

# CHAPTER 4

## AUSTRALIAN CRIME COMMISSION

### Provisions in the Bill

4.1 The Explanatory Memorandum notes that:

The ACC, established under the ACC Act, is a statutory body that works collaboratively with Commonwealth, State and Territory agencies, to counter serious and organised crime in Australia. Using intelligence and investigative strategies, the ACC endeavours to better position Australia to meet and respond to the threats posed by serious and organised crime groups.<sup>1</sup>

4.2 Schedule 7 of the Bill would amend the ACC Act with the aim of improving the operation and accountability of the ACC by:

- (a) clarifying procedural powers for issuing summons and notices to produce;
- (b) increasing the ACC's powers to deal with uncooperative witnesses;
- (c) adding the Commissioner of Taxation to the ACC Board; and
- (d) requiring an independent review of the ACC every five years.<sup>2</sup>

4.3 Many of the changes proposed by the Bill respond to recommendations made by the Parliamentary Joint Committee on the Australian Crime Commission (the PJC) in the report on its inquiry into the *Australian Crime Commission Amendment Act 2007*.<sup>3</sup>

### *Issuing summons and notices to produce*

4.4 Under Division 2 of Part II of the ACC Act, ACC examiners have coercive information gathering powers, similar to those of a Royal Commission, which may be used to obtain information in relation to a special ACC operation or investigation.<sup>4</sup> In particular, examiners have the power:

- to summons a person to appear before an examiner and require the person to answer questions and to produce documents or other things (section 28); and

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1 Explanatory Memorandum, p. 165. The ACC has provided a useful overview of its structure and functions: *Submission 7*, pp1-2.

2 Explanatory Memorandum, pp 3 and 165. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the ACC Act.

3 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, at [http://www.aph.gov.au/Senate/committee/acc\\_ctte/acc\\_amend\\_act07/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_ctte/acc_amend_act07/report/report.pdf) (accessed 13 October 2009), September 2008, recommendations 1 to 8. See also ACC, *Submission 7*, p. 9.

4 Section 7C allows the ACC Board to determine that an intelligence operation or an investigation is a special operation or special investigation.

- to issue a notice that requires a person to produce a document or thing to a specified person (section 29).<sup>5</sup>

4.5 Subsections 28(1A) and 29(1A) require an examiner, when issuing a summons or notice to be satisfied that it is reasonable in all the circumstances to do so and to record in writing the reasons for the issue of the summons or notice.<sup>6</sup> At present under these provisions, the examiner may record his or her reasons before, at the same time or as soon as practicable after the issue of the summons or the notice. The Bill would amend subsections 28(1A) and 29(1A) so that an examiner is required to record these reasons at or before the time the summons or notice was issued.<sup>7</sup>

4.6 Subsections 28(8) and 29(5) currently provide that a failure by an examiner to comply with various requirements for issuing a summons or notice does not invalidate the summons or notice. In particular, these provisions prevent a summons or notice being invalidated where the examiner fails to:

- record reasons for issuing the summons or notice;
- in the case of a summons, attach the relevant ACC Board determination establishing the special operation or investigation to which the summons relates; or
- to issue a non-disclosure notation under section 29A.<sup>8</sup>

4.7 The Bill would amend subsections 28(8) and 29(5) so that a failure to comply with the requirements to record reasons will invalidate the summons or notice. In addition, a failure to attach the relevant ACC Board determination to a summons will invalidate the summons.<sup>9</sup>

4.8 The Bill would also amend subsections 29B(2) and (4) to ensure that, where a notation under section 29A prohibits disclosures about a summons or notice, this will not prevent disclosures:

- to the Ombudsman for the purposes of making a complaint under the *Ombudsman Act 1976*; or

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5 Explanatory Memorandum, p. 168.

6 Explanatory Memorandum, pp 168-169.

7 Items 9, 10, 12 and 13 of Schedule 7; Explanatory Memorandum, pp 170 and 171. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 2, pp 11-16; ACC, *Submission 7*, p. 9.

