

APPENDIX 3

Report by Professor Davis into the role and functions of the Committee

Introduction

I have been asked to inquire into the role and functions of the Parliamentary Joint Committee on the Australian Crime Commission, established under Part III of the *Australian Crime Commission Act 2002*. In particular, I have been asked to consider:

- the appropriateness of that role and those functions, and
- the effectiveness of the Committee in fulfilling its statutory charter with regard to
 - scrutinising the activities of the Australian Crime Commission and its use of its special investigatory powers; and
 - contributing to policy debate in relation to emerging trends and patterns in organised criminal activity.

This inquiry is being conducted at the same time as, and to some extent in tandem with, an inquiry by the Committee itself, under section 61A of the *Australian Crime Commission Act 2002*, into the operation of the Act. In that inquiry, the Committee has been considering the effectiveness of not only the Australian Crime Commission (**the ACC**) and its principal officers but also the Board of the ACC and the Inter-Governmental Committee. The Committee has also been considering whether the roles, powers and structure of the ACC remain relevant to meeting the challenge of organised crime in the twenty-first century, and whether, in the light of its considerations, there needs to be any amendment of the *Australian Crime Commission Act 2002*.

Role and functions of the Committee

The role and functions of the Parliamentary Joint Committee are set out in section 55 of the Australian Crime Commission Act 2002. That section provides:

- (1) The duties of the Committee are:
 - (a) to monitor and to review the performance by the ACC of its functions;
 - (b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

- (c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;
 - (d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and
 - (e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.
- (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.
 - (3) To avoid doubt, the Committee may examine, and report to both houses of the Parliament on, information given to it under section 59.

Is this statutory charter appropriate?

In my view, the role and function of the Committee, as set out in section 55, are not only appropriate but essential. The particular matters specified in the five paragraphs of subsection 55(1) may be divided broadly into two categories: first an oversight function, set out in detail in paragraphs (a), (b) and (c), and secondly a policy function, spelt out in paragraph (d), of considering the broad trend of criminal activities, and proposing to the Parliament any amendments which appear to be necessary as a result of that consideration.

It may be argued that there are other bodies that may carry out one or both of those functions, raising the question of the need for the Committee. It might be said, for instance, that the ACC is subject to more than enough oversight from a range of different organisations and offices, and that consideration of the need for change and proposals for amendment are already well catered for. To rebut these possible arguments, one may consider each in turn.

Oversight of the ACC

It may be conceded that the ACC is subject to considerable oversight. The one body set up by the *Australian Crime Commission Act 2002* for that purpose is the Inter-Governmental Committee, comprising the Minister for Justice and Customs and a Minister from each of the States and mainland Territories. The functions of that Committee are specified in section 9 as including the general monitoring of the work of the ACC and of the Board of the ACC, overseeing the strategic direction of the ACC and its Board and passing relevant information from the Board of the ACC to each of the governments represented on the Inter-Governmental Committee.

Apart from that Committee, the conduct of the ACC and its officers is also subject to review by the Commonwealth Ombudsman, under his or her general powers in the *Ombudsman Act 1976*, as well as by the Auditor-General and the Privacy Commissioner. Furthermore, the Ombudsman is given particular oversight over the ACC's use of controlled operations under Part IAB of the *Crimes Act 1914*, as detailed in Division 2A of that Part, and the ACC's use of surveillance devices, by virtue of subsection 55(2) of the *Surveillance Devices Act 2004*. In addition, under section 82 of the *Telecommunications (Interception) Act 1979* the Ombudsman may inspect the ACC's records relating to telephone intercept warrants, to ensure that it has complied with the requirements of that Act.

