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18 August 2005

Mr Jonathan Curtis
Committee Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Parliament House
Canberra ACT 2600

PARLIAMENTARY JOINT COMMITTEE ON
THE AUSTRALIAN CRIME COMMISSION

REC'D: *Cth Ombudsman*

FROM: *18 AUG 05*

AUTHORISED FOR PUBLICATION:

SECRETARY: *[Signature]*

Dear Mr Curtis

Review of the Australian Crime Commission Act 2002

I make this submission to the review being conducted by the Parliamentary Joint Committee on the Australian Crime Commission (PJC) of the *Australian Crime Commission Act 2002* (the Act). I would be happy to discuss any aspect of the submission with the PJC.

Summary

I consider that the external accountability framework in which the Australian Crime Commission (ACC) operates has been effective in bringing about increased compliance and best practice within the ACC. However, I note that my obligation to brief the PJC under section 55AA of the Act is limited to the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* and does not, of itself, enable me to brief the PJC on the results of other inspections.

I believe that the external accountability structures within 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 in the discharge of its duties. I believe that providing a more detailed briefing would in turn enable the PJC to more effectively perform its duties.

Introduction

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

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

A summary of the sources of this jurisdiction is included at Annexure A. Complaints about the ACC are investigated under the *Ombudsman Act 1976*, which confers general investigative powers across a range of agencies¹. I am happy with this arrangement, and see no need for special legislative arrangements for the investigation of ACC complaints.

The focus of this submission is to comment on the external accountability framework in which the ACC operates, drawing on my experience in investigating complaints and conducting own motion investigations and inspections.

Complaints

For the period 1 July 2004 to 30 June 2005, we received 12 complaints and 3 inquiries². The ACC also made one proactive disclosure to this office, but no action was taken as it was decided that an investigation was not warranted in all the circumstances. The nature of the complaints to our office are summarised in the table below:

Return of property	3
Use of force	1
Surveillance	2
Freedom of Information	2
Inaction	1
Out of jurisdiction	1
Record of interview	1
Corruption	1

In all but two instances, our office made a decision under the *Ombudsman Act* not to investigate the complaints, most commonly for the reason that an investigation was not warranted in all the circumstances.

Own motion investigations

My office has conducted three own motion investigations into the ACC in the past 18 months.

The first investigation was in response to a proactive notification by the ACC, culminating in the release of a report in June 2004 titled "Own motion investigation into a review of the operational and corporate implications for the Australian Crime Commission arising from alleged criminal activity by two former secondees". A follow up investigation of the ACC's implementation of recommendations arising from the initial investigation was conducted, resulting in the release of a further report in November 2004. Copies of the reports were provided to the PJC.

The second investigation was in response to an issue raised by the PJC in October 2003, concerning controlled operations conducted by the ACC under State legislation. These operations are not subject to the inspection and reporting requirements of the Crimes Act. A copy of the report will be provided to the PJC shortly.

¹ This is in contrast to the existing model for investigating complaints made about the Australian Federal Police, which are investigated under the more specific *Complaints (Australian Federal Police) Act 1981*. This model, however, is currently being reviewed in light of the recommendations made in the February 2003 report by the Hon. William Kenneth Fisher AO, QC 'A Review of Professional Standards in the Australian Federal Police'.

² An inquiry is an approach to our office that does not result in the making of a complaint or an expression of dissatisfaction with an agency.

The third investigation relates to the ACC's handling of a registered informant (RI), specifically whether the ACC had misled the RI about arrangements for witness protection. The report was finalised in March 2005, but not made public. I leave it to the PJC to decide whether it wishes to see this report on a confidential basis.

Systemic issues arising from these investigations are discussed below under the heading "Accountability Framework".

Inspections

As outlined in Annexure A, this office conducts inspections of the ACC's records relating to telecommunications interception, controlled operations and surveillance devices³.

Inspections have revealed that the ACC is achieving a high level of compliance with legislation regarding telecommunications interception and controlled operations, and I have commended the ACC on its demonstrated initiative and willingness to develop strategies to improve compliance and achieve best practice.

Formal reports of the results of inspections are provided to the Minister in the case of telecommunications interception and surveillance devices, and directly to Parliament in the case of controlled operations.

