closed. Some of the deficiencies to which

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33 Prof John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 26

34 Assistant Commissioner Kieran Walshe, *Committee Hansard*, Melbourne, 28 October 2005, pp. 8 & 9

35 Assistant Commissioner Kieran Walshe, *Committee Hansard*, Melbourne, 28 October 2005, p. 10

36 Commonwealth Ombudsman, *Submission 4*, p. 4

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we have pointed arose from the fact that the person who did not close the file was a secondee who had moved back to a state police force. The commission said that that was not a justification, but it is an explanation as to why the record keeping requirements have not been followed strictly.<sup>37</sup>

5.71 In the Committee's view, these issues are inherent in an organisation of this nature and extremely difficult to conclusively resolve. However, it is a matter that both the PJC, the Commonwealth Ombudsman and the management of the ACC itself, is alert to. The PJC intends to closely monitor how these issues are handled both procedurally and in practice, and will make recommendations as appropriate, in consultation with the ACC and the Ombudsman.

### ***Gaps in the external procedural scrutiny***

5.72 The Committee has also identified several areas of ACC operations which do not appear to be subject to any routine scrutiny by external agencies. These include the traditionally corruption prone matters of the management of informants and the handling of seized items including drugs and cash.

5.73 In response to this, the Commonwealth Ombudsman stated that this is an area in which his office is likely to further develop its oversight role in a more coherent and planned way:

An obvious way to do that would be to pick some topics for own motion investigations occasionally like management of exhibits, dealing with informers and so on. The New South Wales Ombudsman's office is a good model in this respect. ... We formerly just had a complaint handling role but, as a result of foreshadowed legislative changes and a substantial new budgetary increase, we are developing a quite different oversight function in which complaint handling will be one element only and we will be much more active in looking at compliance activity, arranging our own kind of audit inspections and other periodic oversight activities.<sup>38</sup>

5.74 The Committee considers that it is important for the administrative practices and procedures used for these operational matters to be audited, and urges the Commonwealth Ombudsman to make them the subject of priority own-motion investigations over the period of the coming year.

### ***Weaknesses in the code of conduct***

5.75 A final matter, raised by the AFP submission, contrasts the powers of the CEO of the ACC in relation to ACC employees, who are bound by the provisions of the *Public Service Act 1999* and the accompanying APS Code of Conduct, and the powers of the Commissioner of the AFP:

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37 Prof John McMillan, *Committee Hansard*, Canberra 11 October 2005, p. 26

38 Prof John McMillan, *Committee Hansard*, Canberra 11 October 2005, p. 29

The Public Service Act does not provide for the suite of investigative and discretionary powers available to the Commissioner of the AFP under the AFP Act to address misconduct or corruption. Directing officers to answer questions and random drug testing are two measures open to the Commissioner of the AFP which are not available to the CEO ACC due to the constraints of the ACC's employment framework.<sup>39</sup>

5.76 The Committee has not had sufficient evidence on this matter to form any definitive view. In principle, it would seem appropriate that the CEO of the ACC should have similar powers to investigate misconduct as the Commissioner of the AFP. However, the Committee also appreciates that, given the significance of the powers proposed, these are matters that the agency staff would wish to negotiate.

5.77 The Committee urges the ACC to give active consideration to introducing such measures.

### **PJC on the ACC**

5.78 The statutory role and jurisdiction of the PJC are set out above. This section evaluates the role of the Committee, how it fits into the wider accountability framework and examines several areas in which its effectiveness is limited.

#### ***Need for the PJC***

5.79 Earlier sections of this chapter set out the numerous procedures and organisations to which the ACC is accountable across all of its various activities. In this context, Chief Commissioner Nixon of the Victoria Police questioned the need for the PJC. Noting that the ACC reports to the Minister for Justice, the ACC Board, and the IGC, (and in all probability, to the proposed ACLEI), Ms Nixon considers that there are sufficient reporting obligations, legislative requirements and oversight without the need for an additional layer of accountability through the PJC, which:

limits the effectiveness of the ACC through additional and unnecessary reporting. The IGC-ACC is comprised of State and Commonwealth ministers and can effectively monitor the performance of the ACC.<sup>40</sup>

5.80 This is an issue that arose in relation to this Committee's predecessor, the PJC on the NCA,<sup>41</sup> and was also canvassed briefly in this Committee's last Examination of the Annual Report of the ACC.<sup>42</sup>