While this oversight by both the Inter-Governmental Committee and the Commonwealth Ombudsman is necessary, it is, I suggest, qualitatively different from the oversight which the Parliamentary Joint Committee exercises. The Parliamentary Joint Committee, unlike either the Inter-Governmental Committee or the Commonwealth Ombudsman, is a surrogate of the Parliament itself, and thus is uniquely able to provide an oversight of the ACC which ensures all of the checks and balances that democracy demands. While the Inter-Governmental Committee would report any matters of concern to the Governments from which its members are drawn, and while the Ombudsman would report any issues of concern to the ACC and, in the last resort, to the Prime Minister, the Parliamentary Joint Committee is able to bring the public into the arena of discussion and debate about the operations of the ACC. As its most recent inquiry amply demonstrates, the Parliamentary Joint Committee is able, and willing, to conduct public hearings around the country, and invite a broad range of comment from every interested party. Armed with such information, it is able to provide a particularly well-informed report to the Parliament of the way in which the ACC is operating. The public can rest assured that the body which its representatives in Parliament set up by the legislation which created the ACC is under continuing scrutiny by those same representatives, or at least the members of the Committee charged with that task.

It should be a matter of some pride for the Committee that the operations of the ACC are subject to a much greater level of scrutiny and accountability than similar organisations in the United Kingdom. In 1992, the Home Office in the United Kingdom set up the National Criminal Intelligence Service, with powers very broadly similar to the ACC. However, that Service did not have a statutory basis until the passage of the *Police Act 1997*. It appears that the only measures of oversight and scrutiny of that Service – and these were measures that were introduced by the *Police Reform Act 2002* – were that complaints against members of the National Criminal Intelligence Service would be dealt with by the Independent Police Complaints Commission, and that the conduct of the Service was subject to inspection as to its efficiency and effectiveness by the Inspectors of Constabulary. The National Criminal Intelligence Service, together with the National Crime Squad, are to be replaced by the Serious Organised Crime Agency with effect from 2006, as provided for in the

Serious Organised Crime and Police Act 2005. However, the statutory measures for oversight and scrutiny will remain unchanged under the new legislation.

Consideration of the need for change

Paragraph (d) of subsection 55(1) of the *Australian Crime Commission Act 2002* obliges the Parliamentary Joint Committee to:

examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC.

This provision has remained unchanged in the legislation since it was first included as paragraph 55(1)(d) of the *National Crime Authority Act 1984*, apart from the replacement of the reference to the National Crime Authority with a reference to the ACC. In my view, it is a provision which remains as relevant today as it was in 1984.

The impetus for any reform of the statute-book may come from a variety of sources. While it is often those who are affected by legislation who see most clearly the need for change, there are strong grounds for arguing that of the various entities which are connected with the work of the ACC, the Parliamentary Joint Committee is exceptionally well-placed to consider and promulgate change.

Those who are closely connected to the ACC, such as the Board and the Inter-Governmental Committee, may be seen as too close to the day-to-day operations of the ACC to be able to stand back and take a long view of trends and developments in criminal activities. Those other entities which are concerned more with oversight of the operations of the ACC, such as the Ombudsman, the Auditor-General and the Privacy Commissioner, may be seen as focussed on the particular issues which have arisen, and which call for their attention, and not as much concerned with broader trends and developments. Furthermore, while the Minister and officers of his or her Department will naturally keep the operations of the ACC under continuous review, and put forward proposals for change as and when they are regarded as necessary, it may be suggested that the Minister and Departmental officers have a wide range of other responsibilities, all of which demand attention competing with that to be given to the ACC.

On the other hand, since it is the Parliament which will, if necessary, make any changes to the legislation relating to the ACC, it should be the Parliament – or at least the Parliamentary Committee charged with particular oversight of the ACC – which is the natural starting place for any broad-ranging review of trends and developments in criminal activities and consideration of the need for amendment to the legislation. Especially is this the case with this particular Committee, drawn as it is from both Houses of the Parliament, and with representation from minor parties as well as from the major parties.

Of course, in order to fulfil this function as fully as possible, it is essential that the membership of the Committee remain relatively stable, despite the changes arising

from elections and retirements. It is only with such stability of membership that the Committee is able to develop the longer view, which is the factor that sets it apart from the other entities and organisations concerned with reviews of the *Australian Crime Commission Act 2002*.

