SUBMISSION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (SOUTH AUSTRALIA) TO THE PARLIMENTARY JOINT COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

Review of the Australian Crime Commission Act 2002

This submission is made on behalf on behalf of the Office of the Director of Public Prosecutions (South Australia) (referred to as "ODPP").

I wish to raise two matters for the consideration of the Committee which have come to the attention of the ODPP by virtue of its prosecution function.

1. The first matter falls under the third term of reference "the need for amendment of the Act". It relates to Section 51 of the Australian Crime Commission Act 2002 - the Secrecy Provision.

BACKGROUND

This office had carriage of a criminal forge and utter charge. The defendant claimed that she had been given approval to engage in the conduct by an operative of the Australian Crime Commission. She had been an informant to the Commission and claimed in her evidence that her Commission contact had told her that it was permissible to use the cheques she had obtained. The prosecutor determined that there was a need to examine the Commission operative in this regard by way of rebuttal. Discussions took place at executive level between the ODPP and the Crime Commission. The eventual view taken by the Commission was that the operative could not give evidence in relation to the performance of their duties for the Commission. The matter was resolved on another basis.

ISSUES

From the prosecution perspective Section 51, in its current form, may prevent evidence from being called which would rebut a claim of permission being given by staff of the ACC. The ODPP appreciates the competing concerns which this issue raises, namely:-

- the ACC seeking to protect information from disclosure, given the nature of its work; and
- the ODPP's ability to adduce evidence to prosecute breaches of the criminal law.

Your consideration is invited to amending the provision to facilitate an officer giving evidence to rebut an allegation that authority was given by the Commission staff to certain conduct. Alternatively, where a defendant introduces evidence of Commission activity at a trial, some modification should be considered to facilitate evidence being able to be given.

2. The second matter relates to the fourth term of reference "any other related matter".

The Commission may wish to consider the use of evidence obtained under its coercive powers and in particular the following questions-

- Can the tape recordings of evidence given by witnesses pursuant to the Commission's coercive powers be used in criminal trials?

- If so, to what use can the evidence be put in a criminal trial?

Consideration should cover both the situation where the evidence is that of a witness in the trial and where it is that of an accused person.

BACKGROUND

I draw the Committee's attention to the case of ***R v Cannon*** [2004] QCA 440. It is a decision of the Queensland Court of Appeal. You will note in that case that two witnesses, Neil Hudson and Kellie Quarm, were witnesses who had been declared hostile and for that reason the jury heard what those witnesses had told the Australian Crime Commission. If that scenario was run as a case in South Australia the material could not be admitted as to the truth of its contents (unless the witnesses had given evidence that their prior statements were in fact true).

If tape recordings of Commission hearings contained prior inconsistent statements of the witnesses, they may be received into evidence in South Australia only so far as they are relevant to the credibility of the witness, and not to prove the truth of the facts asserted.

In Queensland this rule has been abrogated by Section 101 of the Evidence Act 1977. There is no similar provision in South Australia, other than Section 34CA of the Evidence Act 1929, which is limited to an earlier complaint by the victim of a sexual offence who is a young child.

Section 27 of the South Australian Evidence Act is the section which allows evidence to be adduced of prior inconsistent statements of a witness who has been declared hostile. Section 27 is not a code on hostile witnesses. The common law relating to hostile witnesses still applies. In relation to directions given as to the use which can be made of evidence of prior inconsistent statements, I refer the committee to ***R v Smith and Turner*** (2) (1995) 64 SASR 1 at page 18. See also ***Driscoll v The Queen*** (1977) 137 CLR 517 at 536, ***R v Jacquier*** (1979) 20 SASR 543 at 554 and ***R v Hutchison*** (1990) 53 SASR 587 at 594, 597.

Two other witnesses' evidence before the Crime Commission was received in the trial as one of the witnesses was deceased and another was incapable of giving evidence in chief. Their evidence in the Queensland matter was admitted under Section 93B of the Queensland Evidence Act. There is no directly comparable provision in South Australia. (There are provisions which deal with witnesses who are seriously ill and the admissibility of depositions of deceased or ill witnesses-Sections 34J and 34K of the Evidence Act)

ISSUES

There is presently no intention to enact a provision similar to Section 101 of the Queensland Evidence Act in South Australia. The purpose in raising it in this submission to the Committee is to identify that there are differences in State laws which may affect the reception into evidence of commission evidence in a criminal trial.

The position of the ODPP is that at common law, the prosecution should not call a witness known to be hostile. Even if a provision such as Section 101 of the Queensland Act was enacted, reliance on that evidence, without anything further, would be unlikely to result in proof of the case beyond reasonable doubt (reference is made to the comments of the then Chief Justice King in this regard in the case of *R v Corkin* (1989) 50 SASR 580 at pages 583 to 584 the court, in considering Section 34CA of the South Australia Evidence Act stated as follows:-

> "thus understood, the section will be seen to be a far reaching provision effecting the rights of persons accused of sexual offences against young children. It will, at least in theory, be possible for such a person to be convicted upon evidence of what the child has said out of court notwithstanding that the child does not repeat the story in court, and notwithstanding that there is no other evidence implicating the accused. I say "in theory" because I would assume that courts would be unwilling to treat such evidence as amounting by itself to prove beyond reasonable doubt. Evidence of complaints by children usually comes from sources which are emotionally involved with the child or for other reasons may be wanting in objectivity. There will always be difficulty in being sure that the Court is receiving an accurate and objective account of what the child really said. Moreover the statement is of its nature incapable of being tested by cross examination satisfactorily if the child does not remember making it or is inarticulate in the witness box. For those reason trials judges will undoubtedly exercise caution in admitting such evidence and courts will undoubtedly be reluctant to treat it as sufficient in itself to constitute proof of a criminal offence."

The author of the submission is Sue Raymond, Staff Development and Policy Officer, contact telephone number 08 8226 3751. The submission is sent with the authority of Geraldine Davison, the Acting Director of Public Prosecutions.

The author is not in a position to give evidence to the Commission should that be required. Others in the ODPP have more direct knowledge of the subject matter which has given rise to the issues being identified.

In relation to the first matter although the witness is not named, if the ACC is of the view that there is any reason for the publication of this information to be restricted then you may wish to consult with them. However the ODPP notes that its submissions relate to evidence given in a criminal hearing.