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39 AFP, *Submission 10*, p. 10

40 Victoria Police, *Submission 8*, p. 2

41 PJC on the NCA, *Who is to guard the guards: an evaluation of the National Crime Authority*, November 1991, p. 125 *et seq*

42 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.31

5.81 Ms Nixon's question is a legitimate one. This review evaluates all aspects of the ACC Act, and since the Committee is itself established by the Act, it is appropriate that the effectiveness of the Committee be considered as well. It is for this reason that the Committee commissioned Professor Davis, Emeritus Professor at the Australian National University, to conduct an independent review of the Committee's role and effectiveness. His separate report is at Attachment 3.

5.82 In an 'accountability rich' environment, does the Committee add value? Are there aspects of the Committee's statutory roles that duplicate the efforts of other bodies, and are perhaps done better? In answer to these questions, the Committee sees three principal reasons for its existence: to contribute to the accountability of the ACC; to develop Parliamentary expertise on organised crime; and to provide a forum for informed public debate.

#### *Accountability*

5.83 In the matter of accountability, the Committee does not consider its role to be duplicated by any of the other existing accountability mechanisms. Both the IGC and the ACC Board are focused primarily on the management and strategic direction of the ACC. Therefore, they cannot act in an independent scrutiny role. As a previous report of the Committee pointed out:

To use an analogy, the control of a public company by a competent and effective Board is not a substitute to the accountability of both the company and the board to the shareholders. In this case, the 'shareholders' are the Australian taxpaying public, represented by the Parliament.<sup>43</sup>

5.84 There is also a substantial difference, in theory and practice, between executive and parliamentary scrutiny. Consistent with the concept of the separation of powers, ministers of the executive do not constitute independent scrutiny of their executive agencies:

These rules are based on sound experience. History shows that the instinctive reaction of government agencies, when confronted with corruption, malpractice or incompetence, is to keep the matter private. Bureaucracies, and police bureaucracies in particular, are notoriously reluctant to allow external scrutiny. A strict application of this separation of powers is even more essential given that the ACC wields powers equivalent to a Royal Commission – powers that were previously granted only to the judiciary, for a limited purpose and duration.<sup>44</sup>

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43 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.31

44 PJC on the ACC, *Examination of the Annual Report for 2003-2004 of the Australian Crime Commission*, para 2.33

*Parliamentary expertise*

5.1 The Committee also provides a forum for the development of a group of Parliamentarians with a detailed understanding of the organised crime environment and the laws that are designed to combat it. Underpinning this factor must be the constant awareness of the Parliament's role: that in the Australian constitutional system, it is the role of parliaments to make law and that of the executive.

5.2 It is self evident that the core of this role is the creation of legislation, but less obvious, particularly in relation to the law enforcement activities of ASIC and the ACC, is the subtle and complex balancing act that Parliamentarians must perform in drafting this legislation and amending it over time. This balance has two principal dynamics.

5.85 The first could be thought of in terms of individual rights versus common rights. In a free society, individuals are entitled to pursue their lives free from interference, invasions of privacy, incarceration or police harassment. Similarly, companies should be free to pursue business opportunities and maximise shareholder value within as free a market as possible without unduly onerous reporting obligations. Both the freedom of the individual and the free conduct of trade and commerce are fundamental principles of our free democratic society.

5.86 However, these must be balanced against the need of society to create and enforce rules of personal and corporate behaviour for the common good. Given the particularly violent and pernicious nature of organised crime, history has shown the need to create specialist crime fighting bodies with significant powers to combat these organised crime networks. However, it is evident from the description of the ACC's powers set out above, that the actions of the ACC have the potential to impact profoundly on the individual citizen's freedom and privacy.

5.87 The second dynamic lies in the relationship between Parliament and the agency: the regulator and the regulated. The tension here lies in balancing an effective regulatory and accountability structure with an agency that has room for tactical flexibility and innovation and that does not need to spend an inordinate proportion of its time or resources complying with paperwork.