As with the oversight of the operations of the ACC, referred to above, the Parliamentary Joint Committee is uniquely placed to seek the widest possible public consideration of any changes which it regards as desirable. In the course of its public hearings around the country, the Committee is able to canvass public reaction to any proposals which it may have developed, and put the results of that consultation forward to the Government.

How effective is the Committee?

My terms of reference require me to consider the effectiveness of the Committee in relation to the two matters considered in the preceding part of this Report, namely scrutiny of the ACC's activities, and the Committee's contribution to the policy debate of the ways in which the ACC should respond to emerging trends and patterns in organised criminal activity. As I have done above, I propose to consider each issue separately.

Scrutiny of the ACC's activities

The various Reports of the Parliamentary Joint Committee (PJC) make it clear that, until relatively recently, there has been a continuing tension between the PJC and the National Crime Authority (NCA), as predecessor of the ACC, relating to the amount of information about operational matters which the NCA was prepared to divulge to the PJC.

In the Report of the PJC on the then NCA of November 1991 entitled *Who is to Guard the Guards?*, Chapter 7 considered in some detail the interplay between section 51 and subsection 55(2) of the then Act. Section 51 (then as now), broadly expressed, obliged members of the then NCA and of the staff of the Authority not to make a record of any information acquired in the course of their duties under the Act, nor to divulge or communicate that information to anyone else – including, of course, the PJC. Subsection 55(2), when dealing with the functions of the PJC, expressly limited those functions by declaring that they did not authorise the PJC:

- (a) to investigate a matter relating to a relevant criminal activity; or
- (b) to reconsider the findings of the [National Crime] Authority in relation to a particular investigation.

[Subsection 55(2) of the current legislation has been amended to some extent, but the above provisions remain.]

In its Report of November 1991, the PJC concluded that these two provisions needed to be amended, as they were conducive to differences of opinion between the PJC and the then NCA as to the degree to which the NCA could properly divulge information

to the PJC. A Bill to amend the NCA legislation was introduced in 1992, many of the amendments drawing on the PJC's report. However, the proposals to amend either or both of section 51 and subsection 55(2) were not included in the Bill, as is recorded, with some frustration, in paragraphs 5.76 to 5.78 of the PJC's Third Evaluation of the National Crime Authority of April 1998.

In that Third Evaluation Report, the Committee concluded its discussion of Parliamentary supervision with Recommendation 18:

That sections 51 and 55 of the National Crime Authority Act 1984 be amended to clarify that the Parliamentary Joint Committee on the National Crime Authority has access to all information held by the Authority which is not of a sensitive nature.

The efforts of the PJC finally bore fruit in the *National Crime Authority Legislation Amendment Act 2001*. That Act amended section 55 by adding subsection 55(3), under which the Parliamentary Joint Committee is expressly empowered to 'examine, and report to both Houses of the Parliament on, information given to it under section 59.' Section 59 was also amended by the addition of subsections 59(6A) to (6D). The only subsequent amendment to those subsections has been the technical amendments, made by the Australian Crime Commission Establishment Act 2001, to change references to the National Crime Authority to the Australian Crime Commission. The subsections are currently in the following terms:

- (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

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- (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.

The PJC has indicated that it feels this provision still to be somewhat restrictive of its right to obtain information from the ACC. In the PJC's Report on the Australian Crime Commission Establishment Bill 2002, published in November 2002, it was noted, at para 2.63, that the Bill:

only proposes technical amendments to the provisions of the NCA Act relating to the disclosure of information concerning an investigation ... Clearly a continuation of the status quo is envisaged.

