



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE STANDING COMMITTEE ON
UNIFORM LEGISLATION AND GENERAL PURPOSES
IN RELATION TO THE

AUSTRALIAN CRIME COMMISSION
(WESTERN AUSTRALIA) BILL 2003**

Presented by Hon Adele Farina MLC (Chairman)

Report 15
June 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

7.1 *A Uniform Legislation and General Purposes Committee* is established.

7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

- (a) to consider and report on bills referred under SO 230A;
- (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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ISBN 1 9208 8610 9

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List of Acronyms and Defined Terms

ACC	Australian Crime Commission
ACT Committee	Standing Committee on Legal Affairs of the Australian Capital Territory Parliament
August Agreement	Meeting of the Commonwealth, State and Territory Police Ministers held on August 9 2004 convened to progress the agreement reached at the Leaders' Summit
CCC	Western Australian Corruption and Crime Commission
CEO	Chief Executive Officer of the Australian Crime Commission
COAG	Council of Australian Governments
<i>Commonwealth Act</i>	<i>Australian Crime Commission Act 2002 (Cth)</i>
Committee	Standing Committee on Uniform Legislation and General Purposes
Council	Legislative Council of the Western Australian Parliament
Derivative use immunity	Prevents evidence sourced from self-incriminating documents or answers being used to support a prosecution against the person who produced the documents or answers
Direct use immunity (also known as immediate use immunity)	Immunity from a prosecution that could otherwise be commenced on the basis of documents produced or answers given in evidence
House	Legislative Council of the Western Australian Parliament
IGC	Inter-Governmental Committee on the Australian Crime Commission (formerly the Inter-Governmental Committee on the National Crime Authority)
Leaders' Summit	Meeting of the Australian Government Leaders (Prime Minister and State and Territory Leaders) at the Summit on Terrorism and Multi-jurisdictional Crime held on April 5 2002
Legislation Committee	Standing Committee on Legislation

Minister	Minister for Police and Emergency Services, Hon Michelle Roberts MLA
NCA	National Crime Authority
PJC	Commonwealth Parliamentary Joint Committee on the National Crime Authority
Prejudice clause	<p>A clause that provides that the Chair of the Board of the Australian Crime Commission is not required to provide certain information if he or she considers that the disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies</p> <p>See for example, clause 43(3) of the Australian Crime Commission (Western Australia) Bill 2003.</p>
State Bill	Australian Crime Commission (Western Australia) Bill 2003
Working party	Working Party of Representatives of Scrutiny Committees throughout Australia
1996 Position Paper	1996 Position Paper by the Working Party of Representatives of Scrutiny Committees throughout Australia

EXECUTIVE SUMMARY AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 The Australian Crime Commission (Western Australia) Bill 2003 is part of a uniform scheme of legislation underpinning the activities of the Commonwealth law enforcement agency, the Australian Crime Commission.
- 2 The Australian Crime Commission commenced operation on January 1 2003 replacing the Commonwealth National Crime Authority and the Commonwealth agencies: the Australian Bureau of Criminal Intelligence and the Office of Strategic Assessments.
- 3 The broad role of the Australian Crime Commission is to provide an enhanced national law enforcement capacity with respect to criminal activity of national significance.¹ In performing this role, the Australian Crime Commission conducts intelligence operations and investigations into serious and organised crime.
- 4 As the *Commonwealth Constitution* does not give the Commonwealth any specific legislative power in relation to criminal law, a uniform legislative scheme, similar to that underpinning the National Crime Authority supports the national operations of the Australian Crime Commission.
- 5 The Australian Crime Commission is established pursuant to the *Australian Crime Commission Establishment Act 2002* (Cth) which amended the *National Crime Authority Act 1984* (Cth). The amended Act was named the *Australian Crime Commission Act 2002* (Cth).
- 6 Pursuant to the *Australian Crime Commission Act 2002* (Cth) the Australian Crime Commission is able to conduct investigations and intelligence operations concerning serious and organised crime relating to Commonwealth offences or State offences (with a federal aspect).
- 7 The primary purpose of the Australian Crime Commission (Western Australia) Bill 2003 is to complement the *Australian Crime Commission Act 2002* (Cth) and enable the Australian Crime Commission to conduct intelligence operations and investigations into serious and organised crime in relation to State offences (irrespective of whether those offences have a federal aspect).
- 8 In conducting intelligence operations and investigations into serious and organised crime, the Australian Crime Commission is vested with coercive powers such as the

¹ See the August Agreement in Appendix 4. See also ACC Profile <http://www.crimecommission.gov.au/content/about/pub-acc-profile-2003.pdf>, (current at June 2 2004).

power to require witnesses to attend and give evidence. The use of these powers must be authorized by the Board of the Australian Crime Commission which comprises 13 voting members, nine of whom are the heads of the various Commonwealth and State police forces.

- 9 Under the National Crime Authority regime, the Inter-Governmental Committee (comprising the State and Commonwealth Ministers) approved references by the Commonwealth and State Ministers to the National Crime Authority for the investigation of criminal offences using coercive powers. Under the Australian Crime Commission scheme, the Inter-Governmental Committee is instead responsible for oversight of the Australian Crime Commission.
- 10 There are a number of amendments which are set out below that the Standing Committee on Uniform Legislation and General Purposes considers are required to enable the Australian Crime Commission to operate effectively pursuant to the Australian Crime Commission (Western Australia) Bill 2003.
- 11 In addition, there are a number of other matters the Standing Committee on Uniform Legislation and General Purposes noted:
 - The shift in the responsibility for the authorization of the use of coercive powers from the Inter-Governmental Committee to the Board and the accountability mechanisms relating to the powers of the Australian Crime Commission and the Board (paragraphs 4.2 to 4.7 and 4.53 to 4.59).
 - The fact that, unlike the National Crime Authority regime, the Board can authorize the Australian Crime Commission to conduct intelligence operations and investigations using coercive powers in relation to State offences within Western Australia irrespective of the consent of the State representative on the Board (paragraphs 2.42 to 2.48).
 - The potential overlap in jurisdiction between the Australian Crime Commission and the Corruption and Crime Commission (paragraphs 3.11 to 3.22).
 - Clause 3 and the potential for the definition of ‘serious and organised crime’ to be expanded by regulation (paragraphs 3.5 to 3.10).
 - Clause 3(3) which enables the Australian Crime Commission to investigate incidental offences to ‘serious and organised crime’ (paragraphs 3.23 to 3.28).
 - Clause 22 and offences of disclosure (paragraphs 3.29 to 3.37).
 - Clause 23 and the abrogation of the privilege against self-incrimination (paragraphs 3.47 to 3.66).

- Clause 24 and the ability of the Australian Crime Commission to detain persons pursuant to arrest warrants (paragraphs 3.86 to 3.90).
- Clause 47 and obstructing, hindering or disrupting the Australian Crime Commission or an examiner (paragraphs 3.125 to 3.130).

RECOMMENDATIONS

12 Recommendations are grouped as they appear in the text at the page number indicated:

Page 43

Recommendation 1: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 expressly preserve the operation of the *Parliamentary Privileges Act 1891*. This can be effected in the following manner:

Clause 32:

Page 37, after line 11 - To insert -

“

(2) Despite subsection (1), the performance or exercise of a function or power conferred or authorized under this Act is subject in every case to the *Parliamentary Privileges Act 1891*.

”.

Page 45

Recommendation 2: The Committee recommends that clause 24 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to explicitly state that an application for a warrant for the arrest of a witness is made to a Judge sitting in chambers. This can be effected in the following manner:

Page 26, line 20 - To insert after “Supreme Court” –

“ sitting in chambers ”.

Page 46

Recommendation 3: The Committee recommends that clause 28 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to explicitly state that an application for an order for delivery to an examiner of the passport of a witness is made to a Judge sitting in chambers. This can be effected in the following manner:

Page 29, line 17 - To insert after “Court” –

“ sitting in chambers ”.

Page 51

Recommendation 4: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to ensure that a legal practitioner appointed under clause 7 is within the ambit of clause 44 which is a statutory secrecy provision. This can be effected in the following manner:

Clause 3:

Page 5, after line 23 - To insert -

“

(2a) For the purposes of this Act (except the definition of “Commonwealth body or person” in subsection (1)) the definition of “member of the staff of the ACC” in section 4(1) of the ACC Act is taken to extend to a legal practitioner appointed under section 7.

”.

Clause 71(2)(d):

Page 58, line 23 - To insert after “Commonwealth” -

“

as extended by section 3(2a) of the *Australian Crime Commission (Western Australia) Act 2004*.

”.

Page 55

Recommendation 5: The Committee recommends that clause 45 which relates to the CEO delegating functions under the Australian Crime Commission (Western Australia) Bill 2003 be amended to prevent the CEO from delegating the power of delegation. This can be effected in the following manner:

Clause 45:

Page 46, line 12 - To insert after “under” -

“ another provision of ”.

Page 60

Recommendation 6: The Committee recommends that clause 64(3) which permits retrospective transitional regulations and the associated clauses 64(4) and 64(5) be deleted. This can be effected in the following manner:

Page 53, line 19 to page 54, line 6 - To delete the lines.

Page 61

Recommendation 7: The Committee recommends that clause 66 of the Australian Crime Commission (Western Australia) Bill 2003 be deleted. This can be effected in the following manner:

Page 55, lines 8 to 19 - To delete the clause.

Page 69

Recommendation 8: The Committee recommends that clause 43 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to remove the restriction in clause 43(3) applying to the State Minister. This can be effected in the following manner:

Page 42, line 6 - To delete “Subject to subsection (3),”.

Page 42, lines 12 to 16 - To delete the lines.

Recommendation 9: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to require that upon the State Minister becoming aware that the review conducted under section 61A of the *Australian Crime Commission Act 2002* (Cth) has been tabled in the Commonwealth Parliament, that the State Minister do inform the State Parliament of that fact and obtain and table a copy of the report in State Parliament. This can be effected in the following manner:

Page 49, after line 8 - To insert the following new Clause –

“

49A Tabling of the review of the ACC Act

At the earliest opportunity after the State Minister becomes aware that a report under section 61A of the ACC Act has been laid before the Commonwealth Parliament the State Minister must -

- (a) cause a copy of the report to be laid before each House of Parliament; or
- (b) if copies of the report are not then available, notify each House that a report has been presented under section 61A and indicate when it is expected that a copy will be laid before it.

”.

Page 80

Recommendation 10: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to require that the State Minister cause a review of the operation of the Act and table that review in State Parliament. This can be effected in the following manner:

Page 49, after line 8 - To insert the following new Clause –

“

49B Review of Act

- (1) The State Minister must cause an independent review of the operation and effectiveness of this Act to be undertaken as soon as possible after the expiration of 3 years after its commencement.
- (2) A person who undertakes such a review must give the State Minister a written report of the review.
- (3) The State Minister must cause a copy of the report of the review to be laid before each House of Parliament of the State within 4 years after the commencement of this Act.

”.

Page 82

Recommendation 11: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to provide for a review of the provisions of the Australian Crime Commission (Western Australia) Bill 2003 in accordance with paragraph 4.79.

CHAPTER 1

INTRODUCTION

REFERRAL OF THE STATE BILL

- 1.1 On December 4 2003, the Australian Crime Commission (Western Australia) Bill 2003 (**State Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to Standing Order 230A. Standing Order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of the first reading of the State Bill, being January 2 2004. Pursuant to the Committee's requests, the House granted extensions of time within which to report with the latest extension being to June 22 2004.
- 1.2 Pursuant to Standing Order 230A(5) the policy of the State Bill is not a matter for inquiry by the Committee.
- 1.3 The purpose of the State Bill is to:
- enable the Commonwealth law enforcement agency, the Australian Crime Commission (**ACC**), to conduct intelligence operations and investigations into relevant criminal activity in Western Australian in relation to State offences (irrespective of whether those offences have a federal aspect);²
 - repeal the *National Crime Authority (State Provisions) Act 1985*; and
 - make consequential amendments to various Acts to effect the transition from the National Crime Authority (**NCA**) to the ACC.

INQUIRY PROCEDURE

- 1.4 The Committee was aware that the State Bill would be subject to Standing Order 230A when it was introduced into the Council and would probably stand referred to the Committee. In anticipation of such referral the Committee, of its own motion, commenced preliminary research into the background to the State Bill.³
- 1.5 On November 28 2003, the Committee wrote to Hon Michelle Roberts MLA, Minister for Police and Emergency Services (**Minister**) seeking information about a number of

² Second Reading Speech, Hon Nick Griffiths MLC, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14150.

³ The Committee's Term of Reference 7.3(b) states "*The functions of the Committee are...(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;*".

aspects of the State Bill including a copy of the relevant intergovernmental agreement or memorandum of understanding. The Minister replied in a letter dated February 16 2004.

- 1.6 The Committee also wrote to the Minister on March 12 2004 and April 20 2004 seeking the Minister's response to a number of specific queries in relation to the State Bill. The Minister replied in letters received on April 7 and May 24 2004.
- 1.7 The Committee wrote to a number of relevant stakeholders inviting submissions on the State Bill. A list of those stakeholders is attached as Appendix 1. The Committee received a submission from the Western Australian Police Service dated February 10 2004 and a submission from the Law Society of Western Australia dated February 11 2004.
- 1.8 Details of the inquiry were also placed on the parliamentary website at: www.parliament.wa.gov.au.

UNIFORM LEGISLATION

- 1.9 The State Bill is an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation or may ratify or give effect to an intergovernmental agreement to which Western Australia is a party.

Scrutiny of uniform legislation in the Western Australian Parliament

- 1.10 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.⁴
- 1.11 More recently, during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation (**Legislation Committee**). In November 2001, the relevant Council Standing Order (Standing Order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative structures

- 1.12 National legislative schemes of uniform legislation were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation (**1996 Position Paper**) by

⁴ For discussion of the history of the scrutiny of uniform legislation and Standing Order 230A refer to: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, August 2002, pp5-6.

the Working Party of Representatives of Scrutiny Committees throughout Australia (**Working Party**). The 1996 Position Paper emphasised that the Working Party does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.

- 1.13 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a ‘given’.⁵
- 1.14 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to Standing Order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarized in Appendix 2.⁶
- 1.15 The State Bill is ‘uniform legislation’ within the meaning of Standing Order 230A by virtue of being pursuant to an intergovernmental agreement to which the Government of the State is a party: Standing Order 230A(1)(a). The State Bill is an example of a form of uniform legislation known as ‘complementary’ or ‘mirror’ legislation (refer to Structure 2 in Appendix 2).

Scrutiny principles

- 1.16 One of the recommendations contained in the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
- does the bill trespass unduly on personal rights and liberties;⁷ and
 - does the bill inappropriately delegate legislative powers?⁸

⁵ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, Scrutiny of National Schemes of Legislation Position Paper, October 1996, pp7 - 12 attached as Appendix 1 to Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Position Paper: Scrutiny of National Schemes of Legislation, October 17 1996.

⁶ Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

⁷ For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

⁸ For example: ‘Henry VIII clauses’, insufficient parliamentary scrutiny of the exercise of legislative power.

- 1.17 In recent times, the Committee has also considered the impact of proposed legislation on the application of parliamentary privilege.⁹ This issue is considered in Chapter 3 of this Report in relation to clauses 23 and 44 of the State Bill.
- 1.18 Although not adopted formally by the Council as part of the Committee's terms of reference, the uniform scrutiny principles can be applied as a convenient framework for the scrutiny of legislation.

BACKGROUND TO THE STATE BILL

Intergovernmental Agreement

- 1.19 The impetus for the creation of the ACC was an agreement reached on April 5 2002 by the Australian Government Leaders (Prime Minister and State and Territory Leaders) at the Summit on Terrorism and Multi-jurisdictional Crime (**Leaders' Summit**).¹⁰ The Leaders' Summit considered the measures required to address terrorism, organised crime and multi-jurisdictional crime following the attacks in the United States on September 11 2001.¹¹
- 1.20 In relation to organised crime, the principal agreement was to strengthen the fight against organised crime by replacing the National Crime Authority (NCA) with the ACC. It was agreed that the ACC would come into operation by December 31 2002¹² and would be implemented through a similar cooperative legislative scheme to that utilised for the NCA.¹³
- 1.21 A copy of the agreement from the Leaders' Summit has been provided to the Committee by the Minister in response to a request for the relevant Intergovernmental Agreement (attached as Appendix 3). The Minister also provided the following documents (also see Appendix 3):
- a) an extract from the 38th meeting of the Inter-Governmental Committee of the NCA (Resolutions) November 5 2002; and

⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp7–12; and also refer to *Report No 11: Higher Education Bill 2003*, September 2003, pp24–34.

¹⁰ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14149; Commonwealth, Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p1.

¹¹ *Commonwealth and State and Territories Agreement on Terrorism and Multi-jurisdictional Crime, 5 April 2002* annexed to Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, February 16 2003 (see Appendix 3).

¹² Ibid.

¹³ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14150.

- b) a copy of the minutes of a meeting of the Inter-Governmental Committee on the ACC (consideration out of session) relating to the model State Bill (undated).
- 1.22 The Minister advised the Committee that these documents demonstrate the events leading to the development of the State Bill.¹⁴
- 1.23 On August 9 2002, a meeting of the Commonwealth, State and Territory Police Ministers was convened to progress the agreement reached at the Leaders' Summit in relation to the ACC and a number of significant matters were agreed (**August Agreement**) (attached as Appendix 4).

Observations

- 1.24 The Committee observes that the Intergovernmental Agreement relating to the ACC is limited to seven points in a wider agreement relating to terrorism and multi-jurisdictional crime. The Intergovernmental Agreement and the August Agreement canvass broad general principles only.
- 1.25 The Committee has previously reported its concerns to the House where there is little or no written material recording the original agreement between the Commonwealth, States and Territories when uniform legislation is proposed.¹⁵

The ACC

- 1.26 The ACC commenced operation on January 1 2003 pursuant to the *Australian Crime Commission Establishment Act 2002* (Cth) which amended the *National Crime Authority Act 1984* (Cth). The amended Act was named the *Australian Crime Commission Act 2002* (Cth) (**Commonwealth Act**).
- 1.27 The broad role of the ACC is to provide an enhanced national law enforcement capacity with respect to criminal activity of national significance.¹⁶

¹⁴ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1). It is noted that the advice from the Minister contained in this letter is primarily contained in an attachment which indicates that the advice was provided by the Western Australian Police Service. This applies to all references to Letter 1 of April 7 2004 in this Report.

¹⁵ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p1. In the case of that bill there were no documents available to the Committee on the National Crime Authority (State Provisions) Amendment Bill 2002. In addition, there was no state held record of why that bill had been introduced, whether its provisions accorded with the Inter-Governmental Committee's agreement and whether other options had been considered. See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004, pp5-7.

¹⁶ See the August Agreement in Appendix 4. See also ACC Profile <http://www.crimecommission.gov.au/content/about/pub-acc-profile-2003.pdf>, (current at June 2 2004).

- 1.28 The ACC was created out of the merger of the NCA, the Australian Bureau of Criminal Intelligence and the Office of Strategic Assessments.¹⁷
- 1.29 The NCA was established to coordinate and lead a national law enforcement response to organised crime.¹⁸ The previous role of the NCA and its operations are considered in more detail at paragraphs 1.33 to 1.39.
- 1.30 The Australian Bureau of Criminal Intelligence was designed to facilitate the exchange of criminal intelligence between Australia's law enforcement agencies.¹⁹
- 1.31 The Office of Strategic Assessments was established to provide the Commonwealth Government with strategic assessments of significant crime trends and criminal threats to Australia, likely to emerge within 5 years.²⁰
- 1.32 The ACC has a role in relation to both criminal intelligence and the investigation of organised crime which reflects the amalgamation of these agencies. The role and powers of the ACC are considered in Chapter 2.

The NCA

- 1.33 The ACC is the successor to the NCA and adopts the legislative scheme which supported the operations of that agency. Therefore, it is relevant to briefly outline how the NCA operated.
- 1.34 As indicated, the NCA was established in order to coordinate and lead a national law enforcement response to organised crime. The *Commonwealth Constitution* does not give the Commonwealth any specific legislative power in relation to criminal law.²¹ Consequently, the operations of the NCA were underpinned by the *National Crime*

¹⁷ See Appendix 3 and Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14149.

¹⁸ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14150.

¹⁹ J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p5.

²⁰ The other main function of the Office of Strategic Assessments was to facilitate the coordination of intelligence assessment activities within Commonwealth law enforcement (see J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p6).

²¹ S. Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Australia, 2001, p32; J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p4.

Authority Act 1984 (Cth) and complementary enabling legislation in the States and Territories.²²

1.35 Pursuant to the *National Crime Authority Act 1984* (Cth), the NCA had two types of functions. The NCA had **general functions** including:²³

- collecting, analysing and disseminating criminal information and intelligence to law enforcement agencies;
- investigating relevant criminal activity;²⁴ and
- making arrangements for the establishment of taskforces and co-ordinating their work.

1.36 The NCA also had **special functions** in pursuance of which it was able to use coercive powers. Coercive powers “*permit an officially sanctioned body to take initiatives which ordinarily would be outside the scope of legally acceptable methods of criminal investigation*”.²⁵ For example, when investigating relevant criminal activity, the NCA was able to compel people to attend before it to give evidence and produce documents.²⁶

1.37 The special functions of the NCA were to investigate matters ‘referred’ pursuant to the *National Crime Authority Act 1984* (Cth) by either:²⁷

- the Commonwealth Minister (after consulting with the Inter-Governmental Committee²⁸) in relation to a **federally relevant criminal activity** (Commonwealth offences and State offences with a federal aspect); or
- the State Ministers (with the approval of the Inter-Governmental Committee) in relation to a **federally relevant criminal activity** (Commonwealth offences and State offences with a federal aspect) in so far as the relevant offence was,

²² Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, pp14150; J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p4.