5.88 Again, history has shown the need for strict accountability regimes for law enforcement agencies, since left to their own devices, agencies have a tendency to become corrupt or self serving. Thus, the greater the powers possessed by these agencies, the greater the accountability mechanisms must be. But conversely, both corporate and underworld criminals are adept at finding and exploiting loopholes and circumventing the law. Now, more than ever before, law enforcement agencies must be capable of rapidly adapting to the evolving tactics of their targets. Agencies that are bound in rigid procedures and rules will lack this necessary flexibility and will rapidly lose their effectiveness.

5.89 To craft legislation that finds an appropriate balance in these relationships, the Parliament must have experts who understand both the subject matter of the



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regulation – organised crime – and the detail of how their agencies do their work. This includes their policies, procedures, funding and culture, all of which is also vitally important in performing the accountability function.

### *Public debate*

5.90 The final rationale for the Committee's role is to provide a forum for informed public debate on organised crime, and the legislative balance between investigative powers and the checks and balances on those powers. The public is entitled to participate actively in making these judgements. Conversely, these are not matters that should be left to agencies and ministries. Driven by the priorities and circumstances of their jobs, they are prone to develop a world view and associated priorities that may not accord with the values of the wider community. This is particularly evident in relation to law enforcement officials, whose thinking is understandably driven by their experience of criminality and their desire to combat it.

5.91 The Parliament provides one of the few forums for such an informed public debate, particularly given that many of the ACC's operations are – necessarily – conducted in secret, and bodies such as the ACC Board and the IGC do not report publicly. Virtually all key debates in relation to organised crime occur behind closed doors among executive agencies, within the confines of Board discussions, or at ministerial meetings.

5.92 Informed public debate is further restricted by the secrecy provisions relating to ACC Examinations, which prohibit disclosing the goings-on within an Examination or even the existence of a summons to such a hearing.

5.93 In this context, the authority of the Committee to call for evidence, combined with the capacity for witnesses to provide evidence under the protection of Parliamentary privilege is an important mechanism to ensure that critical information is made available to the public.

### *Success of the PJC*

5.94 It is against these criteria that the Committee seeks to make some comment on its own performance.

5.95 A starting point for this analysis is the extent of the Committee's activities. Since its inception in 2003, the Committee has undertaken the following five inquiries and reports:

- Supplementary report on the trafficking in women for sexual servitude (tabled in August 2005)
- Report on the Examination of the Annual Report for 2003-2004 of the Australian Crime Commission (tabled in June 2005)
- Report on the Examination of the Annual Report for 2002-2003 of the National Crime Authority and the Australian Crime Commission (tabled in August 2004)

- Australian Crime Commission's response to trafficking in women for sexual servitude (tabled in June 2004)
- Cybercrime (tabled in March 2004)
- Report of the Examination of the Annual Report for 2001-2002 of the National Crime Authority (tabled in October 2003)

5.96 In the course of these inquiries, the Committee has held fifteen public hearings in various locations around the country.

5.97 It is important to note that the Committee conducts a considerable amount of further work in private meetings, of which there have been sixty-three, which include the annual briefings from the Commonwealth Ombudsman on the ACC's use of controlled operations. On occasions, the Committee has also sought and received briefings from the ACC and other relevant agencies such as the AFP, in relation to developments in patterns of criminal activity, and management or accountability issues. While it is recognised that as much of the Committee's work as possible should be conducted in public, it is also important that the Committee give agencies the opportunity to give greater detail in private.

5.98 In considering the effectiveness of the PJC, it is also material to note that the Committee's activities have been – and continues to be – marked by a very high degree of bi-partisanship. This is reflected in the invariably unanimous reports of the Committee and an approach to the conduct of inquiries that focuses on the substance of issues and constructive analysis. In the Committee's view, this gives greater weight to the findings of these inquiries, particularly in the national context in which the ACC itself answers (indirectly) to governments of both persuasions.

5.99 Measuring the effectiveness, quality or impact of these activities is more difficult for the Committee to judge.

### ***Limits to the effectiveness of the PJC***

5.100 The Committee is aware of certain limits to its capacity to fulfil its duties. The more significant of these limitations is in respect to the accountability function; the second is access to information.