The PJC went on, in para 2.64, to reiterate its then belief that 'if it is to conduct its oversight role effectively it must have access to operational information.' It concluded this section of the Report with Recommendation 9:

The PJC recommends that the [Australian Crime Commission Establishment] Bill be amended to provide that the ACC is obliged to provide the Parliamentary Committee overseeing its operations with any information sought by the Committee except where that information would identify any particular individual suspected of criminal conduct ... or would, in the opinion of the CEO [of the ACC], risk prejudicing a current inquiry.

This Recommendation was not accepted by the Government of the day.

It is suggested that the above Recommendation goes too far, and that the compromise arrived at in 2001, which found expression as subsections 59(6A) to (6D), strikes a reasonable balance between the PJC's quite proper desire to ensure that it is fully informed on operational matters and the ACC's equally proper concern that there is an inherent risk in the dissemination of any information gathered by it beyond what is essential for the conduct of the particular operation.

Although the PJC, in its Report of November 2002 on the Bill to establish the ACC, stated (as quoted above) that 'a continuation of the status quo is envisaged', it may be observed that the status quo there referred to had been set up little more than a year previously, when the *National Crime Authority Legislation Amendment Act 2001* added subsections 59(6A) to (6D) with effect from 12 October 2001.

It may further be noted that paragraph 59(5A)(a) obliges the Chair of the Board of the ACC to provide to the PJC information 'relating to an ACC operation/investigation that the ACC ... is conducting', and then puts the onus on the Chair of the Board to show cause why the information ought not to be released, with any deadlock between the PJC and the Chair of the Board being resolved by the Minister. It is suggested that these subsections go a long way to meet the concerns that the PJC has expressed.

Reference might also be made to the fact that, in the course of the hearings conducted by the PJC under section 61A of the Act from August to October 2005, the Commonwealth Ombudsman suggested, both in his submission to the PJC and in oral evidence, that a further means by which the PJC could obtain information on the ACC's operations would be for the scope of the Ombudsman's annual briefings of the PJC to be expanded. Currently, section 55AA obliges the Ombudsman to brief the PJC at least once every year about the ACC's involvement in 'controlled operations' – ie, operations under which members of the ACC engage in conduct which would otherwise be unlawful, in order to obtain information about the possible commission of serious offences. The Ombudsman suggested that his obligation be expanded to include any matter relating to the ACC. Acceptance of this suggestion would appear to resolve any lingering difficulties that the PJC might have about the extent of the information that it receives from the ACC about its operations.

Furthermore, the point has been made above, when discussing the appropriateness of the PJC's statutory charter, that the great strength of the Committee, and the fact which sets it apart from the other entities with oversight of the ACC, is its power to conduct open inquiries, in capital cities and major centres around the country, in order to foster and encourage public debate about the conduct of the ACC. It may be suggested that vigorous and open debate by those concerned in whatever way with the conduct of the ACC provides a better means of oversight of the Commission than may be derived from the PJC's ability to obtain operational information about some of the ACC's investigations or operations.

Scrutiny of the ACC's special investigatory powers

Under sections 28 and 29 of the *Australian Crime Commission Act 2002* examiners have very wide coercive powers to summon witnesses, take evidence and compel the production of documents for the purposes of furthering a special operation or a special investigation. Failure to comply with a summons to attend to answer questions or to produce documents is a criminal offence under subsections 29(3A) and 30(6), and by virtue of subsections 29(4) and 30(4) an examinee's privilege against self-incrimination is substantially limited.

It may be observed that these powers, while wide, are by no means unique to the ACC. The Senate Standing Committee for the Scrutiny of Bills maintains a watching brief on those provisions in all legislation introduced into either House of the Parliament which impose criminal liability on any person for failure to provide information to a public authority. The incidence of such provisions may be ascertained from the relevant Table to that Committee's Alert Digests.