²³ Section 11(1), *National Crime Authority Act 1984* (Cth).

²⁴ Defined in section 4 of the *National Crime Authority Act 1984* (Cth) to mean any circumstances implying, or any allegations, that a relevant offence (certain listed offences) may have been, may be, being, or may in future be committed against a law of the Commonwealth, of a State or of a Territory. To the extent that the definition in the *National Crime Authority Act 1984* (Cth) referred to an offence against a law of a State, it was held that the definition was not operative. *NCA v AI* (1997) 145 ALR 126 at 146.

²⁵ Commonwealth, Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p21.

²⁶ See sections 24A, 25 and 29, *National Crime Authority Act 1984* (Cth).

²⁷ Sections 11(2), 13 and 14, *National Crime Authority Act 1984* (Cth).

²⁸ The role of the Inter-Governmental Committee is considered further in Chapters 2 and 4.

or the relevant offences were or included an offence or offences against a law of that State.²⁹

- 1.38 These referrals by the Commonwealth Minister or the State Ministers under the *National Crime Authority Act 1984* (Cth) were restricted to Commonwealth offences or State offences with a federal aspect because of the limits on the legislative power of the Commonwealth. Consequently, the State and Territories passed complementary legislation to extend the jurisdiction of the NCA to include offences that had no link to an offence against Commonwealth law (no federal aspect). In Western Australia, this is the *National Crime Authority (State Provisions) Act 1985*.
- 1.39 Pursuant to the *National Crime Authority (State Provisions) Act 1985*, the State Minister was able (with the approval of the Inter-Governmental Committee) to refer a matter relating to relevant criminal activity for investigation by the NCA to the extent that the relevant offences were State offences (or included State offences).³⁰

PURPOSE OF THE STATE BILL

- 1.40 Similarly to the NCA, the ACC is established pursuant to the *Commonwealth Act* and is able to conduct investigations and intelligence operations³¹ concerning serious and organised crime within Commonwealth jurisdiction ('federally relevant criminal activity').³²
- 1.41 The State Bill like the *National Crime Authority (State Provisions) Act 1985*, is intended to extend the jurisdiction of the ACC to Western Australian offences that have no link to Commonwealth law. As Hon Nick Griffiths MLC stated in the Second Reading Speech, the State Bill is intended to:

...allow the appropriate ACC investigations and examinations in this State and to ensure that the ACC is empowered to conduct investigations and intelligence operations relating to state offences, including state offences without a federal aspect. It is almost an operational certainty that in the course of investigating offences with

²⁹ The consent of the Commonwealth Minister was also required, section 14 *National Crime Authority Act 1984* (Cth).

³⁰ Section 5, *National Crime Authority (State Provisions) Act 1985*.

³¹ Unlike the ACC, the NCA was not able to apply coercive powers to intelligence operations. For further consideration of this issue see Commonwealth, Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p29.

³² 'Federally relevant criminal activity' is defined in section 4 of the *Australian Crime Commission Act 2002* (Cth) to mean (a) a relevant criminal activity, where the serious and organised crime is an offence against a law of the Commonwealth or of a Territory; or (b) a relevant criminal activity, where the serious and organised crime is an offence against the law of the State and has a 'federal aspect'. 'Federal aspect' is widely defined in section 4A of the *Australian Crime Commission Act 2002* (Cth). Chapter 2 considers the functions and powers of the ACC pursuant to the *Australian Crime Commission Act 2002* (Cth) and the Australian Crime Commission (Western Australia) Bill 2003 in more detail.

*a federal aspect, the commission of offences of a purely state nature will also be disclosed.*³³

1.42 The State Bill also:

- repeals the *National Crime Authority (State Provisions) Act 1985* which is obsolete following the abolition of the NCA;³⁴ and
- makes consequential amendments to various Acts to effect the transition from the NCA to the ACC.³⁵

1.43 The State Bill is based on a model Bill which adopts a replication approach whereby the relevant provisions of the *Commonwealth Act* are replicated in the State Bill with necessary modifications.³⁶

STRUCTURE OF THE STATE BILL

1.44 The State Bill contains eight parts:

- Part 1 - Preliminary
- Part 2 - The Australian Crime Commission, the Board and the Inter-Governmental Committee
- Part 3 - Examinations
- Part 4 - Search Warrants
- Part 5 - Performance of functions and exercise of powers
- Part 6 - General
- Part 7 - Transitional
- Part 8 - Repeal of the *National Crime Authority (State Provisions) Act 1985* and amendments to other written laws.

³³ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14150.

³⁴ Clause 65, Australian Crime Commission (Western Australia) Bill 2003.

³⁵ Part 7, Australian Crime Commission (Western Australia) Bill 2003.

³⁶ Hon Nick Griffiths MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, December 4 2003, p14150 and letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, February 16 2003. Hon Michelle Roberts MLA, Minister for Police and Emergency Services provided the Committee with a copy of the model Bill.

LEGISLATIVE RESPONSE IN OTHER PARTICIPATING JURISDICTIONS

1.45 As part of the cooperative legislative scheme underpinning the ACC, the States and Territories have commenced enacting complementary legislation. The legislative response in other participating jurisdictions is as follows:

- **Commonwealth:** the *Commonwealth Act* commenced operation on January 1 2003.
- **NSW:** the *Australian Crime Commission (New South Wales) Act 2003* (NSW) commenced operation on June 30 2003 (with the exception of certain consequential amendments).³⁷
- **Australian Capital Territory:** sections 1 and 2 of the *Australian Crime Commission (ACT) Act 2003* (ACT) commenced operation on December 17 2003. The remainder of the Act is awaiting commencement but there is a default commencement date of June 17 2004.³⁸
- **Queensland:** sections 1 and 2 of the *Australian Crime Commission (Queensland) Act 2003* (Qld) commenced operation on November 6 2003, the remaining provisions are awaiting proclamation.³⁹
- **Victoria:** the *Australian Crime Commission (State Provisions) Act 2003* (Vic) commenced operation on June 16 2003.⁴⁰
- **South Australia:** the *Australian Crime Commission (South Australia) Act 2004* (SA) has been passed by the Parliament and commenced on May 6 2004.⁴¹
- **Tasmania:** the *Australian Crime Commission (Tasmania) Bill 2004* is currently before the Tasmanian Parliament.⁴²

³⁷ Section 2 and <http://www.legislation.nsw.gov.au/maintop/scanact/inforce/NONE/0>, (current at June 15 2004) for the date of assent.

³⁸ <http://www.legislation.act.gov.au/a/2003-58/default.asp>, (current at May 26 2004).

³⁹ http://www.legislation.qld.gov.au/ANNOTATIONS/CURRENT/01Table1_curr_alpha.pdf, (current at May 26 2004).

⁴⁰ The *Australian Crime Commission (State Provisions) Act 2003* (Vic) came into operation on the day that it received Royal Assent which was June 16 2003. See section 2 and http://www.dms.dpc.vic.gov.au/sb/2003_Act/A01272.html, (current at February 16 2004) and http://www.legislation.qld.gov.au/ANNOTATIONS/CURRENT/01Table1_curr_alpha.pdf, (current at May 4 2004).

⁴¹ See <http://www.parliament.sa.gov.au/Catalog/legislation/Acts/A/2004.7.un.htm4>, (current at May 26 2004).

⁴² See http://www.parliament.tas.gov.au/bills/12_of_2004.htm, (current at May 26 2004).

- **Northern Territory:** an Act has not been passed and there is no bill currently before the Parliament dealing with the ACC.⁴³

NATIONAL CRIME AUTHORITY (STATE PROVISIONS) AMENDMENT BILL 2002

- 1.46 As indicated, the *Australian Crime Commission Establishment Act 2002* (Cth) amended the *National Crime Authority Act 1984* (Cth) to create the ACC. Consequently, a large number of the provisions of the *National Crime Authority Act 1984* (Cth) are replicated in the *Commonwealth Act* and thus the State Bill.⁴⁴
- 1.47 The Committee notes that in 2001, the *National Crime Authority Act 1984* (Cth) was amended by the *National Crime Authority Legislation Amendment Act 2001* (Cth). Significantly, the *National Crime Authority Legislation Amendment Act 2001* (Cth) amended the defence of reasonable excuse, the privilege against self-incrimination and provisions relating to search warrants in relation to the operations of the NCA.⁴⁵
- 1.48 To effect these amendments at a State level, the National Crime Authority (State Provisions) Amendment Bill 2002 was introduced into the Western Australian Parliament in March 2002 to amend the *National Crime Authority (State Provisions) Act 1985*. This bill was considered and reported on by the Committee in November 2002.⁴⁶ As a result of the commencement of the ACC on January 1 2003, the National Crime Authority (State Provisions) Amendment Bill 2002 has not been progressed or considered by the House. The Committee commends that report to the House.

⁴³ For legislation see <http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2?OpenView>, (current at May 26 2004) and for Bills progress details <http://notes.nt.gov.au/dcm/legislat/Acts.nsf/8951faff2d9faeaa692565610018f15c?OpenView>, (current at May 26 2004).

⁴⁴ As indicated at paragraph 1.43, the Australian Crime Commission (Western Australia) Bill 2003 replicates the *Commonwealth Act*.

⁴⁵ National Crime Authority Legislation Amendment Bill 2000 (Cth), Explanatory Memorandum.

⁴⁶ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002.

- 1.49 Where the provisions of the National Crime Authority (State Provisions) Amendment Bill 2002 are reflected in the State Bill, this Report notes the relevant clauses and reiterates the Committee's previous comments.

CHAPTER 2

OVERVIEW OF THE ACC

- 2.1 The ACC is established by the *Commonwealth Act* and its operations are extended by complementary legislation in the States and Territories. Consequently, before considering the particular issues raised by the State Bill, it is apposite to outline the operations of the ACC pursuant to the *Commonwealth Act* and indicate how the State Bill proposes to expand those operations.

FUNCTIONS OF THE ACC

Commonwealth Act

- 2.2 Pursuant to the *Commonwealth Act*, the functions of the ACC are:⁴⁷
- a) to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence;
 - b) to undertake, when authorized by the Board, **intelligence operations**;
 - c) to **investigate**, when authorized by the Board, matters relating to **federally relevant criminal activity**;
 - d) to provide reports to the Board on the outcomes of those operations or investigations;
 - e) to provide strategic criminal intelligence assessments, and any other criminal information and intelligence, to the Board;
 - f) to provide advice to the Board on national criminal intelligence priorities; and
 - g) such other functions as are conferred on the ACC by other provisions of the *Commonwealth Act* or by any other Act.
- 2.3 The key functions of the ACC are to:
- undertake **criminal investigations** in relation to ‘**federally relevant criminal activity**’; and

⁴⁷ Section 7A, *Australian Crime Commission Act 2002* (Cth).

- conduct **intelligence operations** which involve the collection, correlation, analysis or dissemination of criminal information and intelligence relating to **‘federally relevant criminal activity’**.
- 2.4 Section 4 of the *Commonwealth Act* defines **‘federally relevant criminal activity’** and **‘relevant criminal activity’**. Essentially, these terms involve ‘serious and organised crime’⁴⁸ which constitutes an offence against a law of the Commonwealth or a law of the State which has a **‘federal aspect’**.
- 2.5 A State offence has a **‘federal aspect’** if it meets the criteria in section 4A(2) of the *Commonwealth Act*. The criteria in section 4A(2) are detailed and need not be set out for the purposes of this Report. However, the Committee observes that the phrase is wide ranging and incorporates situations including those where the acts or omissions involved in committing the State offence are matters over which the Commonwealth could legislate. For example, if the general offence of fraud is a State offence, then when fraud is committed by a constitutional corporation it is an offence that could have been enacted by the Commonwealth Parliament and therefore it will have a federal aspect.⁴⁹
- 2.6 It follows that pursuant to the *Commonwealth Act*, the focus of the ACC is undertaking criminal investigations and intelligence operations into serious and organised crime relating to federal offences or State offences (with a federal aspect). The provisions of the State Bill complement the *Commonwealth Act*.

State Bill

- 2.7 Pursuant to clause 5 of the State Bill the ACC has the following functions:
- a) to **investigate** a matter relating to a relevant criminal activity, in so far as the serious and organised crime is, or the serious and organised crimes are or include, an offence or offences against a law of the State (**irrespective of whether that offence or those offences have a federal aspect**);
 - b) to **undertake** an **intelligence operation** in so far as the serious and organised crime is, or the serious and organised crimes are or include, an offence or offences against a law of the State (**irrespective of whether that offence or those offences have a federal aspect**);

⁴⁸ Defined in section 4 of the *Australian Crime Commission Act 2002* (Cth). The definition of ‘serious and organised crime’ in the Australian Crime Commission (Western Australia) Bill 2003 is considered in more detail at paragraph 3.2 to 3.28.

⁴⁹ This example is taken from the *National Crime Authority Amendment Act 2000* (Cth), Explanatory Memorandum which inserted the definition of ‘federal aspect’ in the *National Crime Authority Act 1984* (Cth). The definition is continued in the *Australian Crime Commission Act 2002* (Cth).

- c) to provide a report to the Board on the outcome of such an investigation or operation; and
- d) such other functions as are conferred on the ACC by other provisions of the State Bill or any other Act.

2.8 These functions make it clear that the primary purpose of the State Bill is to enable the ACC to undertake investigations and intelligence operations concerning serious and organised crime in relation to State offences (without a federal aspect).

COMPOSITION AND GOVERNANCE OF THE ACC

Composition of the ACC

2.9 The *Commonwealth Act* provides that the ACC comprises the Chief Executive Officer (CEO), the examiners and the members of the staff of the ACC.⁵⁰

The CEO

2.10 Pursuant to the *Commonwealth Act*, the CEO is, amongst other things:⁵¹

- responsible for the management and administration of the ACC; and
- required to manage, coordinate and control ACC operations or investigations.

Examiners

2.11 Examiners are appointed to the ACC by the Governor General and are persons who are enrolled as a legal practitioner and have been so for at least five years.⁵² Examiners exercise the powers granted to the ACC such as the power to request information from Commonwealth agencies, the power to conduct an examination on oath and the power to summon witnesses and take evidence.⁵³

Member of the staff of the ACC

2.12 The term ‘member of the staff of the ACC’ is defined in section 4(1) of the *Commonwealth Act* to mean:

- (a) *a member of the staff referred to in subsection 47(1) [staff engaged under the Public Service Act 1999 (Cth)]; or*

⁵⁰ Section 7, *Australian Crime Commission Act 2002* (Cth).

⁵¹ Sections 46A(1) and 46A(2), *Australian Crime Commission Act 2002* (Cth).

⁵² Section 46B, *Australian Crime Commission Act 2002* (Cth).

⁵³ Sections 19A, 25A and section 28 *Australian Crime Commission Act 2002* (Cth). See also clauses 17 and 19 of the Australian Crime Commission (Western Australia) Bill 2003.

- (b) *a person participating in an ACC operation/investigation; or*
- (c) *a member of a task force established by the Board under paragraph 7C(1)(f); or*
- (d) *a person engaged under subsection 48(1) [consultants]; or*
- (e) *a person referred to in section 49 [seconded staff] whose services are made available to the ACC; or*
- (f) *a legal practitioner appointed under section 50 to assist the ACC as counsel.*

2.13 This definition is considered in more detail in Chapter 3 at paragraphs 3.102 to 3.105.

Governance of the ACC

2.14 The ACC is governed by the CEO, the Board and the IGC. The Committee notes that although they have a role in governing the ACC, the Board and the IGC are external to the agency.

The Board

2.15 The *Commonwealth Act* provides that the Board has 14 members including the CEO who is a non-voting member. The 13 voting members are:

- the Commissioner of the Australian Federal Police;
- the Secretary of the Attorney-General's Department;
- the Chief Executive Officer of the Australian Customs Service;
- the Chairperson of the Australian Securities and Investment Commission;
- the Director-General of Security;
- the Commissioner (or head) of the police force of each State and the Northern Territory; and
- the Chief Police Officer of the Australian Capital Territory.⁵⁴

2.16 The Committee notes that nine of the 13 voting members of the Board represent the various police forces across Australia.

2.17 Pursuant to the *Commonwealth Act*, the Board's functions include:

- the authorization of intelligence operations and investigations undertaken by the ACC;
 - determining national criminal intelligence priorities; and
 - the provision of strategic direction for the ACC.⁵⁵
- 2.18 The Committee notes that Board authorization is required before the ACC can undertake any intelligence operation or investigation.
- 2.19 Additionally and significantly, the Board has the function of determining whether an intelligence operation or an investigation is to be a ‘special operation’ or ‘special investigation’ which can use coercive powers.⁵⁶
- 2.20 The State Bill expands the role of the Board to include the function of determining whether an **ACC State intelligence operation** is a ‘special operation’ and whether an **ACC State investigation** is to be a ‘special investigation’ able to use coercive powers.⁵⁷

The IGC

- 2.21 The IGC was originally established by the *National Crime Authority Act 1984* (Cth) and continues to operate in relation to the ACC.⁵⁸ However, in relation to the ACC, the IGC has altered functions which represents a significant diminution in its role.
- 2.22 The IGC consists of the Commonwealth Minister⁵⁹ and in relation to participating States, a Minister of the Crown nominated by the Premier.⁶⁰
- 2.23 Previously, the IGC approved references by the Commonwealth and State Ministers to the NCA for the investigation of criminal offences. Once a reference was approved, the NCA could use coercive powers in its investigations.⁶¹ As indicated, pursuant to

⁵⁴ Section 7B(2), *Australian Crime Commission Act 2002* (Cth).

⁵⁵ Section 7C, *Australian Crime Commission Act 2002* (Cth).

⁵⁶ Section 7C(1)(d), *Australian Crime Commission Act 2002* (Cth).

⁵⁷ Clause 5, *Australian Crime Commission (Western Australia) Bill 2003*. The meaning of the phrases ACC State intelligence operation and ACC State investigation are considered in paragraphs 2.30, 2.37 and 2.38 of this Chapter.

⁵⁸ For further discussion of the role of the Inter-Governmental Committee pursuant to the *National Crime Authority Act 1984* see J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p17 and p19.

⁵⁹ Section 4, *Australian Crime Commission Act 2002* (Cth) defines the ‘Commonwealth Minister’ as being the Minister of State administering this Act.

⁶⁰ Section 8, *Australian Crime Commission Act 2002* (Cth).

⁶¹ J. Norberry, *Australian Crime Commission Establishment Bill 2002: Bills Digest No. 54 2002-2003*, Department of the Parliamentary Library, Commonwealth Parliament, Canberra, October 21 2002, p17.

the *Commonwealth Act*, the ACC Board instead performs the role of authorising the use of coercive powers by the ACC. The IGC now has an oversight role involving the following functions:⁶²

- to monitor generally the work of the ACC and the Board;
- to oversee the strategic direction of the ACC and the Board;
- to receive reports from the Board for transmission to the Governments represented on the IGC; and
- such other functions conferred under the *Commonwealth Act*.

2.24 The Committee asked the Minister why the role of authorising investigations and intelligence operations has been vested in the Board rather than remaining with the IGC. The Minister advised the Committee that:

Whilst the functions of the Inter-Governmental Committee ("IGC") [Sections 8 and 9 of the ACC Act] have been amended so as to reflect the Board's existence, the IGC will nevertheless continue to play a key role in the monitoring and oversight of the new agency, the ACC. The IGC will receive regular reports from the Board for transmission to the respective State or Territory Governments represented on the Board. Further, the IGC must be consulted with respect to the appointment of the ACC Chief Executive Officer and the Examiners. The IGC will remain empowered to revoke special determinations made by the ACC Board [Section 9(7)].

It should be noted that the Commonwealth Minister cannot give directions to the Board in the absence of a resolution in support from the members of the IGC [Section 18(2) Commonwealth Act].

The previous procedure by which the NCA was authorised to access co-ercive powers by references from the Commonwealth and the States was often a slow and cumbersome process. The Commonwealth Minister was required to consult with the IGC before a matter could be referred; before a State or Territory Minister could refer a matter it had to have the agreement of the IGC-NCA and consent of the Commonwealth Minister.

*The new structure will allow continued Commonwealth and State/Territory Ministerial oversight, whilst at the same time reflecting the introduction of a Board of management.*⁶³

⁶² Section 9(1), *Australian Crime Commission Act 2002* (Cth).

- 2.25 Although the IGC is vested with an oversight role in relation to the ACC and the Board, it is restricted in its ability to execute this role. The oversight role and the restrictions on this role are considered in more detail in Chapter 4.
- 2.26 The Committee notes that the August Agreement indicated that the IGC would (amongst other things) be responsible for the identification of strategic crime priorities.⁶⁴ However, the *Commonwealth Act* provides that the Board (and not the IGC) is to determine national criminal intelligence priorities and provide strategic direction for the ACC.⁶⁵ The IGC is limited to overseeing the strategic direction of the ACC and the Board.⁶⁶

POWERS OF THE ACC

Commonwealth Act

- 2.27 When the Board has authorized an intelligence operation or an investigation into ‘federally relevant criminal activity’ pursuant to the *Commonwealth Act* the ACC is able to access two types of powers.
- 2.28 Firstly, the ACC has **general statutory powers**. Examiners of the ACC are able to:⁶⁷
- request information from Commonwealth agencies; and
 - require information from Commonwealth agencies in certain cases.
- 2.29 Secondly, in addition to these powers, the ACC is able to access **coercive powers** when a ‘special operation’ or ‘special investigation’ is authorized by the Board.⁶⁸
- 2.30 The terms ‘special operation’ and ‘special investigation’ are not defined in the *Commonwealth Act* however ‘special ACC operation/investigation’ is defined to mean:⁶⁹

(a) an intelligence operation that the ACC is undertaking and that the Board has determined to be a special operation; or

⁶³ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

⁶⁴ See Appendix 4: August Agreement, p2.

⁶⁵ Section 7C, *Australian Crime Commission Act 2002* (Cth).