5.101 As stated above, a core rationale for the Committee is to supervise the ACC's use of its various investigative powers, and in particular, its coercive powers. The Committee may well become aware of instances of the ACC acting beyond its powers by reason of these actions generating public complaints or court appeals from those affected. However, examination of instances of entrenched corruption and misconduct within other similar agencies to the ACC, suggests that the PJC is unlikely to discover such patterns of behaviour were they to occur in the ACC. Several witnesses to the inquiry voiced this concern. Mr Terry O'Gorman, an experienced lawyer and president of the Australian Council for Civil Liberties, told the Committee that:

your ability to supervise is very restricted unless you have a body like the proposed ALRC oversight body doing the work for you. Experience has

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shown ... that, because of lack of time, resources and law enforcement experience by committee members and the constant turnover of committee members, a parliamentary committee just simply cannot by itself, without having an external agency positioned between the ACC and itself, do its job.<sup>45</sup>

5.102 Similarly, Mr Peter Faris QC, a former Chairman of the NCA, observed that:

[T]he parliament has given these coercive powers to the Crime Commission, and the trade-off is that there will be a parliamentary committee which supervises. I do not think any committee has a hope in hell, in reality, of supervising it at all.<sup>46</sup>

...

I was not trying to belittle the committee. The point I was trying to make was that committees are not the proper method for the supervision of what is happening on the ground.<sup>47</sup>

5.103 The reasons for this assessment are twofold. First, as the experience of the Wood Royal Commission into the NSW Police Service demonstrated, successful anti-corruption investigations require aggressive, proactive investigations that make full use of the surveillance, informants, undercover operations and coercive powers that the ACC itself uses.<sup>48</sup> Clearly, the PJC has neither the expertise, resources or remit to undertake activities of this order – rather, these are tasks for specialist organisations such as the proposed Australian Commission for Law Enforcement Integrity, discussed above.

5.104 The second matter is access to information.

5.105 Under by the Resolutions establishing the Committee, the Committee has a general power to 'call for witnesses to attend and for documents to be produced'.<sup>49</sup> This power, which is common to most Parliamentary committees, is quite broad, but is limited by the provisions of Section 55(2) of the ACC Act:

- (2) Nothing in this Part authorises the Committee:
  - (a) to undertake an intelligence operation or to investigate a matter relating to a relevant criminal activity; or
  - (b) to reconsider the findings of the ACC in relation to a particular ACC operation/investigation.

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45 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 34

46 Mr Peter Faris QC, *Committee Hansard*, Melbourne, 16 September 2005, p. 7

47 Mr Peter Faris QC, *Committee Hansard*, Melbourne, 16 September 2005, p. 13

48 The Hon. Justice James Wood, *Royal Commission into the New South Wales Police Service*, speech to the 8<sup>th</sup> International anti-corruption conference, p. 6

49 Resolution of the Senate, 18 November 2004, para (k)

5.106 As a result of previous disagreements over access to information, these general powers are bolstered by specific provisions of Section 59 of the ACC Act:

- (6A) Subject to subsection (6B), the Chair of the Board:
  - (a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the PJC) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and
  - (b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.
- (6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.
- (6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.
- (6D) If the PJC refers the request to the Minister, the Minister:
  - (a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and
  - (b) must provide copies of that determination to the Chair of the Board and the PJC; and
  - (c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.

5.107 The practical import of these provisions is that the Committee cannot require the ACC to divulge any information relating to operational matters. There are obvious practical reasons for this limitation, as Mr Crooke QC, a former Chairman of the NCA pointed out:

We are talking concrete boot stuff in relation to the things that the [ACC] does – organised crime et cetera – and it is not overstating the situation to say that if some of the information got out in the course of an operation, or even afterwards, people could be killed. There is an issue for the good people on the committee as to whether they want to be burdened with the responsibility of having that information in their possession or even in their heads. If anything goes wrong, do they really want to be part of an investigative loop to see whether it could possibly have been them, either

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deliberately or through some sort of inadvertence, who let information go?<sup>50</sup>

5.108 Nevertheless, it must be recognised that, in the absence of operational information, it is difficult (if not impossible) to scrutinise whole areas of the ACC's operations. The sceptic would also be aware that the ACC itself remains the arbiter of what constitutes 'operational'. Mr O'Gorman argued that:

Operational secrecy is something behind which errant ... law enforcers have long hidden in order to hide their misdeeds or avoid accountability.<sup>51</sup>

5.109 The AFP Association also put it to the Committee that:

The ACC has developed a culture of answering Committee questions in limited terms and if possible avoiding answering questions at all.<sup>52</sup>

5.110 A further aspect of this issue is the workings of the examination process and the extent to which the Committee and its inquiries are subject to the constraints imposed by secrecy notations made by Examiners under sections 29A and 29B. Pursuant to these provisions, it is an offence to disclose a summons, a notice, or 'any official matter' connected with the summons or notice. On several occasions during this inquiry, potential witnesses have declined to give evidence relating to the conduct of examinations on the basis that they may be subject to prosecution for breach of these sections.

