

Government Response

Parliamentary Joint Committee on the Australian Crime Commission Report

Inquiry into ACC Amendment Act 2007

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Recommendation 1: The committee recommends that the Australian Crime Commission be required to, without delay, develop and implement a consistent and reliable method for its examiners to promptly and securely record their reasons for decision as required by Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002*.

Accepted

It is now the established practice of Australian Crime Commission (ACC) examiners to prepare and record their reasons prior to the issue of every summons and notice pursuant to subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* (the ACC Act). The forms used for summonses and notices now include the time and date of issue. The time and date of settlement is also included in the record of reasons, ensuring that compliance is apparent on the face of the documentation.

Measures are in place to provide assurance as to the accuracy of the documents at the relevant time including restricted electronic access and audit measures that disclose any subsequent amendments to the documentation.

Recommendation 2: The committee recommends that the amendment made to Part II Division 2 Subsections 28(1A) and 29(1A) of the *Australian Crime Commission Act 2002* by the *Australian Crime Commission Amendment Act 2007* be repealed but that those subsections be amended to ensure that the reasons for the decision must be recorded in writing before the issuing of a summons or notice.

Accepted

The *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (the SOC No. 2 Act) amended the ACC Act to ensure that ACC examiners record their reasons for issuing a summons or notice to produce before, or at the same time as, the summons or notice is issued. A failure to do this invalidates the summons or notice. ACC examiners are no longer able to record reasons after the summons or notice has been issued.

Recommendation 3: The committee recommends that Part II Division 2 Subsections 28(8) and 29(5) of the *Australian Crime Commission Act 2002* be repealed.

Accepted

The SOC No. 2 Act repealed subsection 28(8) of the ACC Act and replaced it with a new subsection stating that a failure to comply with requirements set out in section 29A will not invalidate the summons. As such, a failure to comply with the

requirement to record reasons and attach the relevant Board determination (subsections 28(1A) and 28(2)) will invalidate the summons.

The SOC No. 2 Act also repealed subsection 29(5) and replaced it with a new subsection stating that a failure to comply with requirements set out in section 29A will not invalidate the notice. The effect of this amendment is that a failure to comply with the requirement to record reasons in subsection 29(1A) will invalidate the summons.

This recommendation suggests that subsections 28(8) and 29(5) be repealed in their entirety. However, the new subsections 28(8) and 29(5) state that a failure to issue a non-disclosure notation under section 29A will not invalidate the summons. The Committee's report focused on ensuring that an examiner be properly satisfied prior to issuing a summons or notice, and that the reasons for issuing the summons or notice are recorded. The requirement to include a non-disclosure notation under section 29A is not related to the decision of whether or not to issue a summons or notice.

Recommendation 4: The committee recommends that Part II Division 2 Subsection 29B(4) of the *Australian Crime Commission Act 2002* be amended to include the Commonwealth Ombudsman.

Accepted

The SOC No. 2 Act expands the circumstances in which a disclosure may be made under subsection 28B(4) to include making disclosures to the Commonwealth Ombudsman (the Ombudsman) for the purpose of making a complaint under the *Ombudsman Act 1976*. The SOC No. 2 Act also allows disclosure under subsection 28(4) to the Australian Commission for Law Enforcement Integrity (ACLEI) for the purpose of referring to the Integrity Commissioner an allegation or information that raises a corruption issue. ACLEI is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Federal Police and the ACC. As such, it is appropriate that a person is able to disclose a summons or notice to ACLEI for the purpose of referring to the Integrity Commissioner an allegation, or information that raises a corruption allegation.

The SOC No. 2 Act also expands the circumstances in which a disclosure may be made under subsection 29B(2) to include making disclosures to the Ombudsman for the purpose of making a complaint under the Ombudsman Act, or to the ACLEI for the purpose of referring to the Integrity Commissioner an allegation or information that raises a corruption issue.

Recommendation 4 of the PJC-ACC Report was limited to amending subsection 29B(4). However, it is appropriate that all people who are aware of a summons or notice (either under subsection 29B(2) or 29B(4)) be able to disclose matters connected to the summons or notice to the Ombudsman or ACLEI where appropriate.