8 Explanatory Memorandum, pp 170 and 171. In some circumstances, section 29A requires an examiner to include a notation in a summons or notice prohibiting disclosure of information about the summons or notice (for example, where it is reasonable to expect that a disclosure would prejudice the safety or reputation of a person).

9 Items 11 and 14, of Schedule 7; Explanatory Memorandum, pp 170-171. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 3, pp 21-22; ACC, *Submission 7*, p. 9.

- 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.<sup>10</sup>

### ***Powers to deal with uncooperative witnesses***

4.9 The ACC Act contains a number of criminal offences aimed at ensuring that a person issued with a notice or summons complies with that notice or summons. These offences are punishable by up to five years imprisonment or a fine not exceeding 200 penalty units and relate to:

- failing to attend an examination;
- failing to take an oath or affirmation;
- failing to produce a document;
- failing to answer questions;
- giving false or misleading evidence; and
- obstructing or hindering an examiner or the ACC.<sup>11</sup>

4.10 However, the Explanatory Memorandum argues that there are difficulties in relation to these offences achieving the aim of ensuring witnesses comply with notices and summons:

There are two issues with the offences as they currently operate. Firstly, there is no immediate threat of detention. At present, if a person is summonsed to appear as a witness and attends the examination but refuses to cooperate, the matter is referred to the [Commonwealth Director of Public Prosecutions] and the prosecution proceeds by way of summons. As a result, there is no immediate detention or threat of immediate detention to the person. ...

Secondly, the effectiveness of these offences is often compromised by the delay in the commencement of court proceedings. It can often take a long time before a matter is brought before a court and even longer before the court is able to deal with the matter. Witnesses have been prepared to not cooperate with examiners, knowing that no penalty will be imposed for at least 12-18 months. Witnesses are aware that they may also be able to avoid criminal conviction (and therefore any penalty) by eventually agreeing to give evidence prior to the completion of the criminal process knowing that the evidence will have lost its value to the investigation by that stage. By

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10 Items 15 and 17 of Schedule 7; Explanatory Memorandum, pp 171-174. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 4, p. 26; ACC, *Submission 7*, p. 6.

11 Subsection 29(3A), subsection 30(6), subsection 33(2) and subsection 35(2); Explanatory Memorandum, p. 174. A 'penalty unit' is currently \$110.

delaying when information is provided, a witness is able to effectively delay and frustrate the operation of an ACC investigation.<sup>12</sup>

4.11 The Bill proposes to insert new provisions in the ACC Act which would allow the ACC to refer a witness, who is not cooperating with an examination, to a court to be dealt with as if the person was in contempt of that court.<sup>13</sup> Similar powers were proposed for the National Crime Authority by the National Crime Authority Legislation Amendment Bill 2000 but were rejected by the Senate.<sup>14</sup>

4.12 Proposed section 34A would provide that a person is 'in contempt of the ACC' if he or she:

- (a) refuses or fails:
  - (i) to take an oath or affirmation;
  - (ii) to answer a question; or
  - (iii) to produce a document or thing;
- (b) provides false or misleading information to an examiner;
- (c) obstructs or hinders an examiner in the performance of his or her functions;
- (d) disrupts an examination; or
- (e) threatens a person present at an examination.<sup>15</sup>

4.13 In addition, proposed subsection 34A(b) would provide that a legal practitioner is in contempt of the ACC if the practitioner:

- refuses to answer a question or produce a document on the basis of legal professional privilege; and
- also refuses to reveal the name and the address of the person to whom the privilege applies.<sup>16</sup>

4.14 The Explanatory Memorandum notes that the elements of proposed section 34A mirror the offences under the ACC Act related to not cooperating with an ACC examination.<sup>17</sup>

4.15 Where an examiner considers that a person is in contempt of the ACC, proposed subsection 34B(1) would allow the examiner to apply to a court for the

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12 Explanatory Memorandum, pp 174-175. See also ACC, *Submission 7*, pp 3-4; Mr John Lawler, Chief Executive Officer, ACC, *Committee Hansard*, 29 October 2009, pp 1 and 4; *Answers to questions on notice*, 9 November 2009, p. 16.