5.111 It is the Committee's strong view that this provision does not operate to inhibit the Committee's capacity to take evidence, which has precedence by reason of overriding Parliamentary Privilege. According to Odgers' Australian Senate Practice 'Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information'.<sup>53</sup> Thus, Parliamentary privilege is only limited by specific words in the legislation. There are no such limiting words in the relevant provisions of Sections 29A or B, and as such, potential witness cannot be found criminally liable for disclosing information to this Committee, notwithstanding the provisions of the ACC Act 2005.

5.112 The Committee notes that this interpretation is consistent with the view of the PJC on ASIO, ASIS and DSD, which is based on the advice of the Clerks of both Houses of Parliament and the formal opinion of Mr Brett Walker QC.<sup>54</sup>

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50 Mr Gary Crooke QC, *Committee Hansard*, Brisbane, 19 August 2005, pp. 48 - 49

51 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 37

52 AFPA, *Submission 16*, p. 4

53 11th Edition, p. 49

54 Swieringa, M., *Intelligence oversight on the war on terrorism*, speech to the Australasian Study of Parliament Conference, Sydney 2005, p. 4

5.113 This interpretation is also essential to the capacity of the Parliament generally, and the Committee in particular, to consider the operations and effectiveness of the ACC Act.

5.114 To clarify this issue, the Committee has determined to adopt an advice for potential witnesses that is closely modelled on the practice of the PJC on ASIO, ASIS and DSD:

Submissions made to or evidence given before the Joint Parliamentary Committee on the Australian Crime Commission in respect of its statutory oversight of examinations carried out pursuant to Division 2 of the *Australian Crime Commission Act 2002*, are protected by the provisions of the Parliamentary Privileges Act 1987 relating to the protection of witnesses, namely subsections 12(1) and (2) and 16 (3) and (4). Furthermore, anybody threatening such a prosecution may be committing an offence.

The Committee advises persons who intend to give evidence or make submissions to the Committee that sections 29A and 29B of the ACC Act do not apply. Potential witnesses must note, however, that the committee does not wish to examine the intelligence or the subject matter(s) discussed in the course of an Examination, except where specifically otherwise stated. It wishes to pursue only those procedures used in the operation of the Examination under the ACC Act.

The Committee may choose to take such evidence in-camera and witnesses are reminded that any unauthorised disclosure of evidence taken in-camera by a witness or other person could be proceeded against as a contempt of Parliament and prosecuted as an offence under section 13 of the *Parliamentary Privileges Act 1987*.

5.115 In adopting this procedure, the Committee stresses that it recognises the sensitivity of such information and would, in almost all cases, hear such witnesses in private and that most of the evidence would not be publicly reported.

5.116 In assessing these issues, the Committee emphasises that, during the life of the current Parliament at least, it has found the ACC extremely cooperative in its provision of information. A sensible approach by both the Committee and the ACC that recognises the need for accountability on the one hand and operational security on the other, has seen this matter negotiated to the Committee's complete satisfaction. However, as stated at the beginning of the chapter, accountability systems must be grounded not on current incumbents or existing strong relationships, but rather on a pessimistic assessment of possible future problems.

### ***Increasing the effectiveness of the PJC***

5.117 Several solutions can be advanced to enhance the effectiveness of the PJC.

5.118 The first option is to amend the Act to further broaden the power of the Committee to access information relating to operational details, in association with an increase in the formal arrangements for the security of that information. The

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Committee notes the example of the related Parliamentary Joint Committee on ASIO, ASIS and DSD – the three intelligence collection agencies.