Recommendation 5: The committee notes that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* deems certain summonses and notices valid thereby protecting any prosecution based on those summonses and notices. The committee recommends that:

- the same practice be adopted in relation to summonses and notices issued subsequent to the *Australian Crime Commission Amendment Act 2007* until now;
- but that henceforth, in line with Recommendation 2, the practice of retrospectively recording reasons for the issue of summonses and notices be immediately discontinued and that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* be repealed.

Accepted

The amendments in the SOC No. 2 Act only operate prospectively. Therefore the requirements to records reasons before or at the time a summons or notice is issued only applies to summons or notices issued after the commencement of Schedule 7 of the SOC No. 2 Act. Accordingly, a failure to comply with such requirements will only invalidate summons or notices issued after commencement.

Recommendation 6: The committee recommends that the *Australian Crime Commission Act 2002* be amended to include the statutory definition of contempt and the statutory power of referral, plus ancillary provisions, proposed as clauses 34A and 34B in the National Crime Authority Legislation Amendment Bill 2000 (except that the referral be to the Federal Magistrates Court) for matters arising under Section 30 of the *Australian Crime Commission Act 2002*.

Accepted

The SOC No. 2 Act enables the ACC to apply to a Court to have an uncooperative witness dealt with for contempt. This provides the ACC with a more immediate means of encouraging witnesses to cooperate with ACC Examiners, as the ACC can issue the threat of immediate detention. A contempt power was also recommended by the independent review of the ACC Act conducted by Mr Mark Trowell QC.

Recommendation 7: As a corollary of Recommendation 6, or as an alternative thereto, the committee urges the Commonwealth Attorney-General to negotiate with the judiciary an expedited judicial process for matters referred by the Australian Crime Commission under Part II Division 2 Section 30 of the *Australian Crime Commission Act 2002*.

Noted

As the SOC No. 2 Act provides the ACC with a contempt power, the Government will not be responding to this recommendation. The Commonwealth consulted with States and Territories on the contempt regime.

Recommendation 8: The committee recommends that Part IV Section 61A of the *Australian Crime Commission Act 2002* be amended to require the Minister to cause an independent review of the operation of the *Australian Crime Commission Act 2002* every five years with the first review to be undertaken no later than 1 January 2011.

Accepted

The SOC No. 2 Act requires that the provisions and operation of the ACC Act be reviewed once every five years.

Recommendation 9: The committee recommends that the Commonwealth Ombudsman be required to inspect records made by the Australian Crime Commission examiners to ensure full compliance with Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that the Ombudsman report annually to the Parliament on this matter.

Recommendation 10: The committee recommends that at least once in each year the Commonwealth Ombudsman be required to provide a briefing to the Parliamentary Joint Committee on the Australian Crime Commission about the Australian Crime Commission's exercise of the coercive powers under Part II Division 2 Sections 28 and 29 of the *Australian Crime Commission Act 2002* and that Part III Section 55AA of the *Australian Crime Commission Act 2002* be amended accordingly.

Not accepted

The Government does not accept that the additional statutory oversight recommended by the Committee is necessary given the extent of statutory and judicial oversight already in place. The ACC is subject to regular review by the Courts and through the existing capacity of the Ombudsman. The Ombudsman's own motion investigation powers can be used for any part of the ACC's operations, including examination processes and other matters related to the use of coercive powers. For example, in August 2008, the Ombudsman released a report into the ACC's use of powers under Division 2, Part II of the ACC Act, which provides the framework for examinations.

Administrative measures have been implemented in relation to the Committee's recommendation that reasons be recorded prior to the issue of a summons or notice to produce. Reasons are now recorded prior to issue in all cases. These administrative measures were reinforced by amendments to the ACC Act included in Schedule 7 to the SOC No. 2 Act. These changes to administrative practices, along with a clear legal obligation to record reasons no later than the time of issue of a summons or notice, will ensure appropriate scrutiny and oversight of the ACC's legal obligations through the existing legal processes available in the Administrative Appeals Tribunal and Courts.