⁶⁶ Section 9, *Australian Crime Commission Act 2002* (Cth).

⁶⁷ Sections 19A and 20, *Australian Crime Commission Act 2002* (Cth).

⁶⁸ See section 7C, *Australian Crime Commission Act 2002* (Cth) in relation to the requirement for Board authorization.

⁶⁹ Section 4, *Australian Crime Commission Act 2002* (Cth).

(b) an investigation into matters relating to federally relevant criminal activity that the ACC is conducting and that the Board has determined to be a special investigation.

2.31 There are two hurdles that must be overcome in obtaining the Board's authorization for a 'special operation' or 'special investigation' using coercive powers:

- Firstly, before the Board authorizes a 'special operation' it must consider whether methods of collecting the criminal information and intelligence, not involving the use of powers in the Act, have been effective. Similarly, before the Board authorizes a 'special investigation' it must consider whether ordinary police methods of investigation into the matters are likely to be effective.⁷⁰
- Secondly, a determination by the Board that an intelligence operation or an investigation is a 'special operation' or 'special investigation' requires at least nine of the 13 voting members (including at least two eligible Commonwealth Board members⁷¹) to vote in favour of the determination.⁷²

2.32 Once these hurdles are overcome, the coercive powers available to the ACC under the *Commonwealth Act* are:

- the power of examiners to summon witnesses and take evidence;⁷³
- the power of examiners to require persons to produce documents;⁷⁴
- the ability to apply to a Judge of the Federal Court, State or Territory or a Federal Magistrate for a search warrant;⁷⁵
- the ability to apply to a Judge of the Federal Court, State or Territory or a Federal Magistrate for a search warrant by telephone;⁷⁶

⁷⁰ Sections 7C(2) and 7C(3), *Australian Crime Commission Act 2002* (Cth).

⁷¹ 'Eligible Commonwealth Board member' is defined in section 4 of the *Australian Crime Commission Act 2002* (Cth) to mean the Commissioner of the Australian Federal Police, the Secretary of the Department, the Chief Executive Officer of the Australian Customs Service, the Chairperson of the Australian Securities and Investments Commission and the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979* (Cth).

⁷² Section 7G(4), *Australian Crime Commission Act 2002* (Cth).

⁷³ Section 28, *Australian Crime Commission Act 2002* (Cth).

⁷⁴ Section 29, *Australian Crime Commission Act 2002* (Cth).

⁷⁵ Section 22, *Australian Crime Commission Act 2002* (Cth).

⁷⁶ Section 23, *Australian Crime Commission Act 2002* (Cth).

- the ability to apply to an examiner or a Judge of the Federal Court for an order for the delivery of a passport of a witness; and⁷⁷
 - the ability of examiners to apply for warrants for the arrest of witnesses.⁷⁸
- 2.33 In relation to Commonwealth offences, the ACC can also undertake controlled operations and use assumed identities pursuant to the Part IAB of the *Crimes Act 1914* (Cth). Further, the ACC is able to obtain telephone intercepts under the *Telecommunications (Interception) Act 1979* (Cth).

State Bill

- 2.34 The State Bill proposes that the ACC be able to access coercive powers with the Board's authorization when undertaking intelligence operations or investigations in relation to State offences (without a federal aspect).
- 2.35 Clause 8 of the State Bill provides that the Board has the function of determining whether an **ACC State intelligence operation** or an **ACC State investigation** is a 'special operation' or 'special investigation'.
- 2.36 Both of the phrases **ACC State intelligence operation** and **ACC State intelligence investigation** are defined to relate to serious and organised crime which is an offence against the law of the State (irrespective of whether that offence or offences have a federal aspect).⁷⁹
- 2.37 As with the *Commonwealth Act*, the terms 'special operation' and 'special investigation' are not defined. However, clause 3 of the State Bill defines 'special ACC operation/investigation' to mean:
- (a) *an ACC State intelligence operation that the Board has determined to be a special operation; or*
 - (b) *an ACC State investigation that the Board has determined to be a special investigation. [emphasis added]*
- 2.38 The Committee asked the Minister why the terms 'special operation' and 'special investigation' are not defined and how they relate to the definition of 'special ACC operation/investigation'. The Minister advised the Committee that:

The terms 'special operation' and 'special investigation' are interchangeable with the terms special ACC operation and special

⁷⁷ Section 24, *Australian Crime Commission Act 2002* (Cth).

⁷⁸ Section 31, *Australian Crime Commission Act 2002* (Cth).

⁷⁹ See clause 3 and clauses 5(a) and 5(b).

*ACC investigation. The definition of these terms in clause 3 of the Bill indicates that it is the nature and extent of the Board's determination that will determine the status of an operation or investigation as being 'special' thereby enabling access to the special powers.*⁸⁰

2.39 The hurdles that apply under the *Commonwealth Act* in relation to Board authorizations for a 'special operation' or 'special investigation' also apply to Board authorizations under the State Bill.⁸¹

2.40 The powers that the State Bill proposes to make available to the ACC when working on a special operation or special investigation in relation to State offences (without a federal aspect) are:

- the power of examiners to summon witnesses and take evidence (clause 19);
- the power of examiners to require persons to produce documents (clause 20);
- the ability to apply to a Judge of the Federal Court, State or Territory or a Federal Magistrate for a search warrant (clause 29);
- the ability to apply to a Judge of the Federal Court, State or Territory or a Federal Magistrate for a search warrant by telephone (clause 30);
- the ability to apply to an examiner or a Judge of the Federal Court for an order for the delivery of a passport of a witness (clause 28); and
- the ability of examiners to apply for warrants for the arrest of witnesses (clause 24).

2.41 The State Bill does not replicate the sections from the *Commonwealth Act* in relation to the general statutory powers of the ACC to obtain information from Commonwealth agencies presumably because of the legislative limits on the State Parliament.

Comparison with the NCA

2.42 As part of its inquiry, the Committee considered the extent to which the ACC differs from the NCA. In considering the powers of the ACC, the Committee noted an important distinction from the operations of the NCA.

⁸⁰ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

⁸¹ Clause 8 and 12, Australian Crime Commission (Western Australia) Bill 2003.

- 2.43 As indicated in paragraphs 1.36 to 1.39, pursuant to the *National Crime Authority Act 1984*, the NCA had special functions pursuant to which the agency could use coercive powers. The special functions of the NCA were to investigate matters referred by either the Commonwealth Minister or State Ministers. The references by the State Ministers required the approval of the IGC. Significantly, these references had no effect unless the State Minister on the IGC representing that State⁸² voted in favour of the resolution.⁸³
- 2.44 The Board instead of the IGC is now responsible for the authorization of the use of coercive powers by the ACC. If the ACC wishes to conduct an intelligence operation or investigation in relation to State offences (with or without a federal aspect) then a special majority being nine of the 13 voting Board members must vote in favour of the authorization. However, notably, there is no requirement in either the *Commonwealth Act* or State Bill that the State representative on the IGC (the Police Commissioner) vote in favour of the authorization.
- 2.45 The omission of such a requirement means that the Board can agree to the ACC conducting intelligence operations or investigations using coercive powers in relation to State offences within Western Australian irrespective of the consent of the State.

Observations

- 2.46 The Committee notes that the *Commonwealth Act* and the State Bill enable the Board of the ACC to authorize intelligence operations and investigations in relation to State offences (with or without a federal aspect) and the consent of the State representative (the Police Commissioner) is not required.
- 2.47 This is a significant shift from the manner in which the NCA operated in the various States. However, this issue has not been highlighted in the Intergovernmental Agreement, the August Agreement or the associated material.
- 2.48 Although it is open to the Committee to recommend amendments to address this issue, the Committee is aware that the uniform nature of the legislative scheme means that any amendment proposed by this Committee would only affect the operations of the ACC pursuant to the State Bill, that is in relation to State offences (without a federal aspect). Consequently, any amendment would be of limited effect and could

⁸² A Minister of the Crown nominated by the Premier of that State. Section 8, *National Crime Authority Act 1984* (Cth).

⁸³ Section 9(3), *National Crime Authority Act 1984* (Cth).

potentially undermine the uniformity of the scheme. However, the Committee draws this issue to the attention of the House.

CHAPTER 3

SELECTED CLAUSES OF THE STATE BILL

- 3.1 In this Chapter the Committee comments on those specific clauses of the State Bill which required further examination.

CLAUSE 3 - DEFINITION OF 'SERIOUS AND ORGANISED CRIME'

- 3.2 The definition of 'serious and organised crime' is fundamental as it delineates the ambit of the offences which may be the subject of an ACC investigation or intelligence operation pursuant to the State Bill. Clause 3 (which replicates the definition in the *Commonwealth Act*) defines this term as:

an offence -

- (a) that involves 2 or more offenders and substantial planning and organisation;*
- (b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques;*
- (c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind;*
- (d) that is an offence of a kind prescribed by the regulations or an offence that involves any of the following;*
 - (i) theft;*
 - (ii) fraud;*
 - (iii) tax evasion;*
 - (iv) money laundering;*
 - (v) currency violations;*
 - (vi) illegal drug dealings;*
 - (vii) illegal gambling;*
 - (viii) obtaining financial benefit by vice engaged in by others;*
 - (ix) extortion;*

(x) *violence;*

(xi) *bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory;*

(xii) *perverting the course of justice;*

(xiii) *bankruptcy and company violations;*

(xiv) *harbouring of criminals;*

(xv) *forging of passports;*

(xvi) *firearms;*

(xvii) *armament dealings;*

(xviii) *illegal importation or exportation of fauna into or out of Australia;*

(xix) *cybercrime;*

(xx) *matters of the same general nature as one or more of the matters listed above;*

and

(e) *that is punishable by imprisonment for a period of 3 years or more,*

but -

(f) *does not include an offence committed in the course of a genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the commission of a serious and organised crime other than an offence so committed; and*

(g) *does not include an offence the time for the commencement of a prosecution for which has expired. [underlining added]*

3.3 The offences referred to in sub-clause (d) are the same as those under the *Commonwealth Act* except there is no reference to serious offences under the

Proceeds of Crime Act 2002 (Cth). The Explanatory Memorandum indicates that such offences are not relevant in a State context.⁸⁴

- 3.4 The list of offences replicates the offences the NCA could investigate with the addition of firearms and cybercrime offences.⁸⁵

Expansion by regulation

- 3.5 Sub-clause (d) of the definition of ‘serious and organised crime’ in the State Bill and the *Commonwealth Act* allows the list of offences to be expanded by ‘regulations’. The question arises whether the Commonwealth is able to expand by ‘regulation’ the list of offences for the purposes of the *Commonwealth Act* **and** the State Bill.

- 3.6 Both the *Acts Interpretation Act 1901* (Cth) and the *Interpretation Act 1984* effectively provide that the word ‘regulation’ within an Act refers to regulations made under the Act in which the term is used.⁸⁶

- 3.7 Consequently, the Committee understands that the Commonwealth cannot expand the list of offences for the purposes of the State Bill by regulations made under the *Commonwealth Act*. If the ACC wished to expand the list of offences in relation to both the *Commonwealth Act* and the State Bill then:

- the Commonwealth would need to enact regulations expanding the list for the purposes of the *Commonwealth Act*; and
- the State would need to enact regulations expanding the list for the purposes of the State Bill. These regulations would be subject to the scrutiny processes in the *Interpretation Act 1984*.

Observations

- 3.8 The Committee observes that whilst the operation of the State Bill is not directly affected by any Commonwealth regulations that are passed, the complementary nature of the legislation needs to be taken into account. An expansion of the list of offences under the *Commonwealth Act* will mean that unless the State passes commensurate regulations, the complementary scheme could be undermined.

- 3.9 Hence, the Commonwealth can readily effect changes to the scope of the list of offences through regulations (rather than the full legislative process required for an amendment to the principal Act) and place an onus on Western Australia (and other State and Territories) to similarly expand the relevant regulations.

⁸⁴ Australian Crime Commission (Western Australia) Bill 2003, Explanatory Memorandum, p2.

⁸⁵ Ibid.

⁸⁶ Section 17(r), *Acts Interpretation Act 1901* (Cth) and section 5, *Interpretation Act 1984*.

- 3.10 The Committee is concerned that the use of regulations to expand the list of offences for the purposes of the *Commonwealth Act* denies the State of Western Australia an opportunity to comment on that expansion despite the fact that it necessarily impacts on the complementary legislation in this State.

Overlap with the Corruption and Crime Commission

- 3.11 The Corruption and Crime Commission (CCC) commenced operation in Western Australia on January 1 2004 pursuant to the *Corruption and Crime Commission Act 2003*. The CCC has a number of functions including an organised crime function.⁸⁷
- 3.12 In pursuance of the organised crime function police officers can apply to the Commissioner of the CCC to use coercive powers when dealing with certain offences committed in the course of an ‘organised crime’.⁸⁸ The *Corruption and Crime Commission Act 2003* defines ‘organised crime’ as:

activities of 2 or more persons associated together solely or partly for purposes in the pursuit of which 2 or more Schedule 1 offences [listed offences] are committed, the commission of each of which involves substantial planning and organisation. [emphasis added]⁸⁹

- 3.13 Similarly, the definition of ‘serious and organised crime’ in the State Bill involves **2 or more offenders** and **substantial planning and organisation**.
- 3.14 A number of the offences relevant to the State Bill are similar to the Schedule 1 offences for the purposes of the *Corruption and Crime Commission Act 2003* thereby creating a potential overlap of jurisdiction with the CCC. The Committee has prepared a comparative table (see Appendix 5) which identifies those offences where the potential for an overlap of jurisdiction arises.
- 3.15 In relation to the potential overlap of jurisdiction, the Western Australian Police Service submitted that:

Whilst it is arguable that the newly formed Corruption and Crime Commission (CCC) will have a similar role in terms of investigating Western Australia based organised and major crime, the passing of

⁸⁷ Section 21, *Corruption and Crime Commission Act 2003*. The Standing Committee on Legislation in considering the *Corruption and Crime Commission Act 2003* and the *Corruption and Crime Commission Amendment Bill 2003* indicated that although labelled an organised crime function, it does not involve the CCC investigating organised crime but makes the Commissioner of the CCC the equivalent of a special commissioner under the *Criminal Investigation (Exceptional Powers) and Fortification Removal Act 2002*. Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 21: Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, p57.

⁸⁸ See Part 4, *Corruption and Crime Commission Act 2003*.

⁸⁹ Section 3, *Corruption and Crime Commission Act 2003*.

the proposed Bill would service to fill in “gaps” between the roles of the ACC and the CCC. In addition, the activities of the ACC would provide the Western Australian Police Service with additional information and intelligence to enable it to better target criminals and crime syndicates operating within the state jurisdiction...

The Western Australian Police Service supports the role and functions of the ACC in investigating Western Australia based crime, particularly as it is arguable that the CCC will be significantly involved in post-Kennedy Royal Commission issues and its primary responsibility for the investigation of suspected criminal misconduct and corruption in Western Australia.⁹⁰

3.16 The Minister provided advice to the Committee on this issue as follows:

The definition of ‘serious and organised crime’ is set out in s 4(1) of the Commonwealth Australian Crime Commission Act 2002. That definition includes offences that relate to such matters as theft, fraud, tax evasion, money laundering, illegal drug dealings, extortion, violence, perverting the course of justice, firearms and cybercrime. In regard to the definition of ‘organised crime’ in s 3 of the Corruption and Crime Commission Act 2003 (WA), specific offences are set out in Schedule 1 of that Act. Those offences include matters relating to perverting the course of justice, murder, endangering safety, explosions, property laundering and drug trafficking, which could conceivably also fall within the jurisdiction of the ACC. (This list is indicative and is not meant to be exhaustive.)

If it should occur that the activities of the two agencies, i.e. the CCC and the ACC, result in an investigation of the same matters or suspected crimes, this would not be an entirely novel situation. It is expected the agencies will cooperate and establish protocols in determining how such matters are to be progressed. Legislative provisions also contemplate this scenario arising from time to time and section 17(1) of the Commonwealth Australian Crime Commission Act 2002 requires this in the case of the ACC.

It is further advised that the CCC and the ACC have already developed a memorandum of understanding.

The Committee asks whether the ACC can ‘take over’ a CCC investigation. As a matter of law, the answer is no. Both the ACC

⁹⁰ Submission No 1 from the Western Australian Police Service, February 10 2004, pp1-2.

*and the CCC are separate independent governmental agencies. The ACC has no power to limit or control in any way the work of any other agency. Legislation governing the ACC in no way limits or affects the CCC.*⁹¹

Observations

3.17 The Committee noted that where there is an overlap of jurisdiction between the ACC and the CCC, the Police Service may opt to use the ACC in preference to the CCC. The Committee considers that this is likely to occur due to:

- the less restrictive definition of ‘serious and organised crime’ under the *Commonwealth Act* and the State Bill in comparison to the *Corruption and Crime Commission Act 2003*; and
- the absence of an effective independent oversight mechanism in relation to the ACC.

3.18 In relation to the definition of ‘serious and organised crime’, Mr Michael Cashman, Director of Legal Services, CCC, indicated that at an anecdotal level those working in the organised crime area of the Western Australian Police Service see the definition of ‘organised crime’ in the *Corruption and Crime Commission Act 2003* as restrictive whereas the definition in the *Commonwealth Act* and the State Bill is more expansive.⁹²

3.19 Mr Cashman further indicated that:

*It is easier for the Western Australian Police to enter into, for example, a task force with the ACC to investigate aspects of organised crime, rather than having to jump through hoops or cross a threshold in terms of getting the CCC to make an exceptional powers finding on the basis of that definition of organised crime.*⁹³

3.20 The Committee also notes that a consideration of Appendix 5 reveals that the CCC is limited to operating in relation to specific offences. In contrast, the ACC is able to operate in relation to offences involving broadly described criminal conduct such as ‘fraud’ or ‘violence’ (where the offence is punishable by imprisonment for a period of three years or more). The Committee observes that the breadth of these descriptions

⁹¹ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received May 24 2004.

⁹² Mr Michael Cashman, Director, Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, April 23 2004, p4.

⁹³ Mr Michael Cashman, Director, Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, April 23 2004, p4.

could enable the ACC to work in relation to a wider range of offences and potentially less serious offences.

- 3.21 In relation to accountability mechanisms, the Committee observes that the CCC has a powerful and independent accountability mechanism in the form of the Parliamentary Inspector who has unrestricted access to information about the activities of the CCC.⁹⁴ In contrast, the Committee notes that there is no effective independent accountability mechanism operating with respect to the ACC as there are limitations on the IGC accessing information about the activities of the ACC. (This issue is explored in more detail in Chapter 4).
- 3.22 The Committee is mindful that the complementary nature of the uniform legislative scheme means that any amendments to the State Bill to deal with this issue could undermine the scheme and therefore it does not propose an amendment.

Incidental offences

- 3.23 Clause 3(3) (which replicates section 4(2) of the *Commonwealth Act*) expands the ambit of the definition of ‘serious and organised crime’ as follows:

*If the head of an ACC operation/investigation suspects that an offence (the “**incidental offence**”) that is not a serious and organised crime may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of a serious and organised crime (whether or not the head has identified the nature of that serious and organised crime), then the incidental offence is, for so long only as the head so suspects, taken, for the purposes of this Act, to be a serious and organised crime. [underlining added]*

- 3.24 The Committee notes that the head of the ACC operation/investigation is only required to ‘suspect’ the commission of the incidental offence. There is no requirement that the head of the ACC operation/investigation ‘reasonably suspects’ or ‘has reasonable grounds to suspect’ the commission of the incidental offence.
- 3.25 In *George v Rockett* (1990) 93 ALR 483 the Full Court of the High Court held that a ‘suspicion’ is:

*...more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to ‘a slight opinion, but without sufficient evidence’...*⁹⁵

⁹⁴ See for example, section 197, *Corruption and Crime Commission Act 2003* which provides that the Parliamentary Inspector can conduct an inquiry with all the powers of a Royal Commission.

⁹⁵ *George v Rockett* (1990) 93 ALR 483 at 490-491.

- 3.26 A 'reasonable suspicion' is a suspicion based on facts which, objectively seen, are sufficient to give rise to an apprehension of a suspected matter.⁹⁶ The Committee notes that a 'suspicion' is a lesser requirement than a 'belief'.⁹⁷ In relation to this issue, the Minister advised the Committee that:

*In the initial stages of any investigation into serious and organised crime it is often difficult to accurately define the nature and extent of criminal activities and the participants in those activities. This can be due to several reasons including the abilities of organised crime networks to use sophisticated techniques to deflect the attentions of law enforcement agencies. To require officers of the ACC to consider whether reasonable grounds exist for their suspicions at such an early point in an investigation would unnecessarily restrict officers of the ACC in their investigations. It should be noted under clause 3(3) however that there is an ongoing obligation to assess any such suspicion.*⁹⁸

Observations

- 3.27 The Committee understands that the 'ongoing obligation' referred to in the Minister's advice is that part of clause 3(3) which provides that the incidental offence is taken to be a 'serious and organised crime' "for so long only as the head so suspects". The Committee notes that this test may be difficult to objectively determine.
- 3.28 The Committee observes that the subjective nature of clause 3(3) circumscribes the ability of a court to review the appropriateness of an investigation or intelligence operation. As clause 3(3) expands the ambit of the definition of 'serious and organised crime' and thus the jurisdiction of the ACC, the Committee draws this matter to the attention of the House.

CLAUSE 22 - OFFENCES OF DISCLOSURE

- 3.29 Pursuant to clause 21 when issuing a summons or notice to produce, an examiner may in certain circumstances, include a notation to the effect that disclosure of information about the summons or notice or any official matter connected with it, is prohibited.
- 3.30 Clause 22(1) creates an offence for disclosing certain information about a summons or notice to produce that contains such a non-disclosure notation.

⁹⁶ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p985.

⁹⁷ The facts that can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p1142.