5.119 Under the *Intelligence Services Act 2001*, this Committee has significant restrictions on its operations, including:

- The intelligence agencies have a say over the suitability of meeting places (section 17(3) of Schedule 1)
- The Minister must approve the holding of any public hearings (section 20(2))
- Ministers can prevent persons from giving evidence or documents being provided (on operationally sensitive matters) by giving a certificate to the Presiding Officers. (section 4)
- The staff of the committee must be cleared to the level of an ASIS officer – TSPV
- The intelligence agencies must approve the arrangements for the security of documents (section 22(1)) – safes, swipe pass entry to suites, protocols for handling, safe hand and registration of documents, Hansard recording and transcript production, isolated copiers, safe phones etc.
- The secrecy provisions in the Intelligence Services Act (reinforced by the Crimes Act and the ASIO Act) are onerous and carry heavy penalties. (See Schedule 1 Part 2, particularly section 12)
- Committee reports cannot be made to the Parliament until they are expressly cleared by the responsible ministers. (section 7)<sup>55</sup>

5.120 The Committee is reluctant to recommend this approach. At this time, the balance between the Committee's access to information and operational security is considered workable. Adopting procedures similar to the PJC on ASIO, ASIS and DSD would impose a degree of restriction on the activities of this Committee that would considerably hamper its capacity to undertake its public accountability role.

5.121 The second is to create for the ACC a Parliamentary Commissioner similar to those used by the PJC's state parliamentary equivalents – the Queensland Parliament's Crime and Misconduct Committee, the WA Parliament's Committee on the Corruption and Crime Commission, or the NSW Parliament's Committee on the Independent Commission Against Corruption. In these jurisdictions, recognition of the limits to the parliamentary committees' capacity to access information led to the appointment of a senior independent lawyer, who is guaranteed complete access to all operational information:

When the committee have concerns about whether the CMC has done something right or wrong, they use that legally trained, usually quite experienced, barrister to go and do the investigative work for them.<sup>56</sup>

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55 This explanation is taken from Swieringa, M., *Intelligence oversight on the war on terrorism*, speech to the Australasian Study of Parliament Conference, Sydney 2005, p. 2

5.122 Mr O'Gorman argued that the parliamentary commissioner should have unrestricted powers to access all operational intelligence material: 'If accountability is going to mean anything, then we have to get away from this shield behind which these law enforcers constantly hide called "operational secrecy".'<sup>57</sup>

5.123 Mr Crooke QC explained that this enables the Committee to satisfy itself, by means of an independent investigator, that there is nothing untoward going on, while members of the committee are not burdened with the responsibility and risk of being privy to the detailed operational information.<sup>58</sup>

5.124 The Committee sees considerable advantages in this proposal. It solves the vexed problem of access to information, while at the same time provides the Committee with its own independent investigator capable of penetrating the veil of operational secrecy. However, the Committee concludes that consideration of the adoption of a Parliamentary Commissioner should be deferred until after the introduction of ACLEI. Once ACLEI is in place, the Committee will be able to reconsider the issue, based on the extent of ACLEI's legislated powers, the nature of the Committee's relationship with ACLEI, and a correspondingly clearer view of any resulting gaps in the overall accountability regime.

5.125 A second suggestion is put forward by Professor McMillan, the Commonwealth Ombudsman, which would also enhance the Committee's access to information:

I consider that the accountability framework under the Act could be strengthened by amending section 55AA of the Act to broaden the scope of my briefing to the PJC to any matter relating to the ACC. This would enable my briefing to cover the ACC's performance across all areas inspected, complaints received, and any other matter coming to the attention of my office...<sup>59</sup>

5.126 As Professor McMillan pointed out in evidence to the Committee:

It is simply that in our annual meeting with the parliamentary joint committee we could comment upon any complaints that we had received and any own motion investigations we have undertaken. In fact, that has tended to occur in practice. ... So to some extent I am proposing that we formalise what has been occurring informally.<sup>60</sup>

5.127 The Committee agrees with the Commonwealth Ombudsman's assessment.

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56 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 34

57 Mr Terry O'Gorman, *Committee Hansard*, Brisbane, 19 August 2005, p. 39

58 Mr Gary Crooke QC, *Committee Hansard*, Brisbane, 19 August 2005, pp. 48-49

59 Commonwealth Ombudsman, *Submission 4*, p. 3

60 Prof. John McMillan, *Committee Hansard*, Canberra, 11 October 2005, p. 28



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## Recommendation 10

**5.128 The Committee recommends that section 55AA of the Australian Crime Commission Act 2002 be amended to broaden the scope of the Commonwealth Ombudsman's briefing to the PJC to include any matter relating to the operations of the ACC.**

