

CHAPTER 4

Accountability

4.1 The Parliamentary Joint Committee on the Australian Crime Commission (PJC/committee) approached this inquiry with a strong sense of purpose.

4.2 As discussed in this report, the *Australian Crime Commission Amendment Act 2007* (the Amending Act) has been controversial from its inception. And the committee has particular responsibilities in relation to the Australian Crime Commission.

4.3 Part III subsection 55(1) of the *Australian Crime Commission Act 2002* (the Act) states that the PJC's duties include:

- monitoring and reviewing the performance by the Australian Crime Commission (ACC) of its functions; and
- reporting 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.¹

4.4 As stated by the Police Federation of Australia, it is fitting that:

Parliament puts in place appropriate oversight by bodies such as the Australian Commission for Law Enforcement Integrity and the Parliamentary Joint Committee on the Australian Crime Commission to ensure that the application of the law is handled appropriately.²

4.5 The passage of the Amending Act in both chambers, three days after the legislation was first introduced in the Parliament, prevented the PJC from exercising its important oversight role.

4.6 But the controversial nature of the legislation was not lost on either members or senators. And the Amending Act was passed on the understanding that the PJC would be required to conduct an inquiry in the 42nd Parliament.

4.7 The PJC notes that in better circumstances, and as per normal practice, the inquiry would have been conducted before passage of the Amending Act.³

1 Subparagraphs 55(1) (a) and (b) of the *Australian Crime Commission Act 2002*

2 Police Federation of Australia, *Submission 4*, p. 2.

3 Liberty Victoria, *Submission 1*, p. 1.

4.8 Be that as it may, the committee has conducted its inquiry, and in fulfilling its duties under section 55 of the Act, two matters have drawn the PJC's attention and further comment.

Oversight

The committee

4.9 Section 59 of the Act concerns the furnishing of reports and information to a number of bodies by the ACC. In relation to the PJC, section 59 provides:

(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.⁴

4.10 These provisions were amendments made to the Act with the enactment of the *National Crime Authority Legislation Amendment Bill 2001*. They were intended to clarify the ability of the PJC to request and receive certain information from the ACC.

This mechanism is designed to ensure that sensitive material is appropriately protected, but in a way that ensures that there is confidence

4 Subsections 59(6A)-(6D) of the *Australian Crime Commission Act 2002*

that, subject to these sensitivities, appropriate disclosure is made to the PJC-NCA.⁵

4.11 The committee notes its contemporaneous comments regarding the *National Crime Authority Legislation Amendment Bill 2001*:

In considering the original NCA Bill in 1984 the Senate replaced the Government's proposals for NCA accountability through the Ombudsman and regular judicial review with the operations of the PJC. In 1985 the then PJC stated that the provisions in the NCA Act were so poorly drafted that, unless they were appropriately amended, there was no point in retaining a parliamentary committee to act as a watchdog over the NCA. The situation was described as a 'charade'.

This Government Bill proposes to continue the charade, by giving to the PJC such qualified powers of access to NCA information as to render the PJC no more capable of scrutinising the NCA's operations than an existing standing committee using standard parliamentary committee powers. In particular the Bill leaves unamended the limitations on the PJC's role in subsection 55(2) and the PJC's rights of access to information under the NCA Act's secrecy provision (section 51), reform for which the Senate's Committee of Privileges called in 1998.⁶

4.12 The committee continues to express concern with the limitations contained in the Act. In particular, the PJC's power to access information assumes that the committee is informed about matters within the ACC, and that this knowledge allows the PJC to request and receive information from the Chair of the ACC Board. This is not always the case, and in such circumstances, the PJC is left with no mechanism to seek information from the ACC.

4.13 Further, subsection 59(6A) does not stipulate when the Chair of the ACC Board must comply with the committee's request, and subsection 59(6B) allows the Chair of the Board a means by which the PJC's request for information can be denied, although there is a means for appeal to the Minister.

4.14 The totality of the provisions does not suggest that the PJC has any special ability to meaningfully oversee the ACC.

4.15 That there is a need for such an ability was demonstrated by recent litigation which challenged the manner in which the examiners were exercising the ACC's coercive powers.

It was not this committee or the ACC Annual Report or the Ombudsman which exposed that in over ninety percent of cases ACC examiners were

5 *National Crime Authority Legislation Amendment Bill 2001*, Explanatory Memorandum, p. 19.

6 Parliamentary Joint Committee on the National Crime Authority, *National Crime Authority Legislation Amendment Bill 2000*, March 2001, p. 23. Also, see Senate Committee of Privileges, *70th Report: Questions arising from proceedings of the Parliamentary Joint Committee on the National Crime Authority*, April 1998.

not recording reasons until after the summons was issued. It was [an accused] and his defence counsel who brought that to light.⁷

4.16 In the absence of any statutory requirement, neither the ACC nor the ACC Board had advised the PJC that there was a potential problem with the issuing of summonses and notices. And the committee had therefore not requested information from either of those bodies, or sought to facilitate a considered response.