It may also be observed that the abrogation of an examinee's privilege against self-incrimination under the *Australian Crime Commission Act 2002*, while more extensive than the norm, is also not unique. By virtue of subsections 30(4) and (5), the answers provided by an examinee, or the document or thing which he or she has produced, are generally not admissible in evidence against the examinee in a criminal proceeding, or in a proceeding for the imposition of a penalty. But the subsections do not give

immunity for information obtained as a direct or indirect consequence of the giving of that information, commonly referred to as a “derivative use” immunity. In that respect, the provisions go further than most of those which abrogate the privilege against self-incrimination. However, in a paper entitled *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by authority of the Minister for Justice and Customs, the comment is made on page 87 that the more circumscribed immunity given to examinees under this legislation has 'been accepted as appropriate' for legislation governing the Australian Securities and Investment Commission, the Australian Prudential Regulation Authority and the Australian Competition and Consumer Commission. As the paper goes on to note, it has been 'accepted that a full "use" and "derivative use" immunity would unacceptably fetter investigation and prosecution of corporate misconduct offences.' Doubtless the same policy objectives were behind the drafting of subsections 30(4) and (5) of the *Australian Crime Commission Act 2002*.

For all that the powers of examiners under the *Australian Crime Commission Act 2002* find an echo in some other Commonwealth legislation, it is nevertheless true that those powers are wider than those available to most police forces. The exercise of those powers is therefore a matter about which the PJC, it might be thought, should be especially vigilant. Regrettably, scrutiny by the PJC of the exercise of these powers is to all intents and purposes impossible. The only information provided by the ACC as to that exercise are statements in its Annual Reports of the number of examinations that have been held under section 28, and the number of notices requiring the production of documents that have been issued under section 29, in the year under review. No information is provided about the nature of the information obtained, its use in achieving outcomes, or even the number of occasions on which an examinee sought protection from giving information on the ground of possible self-incrimination.

It is, unfortunately, not clear what sort of information the ACC might provide to the PJC relating to the former's exercise of its special investigatory powers, but it is suggested that this is an issue which the PJC may care to consider further. One possible means of resolving the difficulty is by accepting the suggestion of the Commonwealth Ombudsman, referred to above, that section 55AA of the Act be expanded to oblige the Ombudsman to brief the PJC about all aspects of the ACC's performance, rather than, as at present, the briefing be confined to the ACC's involvement in 'controlled operations'.

Contribution to policy debate

My terms of reference required me to consider the effectiveness of the Committee in contributing to policy debate in relation to emerging trends and patterns in organised criminal activity relevant to the ACC. In my view, the Committee has, at least over the past few years, been highly effective in fulfilling this aspect of its statutory charter.

The Reports prepared by the Committee may be broadly divided into three categories

- occasional reports on specific aspects of the work of the ACC, resulting from an own motion inquiry conducted under paragraph 55(1)(d) of the Australian Crime Commission Act 2002, the most recent of these being the *Report on Cybercrime*, of March 2004, the *Report of An Inquiry into the Trafficking of Women for Sexual Servitude*, of June 2004, and a *Supplementary Report on the Trafficking of Women for Sexual Servitude* of August 2005;
- the examination of each of the ACC's Annual Reports, a duty cast on the PJC by paragraph 55(1)(c) of the *Australian Crime Commission Act 2002*; and
- the septennial evaluations of the former National Crime Authority and the current ACC, comprising the *Initial Evaluation Report* tabled in May 1988, the Report entitled *Who is to Guard the Guards?*, tabled in November 1991 and the *Third Evaluation Report*, tabled in April 1998.

Each Report in each of these categories is generally thorough, comprehensive and pulls together a wide range of information which is distilled into a series of cogent recommendations for changes either in the law or in the way in which the ACC might handle its affairs.