⁹⁸ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

- 3.31 In relation to legal practitioners and their clients there are two relevant circumstances where the prohibition on disclosure does not prevent a person from making a disclosure. These circumstances are a disclosure:
- by a person to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, notice or matter (clause 22(2)(b)); and
 - by a legal practitioner for the purpose of obtaining the agreement of another person under clause 23(3) to the legal practitioner answering a question or producing a document at an examination before an examiner (clause 22(2)(d)).
- 3.32 The latter exception refers to clause 23(3), which relates to legal practitioners answering questions and producing documents at ACC hearings.⁹⁹ Clause 23(3) permits a legal practitioner to decline to answer questions or produce documents on the grounds of legal professional privilege except if the client agrees to the information being disclosed. However, if the legal practitioner refuses to provide the information then he or she must provide the name and address of the client.
- 3.33 It follows that clause 22(2)(d) permits the legal practitioner who receives a summons to contact their client to determine whether the client agrees to the legal practitioner disclosing to the ACC the information sought by the summons.
- 3.34 The Committee considered a similar provision to clause 22 in its report on the National Crime Authority (State Provisions) Amendment Bill 2002. The Committee noted that amendments in that bill proposed to delete an additional exception currently existing in the *National Crime Authority (State Provisions) Act 1985* relating to a disclosure:
- by a legal practitioner “*for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client*”.¹⁰⁰
- 3.35 The effect of that proposed amendment is replicated in the State Bill in that the exception does not appear.

Observations

- 3.36 In its report on the National Crime Authority (State Provisions) Amendment Bill 2002 the Committee was of the view that in considering the omission of the exception

⁹⁹ This clause is also considered at paragraphs 3.39 to 3.46.

¹⁰⁰ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p20-21.

relating to legal duty it was important to determine where the public interest lay. In particular, was it:

- with the NCA in its role of investigating serious and organised crime; or
- with the lawyer/client relationship which is of such a nature the State ought not attempt to restrict it?

3.37 In its report on the National Crime Authority (State Provisions) Amendment Bill 2002, the Committee indicated that the House might wish to consider these issues. The same issues arise in relation to clause 22 and the Committee again recommends that the House consider them. Appendix 6 contains the relevant extract from Committee's previous report.

CLAUSE 23 - FAILURE OF WITNESSES TO ATTEND AND ANSWER QUESTIONS

3.38 Clause 23 creates an offence for failure to attend and answer questions or produce documents at an examination and raises issues in relation to legal professional privilege, the privilege against self-incrimination and parliamentary privilege.¹⁰¹

Legal professional privilege

3.39 Clauses 23(3) and 23(7) relate to legal professional privilege. In the recent High Court judgment of *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 192 ALR 561, Gleeson CJ, Gaudron, Gummow and Hayne JJ stated that legal professional privilege is:

*[A] rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings.*¹⁰²

3.40 Clause 23(3) provides that:

Where -

- (a) *a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and*

¹⁰¹ The Committee notes that clause 23 reflects section 30 of the *National Crime Authority Act 1984* (Cth).

¹⁰² *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 192 ALR 561 at 564.

(b) *the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner,*

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she must, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

3.41 Clause 23(3) is to be read in conjunction with clause 23(7) which states:

Subsection (3) does not affect the law relating to legal professional privilege.

3.42 The Committee notes that Standing Committee on Legal Affairs of the Parliament of the Australian Capital Territory (**ACT Committee**) considered similar provisions in the Australian Crime Commission (ACT) Bill 2003 (ACT).

3.43 In relation to a clause equivalent to clause 23(3), the ACT Committee concluded that whilst it expressly enables a legal practitioner to rely on legal professional privilege, it leaves open the question of whether the client may also rely on legal professional privilege.¹⁰³ The ACT Committee highlighted that legal professional privilege is the privilege of the client not of the legal adviser.¹⁰⁴

3.44 The ACT Committee was of the view that the construction of the sub-clauses cast doubt on whether legal professional privilege was a ground for non-compliance and sought that the Explanatory Statement be re-drafted to address the extent to which a claim for legal professional privilege could be maintained.¹⁰⁵

3.45 In light of the concerns raised by the ACT Committee, the Committee asked the Minister to clarify the effect of clause 23 on the operation of legal professional privilege including whether it extends to a claim by a client. The Minister advised the Committee as follows:

¹⁰³ Australian Capital Territory, Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report*, November 12 2003, p3.

¹⁰⁴ See *Baker v Campbell* (1983) 153 CLR 52 in relation to this principle.

¹⁰⁵ Australian Capital Territory, Legislative Assembly, Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), *Scrutiny Report*, November 12 2003, p4.

Legal professional privilege is an important common law right/immunity that will not be taken to have been abolished by statute except by express language or by clear and unmistakable implication: Daniels Corporation International Pty Ltd v. Australian Competition and Consumer Commission (2002) 192 ALR 561 at 570, 584-585, 597.

In Mansfield v. Australian Crime Commission [2003] FCA 1059 the Federal Court of Australia considered whether the Cth ACC Act abrogated legal professional privilege. Section 30 of the Cth ACC Act is almost identical in terms to clause 23 of the Bill. Carr J considered stated at [54] and [55] that:

“Section 30(3) (set out at paragraph [29] above) to some extent restates the content of legal professional privilege, but imposes an obligation on a legal practitioner to give the examiner the name and address of the person to whom or by whom the communication was made. In my view, s 30(9) makes it quite clear that Parliament had no intention to abrogate, in examination proceedings under Part II of the Act, the immunity conferred by the common law rule of legal professional privilege. Subsection (9) provides that subsection (3) does not affect the law relating to legal professional privilege.

In my view, nothing in the statutory framework amounts to an express intention to abrogate legal professional privilege nor is there any implication, let alone a necessary implication, of an intention to do so.”

In light of the above decision, clause 23 of the Bill does not prevent a client from claiming legal professional privilege in relation to an examination. This clause deals with waiver of that privilege by the client.¹⁰⁶

Observations

- 3.46 Based on this advice, the Committee understands that clause 23 does not prevent a witness (either a lawyer or the client) before an ACC examiner from refusing to answer a question or produce a document on the grounds of legal professional privilege. However, if that witness is a lawyer, he or she must provide to the examiner the name and address of the person who made the privileged communication.

¹⁰⁶ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

Privilege against self-incrimination

Abrogation of the privilege

3.47 The privilege against self-incrimination is:

*The common law right of a person not to answer questions or produce material which may tend to incriminate the person of a criminal offence or expose the person to a civil penalty.*¹⁰⁷

3.48 Clause 23(2) makes it an offence to refuse or fail to comply with a requirement to answer questions or produce documents to the ACC. It has been held that the equivalent section in the *Commonwealth Act* abrogates, by necessary implication, the privilege against self-incrimination.¹⁰⁸ However, ‘compensatory protection’¹⁰⁹ is created by clause 23(5) which provides:

The answer, document or thing, is not admissible in evidence against the person in -

(a) *a criminal proceeding; or*

(b) *a proceeding for the imposition of a penalty,*

other than -

(c) *confiscation proceedings; or*

(d) *a proceeding in respect of -*

(i) *in the case of an answer - the falsity of the answer; or*

(ii) *in the case of the production of a document - the falsity of any statement contained in the document.*

3.49 Clause 23(4) provides that clause 23(5) only applies if:

¹⁰⁷ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p924 citing *Sorby v Commonwealth* (1983) CLR 281. For further consideration of the historical basis of the privilege against self-incrimination and the current case law see the Committee’s previous report, Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp14-17.

¹⁰⁸ In *A v Boulton* (2004) 204 ALR 598 a single Judge of the Federal Court held that the equivalent provision in the *Australian Crime Commission Act 2002* (Cth) abrogated the privilege against self-incrimination by necessary implication. This judgment affirmed the judgment of *Mansfield v Australian Crime Commission* [2003] FCA 1057; BC 200305747.

¹⁰⁹ The phrase ‘compensatory protection’ in the context of the abrogation of the privilege against self-incrimination was referred to in *A v Boulton* (2004) 204 ALR 598 at 613 citing *Mansfield v Australian Crime Commission* [2003] FCA 1057; BC 200305747 and at 616.

- the person answers the question or produces the document;¹¹⁰ and
- before answering the question or producing the document or thing, the person claims that to comply might tend to incriminate the person or make the person liable to a penalty.

Scope of immunity

3.50 Clause 23(5) provides what is known as **direct use immunity**. There are two forms of immunity which are sometimes extended by a statute when the privilege against self-incrimination is abrogated. These are:¹¹¹

- **immediate use/direct use immunity** - which constitutes immunity from a prosecution that could otherwise be commenced on the basis of the documents produced or the answers given; and
- **derivative use immunity** - which prevents evidence sourced from the self-incriminating documents or answers being used to support a prosecution against the person.

3.51 The protection provided by clause 23(5) is limited to direct use immunity and does not extend to derivative use immunity.¹¹²

3.52 Clause 23 mirrors section 30 of the *Commonwealth Act* which replicates its precursor, section 30 of the *National Crime Authority Act 1984* (Cth). Section 30 of the *National Crime Authority Act 1984* (Cth) incorporated the amendments effected by the *National Crime Authority Legislation Amendment Act 2001* (Cth).

3.53 Prior to the passage of the *National Crime Authority Legislation Amendment Act 2001* (Cth) witnesses before the NCA were able to obtain the benefit of both direct and derivative use immunity. The *National Crime Authority Legislation Amendment Act 2001* (Cth) abolished derivative use immunity for the purpose of NCA examinations and this amendment was replicated in the *National Crime Authority (State Provisions) Amendment Bill 2002*.

3.54 In its report on the *National Crime Authority (State Provisions) Amendment Bill 2002* this Committee did not object to the abolition of derivative use immunity in view of

¹¹⁰ In the case of the production of a document that is, or forms part of, a record of an existing or past business - the protection only applies if the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information, clause 23(4)(b).

¹¹¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p16.

¹¹² *A v Boulton* (2004) 204 ALR 598 at 616.

the fact that the effect of the abolition would be reviewed after five years of operation.¹¹³

- 3.55 In particular, the *National Crime Authority Legislation Amendment Act 2001* amended the *National Crime Authority Act 1984* (Cth) to provide for such a review at the Commonwealth level in relation to the provisions of that Act. The Committee recommended that similarly, at a State level, such review provisions be incorporated into the *National Crime Authority (State Provisions) Amendment Bill 2002* to affect the *National Crime Authority (State Provisions) Act 1985*.

Observations

- 3.56 The Committee notes that unlike the *National Crime Authority (State Provisions) Act 1985*, the State Bill does not provide for derivative use immunity. As with the *National Crime Authority (State Provisions) Amendment Bill 2002*, this Committee does not object to the absence of derivative use immunity in view of the fact that there will be a review at the Commonwealth level of the effect of the abolition of derivative use immunity in the *National Crime Authority Act 1984* (Cth) and its successor legislation, the *Commonwealth Act*.¹¹⁴
- 3.57 In addition to the Commonwealth review, the Committee recommends (in Chapter 4) an amendment to create such a review at the State level. The Committee considers these issues further at paragraphs 4.75 to 4.83.

Claim for immunity

- 3.58 The Committee notes that clause 23(4) requires a person to claim that the answers or documents they are producing may incriminate them in order to obtain the benefit of the ‘direct use immunity’ in clause 23(5).
- 3.59 The Committee notes that similar provisions in the *Corruption and Crime Commission Act 2003*¹¹⁵ and the *New South Wales Crime Commission Act 1985* (NSW)¹¹⁶ provide for ‘direct use immunity’ in certain circumstances but do not specifically require the person to make a claim in relation to self-incrimination. In contrast, the *Crime and Misconduct Act 2001* (Qld) and the *Australian Securities and*

¹¹³ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p17.

¹¹⁴ See paragraph 4.75 for further details in relation to this review.

¹¹⁵ Section 145, *Corruption and Crime Commission Act 2003*.

¹¹⁶ Section 18B, *New South Wales Crime Commission Act 1985* (NSW).

Investments Commission Act 2001 (Cth) require the person to claim that the document or statement may incriminate them.¹¹⁷

3.60 In relation to this requirement, the Minister advised the Committee that:

The ACC is unique in nature and has a critical role to play in the fight against serious and organised crime both nationally and within this State. By necessity, this will mean that there is a strong public interest in the Commission having full and effective investigatory powers, including the ability to conduct coercive examinations. The ability to resort to the use of such proceedings is central to the role and function of the ACC.

The 'protection' of clause 23(5) will come into operation when a witness is required to answer a question by an Examiner that might tend to incriminate the witness, or make the witness liable to a penalty.

Whilst it is true to say that the obligation to make the claim lies upon the witness, it should be noted that the witness is not in any respect 'ambushed' during these proceedings as a statement of rights and obligations must be served upon the witness. Explanatory notes are also served upon witnesses which explain in plain terms their obligation to answer all questions. This document also advises witnesses in plain terms that they should make it known to the Examiner if an answer or document might tend to incriminate them. Witnesses are also advised in plain terms within the summons of their right to have a lawyer of their choice present during their examination.

It is common practice for Examiners to explain these rights and obligations to the witness in some detail prior to the formal commencement of their examination. The Examiner must also satisfy him or herself that the summoning of a particular witness is 'reasonable in all the circumstances'.¹¹⁸

¹¹⁷ Section 197, *Crime and Misconduct Act 2001* (Qld) and section 68, *Australian Securities and Investments Commission Act 2001* (Cth).

¹¹⁸ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

Observations

- 3.61 The Committee is not satisfied that the requirement for witnesses to claim that answers or documents may incriminate them, prior to compliance, in order to obtain direct use immunity, has been justified.
- 3.62 The Committee emphasises that this requirement is not a feature of the examinations conducted by the CCC and, as with ACC inquiries, these examinations may relate to the investigation of organised crime.
- 3.63 It is not readily apparent to the Committee why the requirement is included if the intention is not to ambush witnesses. The provision of a statement of rights and obligations is only effective where witnesses can read, comprehend legal complexities and are not so intimidated by the process that they are able to comprehend the material provided.
- 3.64 The Committee is of the view that the approach adopted by the *Corruption and Crime Commission Act 2003* whereby there is no requirement to make a claim in relation to self-incrimination prior to compliance, provides a greater level of fairness to witnesses.
- 3.65 However, the Committee is mindful of the fact that an amendment to the State Bill only affects the operations of the ACC pursuant to the State Bill and not the *Commonwealth Act*. As a practical matter, if the State Bill was amended to remove this requirement it could be very difficult for ACC officers to delineate whether they are working under the State Bill (where the requirement is absent) and the *Commonwealth Act* (where the requirement is present).
- 3.66 These competing concerns in relation to clause 23(4) highlight the essential dilemma of uniform legislative schemes namely the need for uniformity, which has to be balanced against the role of the State Parliament.

Parliamentary privilege - reasonable excuse

- 3.67 Prior to the enactment of the amendments contained in the *National Crime Authority Legislation Amendment Act 2001* (Cth) there was a defence of 'reasonable excuse' available in relation to attendance at an NCA hearing and the answering of questions or the production of documents.
- 3.68 At the Commonwealth level, the *National Crime Authority Legislation Amendment Act 2001* (Cth) abolished the defence of reasonable excuse for NCA hearings. As indicated, the complementary State amendments contained in the National Crime Authority (State Provisions) Amendment Bill 2002 have not been passed. However, the *Commonwealth Act* and the State Bill replicate the position under the *National*

Crime Authority Act 1984 (Cth), that is there is no defence of reasonable excuse available for ACC hearings.

- 3.69 In its report on the National Crime Authority (State Provisions) Amendment Bill 2002, the Committee indicated that the effect of the Commonwealth and proposed State amendments created uncertainty as to whether it was intended to extinguish a defence of 'reasonable excuse' founded on a claim of parliamentary privilege.¹¹⁹ The Committee was of the view that the issue should be clarified. This issue also arises in relation to the *Commonwealth Act* and the State Bill.

- 3.70 Following a query from the Committee in relation to this issue, the Minister advised that:

As the Committee has identified, both the Cth ACC Act and the Bill have abolished the defence of reasonable excuse with respect to answering questions, producing documents etc. Accordingly, it is not open to a person who does not attend at a hearing, does not answer questions or does not produce documents to claim that he or she had a reasonable excuse for not so doing based on parliamentary privilege...

It would seem a matter of public policy that if a parliamentarian knew of matters pertaining to serious and organised crime they would make every effort to cooperate with authorities in this regard and it is also hoped that any such summons would not arise in the context of the parliamentarian being the target of an investigation. If the latter were the case then as a matter of policy that person should not be able to use their office as a shield.¹²⁰

Observations

- 3.71 The Minister also indicated that it is 'arguable' that the issue of a summons or notice to a Member of Parliament whilst Parliament is sitting could constitute a contempt of Parliament. However, the Committee received advice from the Clerk of the Council that it was not 'arguable' and would constitute a contempt of Parliament.
- 3.72 The Committee also received advice from the Clerk of the Council that is at variance with the Minister's advice that parliamentary privilege under the *Parliamentary Privileges Act 1891* has been abrogated by the State Bill.

¹¹⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp7-12.

¹²⁰ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

- 3.73 In light of these conflicting views, the Committee has concluded that the issue is most appropriately resolved by an amendment to the State Bill to expressly preserve the operation of the *Parliamentary Privileges Act 1891*.
- 3.74 The Committee notes that similarly, the *Corruption and Crime Commission Act 2003* includes a clause that expressly preserves the operation of the *Parliamentary Privileges Act 1891* and the *Parliamentary Papers Act 1891*.¹²¹

Recommendation

Recommendation 1: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 expressly preserve the operation of the *Parliamentary Privileges Act 1891*. This can be effected in the following manner:

Clause 32:

Page 37, after line 11 - To insert -

“

(2) Despite subsection (1), the performance or exercise of a function or power conferred or authorized under this Act is subject in every case to the *Parliamentary Privileges Act 1891*.

”.

CLAUSES 24 AND 28 - ‘SITTING IN CHAMBERS’

Clause 24

- 3.75 Clause 24 reflects section 31 of the *Commonwealth Act* and provides for an application to be made to “a Judge of the Federal Court or Supreme Court” for the issuing of a warrant of arrest in specified circumstances.

- 3.76 However, in the *Commonwealth Act* the examiner makes an application to:

...a Judge of the Federal Court or a Judge of the Supreme Court of a State or Territory sitting in chambers. [underlining added]

- 3.77 In the equivalent provisions in the *Australian Crime Commission (State Provisions) Act 2003* (Vic),¹²² the *Australian Crime Commission (ACT) Act 2003* (ACT)¹²³ and the

¹²¹ Section 3(2), *Corruption and Crime Commission Act 2003*.

¹²² Section 24, *Australian Crime Commission (State Provisions) Act 2003* (Vic).

¹²³ Section 27, *Australian Crime Commission (ACT) Act 2003* (ACT).

*National Crime Authority (State Provisions) Act 1985*¹²⁴ there is a reference to the Judge ‘sitting in chambers’.

- 3.78 The *Australian Crime Commission (Queensland) Act 2003* (Qld), like clause 24, omits any reference to the application being made to a Judge ‘sitting in chambers’.¹²⁵

Clause 28

- 3.79 Clause 28 enables an examiner to apply to a Judge of the Federal Court for an order that a person who has been summonsed to appear before the examiner in connection with a special ACC operation/investigation, or who has appeared before the examiner, must surrender his or her passport to the examiner.

- 3.80 As with clause 24, clause 28 simply refers to the application being made to “*a Judge of the Federal Court*”. The *Commonwealth Act*¹²⁶ and the complementary provisions in the *Australian Crime Commission (State Provisions) Act 2003* (Vic),¹²⁷ the *Australian Crime Commission (ACT) Act 2003* (ACT),¹²⁸ and the *Australian Crime Commission (Queensland) Act 2003* (Qld)¹²⁹ provide that the application is to be made to “*a Judge of the Federal Court sitting in chambers*” [emphasis added]. The equivalent provision in the *National Crime Authority (State Provisions) Act 1985* also provides that the application is to be made to “*a Judge of the Federal Court sitting in chambers*”.¹³⁰

- 3.81 Judicial officers are able to hear certain applications ‘in chambers’. For this purpose, ‘chambers’ is defined as:

*The room in which judges and their associates sit to hear interlocutory [interim] matters which need not be heard in court. Proceedings in chambers are not open to the public.*¹³¹

- 3.82 The Committee asked the Minister why the words ‘sitting in chambers’ have been omitted in clauses 24 and 28 and what effect (if any) the omission will have. The Minister advised the Committee that:

¹²⁴ Section 20, *National Crime Authority (State Provisions) Act 1985*.

¹²⁵ Section 24, *Australian Crime Commission (Queensland) Act 2003* (Qld).

¹²⁶ Section 24, *Australian Crime Commission Act 2002* (Cth).

¹²⁷ Section 28, *Australian Crime Commission (State Provisions) Act 2003* (Vic).

¹²⁸ Section 31, *Australian Crime Commission (ACT) Act 2003* (ACT).

¹²⁹ Section 28, *Australian Crime Commission (Queensland) Act 2003* (Qld).

¹³⁰ Section 29, *National Crime Authority (State Provisions) Act 1985*.

¹³¹ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p9181.

*Whilst clauses 24 and 28 do not specifically refer to such applications being made before a Judge ‘in chambers’, it should be noted that a Judge is exercising an administrative and not judicial function when considering whether to issue a warrant. Whilst it may have been desirable for the Bill to have simply reflected section 31(1) of the Commonwealth Act, it can nevertheless be inferred that applications under clauses 24 and 28 are to be heard ‘in chambers’. This can be gleaned from section 31 of the Commonwealth Act, and also by the nature of the ACC’s functions in investigating serious and organised crime. Disclosure of such information in open court would potentially pose a significant threat to the security of a major investigation.*¹³²

Observations

- 3.83 The Committee notes the advice of the Minister that the Judge is exercising an administrative function rather than a judicial function.
- 3.84 The Committee understands that, in certain circumstances, non-judicial functions (generally of an administrative nature) can be vested in judicial officers in their individual capacity rather than as judges of the relevant court.¹³³ If the Judge is exercising a non-judicial function in authorising the applications in clauses 24 and 28 then necessarily these applications would not occur in open court as the judicial officer is not acting in a judicial capacity.
- 3.85 However, in order to avoid any doubt or uncertainty, the Committee considers it preferable to include in both clauses 24 and 28 the phrase ‘sitting in chambers’ (see Recommendations 2 and 3).