4.17 This had lead Mr Duncan Kerr MP, the then deputy chair of the committee, to observe:

I have some discontent with the fact that, as the deputy chair of the Parliamentary Joint Committee on the Australian Crime Commission, which has oversight of the Australian Crime Commission, the committee was not advised that this issue was one requiring attention. It is, I think, a matter of grave concern that the Australian Crime Commission and its board failed to come before the parliamentary committee which was established by legislation to supervise the work of the Australian Crime Commission. The parliamentary committee was not advised of the fact that there was a substantive issue arising which might affect a substantial number of the inquiries and examinations conducted under the legislation. In fact, we found out about this, as the shadow minister says, by the introduction of a piece of legislation into this parliament on Monday. That is an extraordinary thing. That is an extraordinary and contemptuous way to deal with the parliamentary oversight body established under legislation.⁸

4.18 Mr Chris Hayes MP, also a member of the PJC, noted:

Under section 55 [of the Act] the committee has a specific role. There are various obligations. It is part of the counterweight of balance because of the coercive nature of this very special law enforcement body. This body has extreme powers. Its powers are akin to a royal commission and, at the time of its being set up, the parliament in its wisdom decided, as was the case with the [National Crime Authority], that there would be a measure of parliamentary oversight and that it would be done through a parliamentary joint committee.⁹

4.19 The CEO of the ACC, Mr Alastair Milroy explained the ACC's failure to notify the PJC as follows:

My only comment there is that there was a considerably tight time frame and there were certain actions taken to try to brief as many as possible. But the Attorney-General's Department, of course, did take the lead to drive the process and initiate some consultation.¹⁰

7 Law Council of Australia, *Submission 5*, p. 6.

8 Mr Duncan Kerr MP, *House Hansard*, 20 September 2007, p. 83.

9 Mr Chris Hayes MP, *House Hansard*, 20 September 2007, p. 130.

10 Mr Alastair Milroy, CEO, ACC, *Committee Hansard*, Canberra, 17 June 2008, p. 21.

4.20 Dr Karl Alderson, from the Attorney-General's Department, expanded on Mr Alastair Milroy's response:

In terms of the process that was followed, those decisions are very much ones for the minister and the government of the day to decide. Ministers and governments make choices between a sort of broader consultation and narrower one moving more quickly. The process that was followed was one that was judged by the minister and government at the time as being the appropriate one.¹¹

4.21 It is extremely disappointing to the PJC that the ACC at no time sought to notify its parliamentary oversight committee. The PJC believes that the ACC had an obligation to notify the committee, even if the executive did not believe that there was any need to notify the Parliament.

4.22 The PJC believes that the Act should not need to specify every occasion on which the ACC, and/or its Board, report to the PJC and the Parliament. Some matters, such as the one mentioned, are of such importance that they must be reported to the PJC in a timely and appropriate fashion, and as a matter of course. In future, the PJC expects that all matters reasonably requiring its attention will be so notified.

4.23 The PJC notes similar, albeit more generic, comments from Senator Bishop during its inquiry into *The future impact of serious and organised crime on Australian society*:

The ACC governance model, in terms of accountability, is primarily to its stakeholders viz, from the CEO to the Board, from the Board to the Intergovernmental Committee (IGC), and thence to ministers...

The Committee's role does not seem to be part of that hierarchy. I suggest a clarification of the Committee's role, which, in light of this current inquiry, may be far more limited than previously realised...

Considering the terms of reference set out in Section 55 of the Act it would seem that while the ACC is not accountable to the Committee, the Committee is accountable to the Parliament for assessment of the way in which the ACC operates and the function it performs nationally in accordance with its charter.

Hence in taking evidence during this inquiry, important questions are declined on the basis that this is a matter for government policy...

Within this role as "systemic mentor" of the ACC model, it may be necessary for the Committee to approach its work with a modus operandi than might otherwise be the case with parliamentary committees. This will entail continuing development of the special relationship of trust with the ACC, and mutual respect for the complementary responsibilities. None of this, however, should preclude the Committee from operating as a

11 Dr Karl Alderson, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 17 June 2008, p. 21.

watchdog of the parliament, including regular assessment of the operational performance of the ACC model within its legislative charter.¹²

4.24 The PJC's terms of reference for this inquiry do not encompass the broader issues of whether the role of the committee, and the powers granted to it, are sufficient. However, in light of the preceding paragraphs, the committee suggests that these are significant matters which should be re-examined, and that there is a need for regular review of the operation of the Act.

4.25 In making this suggestion, the committee notes that section 61A of the Act does not include periodic reviews of the Act. The PJC believes that legislation that governs an agency such as the ACC, and which grants that agency substantial powers, including intrusive coercive powers, should be regularly reviewed so as to ensure its appropriateness and effectiveness.

Recommendation 8

4.26 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.