I note that my obligation to brief the PJC under section 55AA of the Act is limited to the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* and does not, of itself, enable me to brief the PJC on the results of other inspections.

While I am confident that the existing level of Ministerial scrutiny is effective in bringing about increased compliance and best practice within the ACC, 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 in the discharge of its duties. I believe that providing a more detailed briefing would in turn enable the PJC more effectively to perform its duties.

Accountability framework

Our limited experience of the ACC is that the CEO, Mr Milroy, is committed to administrative best practice in the ACC's accountability regime. We observe that he has adopted a practice of pro-active disclosure to the Ombudsman of serious complaint or integrity matters, has engaged independent consultants to investigate matters, and has developed a dedicated integrity plan. However, in my view, there are two systemic issues impacting on the accountability framework as outlined below.

Secondees

The ACC's management of secondees has been identified as an issue in both a complaints and inspection context. The ACC is a 'hybrid' agency that relies on the secondment of law enforcement officers to perform its function in fighting national and organised crime. It is my understanding that while on secondment, law enforcement officers are both a member of the ACC and their 'home' law enforcement agency.

³ Our first inspection of ACC surveillance device records is scheduled to take place in September this year.

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.

This may be practically difficult, and raises the issue of how secondees should address conflicts between agencies.

The short term nature of the secondments has also made it difficult for the ACC to address performance issues after the secondee 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.

Cross Border Law Enforcement Powers

The hybrid nature of the ACC caused the Australasian Police Ministers' Council to agree that the Commonwealth Ombudsman should oversight all of the ACC's activities in accessing cross-border law enforcement powers. Currently, the only legislation that confers an oversight function of that kind on the Ombudsman, deals with the ACC's use of surveillance devices under Commonwealth, State or Territory legislation. Consequently, until there is full harmonisation of cross-border law enforcement powers, my office is only able to oversee the ACC's use of State or Territory laws in areas other than surveillance devices through own motion investigations.


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.

This own motion investigation also suggests that the ACC will need to continue to develop its administrative systems to capture the highest standard of transparency in the period while these powers are being harmonised, and maintain those standards in the future. I have suggested that:

- (a) the ACC develop formal arrangements with other law enforcement agencies to ensure that it has access to copies of all relevant documents relating to controlled operations carried out under State legislation, and
- (b) the accountability framework will be strengthened if the ACC considers and documents the policies and procedures used by its officers when conducting controlled operations under State legislation.

Please do not hesitate to contact either myself or the Senior Assistant Ombudsman with responsibility for law enforcement matters, Ms Vicki Brown, on (02) 6276 0111 if you would like to discuss any aspect of the submission.

Yours sincerely



Prof. John McMillan
Commonwealth Ombudsman

Annexure A – Summary of Commonwealth Ombudsman's jurisdiction in relation to the ACC

Category	Legislation	Function
Complaints	<i>Ombudsman Act 1976</i> (Cth)	Investigate complaints about the ACC's administrative decisions Conduct own motion investigations into the ACC
Inspections	<i>Telecommunications (Interception) Act 1979</i> (Cth)	Inspect the ACC's records twice each financial year and prepare a report to the Attorney-General once a year
	<i>Part 1AB Crimes Act 1914</i> (Cth) <i>Australian Crime Commission Act 2002</i> (Cth) – section 55AA	Inspect the ACC's conduct of controlled operations to determine the extent of compliance with Part 1AB of the Act Report to the Parliament on the adequacy and comprehensiveness of controlled operation reports submitted to Parliament Brief the Parliamentary Joint Committee on the Australian Crime Commission about the ACC's involvement in controlled operations under Part 1AB of the Act
	<i>Surveillance Devices Act 2004</i> (Cth)	Inspect the ACC's records to determine the extent of compliance with the Act Inspect the ACC's records to determine the extent of compliance with surveillance device laws of a State or Territory Report to the Minister at six monthly intervals
	<i>Surveillance Devices Act 1999</i> (Vic) – sections 30P and 30Q	Inspect the ACC's records to determine the extent of compliance with the Act and report to the Parliament at six monthly intervals