5.129 The final matter reflects the Committee's view of its jurisdiction.

5.130 The Committee recognises the limits to which it can scrutinise the ACC's operational use of its investigatory powers, as discussed above. Nevertheless, the PJC has a wide capacity to perform effective 'strategic' scrutiny of the ACC in relation to its overall directions, management, and expenditure of public funds. The Committee's weakness in scrutinising operational detail is also its strength in having a 'view from the mountaintop' that other elements of the accountability framework do not. Further, contemporary practice has reinforced the need for interlocking systems of accountability, based on the experience that no one watchdog agency can be expected to cover the field. The Committee is in a good position to assess how all the elements of this picture fit together, searching for anomalies, inconsistencies, or gaps.

5.131 This strategic view is enhanced by its other roles in relation to legislative policy, and the public debate. It is in this respect that the Committee has identified some frustration at the limits of its jurisdiction.

5.132 As has been observed, the ACC is a national law enforcement agency that operates across several jurisdictions in close partnership with a number of other agencies, both state and Commonwealth. To perform properly any of the Committee's three functions, it must be able to gather effectively evidence from all of these agencies to the extent that their operations relate to combating organised and serious crime. Thus for example, during the Committee's inquiry into the trafficking of women for sexual servitude, it was necessary to take evidence from agencies such as the AFP and the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA).

5.133 In most cases, agencies have been very cooperative and have afforded the Committee every assistance. However, particularly in the current review, the lack of assistance from some state and territory agencies has been noteworthy.

5.134 For this reason, the Committee considers that its effectiveness would be improved if its powers under the Act were amended to specify an obligation for agencies represented on the ACC Board to co-operate with the Committee in matters that relate to the ACC's work.

5.135 Further, the Committee's terms of reference should also be expanded to include the Australian Commission for Law Enforcement Integrity, as and when this body is created. As noted above, the PJC, ACLEI, and the Commonwealth Ombudsman, will together form a coherent integrity structure, not only in relation to the ACC, but other agencies such as the AFP and the Australian Customs Service. For

this reason, it will be important to consider in detail the relationship established by the legislation between the proposed ACLEI and the Committee. Approaches that could be appropriate include: that the ACLEI report to this Committee on both its scrutiny over the ACC and for the use of its special investigatory powers; or that the Committee is able to request ACLEI to investigate matters; or that ACLEI have stipulated reporting obligations to the Committee.

### **Recommendation 11**

**5.136 The Committee recommends that the ACC Act 2002 be amended to provide explicit requirements to Board agencies to provide enumerated classes of information to the PJC on the ACC.**

### **Recommendation 12**

**5.137 The Committee recommends that the Australian Commission for Law Enforcement Integrity Bill, when introduced, include provisions that provide for scrutiny of the agency's operations by this Committee.**

5.138 The creation of ACLEI will also raise wider questions about the overall structure of accountability arrangements and their relationship with the Parliament. The Committee notes that unlike the ACC, ASIO, ASIS, DSD and ASIC, the AFP has no formal Committee oversight. A second point is that if ACLEI has the responsibility for integrity issues in the AFP, ACC and ACS, it may result in a jurisdictional mismatch in which the Committee is unable to oversee the system as a whole.

5.139 A solution that the Parliament may consider, in parallel to the establishment of ACLEI, is the amendment of this Committee's statutory terms of reference to create a Parliamentary Joint Committee on Commonwealth Law Enforcement. Such a Committee would have oversight of the AFP, ACC, ACLEI and ACS to the extent of its involvement in Commonwealth law enforcement activities.

### **Recommendation 13**

**5.140 The Committee recommends that the Parliament create a new Parliamentary Joint Committee on Commonwealth Law Enforcement, with jurisdiction to supervise the operations of the Australian Crime Commission, the Australian Federal Police and other Commonwealth law enforcement agencies.**

### **Recommendation 14**

**5.141 The Committee recommends that the legislation for the creation of the Australian Commission for Law Enforcement Integrity includes provision for the Committee to refer matters to the Commission for investigation, with a requirement to report to the Committee on the results of such investigations. This ensures the completeness and effectiveness of arrangements for scrutinising the operations of agencies, and - were its jurisdiction expanded as recommended above - prevents the Committee's workload from becoming too great for effective Parliamentary supervision of the relevant agencies.**