The Commonwealth Ombudsman

4.27 In addition to the PJC, the Commonwealth Ombudsman (the Ombudsman) provides some oversight of the ACC. In relation to this inquiry, the committee was interested in the Ombudsman's ability to inspect ACC records in relation to controlled operations.¹³

4.28 Controlled operation records inspections are conducted only for the purposes of Part IAB of the *Crimes Act 1914*, under which the inspections are authorised. But the committee believes this accountability mechanism might be relevant to summonses and notices issued under subsections 28(1) and 29(1) of the Act.

4.29 In chapter 2 of this report, the committee discussed and noted concerns with the record making requirements of subsections 28(1A) and 29(1B) of the Act. The committee has made suggestions and recommendations in support of the safeguards contained in those provisions. As a result, the ACC may in future generate records relating to the ACC's exercise of its coercive powers. But even if they do not, the PJC suggests that examiners' records should be open to inspection by an independent and external body.

12 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, pp 111-112.

13 Section 15UB of the *Crimes Act 1914*

Recommendation 9

4.30 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

4.31 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.

Unauthorised disclosure - a possible contempt of the Senate

4.32 The second matter upon which the PJC wishes to comment is an incident which occurred during the inquiry.

4.33 At its hearings on 1 May 2008, the committee received urgent and private correspondence. After consideration of that correspondence, the PJC decided to adjourn the public hearing on the grounds that a matter before the courts could be adversely affected should the hearing proceed. The committee resolved to accept the correspondence as a confidential committee document. However, on 2 May 2008, the nature and content of the confidential correspondence was disclosed in a media article.

4.34 The Senate clearly articulates the rules regarding the unauthorised disclosure of confidential documents in Parliamentary Privilege Resolution 6, 25 February 1988.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;

(b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or

(c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.¹⁴

4.35 The 122nd Report of the Senate Committee of Privileges sets out the importance of protecting sources of information, and ensuring that the work of the Parliament and its committees is not interfered with:

The Committee of Privileges, and the Senate, have always taken the view that the highest duty of any house of a parliament is to protect its sources of information...This is reflected in the Parliamentary Privileges Act, which separately specifies interference with witnesses and release of in camera evidence as the only two criminal offences under that Act.¹⁵

4.36 The purpose of the prohibition against unauthorised disclosure is primarily the protection of persons giving information to committees. But the prohibition also covers persons about whom information may be given, or who may be adversely affected by the findings and conclusions of a parliamentary committee.

4.37 In the first instance the PJC chose to investigate the source of the unauthorised disclosure in order to establish whether a case for contempt of the Senate could be found. The Chair of the PJC, Senator Stephen Hutchins, wrote to all those who had access to the correspondence in question seeking to establish the source of the unauthorised disclosure.

4.38 The correspondence in response to Senator Stephen Hutchins' request for information did not identify the source of the unauthorised disclosure. The PJC was disappointed that, for some, semantic vaguer was employed to avoid providing the information sought by the committee. An example of this is at Appendix 5. The PJC decided not to refer the matter to the Committee of Privileges as a possible contempt of the Senate. But the committee cautions against interpreting this decision as a tacit sanction of this or any other unauthorised disclosure.

Conclusion

4.39 In 2007, the then Minister for Justice and Customs, Senator, the Hon. David Johnston assured the Parliament that, on review by the PJC:

If deficiency is found or the degree of protection, safe-guards, checks and balances is not found to be sufficient, the government will then consider those findings and seek to address those points raised, whilst seeking to preserve the integrity of the intent of the legislation.¹⁶

14 The Senate, *Standing Orders and other orders of the Senate*, September 2006, p. 110.

15 Senate Committee of Privileges, 122nd Report, June 2005, p. 37.

16 Senator the Hon. David Johnston, Minister for Justice and Customs, *Senate Hansard*, 18 September 2007, p. 100.

4.40 The committee has reviewed the Amending Act and found most of its provisions to be highly problematic. The Amending Act grants examiners latitude in the recording of reasons for the issue of summonses/notices beyond what is necessary. And the Amending Act validates summonses/notices whose issue does not comply with statutory requirements. Further, the Amending Act retrospectively applies those provisions to prevent legal challenge to summonses/notices which were issued in contravention of the legislation.

4.41 The committee acknowledges that the Act may have been ambiguous. But the PJC is concerned that the legislation has clearly attempted to safe-guard individual rights while allowing the ACC coercive powers to effectively fulfil its function. And it appears that the statutory safe-guards have been consistently read down and diminished. The committee considers the Parliament to have indicated its intention that a balance be struck, and is disappointed that in practice this has not been the case, a situation that has been exacerbated by the Amending Act.

4.42 The committee acknowledges the circumstances in which the Amending Act passed into law, and its effectiveness in immediately addressing ACC operational difficulties. But the PJC by no means wishes to condone such a dangerous precedent, finding that such legislation has no proper place among the laws of the Commonwealth. In the words of Niccolo Machiavelli,

One should never allow an evil to run on out of respect for the law, especially when the law itself might easily be destroyed by the evil.¹⁷

4.43 The PJC has therefore made recommendations which it considers will restore some balance to the Act.

Senator Stephen Hutchins

Chair

17 Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius*, Book 3, Chapter III.