Recommendations

Recommendation 2: The Committee recommends that clause 24 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to explicitly state that an application for a warrant for the arrest of a witness is made to a Judge sitting in chambers. This can be effected in the following manner:

Page 26, line 20 - To insert after “Supreme Court” –

“ sitting in chambers ”.

¹³² Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

¹³³ This is often referred to as the persona designata principle. See *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1 and K. Walker, ‘Persona Designata, Incompatibility and the Separation of Powers’, Public Law Review, v.8, no.3, Sept 1997, p153.

Recommendation 3: The Committee recommends that clause 28 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to explicitly state that an application for an order for delivery to an examiner of the passport of a witness is made to a Judge sitting in chambers. This can be effected in the following manner:

Page 29, line 17 - To insert after "Court" –

“ sitting in chambers ”.

CLAUSE 24 - WARRANT FOR ARREST OF WITNESS

- 3.86 Clause 24 enables a person to be detained pursuant to an arrest warrant. That detention may continue if a Judge of the Federal or Supreme Court orders this pursuant to clause 24(6)(b).
- 3.87 The Committee notes that the persons that may be detained are witnesses only and have not been charged with relevant offences. The Committee notes that clause 24 does not indicate where and how such persons are to be detained and the rights available to them. Following an inquiry from the Committee in relation to this issue, the Minister advised that:

Advice from the Police Service is the warrant if enacted as proposed, would be lawful.

The Prisons Act places an obligation on Western Australia prisons to receive all prisoners subject to a lawful Commonwealth warrant or term of imprisonment. Presently the Commonwealth, in accordance with agreements made between the State and the Commonwealth, funds Commonwealth prisoners held in State prisons.

Preliminary advice from the ACC to the Police Service is the ACC would seek to have persons held on warrant detained at a suitable State or Commonwealth detention facility, not in their offices. It is envisaged cost burdens would be along the lines as that currently in place between the State and the Commonwealth.

Due to the need to conduct further research from the ACC perspective as to any intention to detain persons at places other than prisons, upon receipt of that advice from the ACC, addendum comments will be provided as soon as possible.¹³⁴

¹³⁴ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received May 24 2004.

- 3.88 Further information from the Minister was not available prior to the Committee's reporting date.
- 3.89 The Committee notes that in contrast to clause 24, the *Corruption and Crime Commission Act 2003* provides greater detail in relation to the detention of persons pursuant to arrest warrants. For example, section 149A of the *Corruption and Crime Commission Act 2003* provides that if a person is detained overnight the CCC must arrange for accommodation and meals to a standard comparable to that of jurors kept overnight.¹³⁵

Observations

- 3.90 The Committee notes the lack of specificity in the State Bill in relation to the detention of persons pursuant to arrest warrants which contrasts with the level of detail in the *Corruption and Crime Commission Act 2003*. However, the Committee does not make a recommendation in relation to this issue because any amendment to the State Bill departing from the uniform scheme may cause practical problems for the operations of the ACC in Western Australia.

CLAUSE 36 - LIMITATION ON CHALLENGE TO BOARD DETERMINATION

- 3.91 Clause 36 is considered by the Committee in Chapter 4 where it examines the accountability measures relating to the ACC.

CLAUSE 39 - DOUBLE JEOPARDY

- 3.92 Clause 39 is headed 'double jeopardy'. 'Double jeopardy' can be generally defined as:

*Placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion.*¹³⁶

- 3.93 The Committee notes that whilst the general principle is readily expressed, the term has a variety of meanings depending on the context in which it is used.¹³⁷
- 3.94 For the purposes of this Report it suffices to note that one form of double jeopardy is 'double punishment' and at common law a person may be punished twice for the same act or omission if it gives rise to two different offences.¹³⁸

¹³⁵ This provision was inserted following the recommendation of Standing Committee on Legislation. See Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 21: Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, Recommendation 61.

¹³⁶ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p386.

¹³⁷ See *Malcolm Macleod v Australian Securities and Investment Commission* (2002) 211 CLR 287, pp301-302 and *Pearce v The Queen* (1998) 194 CLR 610 for a more detailed consideration of these issues.

- 3.95 Clause 39 is a statutory form of protection against ‘double punishment’ and prevents a person being punished for an offence under the **State Bill** and the *Commonwealth Act*. For example, both the State Bill and the *Commonwealth Act* make it an offence to obstruct or hinder the ACC in the performance of its functions.¹³⁹ Consequently, at common law (in the absence of clause 39), there is the potential for a person to be punished under both offence provisions.¹⁴⁰
- 3.96 Whilst clause 39 avoids the problem of double punishment arising because of an overlap of jurisdiction between the State Bill and the *Commonwealth Act*, the Committee queried the potential for double jeopardy in relation to offences against the *Corruption and Crime Commission Act 2003* and the State Bill.
- 3.97 However, the Minister advised the Committee that in this respect “*no issues of double jeopardy arise*”¹⁴¹ and Commissioner Hammond of the CCC advised the Committee that “*there is no reasonable likelihood of a problem arising here*”.¹⁴²

CLAUSE 43 - FURNISHING OF REPORTS AND INFORMATION

- 3.98 Clause 43 is considered by the Committee in Chapter 4 where it examines the accountability measures relating to the ACC.

CLAUSE 44 - SECRECY

- 3.99 Clause 44 replicates section 51 of the *Commonwealth Act* which imposes statutory secrecy obligations on the CEO, members of the Board, ‘member[s] of staff of the ACC’ (as defined) and examiners.
- 3.100 Specifically, clause 44(2) makes it an offence for those persons to record, divulge or communicate information acquired by them in the course of performing functions under the State Bill, the *Commonwealth Act* or other complementary legislation except for the purposes of, or in connection with the performance of functions under those Acts.
- 3.101 Clause 44(3) ensures that those persons to whom the section applies cannot be required to produce documents or divulge or communicate information which they

¹³⁸ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p387.

¹³⁹ Clause 47, Australian Crime Commission (Western Australia) Bill 2003 and section 35, *Australian Crime Commission Act 2002* (Cth).

¹⁴⁰ The equivalent and complementary section in the *Australian Crime Commission Act 2002* (Cth) is section 35A.

¹⁴¹ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

¹⁴² Commissioner Kevin Hammond, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, April 23 2004, p3.

have obtained in the performance of functions under the State Bill to a court. There are limited exceptions to this clause.

Meaning of ‘member of the staff of the ACC’

3.102 A ‘member of the staff of the ACC’ is defined in clause 44(4) to mean:

- (a) *a person referred to in the definition of “member of the staff of the ACC” in section 4(1) of the ACC Act; or*
- (b) *a person who assists, or performs services for or on behalf of, a legal practitioner appointed under section 7 in the performance of the legal practitioner’s functions as counsel to the ACC;*

3.103 Paragraph (a) of the definition refers to section 4(1) of the “ACC Act” which is the *Commonwealth Act*. Section 4(1) provides that:

“member of the staff of the ACC” means:

- (a) *a member of the staff referred to in subsection 47(1) [staff engaged under the Public Service Act 1999 (Cth)]; or*
- (b) *a person participating in an ACC operation/investigation; or*
- (c) *a member of a task force established by the Board under paragraph 7C(1)(f); or*
- (d) *a person engaged under subsection 48(1) [consultants]; or*
- (e) *a person referred to in section 49 [seconded staff] whose services are made available to the ACC; or*
- (f) *a legal practitioner appointed under section 50 to assist the ACC as counsel.*

3.104 The Committee notes that section 4(1)(f) of the *Commonwealth Act* relates solely to legal practitioners appointed under section 50 of the *Commonwealth Act*. However, clause 7 of the State Bill enables the CEO to appoint a legal practitioner under the State Bill as follows:

The CEO may appoint a legal practitioner to assist the ACC as counsel in relation to ACC operations/investigations generally or in relation to a particular matter or matters.

- 3.105 Paragraph (b) of the definition ‘member of the staff of the ACC’ in clause 44(4) of the State Bill ensures that the secrecy provisions bind persons assisting a legal practitioner appointed under clause 7. However, it appears that the legal practitioner is not equally bound because he or she is not referred to in the definition of ‘member of the staff of the ACC’ in the *Commonwealth Act* or the State Bill.
- 3.106 Consequent upon the Committee’s inquiry, the Minister advised the Committee that it will be necessary to amend clause 44 of the State Bill to overcome this problem and provided the Committee with two suggested insertions prepared by Parliamentary Counsel.¹⁴³

Observations

- 3.107 The Committee considers that these amendments are appropriate and makes Recommendation 4.

¹⁴³ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received May 24 2004.

Recommendation

Recommendation 4: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to ensure that a legal practitioner appointed under clause 7 is within the ambit of clause 44 which is a statutory secrecy provision. This can be effected in the following manner:

Clause 3:

Page 5, after line 23 - To insert -

“

(2a) For the purposes of this Act (except the definition of “Commonwealth body or person” in subsection (1)) the definition of “member of the staff of the ACC” in section 4(1) of the ACC Act is taken to extend to a legal practitioner appointed under section 7.

”.

Clause 71(2)(d):

Page 58, line 23 - To insert after “Commonwealth” -

“

as extended by section 3(2a) of the *Australian Crime Commission (Western Australia) Act 2004*.

”.

Meaning of ‘court’

3.108 Clause 44(3) is intended to preserve the secrecy of information relating to the ACC’s functions where a ‘court’ would otherwise have power to require the production of documents or the answering of questions by certain ACC officers that would disclose that information.¹⁴⁴

3.109 Clause 44(4) provides that ‘court’ is defined for the purposes of the clause as including:

¹⁴⁴ Australian Crime Commission (Western Australia) Bill 2003, Explanatory Memorandum, p19.

...any tribunal, authority or person having power to require the production of documents or the answering of questions.

- 3.110 Parliamentary privilege, in particular, the *Parliamentary Privileges Act 1891*, enables parliamentary committees to compel the attendance of witnesses, the giving of evidence and the production of documents. Therefore, it could be argued that parliamentary committees fall within the definition of ‘court’. Consequently, it might be argued that the statutory secrecy provisions in clause 44 of the State Bill (and section 51 of the *Commonwealth Act*) would prevent the CEO, a member of the Board, a member of the staff of the ACC and an examiner from producing information to a parliamentary committee of the Western Australian Parliament.
- 3.111 The Committee notes that this issue is more than a theoretical one as it arose, at the Commonwealth level, in relation to the statutory secrecy clause in the *National Crime Authority Act 1984* (Cth).¹⁴⁵
- 3.112 In a State context, the issue arose for the former Joint Standing Committee on the Anti-Corruption Commission.¹⁴⁶ The Anti-Corruption Commission has been replaced by the CCC. In reporting on the *Corruption and Crime Commission Act 2003* and the Corruption and Crime Commission Amendment Bill 2003, the Legislation Committee addressed a secrecy clause which incorporated an almost identical definition of ‘court’ to that in clause 44(4).
- 3.113 The Legislation Committee observed that a wide construction of the definition of ‘court’ could be interpreted as preventing any parliamentary committee from using the powers of compulsion conferred by the *Parliamentary Privileges Act 1891*.¹⁴⁷ The Legislation Committee recommended that a clause be included in the proposed legislation to the effect that the *Corruption and Crime Commission Act 2003* does not affect the operation of parliamentary privilege.¹⁴⁸ The House accepted this recommendation and the legislation was amended accordingly.¹⁴⁹

¹⁴⁵ See Odgers' Australian Senate Practice Tenth Edition online <http://www.aph.gov.au/Senate/pubs/html/chap2002.htm#parl>, (current at May 21 2004) pp48-51.

¹⁴⁶ P. McHugh, Clerk of the Legislative Assembly, ‘Statutory Secrecy Provisions’ Paper presented at the 34th Presiding Officers and Clerks Conference, Tonga, June 28 - July 5 2003.

¹⁴⁷ Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 21: Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, p129.

¹⁴⁸ Ibid, p135.

¹⁴⁹ Section 3(2) of the Corruption and Crime Commission Act 2003 provides that: “Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.”

- 3.114 However, the statutory secrecy provision in the *Corruption and Crime Commission Act 2003* can be distinguished from clause 44 which must be viewed in the federal/state context of the State Bill.
- 3.115 The CCC operates pursuant to a State Act, namely the *Corruption and Crime Commission Act 2003*. In contrast, the ACC operates primarily pursuant to the *Commonwealth Act* which is underpinned by complementary State and Territory legislation.
- 3.116 The Committee understands that parliamentary privilege is limited by the legislative power of the State, which (subject to the *Commonwealth Constitution*) is a plenary power.¹⁵⁰ Consequently, the Committee understands that a State parliamentary committee can only compel the CEO, members of the Board, staff of the ACC or examiners to attend before the Committee **in relation to their work pursuant to the State Bill** and not the *Commonwealth Act*.¹⁵¹ However, even in relation to their work under the State Bill, these persons might be able to rely on the secrecy provisions of clause 44 and decline to provide evidence.
- 3.117 The Committee asked the Minister about the effect of clause 44 on parliamentary privilege and the powers of a parliamentary committee to gather evidence. The Minister advised the Committee that:

Pursuant to clause 44(3) of the Bill, the CEO, a member of the Board, a member of the staff of the Australian Crime Commission and an examiner cannot be required to produce in any court any document that has come into his or her custody or control in the course of, or by reason of, the performance of his or her functions under this Act, or to divulge or communicate to a court a matter or thing that has come to his or her notice in the performance of those functions, except:

where the Australian Crime Commission, or the CEO, the acting CEO, a member of the Board or an examiner in his or her official capacity, is a party to the relevant proceeding, or

it is necessary to do so-

for the purpose of carrying into effect the provisions of a relevant Act; or

¹⁵⁰ Plenary power is unlimited legislative power. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p885. In relation to the plenary power of the State Parliament see for example *Nicholas v WA* [1972] WAR 168 at 173.

¹⁵¹ See for example, E. Campbell 'Commonwealth Powers and the Privileges of State Parliaments', 1999 UQLR 20(2) 201 at p220 where the author indicates that Commonwealth statutory secrecy provisions would probably be held to preclude Houses of State Parliaments from compelling those subject to a duty to secrecy to divulge the protected information.

for the purposes of a prosecution instituted as a result of an operation or investigation carried out by the Australian Crime Commission in the performance of its functions.

It is conceivable that a Parliamentary Committee could be carrying out an inquiry, which is consistent with the provisions of the Act and accordingly a person would be permitted to attend and give evidence and produce material. However this provision is designed to prevent fishing expeditions in the courts where the ACC is not the instigator of proceedings and where its involvement is peripheral. The prohibition is qualified by the provisions of section 44(2) where it says expect [sic] in connection with the officer's performance of his or her functions. Arguably a request made to an ACC officer to give evidence before a properly constituted parliamentary committee on matters germane to the performance of that officer's functions could be complied with. However it is likely that is [sic] information sought was sensitive and operational in nature then section 44(3) would be relied upon.¹⁵²

3.118 The Minister also advised that:

...if the officer is asked for information by said committee and that request could readily fall within the officer's duties then ordinarily it is anticipated that he would be permitted to comply subject to the operational sensitivities and exigencies contemplated by section 44(3).¹⁵³

Observations

3.119 The Committee has received advice from the Clerk of the Council to the effect that the State Bill does not abrogate the *Parliamentary Privileges Act 1891* through necessary intendment.¹⁵⁴ This contrasts with the advice from the Minister.

3.120 Recommendation 1 which ensures that the State Bill does not abrogate the *Parliamentary Privileges Act 1891* also clarifies this aspect of parliamentary privilege namely, the powers of State parliamentary committees in relation to requests of ACC

¹⁵² Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

¹⁵³ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 2).

¹⁵⁴ The Committee has previously considered whether or not legislation may operate to oust parliamentary privilege and considered statutory presumptions and constructions in detail. See Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report Number 11: Higher Education Bill 2003*, September 2003, pp24-33.

officers for information about their activities under the State Bill. However, the Committee emphasises that this amendment does not affect the ability of ACC officers to rely upon the statutory secrecy provision in the *Commonwealth Act*¹⁵⁵ in response to questions of a State parliamentary committee about their work under that Act.

CLAUSE 45 - DELEGATION

- 3.121 Clause 45 permits the CEO to delegate to staff of the ACC who are SES employees¹⁵⁶ all or any of the CEO's functions under the State Bill. This clause replicates section 59A of the *Commonwealth Act*.
- 3.122 However, section 59A is to be read subject to section 34AB(b) of the *Acts Interpretation Act 1901* (Cth) which provides that where an Act confers powers on a person or body to delegate a function or power, the powers that may be delegated do not include the power to delegate. The *Interpretation Act 1984* does not include a similar limitation on the power to delegate.
- 3.123 Consequent upon the Committee's inquiry, the Minister advised the Committee that Parliamentary Counsel has prepared an amendment to remedy the lack of a provision comparable to section 34AB(b) of the *Acts Interpretation Act 1901* (Cth).

Observations

- 3.124 The Committee considers that the suggested amendment is appropriate and makes Recommendation 5.

Recommendation

Recommendation 5: The Committee recommends that clause 45 which relates to the CEO delegating functions under the Australian Crime Commission (Western Australia) Bill 2003 be amended to prevent the CEO from delegating the power of delegation. This can be effected in the following manner:

Clause 45:

Page 46, line 12 - To insert after "under" -

“ another provision of ”.

¹⁵⁵ Section 51, *Australian Crime Commission Act 2002* (Cth).

¹⁵⁶ 'SES employee' is defined in section 4 of the *Australian Crime Commission Act 2002* (Cth) as having the same meaning as in the *Public Service Act 1999* (Cth). Section 34 of the *Public Service Act 1999* (Cth) defines 'SES employees' as those Australian Public Service employees who are classified as SES employees under the Classification Rules. The Classification Rules are published in the Gazette, section 23. Section 35 provides that the Senior Executive Service comprises 'SES employees'.

CLAUSE 47 - OBSTRUCTING, HINDERING OR DISRUPTING THE ACC OR AN EXAMINER

- 3.125 Clause 47 is effectively the same as an amendment proposed in clause 7 of the National Crime Authority (State Provisions) Amendment Bill 2002 which the Committee considered in its report on that bill.
- 3.126 Clause 7 of that bill proposed to repeal section 25 of the *National Crime Authority (State Provisions) Act 1985* entitled ‘Contempt of Authority’ and replace it with a provision which extended the operation of the section to ‘hearing officers’.
- 3.127 In addressing the proposed amendment, the Committee also considered the appropriateness of the approach to ‘contempt’ of the NCA in that bill. Appendix 7 contains the relevant extracts from the Committee’s report where this issue was canvassed.
- 3.128 The Committee recommended amendments to effect “*a more coherent approach to ensuring compliance by coercion and making any contempt that of the Court, not the NCA*”.¹⁵⁷ Appendix 8 contains the Committee’s recommended amendments. The Committee’s comments and recommendations apply equally to clause 47.
- 3.129 The Committee asked the Minister whether its views as expressed in its report on the National Crime Authority (State Provisions) Amendment Bill 2002 were addressed in the preparation of the model Bill. The Minister advised that whilst the comments were appreciated and acknowledged by the Department of Justice in Victoria, they were not considered due to the emphasis on the national uniformity with the *Commonwealth Act*.¹⁵⁸ The Minister also advised that clause 47 is in similar terms to section 165 of the *Corruption and Crime Commission Act 2003*.¹⁵⁹

Observations

- 3.130 The Committee reiterates its previous views as expressed in the report on the National Crime Authority (State Provisions) Amendment Bill 2002 and refers the House to Appendix 8 for the statutory amendment it proposed.

¹⁵⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p19.

¹⁵⁸ See Appendix 3 “Other Business 1” where it is noted that Victoria will take the lead in instructing the national Parliamentary Counsel’s Committee in drafting the model State Bill.

¹⁵⁹ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received May 24 2004.

CLAUSE 64 - TRANSITIONAL REGULATIONS**Operation of regulations**

- 3.131 Clause 64 enables regulations to be made if the transitional provisions in the State Bill that deal with a ‘transitional matter’ are insufficient. A ‘transitional matter’ is defined to include “*a savings or application matter*”. Notably, clause 64(3) provides that:

If regulations made under subsection (1) [which permits the making of regulations dealing with a transitional matter] provide that a state of affairs specified or described in the regulations is to be taken to have existed, or not existed, at and from a day that is earlier than the day on which the regulations are published in the Gazette, but not earlier than 1 January 2003, the regulations have effect according to their terms.

- 3.132 Effectively, this clause permits transitional regulations, once published in the *Gazette*, to have retrospective effect from a date not earlier than January 1 2003 (the date the ACC commenced pursuant to the *Commonwealth Act*). For example, transitional regulations may be made in January 2005 that alter a state of affairs in January 2003.
- 3.133 When considering similar clauses in previous reports, this Committee has observed that the common law position is that subsidiary legislation¹⁶⁰ (for example, a regulation) does not come into operation until it is published.¹⁶¹ Although regulations made pursuant to clause 64 do not come into operation until they are published, ***once published***, the regulations can operate from an earlier point in time. The undesirability of the retrospective operation of subsidiary legislation has been the subject of comment in recent reports of Committees of the Council.¹⁶²

¹⁶⁰ Also known as ‘subordinate legislation’, which is defined as legislation the creation of which, by individuals or bodies other than Parliament, is authorized by an Act of Parliament. The forms of subordinate legislation include regulations, rules, by-laws, ordinances, statutory instruments and proclamations. Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p1126.