13 Item 18 of Schedule 7; Explanatory Memorandum, p. 174.

14 *Senate Hansard*, 8 August 2001, pp 25833-25856. See also ACC, *Submission 7*, p. 3.

15 Explanatory Memorandum, p. 176.

16 Explanatory Memorandum, p. 176.

17 Explanatory Memorandum, p. 177. Note that the offence of threatening a person at an examination would be inserted in the ACC Act by Item 19 of Schedule 7 which amends section 35: Explanatory Memorandum, pp 179-180; ACC, *Submission 7*, p. 10.

person to be dealt with in relation to the contempt.<sup>18</sup> The examiner would have to inform the person that he or she proposes to make such an application.<sup>19</sup>

4.16 The application would have to be accompanied by a certificate setting out the grounds for the application and the evidence supporting it.<sup>20</sup> Proposed subsection 34C(3) would provide that this certificate is prima facie evidence of the matters it sets out.<sup>21</sup> The person accused of the contempt would have to be given a copy of the certificate either before or at the same time as the application is made.<sup>22</sup>

4.17 Proposed subsection 34B(5) would allow the court, after considering the certificate and any evidence in support of the ACC or the person, to determine that a person was in contempt of the ACC. Where the court did so, it would be able to deal with the person as if he or she were in contempt of that court.<sup>23</sup>

4.18 Proposed subsection 34D(1) would empower an examiner, who proposes to make a contempt application to a court, to direct an AFP officer or a state or territory police officer to detain a person for the purposes of bringing him or her before the court for contempt proceedings.<sup>24</sup> Where an examiner does so, proposed subsection 34D(2) would require firstly that the ACC to make the contempt application as soon as practicable and secondly that the person be brought before the court as soon as practicable.<sup>25</sup>

4.19 The Bill would amend section 35A to ensure that, where a contempt application is made to a court in relation to a person's conduct and the person is dealt with by the court in relation to that conduct, the person cannot be prosecuted for an offence in relation to the same conduct. Conversely, if a person has been prosecuted for an offence in relation to conduct, a contempt application will not be able to be made in relation to the same conduct.<sup>26</sup>

4.20 The ACC submission noted that state agencies with similar powers to the ACC to investigate serious and organised crime or official corruption have the option of citing a witness for contempt before the state Supreme Court:

This power is rarely used but its availability appears to have a salutary effect on witnesses. It raises the prospect of immediate custody and

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18 Explanatory Memorandum, p. 177. The application must be either to the Federal Court, or to the Supreme Court of the state or territory in which the examination is being conducted.

19 Proposed subsection 34B(2); Explanatory Memorandum, p. 177.

20 Proposed subsection 34B(3); Explanatory Memorandum, p. 177.

21 Explanatory Memorandum, p. 178.

22 Proposed subsection 34B(4); Explanatory Memorandum, p. 177.

23 Explanatory Memorandum, p. 177.

24 See the definition of 'constable' which would be inserted in subsection 4(1) by Item 1 of Schedule 7 and the existing definition of 'State' in subsection 4(1); Explanatory Memorandum, p. 178.

25 Explanatory Memorandum, p. 178. The reference to the ACC in this provision appears to be a drafting error since it is the examiner, not the ACC, who is empowered to make the contempt application under proposed subsection 34B(1).

26 Items 20 and 21 of Schedule 7; Explanatory Memorandum, p. 180.

detention for an initially indeterminate period, even if the alleged [contemnor] is able to obtain bail pending a full hearing of the contempt allegations. This is a strong motivation for an initially recalcitrant witness to reconsider their position and purge their contempt by complying with the original requirement.<sup>27</sup>

4.21 The independent review of the ACC Act conducted by Mr Mark Trowell QC in 2007 (the Trowell report) recommended that contempt provisions be introduced into the ACC Act.<sup>28</sup> The PJC has also supported such provisions noting that:

In view of the ACC's function to combat serious and organised crime, the PJC considers that the ACC examiners should be given assistance to enable them to overcome the difficulties presented by persons who deliberately obstruct the ACC examination process with a view to frustrating special ACC operations and investigations.