On my review of the changes proposed to the former *National Crime Authority Act 1984* and the current *Australian Crime Commission Act 2002*, I have been pleasantly surprised by the extent to which the proposals put forward by the PJC have, in due course, found their way into amendments to the legislation. Sometimes the change has been slow in coming, and not necessarily as comprehensive as the PJC may have wished – a clear example of this being the response to the Committee's proposals for more, and more timely, information about the conduct of the NCA's and the ACC's operations. But one cannot judge proposals for reform of either the law or the operation of the former NCA and current ACC by their apparent "success rate" in being adopted by the Government of the day, or the Board of the NCA or ACC respectively. There are bound always to be a variety of views on the extent to which reform is necessary or desirable, and the fact that the PJC takes one view on such an issue does not mean that those charged with implementing the proposal will necessarily agree. It must be borne in mind that the duty of the PJC, under paragraph 55(1)(d) of the *Australian Crime Commission Act 2002*, is to 'examine trends and changes in criminal activities and methods and report to both Houses of the Parliament any change which the Committee thinks desirable'. The PJC, in other words, is required to alert the Parliament to the need for change and initiate discussion on the form of possible changes. But the essence of the democratic system is that the form which legislation finally takes is the product of a whole range of views, from often widely divergent starting points. The strength of the PJC, and its core role in this aspect of its work, is to be the initiator of the process of change, while leaving to the Parliament as a whole the decision on the final form of that change.

On those occasions when it more particularly considers trends and changes in criminal activities, the PJC has shown that it remains vigilant to the need regularly to monitor for possible change.

In the *Report on Cybercrime*, published in March 2004, the Committee commented at the outset of its Report that the issue of the inter-relationship of new technology and the criminal law had been examined only three years previously, in the then PJC's Report on Law Enforcement Implications of New Technology, published in August 2001. But it considered, in the *Report on Cybercrime*, that 'the complexity of technology has continued to increase exponentially, as have the opportunities for applying technology to criminal activity.' It therefore took the view that it was completely appropriate to inquire into the general issue of technologically assisted criminal activities, with particular reference to child pornography, credit card fraud, money laundering and threats to national critical infrastructure. The Report concluded with eleven Recommendations for action by a wide variety of bodies, including Parliamentary committees, the Government, Government Departments and the ACC.

Some time after the PJC had commenced an inquiry into the trafficking of women for sexual servitude the Government introduced a National Action Plan to combat that trade. The Committee felt that it was unable, in the course of its inquiry, to offer any assessment of that Action Plan. However, 12 months after the Committee had completed its initial Report it considered it timely to review the whole situation, in the light of the Government's Action Plan and proposals for legislative change which had been introduced. The Committee consequently issued its *Supplementary Report on the Trafficking of Women for Sexual Servitude*, which made three further recommendations directed to the ACC, the Government and the Australian National Audit Office.

Conclusion

The former National Crime Authority and the current Australian Crime Commission have been in existence for 21 years, a period which has seen considerable change in organised criminal activity. With the growth in technology, especially over the last few years, those changes are occurring with increasing speed. In the face of such changes, it is essential that the Parliament regularly monitors the way in which its primary weapon against organised criminal activity is operating. The Parliamentary Joint Committee is therefore to be congratulated on continuing the process of septennial reviews of the whole of the operation of the ACC, its staff and Board and the associated entities involved in the organisation. But, in an echo of the title to the first of those septennial reviews – *Who is to Guard the Guards?* – it is also appropriate that the work of the Parliamentary Joint Committee be itself reviewed.

As I have sought to demonstrate in the preceding pages, it is my view that the statutory charter of the Parliamentary Joint Committee, as contained in section 55 of the *Australian Crime Commission Act 2002*, continues to be as appropriate to the current ACC as it was to the original NCA in 1984. It continues to be essential that the Parliament maintains a watching brief over the activities of such a powerful body as the ACC. And, since Parliament as a whole cannot realistically maintain that watching brief, its role is fully and completely played by its surrogate, the Parliamentary Joint

Committee. Furthermore, that Committee has demonstrated, by its activities over the last few years, that, with the exception of the question of scrutinising the exercise of the ACC's special investigative powers, it remains effective in fulfilling the role of maintaining oversight of the ACC's operations together with initiating policy changes that flow from the Committee's longer term view of the fight against organised criminal activity.

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3 November 2005