¹⁶¹ The Committee highlighted that the statutory controls in the *Interpretation Act 1984* reflect this common law position by requiring subsidiary legislation to be published in the *Gazette* and to take effect only at this time or some later time. Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, p61.

¹⁶² Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, *Report No 1: Planning Appeals Amendment Bill 2001*, March 2002; Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*, June 2002, pp60-64; Western Australia, Legislative Council, Standing Committee on Legislation, *Report No 21: Corruption and Crime Commission Act 2003 and Corruption and Crime Commission Amendment Bill 2003*, December 2003, p182.

Check and balance?

3.134 The Committee notes that clause 64 contains two mechanisms which ameliorate the retrospective operation of the clause.

3.135 Firstly, clause 64(4) provides that the power to make retrospective transitional regulations expires 12 months after the day on which clause 65 comes into operation¹⁶³ thereby creating a ‘sunset’ on the ability to make retrospective regulations.

3.136 Secondly, clause 64(5) provides that retrospective regulations made under clause 64(3) do not operate so as to:

- (a) *affect in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the day of publication of those regulations; or*
- (b) *impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the day of publication of those regulations.*

3.137 The apparent purpose of clause 64(5) is to ameliorate the harsh consequences of regulations that operate retrospectively to alter or extinguish existing rights or impose liabilities. The Committee observes that this clause is expressed in terms similar to that found in other legislation previously before the Council which was the subject of extensive inquiry by the Public Administration and Finance Committee.¹⁶⁴

Other jurisdictions

3.138 The relevant provision in the *Australian Crime Commission (State Provisions) Act 2003* (Vic) is the same as clause 64. That Act enables retrospective transitional regulations to be made **from January 1 2003** and the ability to make such regulations expires or ‘sunset’ after 12 months.¹⁶⁵ There is also a similar section to clause 64(5).

3.139 However, notably the *Australian Crime Commission (State Provisions) Act 2003* (Vic), commenced on June 16 2003.¹⁶⁶ This means that the power to make

¹⁶³ Clause 65 provides that the *National Crime Authority (State Provisions) Act 1985* is repealed.

¹⁶⁴ Parliament of Western Australia, Legislative Council, Standing Committee on Public Administration and Finance, *Report No 1: Planning Appeals Amendment Bill 2001*, March, 2002.

¹⁶⁵ Section 65(4) of the *Australian Crime Commission (State Provisions) Act 2003* (Vic), provides that retrospective transitional regulation may not be made more than 12 months after section 51 comes into operation. Section 51 provides for the repeal of the *National Crime Authority (State Provisions) Act 1984* (Vic).

¹⁶⁶ The *Australian Crime Commission (State Provisions) Act 2003* (Vic) came into operation on the day that it received Royal Assent which was June 16 2003. See section 2 and http://www.dms.dpc.vic.gov.au/sb/2003_Act/A01272.html, (current as at June 16 2004).

retrospective regulations ceases on June 16 2004. Consequently, the maximum period for which a transitional regulation could operate retrospectively is 18 months being the time from June 2004 back to January 1 2003.

3.140 The *Australian Crime Commission (Queensland) Act 2003* (Qld) contains a number of measures limiting the operation of retrospective transitional regulations namely:

- any retrospective transitional regulations can only have a retrospective operation **from the date the Queensland Act commences**.¹⁶⁷ This contrasts with clause 64 and the *Australian Crime Commission (State Provisions) Act 2003* (Vic) which provide that retrospective transitional regulations may be made **from January 1 2003**; and
- like clause 64 and the equivalent provision in the *Australian Crime Commission (State Provisions) Act 2003* (Vic), the power to make retrospective transitional regulations expires 12 months after that Act commences.

3.141 The effect of these two limitations in the *Australian Crime Commission (Queensland) Act 2003* (Qld) is that the maximum period for which a transitional regulation could operate retrospectively is 12 months. This is because:

- the ability to make retrospective transitional regulations starts when the Act commences;
- such regulations can only be retrospective to the date the Act commences; and
- the power to make these regulations expires after 12 months.

3.142 The *Australian Crime Commission (Queensland) Act 2003* (Qld) contains an additional limitation which is that any regulation made with a retrospective operation can only operate for 12 months after the Act commences.¹⁶⁸ Clause 64 and the relevant provision in the *Australian Crime Commission (State Provisions) Act 2003* (Vic), do not contain this limitation. The Committee notes that the Council has previously considered this type of limitation and made amendments to similar clauses in other legislation to ensure that both:¹⁶⁹

¹⁶⁷ The main part of the *Australian Crime Commission (Queensland) Act 2003* (Qld) has not commenced to date.

¹⁶⁸ Section 67, *Australian Crime Commission (Queensland) Act 2003* (Qld).

¹⁶⁹ The Legislation Committee made recommendations for a similar 'check and balance' in relation to the Corporations (Consequential Amendments) Bill (No 2) 2001. See Western Australia, Legislative Council, Legislation Committee, *Report No 12: Corporations (Consequential Amendments) Bill (No 2) 2001*, March 2002, pp11-13.

- the power to make retrospective regulations expires after a certain period of time; *and*
- the regulations themselves expire after a certain period of time.

3.143 The Committee asked the Minister why clause 64 permits transitional regulations to be made from January 1 2003 and whether this period of time is necessary to achieve an effective transition. The Minister advised the Committee that:

*Clause 64 permits transitional regulations to be made from 1 January 2003 as this is when the Cth ACC Act came into operation and allows for a seamless transition.*¹⁷⁰

Observations

3.144 The Committee observes that it is becoming increasingly common for bills to include provisions permitting transitional regulations to be made that can have a retrospective operation. The Committee does not consider that the advice of the Minister satisfactorily explains why this clause is required and why it needs to operate over such a significant period of time.

3.145 The Committee notes that the ACC has been in operation for approximately 18 months during which time transitional matters should have been addressed. The Committee is of the view that provisions such as clause 64(3), which enable retrospective transitional regulations to be made, are undesirable and recommends that it be deleted.

Recommendation

Recommendation 6: The Committee recommends that clause 64(3) which permits retrospective transitional regulations and the associated clauses 64(4) and 64(5) be deleted. This can be effected in the following manner:

Page 53, line 19 to page 54, line 6 - To delete the lines.

CLAUSE 66 - ANTI-CORRUPTION COMMISSION ACT 1988 AMENDED

3.146 Clause 66 is intended to effect a consequential amendment to section 12(1)(f) of the *Anti-Corruption Commission Act 1988* which relates to consultation, co-operation and the exchange of information between the Anti-Corruption Commission and agencies such as the NCA. The amendment is intended to replace the reference to the 'NCA' with the 'ACC' in that section of the *Anti-Corruption Commission Act 1988*.

¹⁷⁰ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

- 3.147 However, since the introduction of the State Bill, the *Anti-Corruption Commission Act 1988* has been repealed by the *Corruption and Crime Commission Amendment and Repeal Act 2003*.¹⁷¹ The CCC replaced the Anti-Corruption Commission.
- 3.148 The Committee notes that the equivalent provision to section 12(1)(f) of the *Anti-Corruption Commission Act 1988* is section 18(2)(g) of the *Corruption and Crime Commission Act 2003*. Section 18(2)(g) refers to the CCC consulting, co-operating and exchanging information with the ACC. Therefore, a consequential amendment is not required in either the *Anti-Corruption Commission Act 1988* or the *Corruption and Crime Commission Act 2003* and the Committee considers that clause 66 can be deleted.

Recommendation

Recommendation 7: The Committee recommends that clause 66 of the Australian Crime Commission (Western Australia) Bill 2003 be deleted. This can be effected in the following manner:

Page 55, lines 8 to 19 - To delete the clause.

¹⁷¹ Section 54, *Corruption and Crime Commission Amendment and Repeal Act 2003*.

CHAPTER 4

OTHER ISSUES

INTRODUCTION

4.1 This Chapter address two significant issues that concerned the Committee:

- the accountability of the ACC and the Board; and
- the review of the operations of the ACC.

ACCOUNTABILITY

4.2 As part of its inquiry, the Committee considered the report of the Commonwealth Parliamentary Joint Committee on the NCA (**PJC**) which reported to the Commonwealth Parliament on the Australian Crime Commission Establishment Bill 2002 (Cth) in November 2002.¹⁷² One of the major issues for the PJC was the power of the Board to authorize the use of coercive powers. The concerns raised as part of the PJC's inquiry included:¹⁷³

- Given that the majority of the Board is police officers, it cannot be expected to give a measured and unbiased consideration of the use of coercive powers.
- The new body will be dominated by police forces and possessed of powers which the Parliament has always refused to give to police forces.
- As a matter of precedent, neither the NCA nor the State Crime Commissions currently allow the level of police force influence on the activation of the coercive powers as will be the case with the ACC.

4.3 Similarly, this Committee is concerned about the shift in the responsibility for the authorization of the use of coercive powers from the IGC, comprising Ministers, to the Board, the majority of whom represent the various police forces.

4.4 The Committee notes that this shift in responsibility has removed a key accountability mechanism. The State Minister as part of the IGC was directly accountable to the Western Australian Parliament for determinations of the NCA to authorize the use of coercive powers. The State Minister, as a member of the IGC, is now limited to an oversight role in relation to the authorization of the use of coercive powers. The

¹⁷² Commonwealth, Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002.

¹⁷³ Ibid, pp23-24 and p26.

Police Commissioner, who represents the State of Western Australia on the Board of the ACC is not directly accountable to the Western Australian Parliament.

4.5 This could give rise to a situation whereby the Police Commissioner as part of the Board agrees to the use of coercive powers or sets priorities for the ACC that the Government does not agree with.

4.6 The Committee notes that the Police Commissioners on the Board may well have common interests and approaches in dealing with authorizations. The same commonality was less likely to occur with a Board comprising Ministers with disparate State interests. This potentially operated as an internal 'check and balance' on the authorization of the use of coercive powers for the NCA.

4.7 As a result of its concerns, the Committee evaluated the accountability mechanisms operating in relation to the ACC and the Board namely:

- the IGC;
- the Commonwealth Minister;
- the State Ministers;
- the Parliamentary Joint Committee on the ACC;
- the Commonwealth Ombudsman; and
- the courts.

The IGC

4.8 The principal role of the IGC is oversight of the ACC and the Board. As indicated, its functions include:¹⁷⁴

- monitoring generally the work of the ACC and the Board;
- overseeing the strategic direction of the ACC and the Board; and
- receiving reports from the Board for transmission to the Governments represented on the IGC.

4.9 The Committee examined the extent to which the IGC is empowered to carry out its oversight role. In essence, the IGC:

- receives information through reporting requirements placed on the ACC; and

¹⁷⁴ Section 9(1), *Australian Crime Commission Act 2002* (Cth).

- is able to make requests of the ACC for information.

Reporting requirements

- 4.10 At a broad level, the Board is required by section 7C(1)(h) of the *Commonwealth Act* to report to the IGC on the ACC's performance.
- 4.11 More specifically, within three working days of authorising special ACC operations/investigations, the Chair of the Board must provide the IGC with a copy of its written determination.¹⁷⁵ The IGC can then ask the Chair of the Board to provide further information.¹⁷⁶ The Chair of the Board is required to comply with the IGC's request unless he/she considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies (**prejudice clause**).¹⁷⁷ If the Chair of the Board refuses to provide the information, the IGC can refer the request to the Commonwealth Minister for a determination about the release of the information.¹⁷⁸
- 4.12 The IGC is empowered to revoke the Board's authorization of a special ACC operation/investigation but the revocation is not retrospective and only takes effect when the CEO is notified.¹⁷⁹
- 4.13 Clause 16 of the State Bill reflects the provisions of the *Commonwealth Act* in relation to the authorization of **special ACC State operations or investigations**. If the Chair of the Board refuses to provide the information requested by the IGC on the basis of the prejudice clause, clause 16(4) provides that the IGC may refer the request to the State Minister (as opposed to the Commonwealth Minister) for a determination about the release of the information.
- 4.14 After the completion of any special ACC operation/investigation undertaken by the ACC, the Chair of the Board is required to furnish to the IGC (for transmission to the Governments represented on the IGC) a report of the findings of the intelligence operation or investigation (section 59(4)). This is echoed in clause 43(5) of the State Bill in relation to **special ACC State operations or investigations**.

¹⁷⁵ Section 7C(5), *Australian Crime Commission Act 2002* (Cth).

¹⁷⁶ Section 9(2) *Australian Crime Commission Act 2002* (Cth) provides that six of the eight IGC members (including the Commonwealth Member) must agree to the request.

¹⁷⁷ Sections 9(3) and 9(4), *Australian Crime Commission Act 2002* (Cth).

¹⁷⁸ Sections 9(5) and 9(6), *Australian Crime Commission Act 2002* (Cth).

¹⁷⁹ Sections 9(7) and 9(8), *Australian Crime Commission Act 2002* (Cth). Section 9(7) provides that six of the eight Committee members (including the Commonwealth Member) must agree to revoke the determination.

Requests for information

4.15 Pursuant to section 59 of the *Commonwealth Act*, the IGC can require the Chair of the Board of the ACC to provide information upon request. The request may concern either:

- a **specific matter** relating to an ACC operation/investigation that the ACC has conducted or is conducting; or
- information about the **general conduct** of the operations of the ACC.¹⁸⁰

4.16 However, the provision of this information is subject to a prejudice clause (section 59(5)). Section 59 is reflected in clause 43 of the State Bill.

The Commonwealth Minister*Directions to the ACC*

4.17 Pursuant to section 18 of the *Commonwealth Act*, the Minister is able to give directions or guidelines to the Board with respect to the performance of its functions. If the directions or guidelines relate to particular ACC operations/investigations, then the Minister must obtain the approval of a resolution of the IGC which must be passed by all members present at the relevant meeting.¹⁸¹

Reporting requirements and requests for information

4.18 Pursuant to section 59(1) of the *Commonwealth Act*, the Chair of the Board of the ACC to is required to:

- keep the Commonwealth Minister informed about the **general conduct** of the ACC in the performance of its functions; and
- comply with a request from the Commonwealth Minister concerning a **specific matter** relating to the ACC's conduct in the performance of its functions.

4.19 Clause 43(1) of the State Bill imposes the same requirements on the Chair of the Board in relation to the functions of the ACC pursuant to the State Bill.

4.20 The Committee notes that the Chair of the Board is not able to refuse to provide information to the Commonwealth Minister on the basis of a prejudice clause. This creates an interesting result whereby, the Chair of the Board may refuse to provide

¹⁸⁰ The Chair of the Board may also provide information in relation to the general conduct of the operations of the ACC to the IGC as such other times as the Chair considers appropriate, section 59(3)(b).

¹⁸¹ Section 18(2), *Australian Crime Commission Act 2002* (Cth).

information to the IGC (which includes the Commonwealth Minister) on the basis of a prejudice clause,¹⁸² but the Commonwealth Minister might wish to independently request the same information and the Chair of the Board cannot refuse to provide it.

The State Ministers

4.21 Unlike the position of the Commonwealth Minister, there is no requirement that the Chair of the Board keep the State Ministers on the IGC informed about the **general conduct** of the ACC in the performance of its functions under either the *Commonwealth Act* or the State Bill.

4.22 The Chair of the Board is required to comply with a request by a **State Minister** (who is a member of the IGC) concerning a **specific matter** relating to the ACC's conduct in the performance of its functions pursuant to the *Commonwealth Act* or the State Bill. However, significantly, the Chair of the Board may refuse to provide the information on the basis of a prejudice clause.¹⁸³

4.23 The Committee notes that the limitation on disclosure to State Ministers on the IGC was not a feature of the *National Crime Authority Act 1984* (Cth) and sought the Minister's advice as to the reasons for this limitation.

4.24 The Minister advised the Committee that:

*The Bill has been drafted to adopt the provisions of the model Bill with emphasis on national uniformity with the Commonwealth Act, which does not provide for disclosure to State Ministers. In addition, the ACC is not merely a replication of the NCA but incorporates the functions of the Australian Bureau of Criminal Intelligence (ABCI), which had no legislative provision for access to State Ministers.*¹⁸⁴

4.25 The Minister also advised the Committee that section 59 of the *Commonwealth Act* originally enabled the Chair of the Board to refuse to provide information to **both** the Commonwealth Minister and the State Minister on the basis of a prejudice clause but this was amended in the Senate.¹⁸⁵

¹⁸² See section 59(5), *Australian Crime Commission Act 2002* (Cth) and clause 43(6), Australian Crime Commission (Western Australia) Bill 2003.

¹⁸³ See sections 59(1A) and 59(2), *Australian Crime Commission Act 2002* (Cth) and clause 43(2) and 43(3), Australian Crime Commission (Western Australia) Bill 2003.

¹⁸⁴ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received May 24 2004.

¹⁸⁵ Ibid.

- 4.26 The Senate *Hansard* reveals that one of the reasons for the amendment was the view that the restriction might impede the Commonwealth Minister performing his/her role under section 9 of the *Commonwealth Act* (equivalent to clause 16 of the State Bill).¹⁸⁶
- 4.27 Section 9 of the *Commonwealth Act* relates to requests by the IGC for information about Board authorizations for special operations or special investigations. The Chair of the Board may refuse to provide this information to the IGC on the basis of a prejudice clause. However, if the Chair of the Board refuses to provide the information, the IGC can take the request to the Commonwealth Minister who must consider the request of the IGC and determine whether to release the information.
- 4.28 The Senate *Hansard* indicates that the concern was that in making a determination under section 9, the Commonwealth Minister may require further information. However, section 59 (as originally drafted) enabled the Chair of the Board to withhold information from the Commonwealth Minister on the basis of a prejudice clause. It was considered that such a refusal could impede the Commonwealth Minister from making a section 9 determination.¹⁸⁷
- 4.29 Whilst this potential problem was overcome in the *Commonwealth Act*, the Committee is concerned that the same problem arises in relation to the State Bill.
- 4.30 As indicated, clause 43 enables the Chair of the Board to refuse to provide information to the State Minister on the IGC on the basis of a prejudice clause. However, this limitation might be seen to impede the State Minister performing his/her role under clause 16 which replicates section 9 of the *Commonwealth Act*.
- 4.31 As with section 9, clause 16 relates to requests by the IGC for information about authorizations for special operations or special investigations. The Chair of the Board may refuse to provide this information to the IGC on the basis of a prejudice clause. However, if the Chair of the Board refuses to provide the information, the IGC may take the request to the **State Minister** (as opposed to the Commonwealth Minister under section 9 of the *Commonwealth Act*) who may make a determination about the release of the information. If in making this determination the State Minister requires further information and makes a request for information under clause 43, there is the potential for the Chair of the Board to refuse to provide that information on the basis of a prejudice clause.

Observations

- 4.32 The Committee notes that:

¹⁸⁶ Senate, Commonwealth Parliament, *Parliamentary Debates (Hansard)* November 19 2002, p6754.

¹⁸⁷ Ibid, p6753.

- As a practical matter, it might be the case that the State Minister is provided with and/or can request any necessary information in discharging the role under clause 16 and therefore would not need to make a request under clause 43.
 - If the State Minister is required to make requests under clause 43 in order to make a decision under clause 16, it would seem anomalous that the Chair of the Board would refuse to provide the State Minister with information required to make a decision under clause 16 on the basis of a prejudice clause.
 - It could be argued that clause 43 is to be read down to enable the State Minister to execute the functions vested under clause 16.
- 4.33 Although the *Commonwealth Act* was amended to redress an apparent inconsistency in respect of the Commonwealth Minister, the Committee observes that the same amendment was not made by other participating jurisdictions, in respect of the position of a State Minister under each State's legislative component of the regime.
- 4.34 The Committee notes that if the same amendment was made to the State Bill whilst this would alter the uniformity of the treatment of the State Ministers on the IGC it would only do so in respect of the provision of information to the State Minister under each State's component of the legislative scheme.
- 4.35 Over and above the need for the State Minister to obtain information to determine matters under clause 16, the Committee considers that there should be no restriction on the ability of the State Minister to obtain information concerning a specific matter relating to the ACC's conduct in the performance of its functions under the State Bill (as clause 43 proposes). Therefore, the Committee considers that the amendment made by the Commonwealth Parliament in relation to the Commonwealth equivalent of clause 43 should also be made to the State Bill in respect of the State Minister (see Recommendation 8).

Recommendation

Recommendation 8: The Committee recommends that clause 43 of the Australian Crime Commission (Western Australia) Bill 2003 be amended to remove the restriction in clause 43(3) applying to the State Minister. This can be effected in the following manner:

Page 42, line 6 - To delete "Subject to subsection (3),".

Page 42, lines 12 to 16 - To delete the lines.

The Parliamentary Joint Committee on the ACC

4.36 The Parliamentary Joint Committee on the ACC has a general oversight role in relation to the ACC and its duties include:¹⁸⁸

- monitoring and reviewing the ACC in the performance of its functions;
- reporting to the Parliament upon any matter appertaining to the ACC or connected with the performance of its functions which the Parliamentary Joint Committee on the ACC considers should be brought to the attention of the Parliament; and
- examining each annual report on the ACC and reporting to the Parliament on any matter appearing in or arising out of such annual report.

4.37 In considering the role of the Parliamentary Joint Committee on the ACC, it is appropriate to note the effect of statutory secrecy provisions on parliamentary committees inquiring into the activities of the ACC. As indicated earlier, this was an issue for PJC in relation to the NCA in the 1990s.¹⁸⁹ At the Commonwealth level, *Odgers' Australian Senate Practice* indicates that since 1991, the government has generally adhered to the approach that generic statutory secrecy provisions do not affect parliamentary inquiries.¹⁹⁰

4.38 The Committee addresses the effect of statutory secrecy clauses on State parliamentary committees at paragraphs 3.108 to 3.120.