The committee is persuaded that a limited statutory definition of contempt and a statutory power of referral would be appropriate.<sup>29</sup>

### **ACC Board**

4.22 Item 7 of Schedule 7 would amend subsection 7B(2) of the ACC Act to include the Commissioner of Taxation on the board of the ACC. The Explanatory Memorandum outlines the rationale for the change:

The current membership of the Board provides for a diverse range of issues and views to be considered in setting the ACC's priorities. The benefits of adding the Commissioner of Taxation as a Board member is that it will further enhance the ACC Board's expertise and, in light of significant taxation related activity identified in ACC investigations and intelligence operations, increase the ACC's capability to counter the impact of serious and organised crime.<sup>30</sup>

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27 *Submission 7*, p. 3. See also Explanatory Memorandum, pp 176 and 178. For examples of similar powers under state legislation see section 49 of the *Major Crime (Investigative Powers) Act (Vic)* and section 163 of the *Corruption and Crime Commission Act 2003 (WA)*.

28 Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, March 2007, recommendations 2 to 7, pp 4, 5-6 and 42-71; Explanatory Memorandum, p. 175.

29 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, p. 49. See also recommendation 6 and PJC, *Examination of the Australian Crime Commission Annual Report 2007-08*, at: [http://www.aph.gov.au/Senate/committee/acc\\_ctte/annual/2008/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_ctte/annual/2008/report/report.pdf) (accessed on 14 October 2009), recommendation 1, pp 13-14; Explanatory Memorandum, pp 175-176.

30 Explanatory Memorandum, p. 168. See also ACC, *Submission 7*, p. 4.

4.23 The Explanatory Memorandum notes that the PJC has recommended that the Commissioner of Taxation be included on the board of the ACC on several occasions.<sup>31</sup>

### ***Accountability and review***

4.24 Finally, the Bill would insert a new section 61A to provide for regular, five-yearly reviews of the operation of the ACC Act. The first review would be of the period five years from the commencement of Schedule 7. A review would not have to be conducted in a particular five year period if a parliamentary committee commences a review of the ACC Act in that period.<sup>32</sup> Commenting on this amendment, the ACC acknowledged that:

...it is endowed with extraordinary powers to interfere with the rights of individuals in order to combat a major social evil, in the form of serious and organised crime, and that it is vitally important that these coercive powers are not abused. Accordingly, it accepts that from time to time its performance should be subject to review, to ensure that it is continuing to use the coercive powers, and to perform its functions more generally, in a responsible way, balancing its objectives in robustly addressing the threat of serious and organised crime with sensitivity to the genuine requirements of human rights in a democratic society.<sup>33</sup>

4.25 This amendment responds a recommendation of the PJC but the PJC recommended the first review should occur no later than January 2011.<sup>34</sup>

4.26 In addition, the PJC recommended that the Commonwealth Ombudsman should inspect records of ACC examiners to ensure compliance with the ACC Act and that the Ombudsman should provide at least annual briefings to the PJC in relation to the exercise of coercive powers by the ACC.<sup>35</sup> However the Bill does not implement these recommendations.

### **Issues raised in submissions**

4.27 The Western Australian Attorney-General expressed some concerns in relation to the amendments to the ACC Act which would treat a contempt of the ACC as if it were a contempt of court. In particular, the Attorney-General noted that proposed subsection 34A(b) appears to prevail over legal professional privilege.<sup>36</sup>

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31 Explanatory Memorandum, p. 167. See for example PJC, *Review of the Australian Crime Commission Act 2002*, at [http://www.aph.gov.au/Senate/committee/acc\\_ctte/completed\\_inquiries/2004-07/acc\\_act02/report/index.htm](http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/acc_act02/report/index.htm) (accessed 14 October 2009), November 2005, recommendation 6, pp 54 and 56.