The Commonwealth Ombudsman

4.39 The Commonwealth Ombudsman has jurisdiction over complaints concerning the ACC.¹⁹¹ In this capacity, the Commonwealth Ombudsman has the power to require the production of information or documents. However, if the documents are or were in the possession or control of the ACC or the Board and might endanger the life of a

¹⁸⁸ Section 55, *Australian Crime Commission Act 2002* (Cth).

¹⁸⁹ *Odgers' Australian Senate Practice Tenth Edition* online <http://www.aph.gov.au/Senate/pubs/html/chap2002.htm#parl>, (current at May 21 2004) pp48-51.

¹⁹⁰ *Ibid*, p51.

¹⁹¹ Section 3(13A), *Ombudsman Act 1976* (Cth) provides that the ACC is a prescribed authority for the purposes of that Act.

person or create a risk of serious injury to a person, then the Ombudsman is not entitled to production.¹⁹²

4.40 The Commonwealth Ombudsman also has a monitoring role in relation to the ACC pursuant to a number of Commonwealth Acts namely:¹⁹³

- *Crimes Act 1914* (Cth) - External scrutiny of the conduct of controlled operations and the adequacy and comprehensiveness of ACC reports to Parliament on controlled operations.
- *Telecommunications (Interception) Act 1979* (Cth) - Inspections of compliance with record keeping requirements.

4.41 In fulfilling these roles, the Ombudsman does not appear to be restricted by the sensitive nature of the information being examined.

The courts

4.42 The Committee considered the extent to which the courts are able to review the activities of the ACC. In this regard, the Committee noted clause 36 of the State Bill and section 16 of the *Commonwealth Act* which limit, in certain circumstances, the legal challenges that may be made to ACC activities. Clause 36 provides:

If -

(a) an ACC State intelligence operation is determined by the Board to be a special operation; or

(b) an ACC State investigation is determined by the Board to be a special investigation,

then except in a proceeding instituted by the Attorney-General of the Commonwealth or of a State, any act or thing done by the ACC because of that determination must not be challenged, reviewed, quashed or called into question in any court of the State on the ground that the determination was not lawfully made.

¹⁹² Section 9(3), *Ombudsman Act 1976* (Cth). Complaints relating to Australian Federal Police Officers working for the ACC are dealt with by the Commonwealth Ombudsman through a separate process under the *Complaints (Australian Federal Police) Act 1981* (Cth). In addition, the relevant State or Territory Ombudsman may deal with complaints about the actions of ACC officers seconded from other jurisdictions. The PJC noted these disparate processes and recommended that the Australian Crime Commission Establishment Bill 2002 be amended to provide that the Commonwealth Ombudsman investigate complaints against all staff of the ACC. Commonwealth, Parliamentary Joint Committee on the National Crime Authority, *Australian Crime Commission Establishment Bill 2002*, November 2002, p17.

¹⁹³ *Commonwealth Ombudsman Annual Report 2002 - 2003* from http://www.comb.gov.au/publications_information/Annual_Reports/ar2002-03/entire.pdf, (current at March 19 2004), p82.

4.43 The Explanatory Memorandum for clause 36 indicates that:

*This provision does not prevent challenges in relation to the activities of the ACC once a determination is in place. Also, this limitation does not apply to proceedings initiated by the Attorney-General of the Commonwealth or a State.*¹⁹⁴

4.44 Clause 36 and section 16 of the *Commonwealth Act* are ‘privative clauses’.¹⁹⁵ Privative clauses restrict the scope of ‘judicial review’ for decisions made pursuant to the relevant Act.¹⁹⁶

4.45 ‘Judicial review’ can be defined as:

*The determination by courts of the legality of exercises of power by administrators and tribunals. The High Court of Australia, the Federal Court of Australia, and the superior courts of the States and Territories have final authority to determine the scope of administrators’ powers. The State courts have an inherent jurisdiction to issue relief in the form of prerogative remedies, injunctions and declarations. Review at federal level under the (CTH) Administrative Decisions (Judicial Review) Act 1977 may be called judicial review, although it does not involve the prerogative remedies and is a jurisdiction limited by statute rather than an inherent jurisdiction at general law. Judicial review is confined to review of questions of law and does not extend to review of the merits of administrative action.*¹⁹⁷

4.46 In relation to the activities of the ACC under the State Bill, an application for judicial review could be made to the Supreme Court of Western Australia exercising its inherent supervisory jurisdiction.

¹⁹⁴ Australian Crime Commission (Western Australia) Bill 2003, Explanatory Memorandum, p16.

¹⁹⁵ See Submission No 10 from Attorney-General’s Department, p15 to Parliamentary Joint Committee on the National Crime Authority inquiry into the Australian Crime Commission Establishment Bill 2002 available at http://www.aph.gov.au/Senate/committee/acc_ctte/reports/index.htm, (current at March 10 2004).

¹⁹⁶ G. Coffey, *Privative Clauses and the Theoretical Underpinnings of Administrative Law in Australia* AIAL FORUM (39), September 2003, p69.

¹⁹⁷ Dr P. Nygh and P. Butt, *Butterworths Australian Legal Dictionary*, Butterworths, Australia, 1997, p649.

- 4.47 In relation to the activities of the ACC pursuant to the *Commonwealth Act*, an application could be made to the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act 1977*.¹⁹⁸
- 4.48 The exception to clause 36 is proceedings instituted by the **Attorney General of the Commonwealth or a State** in relation to an ACC investigation or intelligence operation conducted under the **State Bill**.
- 4.49 Similarly, the exception to section 16 of the *Commonwealth Act* is proceedings instituted by the **Attorney General of the Commonwealth or a State** in relation to an ACC investigation or intelligence operation conducted under the *Commonwealth Act*.
- 4.50 The Committee understands that it follows that the **State Attorney General** would be able to institute proceedings concerning an ACC investigation into:
- federal offences (or State offences with a federal aspect) under section 16 of the *Commonwealth Act*; and
 - State offences (without a federal aspect) under clause 36.
- 4.51 Given that clause 36 ousts the jurisdiction of the courts (in certain circumstances), the Committee asked the Minister why this clause is required. The Minister advised that:
- The clause is a necessary one because the ACC in carrying out its functions pursuant to a determination needs to be confident that its investigations will not be hindered or delayed by tactical challenges by persons that are likely to be the subject of investigations.*¹⁹⁹
- 4.52 The Committee asked the Minister whether the limitations imposed by clause 36 cease when the intelligence operation or investigation has been resolved. The Minister indicated that the limitations on judicial review in clause 36 would continue after an intelligence operation or investigation has been resolved.²⁰⁰

¹⁹⁸ See section 57 of the *Australian Crime Commission Act 2002* (Cth). See also section 13 and Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* which exempts certain decisions of the ACC from the obligation to provide a statement of reasons. The *Australian Crime Commission Amendment Act 2004* (Cth) which commenced on April 2 2004 extended the decisions to include intelligence operations and decisions in connection with investigations of State offences with a federal aspect.

¹⁹⁹ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 1).

²⁰⁰ Letter from Hon Michelle Roberts MLA, Minister for Police and Emergency Services, undated, received April 7 2004, (Letter Number 2).

Observations

- 4.53 The Committee has concluded that there are deficiencies in the accountability mechanisms applying to the ACC and the Board of the ACC. The Committee is principally concerned about the oversight role of the IGC. Although the IGC was intended to have an important role in overseeing and monitoring the work of the ACC,²⁰¹ the Committee considers that the IGC is considerably circumscribed in its ability to do so. The Committee considers that a major impediment facing the IGC is the ability of the Chair of the Board to withhold information on the basis of a prejudice clause. As the former PJC on the NCA observed “*information is the lifeblood of accountability*”.²⁰²
- 4.54 The Committee observes that former PJC and the former Joint Standing Committee on the Anti-Corruption Commission in Western Australia (which both had an oversight role) indicated that the inability to access operational information prevented them from ensuring the operational accountability of those agencies. Both Committees suggested that this could be overcome by the appointment of an independent Inspector with a function of auditing and scrutinising the operations of those agencies.²⁰³
- 4.55 The CCC, which recently replaced the Anti-Corruption Commission in Western Australia, has an independent Parliamentary Inspector with extensive powers to obtain information and, if necessary, the ability to conduct an inquiry with all the powers of a Royal Commission.²⁰⁴
- 4.56 The Committee recognises that the restrictions on the provision of information by the former NCA and the former Anti-Corruption Commission to the relevant parliamentary committees differ as the IGC is not a parliamentary committee. However, the Committee notes that the same problems will arise in the IGC’s performance of its oversight role.
- 4.57 The Committee is mindful that the CCC is also operating in Western Australia in relation to organised crime and has the Parliamentary Inspector as a powerful and independent accountability mechanism.

²⁰¹ Australian Crime Commission Establishment Bill 2002, Revised Explanatory Memorandum, Item 38.

²⁰² Commonwealth Parliament, Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, paragraph 598.

²⁰³ Western Australia, Legislative Assembly, Joint Standing Committee on the Anti-Corruption Commission, *Report on the Operational Accountability of the Anti-Corruption Commission and the Protection of Rights under the Anti-Corruption Commission Act 1988*, October 1998, pp7-13. These views were reiterated in later reports including, Western Australia, Legislative Assembly, Joint Standing Committee on the Anti-Corruption Commission, *The Investigative Powers and Operational Accountability of the Anti-Corruption Commission*, August 2000, pp8-9. Commonwealth Parliament, Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, paragraphs 5.92 to 5.103.

²⁰⁴ Section 197, *Corruption and Crime Commission Act 2003*.

- 4.58 The Committee draws the attention of the House to the issue of the overlapping jurisdiction of the ACC and the CCC and, in particular, the evidence of Mr Michael Cashman, Director of Legal Services, CCC at paragraph 3.19. Mr Cashman indicated that at an anecdotal level, there is a view that it is easier for the Western Australian Police Force to enter into a taskforce with the ACC rather than obtaining approval for the use of coercive powers from the CCC.²⁰⁵ As the Committee has indicated, it is of the view that there is no effective independent accountability mechanism in relation to the operations of the ACC.
- 4.59 The Committee considered a number of options to address this issue but the uniform nature of the legislative scheme would mean that any amendment to the State Bill would only affect the operations of the ACC pursuant to the State Bill.

REVIEW PROVISIONS

Section 61A *Commonwealth Act* - Commonwealth review

- 4.60 Section 61A of the *Commonwealth Act* provides for a review of the operation of the *Commonwealth Act* (**general Commonwealth review**) as follows:

- (1) *The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after 1 January 2006.*
- (2) *The persons who undertake such a review must give the Minister a written report of the review.*
- (3) *The Minister must cause a copy of each report to be tabled in each House of the Parliament within 15 sitting days of that House after its receipt by the Minister.*
- (4) *However, this section does not apply if a committee of one or both Houses of the Parliament has reviewed the operation of this Act, or started such a review, before 1 January 2006.*
[underlining added]

- 4.61 This clause raises the following matters:

- tabling of the general Commonwealth review in State Parliament;
- the scope of the general Commonwealth review; and
- the conduct of a general State review and its tabling in State Parliament.

²⁰⁵ Mr Michael Cashman, Director, Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, April 23 2004, p4.

Tabling of the general Commonwealth review in State Parliament

- 4.62 Section 61A(3) of the *Commonwealth Act* requires the Commonwealth Minister to cause the general Commonwealth review to be tabled in each House of the Commonwealth Parliament within 15 days after it is received.
- 4.63 The ACC is created and established by the *Commonwealth Act* and its operations in relation to State offences will be expanded by the State Bill. Therefore, the Committee considers that the general Commonwealth review is relevant to Western Australia.
- 4.64 However, unlike other uniform legislation, there is:
- no provision in the *Commonwealth Act* for the general Commonwealth review to be provided to the State Minister on the IGC; and
 - no requirement that the State Minister table the general Commonwealth review in State Parliament.
- 4.65 In this respect, the Committee observes that both the *Research Involving Human Embryos Act 2002* (Cth) and the *Prohibition of Human Cloning Act 2002* (Cth) set out requirements for the review of each respective Act. These Acts expressly require that reports of the reviews must be given to the Council of Australian Governments (COAG)(as well as both Federal Houses of Parliament) before the third anniversary of the day on which the *Prohibition of Human Cloning Act 2002* (Cth) received Royal Assent.²⁰⁶ In this manner, the State Minister sitting on COAG will formally be provided with a copy of the Commonwealth reviews conducted under that legislative regime. In that legislative regime COAG is the relevant intergovernmental body as is the IGC for the ACC legislative regime.
- 4.66 Despite that fact that the general Commonwealth review once tabled in Commonwealth Parliament is made public, the Committee sees merit in it being formally tabled in State Parliament. This will ensure that the issues raised by the general Commonwealth review will be directly brought to the attention of the State Parliament thereby providing greater scrutiny of the operations of the ACC under the complementary legislation.
- 4.67 Therefore, the Committee considers it appropriate that a clause be inserted into the State Bill to provide that after the tabling of the general Commonwealth review in the Commonwealth Parliament, the State Minister table the general Commonwealth review in State Parliament.

²⁰⁶ Section 47 of the *Research Involving Human Embryos Act 2002* (Cth) and section 25 of the *Prohibition of Human Cloning Act 2002* (Cth).

Recommendation

Recommendation 9: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to require that upon the State Minister becoming aware that the review conducted under section 61A of the *Australian Crime Commission Act 2002* (Cth) has been tabled in the Commonwealth Parliament, that the State Minister do inform the State Parliament of that fact and obtain and table a copy of the report in State Parliament. This can be effected in the following manner:

Page 49, after line 8 - To insert the following new Clause –

“

49A Tabling of the review of the ACC Act

At the earliest opportunity after the State Minister becomes aware that a report under section 61A of the ACC Act has been laid before the Commonwealth Parliament the State Minister must -

- (a) cause a copy of the report to be laid before each House of Parliament; or
- (b) if copies of the report are not then available, notify each House that a report has been presented under section 61A and indicate when it is expected that a copy will be laid before it.

”.

Scope of the general Commonwealth review

4.68 As section 61A(1) of the *Commonwealth Act* refers to “*this Act*” the general Commonwealth review is limited to the federal operations of the ACC and does not appear to relate to its work under the State Bill in relation to State offences (without a federal aspect).

4.69 In other uniform schemes, the Commonwealth legislation in the scheme expressly requires the Commonwealth to undertake a review involving consultation with the States.²⁰⁷ For example:

²⁰⁷ See section 25, *Prohibition of Human Cloning Act 2002* (Cth) and section 47, *Research Involving Human Embryos Act 2002* which relate to the *Human Reproductive Technology Amendment Bill 2003* and the *Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*.

25(6) *The persons undertaking the [Commonwealth] review must consult:*

- (a) *the Commonwealth and the States; and*
- (b) *a broad range of persons with expertise in or experience of relevant disciplines;*

*and the views of the Commonwealth, the States and the persons mentioned in paragraph (b) must be set out in the report to the extent that it is reasonably practicable to do so.*²⁰⁸

4.70 Such provisions are absent from the *Commonwealth Act*.

4.71 The Committee observes that because the State Parliament cannot make amendments to the *Commonwealth Act* the State Minister could make representations to the IGC for an amendment to the *Commonwealth Act* similar to the example above. However, a more direct approach would be for the State Bill to include a clause requiring a review of the operation of the State Bill to occur. This is discussed below.

The conduct of a State review and its tabling in State Parliament

4.72 The Committee observes that there is no provision in the State Bill requiring a review to be undertaken of the operation of the State Bill, that is a review of the State component of the legislative scheme. The Committee observes that in contrast, other uniform legislation before the Western Australian Parliament provides for a separate State review to be conducted, for example, see the Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003.²⁰⁹

4.73 The Committee considers that a review of the operation of the State Bill should occur through a clause equivalent to section 61A being inserted in the State Bill (**general State review**)(see Recommendation 10). This will ensure that the operation of the uniform legislative regime at the State level is considered. The Committee also considers that the following matters reinforce the appropriateness of a general State review:

- in Western Australia, there is the issue of the overlapping jurisdiction of the ACC and the CCC which does not arise at the Commonwealth level;

²⁰⁸ Section 25, *Prohibition of Human Cloning Act 2002* (Cth).

²⁰⁹ Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Human Reproductive Technology Amendment Bill 2003 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, December 2003, pp14-16.

- an independent Commonwealth review is not required to be undertaken if a committee of one or both Houses of the Commonwealth Parliament has reviewed the operation of the *Commonwealth Act* or has started such a review, before January 1 2006 (section 61A(4), *Commonwealth Act*). If this occurs, an independent general State review will be of greater significance; and
- the general Commonwealth review is a one off review to be undertaken as soon as practicable after January 1 2006. By the time the general Commonwealth review is conducted the *Commonwealth Act* would have been proclaimed for three years. The Committee observes that the State Bill, if passed this year, may only have been in operation for 12 to 18 months before the general Commonwealth review is conducted.

4.74 The Committee considers that the general State review should be tabled in State Parliament (see Recommendation 10). Similarly, in its report on the Human Reproductive Technology Amendment Bill 2003 and the Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003, this Committee recommended an amendment to require the general State review to be tabled in State Parliament (see also Recommendation 10).²¹⁰

²¹⁰ Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Human Reproductive Technology Amendment Bill 2003 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2003*, December 2003, pp14-16.

Recommendation

Recommendation 10: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to require that the State Minister cause a review of the operation of the Act and table that review in State Parliament. This can be effected in the following manner:

Page 49, after line 8 - To insert the following new Clause –

“

49B Review of Act

- (1) The State Minister must cause an independent review of the operation and effectiveness of this Act to be undertaken as soon as possible after the expiration of 3 years after its commencement.
- (2) A person who undertakes such a review must give the State Minister a written report of the review.
- (3) The State Minister must cause a copy of the report of the review to be laid before each House of Parliament of the State within 4 years after the commencement of this Act.

”.

Specific review of particular provisions

4.75 As indicated, the *Commonwealth Act* was created by amending the *National Crime Authority Act 1984* (Cth). That Act included certain amendments which were effected in 2001 by the *National Crime Authority Legislation Amendment Act 2001* (Cth).

4.76 The *National Crime Authority Legislation Amendment Act 2001* (Cth) included amendments that:

- removed the defence of reasonable excuse;
- removed derivative use immunity; and
- increased penalties for non-compliance.

- 4.77 However, in conjunction with these amendments was an amendment requiring that a specific review (**specific Commonwealth review**) evaluating the effect of the amendments be undertaken within five years.²¹¹
- 4.78 This Committee reported on the complementary State Bill, the National Crime Authority (State Provisions) Amendment Bill 2002. The Committee noted that the specific Commonwealth review would be provided to the Minister of the Crown of each participating State and would also be tabled in each House of the Commonwealth Parliament within 15 sitting days.
- 4.79 The Committee recommended that the National Crime Authority (State Provisions) Amendment Bill 2002 be amended to require a **specific State review** of the complementary amendments in relation to reasonable excuse, derivative use immunity and the increase in penalties. In doing so, the Committee stated:
- The Committee sees considerable merit in a subsequent review of the State's legislation, that is, a requirement inserted by an amendment to the Bill that the responsible Minister, immediately the Cth report is tabled in either House [of the Commonwealth Parliament], is to carry out a review of the State's complementary provisions, using the same criteria as used by the Cth Review, and that the report be tabled in the Council and the Assembly within 12 months of the tabling of the Cth's report.*²¹²
- 4.80 Although the NCA has been abolished, the *Commonwealth Act* continues the specific Commonwealth review provisions contained in the *National Crime Authority Legislation Amendment Act 2001* (Cth). The specific Commonwealth review is now to be undertaken in relation to the former NCA and its successor, the ACC.²¹³
- 4.81 The relevant provision in the *Commonwealth Act* is in Table A and is attached as Appendix 9.
- 4.82 The Committee considers that in relation to the ACC operating under the State Bill, its previous recommendation that there should be a specific State review remains pertinent and re-iterates its recommendation. The Committee observes that although

²¹¹ Section 4, *National Crime Authority Legislation Amendment Act 2001* (Cth).

²¹² Western Australia, Legislative Council, Standing Committee on Uniform Legislative and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p22.

²¹³ Section 4, *National Crime Authority Legislation Amendment Act 2001* (Cth) which was inserted in Table A of the *National Crime Authority Act 1984* (Cth). The *National Crime Authority Legislation Amendment Act 2001* (Cth) was amended by Items 78 to 83 of Schedule 2 to the *Australian Crime Commission Establishment Act 2002* (Cth) to include references to the ACC. The amended review provision is continued in the *Australian Crime Commission Act 2002* (Cth) Table A, under the heading 'National Crime Authority Legislation Amendment Act 2001'.

as a matter of convenience, the specific State review could be conducted as part of the general State review (see Recommendation 10), the specific Commonwealth review, to which the general State review might have regard may not have yet occurred. That is, the timing of each review might not correlate.

- 4.83 The Committee considers that the specific State review should occur separately to any general State review. The Committee observes that this is analogous to the *Commonwealth Act* which provides for two differently timed reviews: the general Commonwealth review under the section 61A of that Act and the specific Commonwealth review of particular provisions (see Table A).

Recommendation

Recommendation 11: The Committee recommends that the Australian Crime Commission (Western Australia) Bill 2003 be amended to provide for a review of the provisions of the Australian Crime Commission (Western Australia) Bill 2003 in accordance with paragraph 4.79.

CONCLUSION

- 4.84 The Committee commends its Report to the House for consideration.