32 Item 22 of Schedule 7; Explanatory Memorandum, pp 180-181.

33 *Submission 7*, p. 10.

34 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 8, p. 58.

35 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendations 9 and 10, pp 58-59.

36 *Submission 4*, pp 1-2.

4.28 In addition, the Attorney-General pointed out that, under proposed subsection 34D(1), a legal practitioner could be placed in detention, before they are convicted of contempt, for refusing to produce a document to which legal professional privilege would otherwise apply. The Attorney-General argued that, unless there are compelling examples to support the need for such a power, this provision should be amended to provide for contempt applications to be dealt with expeditiously by the courts rather than immediate detention at the behest of the examiner.<sup>37</sup>

4.29 The Law Council similarly argued that:

...ACC examiners, who are not judicial officers, should not be given the power to authorise a person's detention, for whatever purpose or period.<sup>38</sup>

4.30 Furthermore, the Law Council expressed concern:

...that the power to order a person's detention pending referral to the court is not directed at securing their attendance, but rather is intended to operate in a punitive way and thus provide a very immediate incentive for cooperation.<sup>39</sup>

4.31 The Law Council opposed the enactment of proposed subsection 34D but suggested that, at least, proposed subsection 34D(1) should be amended to specifically provide that an examiner may only direct that a person be detained where he or she believes, on reasonable grounds, that it is necessary to detain the person in order to secure that person's attendance before the court.<sup>40</sup>

4.32 In the context of its inquiry into the *Royal Commission Act 1902*, the Australian Law Reform Commission (ALRC) has examined some of the difficulties involved in applying the concept of contempt to non-judicial bodies.<sup>41</sup> ALRC also outlined alternative approaches to contempt provisions similar to those contemplated by the Bill. One example is section 70 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) which allows the Australian Securities and Investments Commission (ASIC) to apply to the Federal Court for an order for enforcement of its orders. A refusal to comply with the court order will then amount to a contempt of court.<sup>42</sup> ASIC frequently considers the use of this power because 'it generally aims to secure compliance rather than impose punishment.'<sup>43</sup> ALRC noted that:

The procedure of applying to a court to enforce an order for compliance differs, in a subtle but important way, from the procedure used in some

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37 *Submission 4*, p. 2.

38 *Submission 12*, p. 20.

39 *Submission 12*, p. 20.

40 *Submission 12*, p. 21.

41 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75, at: <http://www.alrc.gov.au/inquiries/current/royal-commissions/DP75/index.html> (accessed 15 October 2009), August 2009, pp 429-431.

42 ALRC, pp 433-435.

43 ALRC, p. 433.



state and territory legislation of applying to a court to punish conduct as a contempt of court. The approach of applying for enforcement avoids using the concept of contempt in the context of Royal Commissions and other public inquiries. Rather, the scope of the conduct that may be referred to the court is limited to a failure to comply with notices or directions of the tribunal or inquiry.<sup>44</sup>

4.33 Similarly, the Law Council submitted that this procedure of applying to a court to enforce an order for compliance is preferable to the procedure proposed in the Bill because:

...rather than requiring the court to treat contempt of the ACC as contempt of the court, it first requires the court to make a decision whether or not to enforce the relevant order of the ACC.

If the Court decides to enforce that order and the person to whom it is directed still refuses to comply, then this refusal to comply will, in fact, be contempt of the court and may be treated as such. ...[T]he law of contempt was developed to protect the administration of justice. Therefore, it should only be employed to safeguard and reinforce the authority of the court, and not executive bodies exercising executive powers – such as the ACC.<sup>45</sup>

4.34 On the other hand, the Police Associations supported the proposed amendments to the ACC Act that relate to dealing with witnesses who refuse to cooperate with ACC examiners.<sup>46</sup>

### ***Government response***

4.35 In explaining the need for the contempt provisions, Mr John Lawler, Chief Executive Officer of the ACC, noted that the ACC was experiencing a growing problem with uncooperative witnesses:

We are seeing a very deliberate, orchestrated and coordinated campaign by serious and organised crime networks who are lawfully summons before ACC coercive hearings. We are seeing them failing to attend hearings in contravention of the lawful process that has been served upon them, when they arrive at a hearing failing to enter the witness box or to take an oath, failing to answer questions or indeed, when they do answer questions, providing false or misleading evidence to the Australian Crime Commission examiner. ...

In 2007-08 eight persons were charged with such offences and 14 persons were charged in 2008-09, which was a 60 per cent increase. In the five months of the 2009-10 financial year a total of 12 people have already been identified and are in the process of being charged or briefs of evidence are

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44 ALRC, p. 435. See also Law Council, *Submission 12*, pp 17-18.

45 *Submission 12*, p. 18.

46 *Submission 3*, p. 6. See also Professor Broadhurst and Ms Ayling, *Submission 6*, pp 1 and 2.

being prepared for the Director of Public Prosecutions, with six in the last week.<sup>47</sup>

4.36 Mr Michael Outram, Executive Director of the ACC, explained how a coordinated campaign of non-cooperation by witnesses can frustrate ACC investigations:

Under the current process, we cannot usually revert to an arrest scenario because we generally cannot satisfy the arrest provisions. We actually have to go through a summoning process, and that can take some time. We then have to go through the court process... We did an analysis in 2006, ...at that time... the average time being taken was over 20 months to resolve these cases. But, of course, our investigations are very dynamic; it is a very quick moving environment, and when lines of inquiry become 'hot' we want to respond to that. So what this does is undermine the outcome of the investigation or the special intelligence operation and it means that opportunities are lost. Certainly two years down the track the forensic purpose has all but gone and the opportunity has gone.<sup>48</sup>

4.37 In response to a question from the committee regarding why an examiner should have the power to detain a witness before he or she has even made a contempt application to the court, Mr Outram stated:

In a practical sense, if somebody attends an examination and refuses at that point to cooperate, either by refusing to take the oath or by refusing to answer questions, then our purpose is to avoid delay and to get that person to the point where they comply as soon as possible. ...If the examiner does not refer it to the court immediately and the person is not taken into custody by a police officer at the same time or almost immediately, it defeats the purpose, which is to get them in front of the other court as soon as possible.<sup>49</sup>

4.38 The Attorney-General's Department rejected the position of the Western Australian Attorney-General that proposed subsection 34A(b) overrides legal professional privilege:

...that provision does not override legal professional privilege, but it requires a lawyer, when claiming legal professional privilege in relation to answers or documents, to provide the name and address of the individual to whom the legal professional privilege relates—the lawyer's client—so that the ACC can make inquiries of the client about whether they also wish to claim legal professional privilege or waive it in that instance. It is only in

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47 *Committee Hansard*, 29 October 2009, p. 3. See also *Answers to questions on notice*, 9 November 2009, p. 14.

48 *Committee Hansard*, 29 October 2009, pp 7-8. See also Mr Lawler, *Committee Hansard*, 29 October 2009, pp 4 and 8; *Answers to questions on notice*, 9 November 2009, p. 15.

49 *Committee Hansard*, 29 October 2009, p. 14.

relation to a failure to provide a name or address that that lawyer can then be subject to offences.<sup>50</sup>

4.39 In addition, an officer from the Attorney-General's Department advised that the department did consider an approach similar to section 70 of the ASIC Act but instead adopted the proposed contempt provisions in the Bill because they are consistent with the recommendations of the Trowell report and the PJC.<sup>51</sup>

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50 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 8. See also Mr Outram, ACC, *Committee Hansard*, 29 October 2009, p. 9.

51 Ms Chidgey, *Committee Hansard*, 29 October 2009, p. 14.