Hon Adele Farina MLC
Chairman

June 22 2004

APPENDIX 1
LIST OF STAKEHOLDERS

APPENDIX 1

LIST OF STAKEHOLDERS

NAME	ORGANISATION	DATE
Mr Barry Matthews	Commissioner, WA Police Service	December 16 2003
Mr Robert Cock	Director of Public Prosecutions	December 16 2003
Judge Kevin Hammond	Chief Judge, District Court of WA	December 19 2003
Mr Ian Viner AO QC	President, WA Bar Association	December 19 2003
Mr Peter Weygers	President, Civil Liberties Council of WA	December 16 2003
Mr Michael Dean	General President, WA Police Union of Workers	December 16 2003
Mr Dennis Eggington	CEO, Aboriginal Legal Service of WA	December 16 2003
Mr Graeme Charlwood	CEO, Anti-Corruption Commission	December 19 2003
Hon Chief Justice David Malcolm	Chief Justice, Supreme Court of WA	December 19 2003
Ms Elizabeth Heenan	President, Law Society of WA	December 16 2003
Mr Robert Meadows QC	Solicitor General	December 19 2003
Mr Hylton Quail	President, Criminal Lawyers Association	December 16 2003
Dr Neil Morgan	Director of Studies, Crime Research Centre, University of WA	December 19 2003
Hon Geoffrey Kennedy AO QC	Commissioner, Police Royal Commission	December 19 2003
Mr David Ritter	Human Rights Coalition	December 16 2003
Mr Ron Heinrich	President, Law Council of Australia	December 16 2003
Mr Damian Meyer	Human Rights WA	December 16 2003

APPENDIX 2
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 3
INTERGOVERNMENTAL AGREEMENT AND ASSOCIATED DOCUMENTS

APPENDIX 3

INTERGOVERNMENTAL AGREEMENT AND ASSOCIATED DOCUMENTS

COMMONWEALTH AND STATES AND TERRITORIES AGREEMENT ON TERRORISM AND MULTI-JURISDICTIONAL CRIME, 5 APRIL 2002

The Prime Minister and State and Territory Leaders agreed that a new national framework is needed to meet the new challenges of combatting terrorism and multi-jurisdictional crime. The attacks in the United States on 11 September last year indicated that previous assumptions about the nature and potential scale of terrorism are no longer valid. In addition, they noted that international and organised criminal groups did not respect state or national borders, and their activities could also result in major harm to all Australians. They recognised the importance of effective cooperation between the jurisdictions, and the need to build on arrangements that are currently in place in adding elements to national arrangements that will respond quickly and effectively to these challenges.

In relation to terrorism, Leaders agreed:

1. The Commonwealth to have responsibility for "national terrorist situations", to include attacks on Commonwealth targets, multi-jurisdictional attacks, threats against civil aviation and those involving chemical, biological, radiological and nuclear materials.
2. The Commonwealth will consult and seek the agreement of affected States and Territories before a national terrorist situation is declared and States and Territories agree not to withhold unreasonably such agreement.
3. To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.
4. That all jurisdictions will review their legislation and counter-terrorism arrangements to make sure that they are sufficiently strong.
5. That the Commonwealth and States and Territories will continue to:
 - (i) improve Australia's anti-terrorist intelligence capacity and to develop effective means for sharing intelligence.
 - (ii) significantly upgrade the central coordination capacity so that the operational arms of the Commonwealth and the States and Territories can obtain the information and strategic advice necessary to respond rapidly and effectively.
6. The existing Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) will also be reconstituted as the National Counter-Terrorism Committee with a broader mandate to cover prevention and consequence management issues and with Ministerial oversight arrangements.

In relation to Organised Crime, Leaders agreed:

7. To strengthen the fight against organised crime it is agreed to replace the National Crime Authority (NCA) with an Australian Crime Commission (ACC) that builds on the important

features of the NCA for effective national law enforcement operation in partnerships with State and Territory police forces whilst removing the current barriers to its effectiveness.

8. The ACC to be focussed on criminal intelligence collection and establishment of national intelligence priorities.
9. The ACC to have access to taskforce investigative capability to give effect to its intelligence functions and to support its overall operations. The ACC to include the Office of Strategic Crime Assessments and the Australian Bureau of Criminal Intelligence.
10. The Board of the ACC to include representatives from all States and Territories. Ministerial oversight will be retained by having the Board report to an Intergovernmental Committee of State and Commonwealth Ministers.
11. To streamline the process for obtaining investigation references.
12. The ACC will retain the capacity to use coercive powers and to investigate criminal activity of national significance;
13. Other details to be settled by mutual agreement with the new body to come into operation by 31 December 2002.

In relation to arrangements for dealing with multi-jurisdictional crime, Leaders agreed:

14. To reform the laws relating to money laundering, including a possible reference of powers to the Commonwealth if necessary, for effective offences.
15. To legislate through model laws for all jurisdictions and mutual recognition for a national set of powers for cross-border investigations covering controlled operations and assumed identities legislation; electronic surveillance devices; and witness anonymity. Legislation to be settled within 12 months.
16. To legislate and develop administrative arrangements to allow investigations by the Australian Federal police into State offences incidental to multi-jurisdictional crime.
17. To modernise the criminal law by legislating in the priority areas of model forensic procedures (during 2002), model computer offences (during 2002), model serious drug offences (during 2003).
18. To ensure adequate access to radio-frequency spectrum for an effective inter-operability between national security, police and emergency services agencies.
19. To enhance capacity in each jurisdiction for the collection and processing of samples to create DNA profiles, and the uploading of profiles onto the national DNA database.
20. To undertake as a matter of priority work in the following areas of law enforcement: control over the illegal importation of criminal contraband specifically illicit drugs and firearms; extradition between States; recognition of expert evidence (such as drug analysis certificates); firearms trafficking; identity fraud; vehicle rebirthing; gangs; and cyber crime. The purpose of this work is to ensure elimination of administrative and legal barriers in pursuit of criminals operating in more than one jurisdiction.

OTHER BUSINESS 1**AUSTRALIAN CRIME COMMISSION (STATE PROVISIONS) BILL**

The IGC-NCA agreed to:

- a) recognise that, as the ACC will be based on a national co-operative statutory scheme, there is a need for the States to enact complementary legislation to the Commonwealth Act once the Federal legislation is passed;
- b) agree that the preferable approach is to develop a model States Bill as a Principal Act;
- c) agree that Victoria will take the lead in instructing the national Parliamentary Counsel's Committee in drafting the model State Bill;
- d) note that Victoria's role will involve co-ordinating the development of instructions, comments on drafts of the Bill and settlement of the final draft for consideration by State Governments across the jurisdictions (with each jurisdiction then adapting the model Bill to their own Statute book); and
- e) direct their respective Departments/Police Services to nominate a liaison officer (including the officer's address, telephone number and e-mail address) to the Secretary to the Department of Justice Victoria as soon as possible.

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MINISTERIAL COUNCIL ON THE ADMINISTRATION OF JUSTICE

INTERGOVERNMENTAL COMMITTEE ON THE AUSTRALIAN CRIME COMMISSION

CONSIDERATION OUT OF SESSION

AUSTRALIAN CRIME COMMISSION (STATE PROVISIONS) BILL

SPONSOR	Victoria
PURPOSE/ISSUE	To endorse a model States' and Territories' ACC Bill to complement the Commonwealth <i>Australian Crime Commission Act 2002</i> .
RELATIONSHIP TO AUSTRALASIAN POLICING STRATEGY	Relates to all key directions
PREVIOUS INITIATIVES	Heads of Australian Governments' Summit 5 April 2002. The IGC-NCA endorsed arrangements for the development of a model States' and Territories' ACC Bill at its meeting on 5 November 2002.
SENSITIVITY/IMPACT	Significant
URGENCY	High. It is highly desirable that State and Territory ACC legislation be put place as soon as possible to provide a comprehensive basis for the ACC to investigate State and Territory offences.
JURISDICTIONAL IMPLICATIONS	All jurisdictions
FINANCIAL IMPLICATIONS	N/A
BUSINESS CASE	N/A
CONSULTATION	All jurisdictions
PREVIOUS RELATED WORK BY OTHER AGENCIES	N/A
MAJOR NON-POLICE INTERESTS	Heads of Australian Governments
ACTION STATUS	For decision
DRAFT RESOLUTION	The IGC-ACC agreed to: a) endorse the attached "replication" version of the model States' and Territories' ACC Bill (attached at "A") to provide for the operation of the Australian Crime Commission under State and Territory law; and b) note that the Commonwealth has agreed at officer level to make necessary amendments to section 55A of the Commonwealth <i>Australian Crime Commission Act 2002</i> to ensure the validity of a number of proposed provisions in the model Bill.

BACKGROUND

At the Leaders' Summit held in Canberra on 5 April 2002, Leaders agreed to replace the NCA with an Australian Crime Commission (ACC).

Commonwealth legislation to establish the ACC, the *Australian Crime Commission Act 2002* (the Commonwealth Act), commenced operation on 1 January 2003.

Complementary State and Territory legislation is necessary to provide for the operation of the ACC under State and Territory law and to guard the actions of the ACC, so far as possible, against the risk of constitutional challenge.

At its meeting on 5 November last year the IGC-NCA (as it then was) endorsed arrangements for the development of a model States' and Territories' ACC Bill. The IGC-NCA agreed that the national Parliamentary Counsel's Committee (PCC) would draft the model Bill with Victoria as the lead instructor.

PCC has finalised a model States' and Territories' ACC Bill, a copy of which is attached at Attachment "A". That model Bill has been prepared by PCC in accordance with instructions provided by Victoria that were developed in co-ordination with officers in other State and Territories. The Commonwealth and the ACC were also consulted during the development of the model Bill.

STATES' AND TERRITORIES' ACC BILL

The model Bill largely mirrors the Commonwealth Act to ensure that the ACC can conduct investigations and intelligence operations in Commonwealth, State and Territory offences as seamlessly as possible. Broadly, the model Bill:

- a) provides for the functions of the ACC under State/Territory law, including the functions of conducting investigations and intelligence operations in relation to relevant criminal activity;
- b) provides for the functions of the Board and CEO under State/Territory law. The Board's functions will include the authorisation of the use of special powers, while the CEO will be responsible for co-ordinating ACC operations and investigations. These functions will complement the provisions of the Commonwealth Act that establish the ACC's governance regime;
- c) provides for the investigatory powers of the ACC under State/Territory law, including search powers under warrant and coercive examination powers. These powers will be available to the ACC in relation to both its investigatory and criminal intelligence functions;
- d) contains requirements to ensure the appropriate use of the ACC's special powers. The Board will be empowered to authorise the use of special powers where a specified threshold test is met, and the Board's authorisation of special powers will be subject to a number of additional safeguards in the form of special requirements for the composition of the Board, special voting requirements and a power for the IGC-ACC to revoke the authorisation of special powers;
- e) provides for the ACC's examination powers under State/Territory law to be exercised by examiners, who will be independent statutory officers appointed under the Commonwealth Act;

IGC-ACC Consideration Out of Session

- f) creates offences for failure to comply with the Act to facilitate the effective performance of the ACC's functions under State/Territory law. These offences will include failing to attend an examination or to answer questions, and failing to produce documents or things when required to do so by a summons. The offences in the Bill will reflect the offences contained in the Commonwealth Act and the existing State/Territory NCA legislation; and
- g) repeals existing State/Territory NCA legislation and contains necessary transitional provisions to ensure that the transition from the NCA to the ACC under State and Territory law is as seamless as possible.

The model Bill also includes a provision for consequential amendments to other Acts. Each jurisdiction will need to insert any necessary local consequential amendments into this provision.

Jurisdictions would also need to make any necessary local modifications to the model Bill to adapt it to their own statute books. It is highly desirable that States and Territories enact ACC legislation as soon as possible to provide a comprehensive basis for the ACC to investigate State and Territory offences.

The model Bill attached at "A" has been drafted adopting a "replication" approach, whereby the text of the relevant provisions of the Commonwealth Act has been replicated in the Bill with necessary modifications to ensure that the Bill applies appropriately in a State/Territory context. This drafting approach facilitates ease of reference by the reader and would make the State/Territory ACC legislation as self-contained as possible.

Western Australia and New South Wales have reserved their position regarding the adoption of an alternative "applied provisions" version of the Bill. A copy of this version of the Bill is attached at "B" for information. Rather than replicating the text of relevant provisions of the Commonwealth Act, the "applied provisions" version of the Bill would apply those provisions as State law and rely on Regulations to make the necessary modifications to apply those provisions in a State context. It is understood that Western Australia and New South Wales consider that this approach would have the advantage of enabling future amendments to the Commonwealth Act to be picked up automatically by the State ACC legislation without the need for complementary amending legislation.

However, it is suggested that an "applied provisions" version of the model Bill would have the following disadvantages:

- Commonwealth amendments that are not appropriate in the State context would automatically flow through to the State legislation; and
- the Bill would not be self-contained, but rather would have to be read together with the Commonwealth Act and State Regulations. In light of the large number of modifications that are required to adapt the Commonwealth Act to apply in the State context, this would be a cumbersome and potentially confusing exercise for the reader.

Moreover, it is suggested that it is highly desirable to adopt a nationally uniform approach to the States' and Territories' ACC legislation to ensure that the legislative underpinning for the ACC scheme is as consistent as possible across jurisdictions.

For these reasons, the majority of jurisdictions have, at officer level, indicated support for the "replication" version of the model Bill.

IGC-ACC Consideration Out of Session

PROPOSED AMENDMENT OF SECTION 55A OF THE COMMONWEALTH ACT

In developing the model States' and Territories' Bill, a need was identified to amend section 55A of the Commonwealth Act to ensure that it appropriately complements the model Bill.

Section 55A of the Commonwealth Act provides a legislative consent by the Commonwealth for State and Territory laws to invest certain duties, functions and powers in the ACC, the ACC Board and specified Commonwealth officers who have functions under the Commonwealth Act.

This provision is intended to ensure the constitutional validity of State and Territory laws that invest functions in these bodies and persons following the High Court's decision in *Hughes*, which cast doubt on the ability of the States to unilaterally confer powers and duties on Commonwealth officers and bodies.

The model Bill replicates various provisions of the Commonwealth Act, including provisions that confer duties on the IGC-ACC and members of the Board (clauses 15, 16 and 45). These provisions are necessary to ensure that the model Bill appropriately complements the Commonwealth Act. However, the legislative consent in section 55A does not currently extend to the IGC-ACC and Board members.

The Commonwealth has advised at officer level that it proposes to amend section 55A of the Commonwealth Act to address this problem to ensure the validity of the proposed provisions of the model Bill that confer duties on the IGC and Board members. It is proposed that the commencement of these provisions would be delayed pending the commencement of the Commonwealth amendments.

The Victorian Minister for Police and Emergency Services has written to the Commonwealth Minister for Justice and Customs regarding this issue seeking confirmation that the Commonwealth proposes to make the necessary amendments to the Commonwealth Act.

APPENDIX 4
AUGUST AGREEMENT

APPENDIX 4

AUGUST AGREEMENT

COMMONWEALTH, STATE AND TERRITORY POLICE MINISTERS' MEETING

9 AUGUST 2002, SYDNEY, NSW

AUSTRALIAN CRIME COMMISSION

ATTENDANCE

The Hon A Haermeyer Minister for Police, Emergency Services and Minister for Corrections	Vic (Chair)
Mr Ted Quinlan Minister for Police (represented by Mr Tim Keady)	ACT
The Hon Michael Costa Minister for Police	NSW
The Hon S Stirling MLA Deputy Chief Minister and Minister for Police (represented by Mr Mark Nelson)	NT
The Hon Tony McGrady Minister for Police (represented by Mr Scott Singleton)	Qld
The Hon Patrick Conlon Minister for Police and Emergency Services	SA
The Hon Michelle Roberts MLA Minister for Police	WA
Senator the Hon Chris Ellison Minister for Justice and Customs	Commonwealth

THE AUSTRALIAN CRIME COMMISSION

To give effect to the 5 April 2002 Leaders' Summit outcomes in relation to the establishment of a new Australian Crime Commission, Commonwealth, State and Territory's Government's have agreed to the following principles:

1. Function

The National Crime Authority (NCA), Office of Strategic Crime Assessments (OSCA) and the Australian Bureau of Criminal Investigation (ABCI) will be replaced by the Australian Crime Commission. The ACC will provide an enhanced national law enforcement capacity through:

- Improved criminal intelligence collection and analysis;
- Setting clear national criminal intelligence priorities; and
- Conducting intelligence led investigations of criminal activity of national significance including the conduct and/or coordination of investigative and intelligence taskforces as approved by the Board.

2. Intelligence

The ACC will:

- Provide a coordinated national criminal intelligence framework;
- Set national intelligence priorities to avoid duplication;
- Allow areas of new and emerging criminality to be identified and investigated; and
- Provide for investigations to be intelligence driven.

3. Governance

The Inter-Governmental Committee of the NCA (IGC-NCA) will be renamed the IGC-ACC and it will comprise eight State and Territory representatives and one Commonwealth representative. Its responsibilities will include the identification of strategic crime priorities.

Nothing in this agreement is intended to preclude any Head of Government from raising substantive issues of concern at COAG level.

As a Commonwealth law enforcement agency, the ACC will be constituted under the Australian Crime Commission Act 2002 to give effect to the

principles agreed between the Commonwealth, State and Territory Government.

There will be discussions between jurisdictions during the drafting of the ACC Bill.

The Federal Parliamentary Joint Committee (PJC-NCA) overseeing the operations of the NCA will continue its current role and function in overseeing the operation of the ACC.

4. Board and Chair

The new ACC Board shall consist of thirteen voting members and the Chief Executive Officer as a non-voting member. The Chairman of the Board shall be the Commissioner of the Australian Federal Police.

The voting members of the Board will be:

- Eight State and Territory Police Commissioners (New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, Northern Territory and the Chief Police Officer of the Australian Capital Territory) and;
- Five Commonwealth Agency Heads – Commissioner of the Australian Federal Police, Director General of Intelligence, the Chair of the Australian Securities and Investments Commission, the CEO of the Australian Customs Service and the Secretary of the Attorney General's Department.

5. Chief Executive Officer (Director)

The Chief Executive Officer /Director to manage ACC operations will be appointed by the Governor-General on the recommendation of the Commonwealth Minister and Federal Cabinet. Before recommending an appointment, the Commonwealth Minister would accept nominations from members of the Board and consult with members of the Inter-Governmental Committee.

The CEO/Director will be an individual with a strong law enforcement background.

6. Staffing

On establishment, the ACC will maintain the current combined operational staffing levels of the NCA, ABCI and OSCA. Over time this would be subject to the operational requirements of the ACC Board and CEO.

The ACC will have a standing in-house investigative capacity. The mix and composition of in-house and taskforce intelligence and investigative

capabilities will be determined by the Board and Chief Executive Officer in accordance with operational priorities.

7. Offices

On establishment, ACC offices will remain in all current NCA locations at current operational staffing and funding levels. Over time this will be subject to the operational requirements of the ACC Board and CEO. The ACC headquarters will be located in Canberra.

8. Powers

The ACC will have in-house and taskforce access to all coercive and investigatory powers currently available to the NCA, which include coercive hearing and telephone interception powers, and a capability for State and Territory access to these powers where appropriate.

The Board will approve the use to which coercive hearing powers can be applied.

Coercive hearing powers would be exercised through independent statutory officers.

9. Investigations

Investigative and operational priorities will be determined by the Board in accordance with operational priorities.

The first priority taskforce for the ACC will be illegal handgun trafficking both into and within Australia.

10. Operational Expenses

The ACC will fund all in-house resources and operational costs (including salaries, staff overtime and travel allowances) under the same arrangements as currently apply to the National Crime Authority and ABCI. The ACC will fund current NCA references as budgeted for in the Commonwealth forward estimates and during that time would maintain its commitment to in-house investigations subject to the operational requirements of the Board.

Decisions regarding the composition of taskforces and the contributions of jurisdictions to these taskforces would be determined by agreement between the Board, CEO and relevant jurisdictions.

This includes a commitment by Commonwealth, State and Territory police forces to cover salary and salary related and other costs of secondees to additional ACC taskforces they participate in as agreed by the Board and CEO.

After three years of operation a review will be conducted into the balance and mix of the inhouse investigative capacity by the IGC.

11. Budget

It is recognised that almost all of the funding of the ACC is to be provided by the Commonwealth.

The Commonwealth confirms that the current levels of funding provided for the agencies as stipulated in the Forward Estimates by the Commonwealth will be provided to the ACC.

It is accepted by all parties that future funding levels will be subject to the normal budgetary processes.

BACKGROUND

During the course of the 2001 election campaign, the Prime Minister announced his intention to convene a Summit of State and Territory Leaders to consider enhanced national frameworks to deal with transnational crime and terrorism, including the possible reformation, replacement or abolition of the National Crime Authority.

At the Leader's Summit held in Canberra on 5 April 2002 the Prime Minister, Premiers and Chief Ministers agreed on the creation of the Australian Crime Commission (ACC) to strengthen the fight against nationally significant crime. The ACC will replace the NCA and incorporate the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments.

Following the Darwin meeting of the 37th IGC-NCA on 17 July 2002, a meeting of Commonwealth, State and Territory Police Ministers was convened in Sydney 9 August 2002 to progress matters.

APPENDIX 5
COMPARATIVE TABLE - OFFENCES

APPENDIX 5

COMPARATIVE TABLE - OFFENCES

Jurisdiction of the Australian Crime Commission (Australian Crime Commission (Western Australia) Bill 2003) and Corruption and Crime Commission

NOTE: The offences relating to the Australia Crime Commission have been displayed in a manner designed to demonstrate where a potential overlap of jurisdiction arises.

Corruption and Crime Commission	Australian Crime Commission
<p>Part 4 of the <i>Corruption and Crime Commission Act 2003</i> relates to organised crime.</p> <p>In relation to this function of the Corruption and Crime Commission, the Commissioner considers applications by the Commissioner of Police to use ‘exceptional powers’.</p> <p>Exceptional powers relate to section 5 offences which are offences committed in the course of an ‘organised crime’.</p> <p>‘Organised crime’ is activities of 2 or more persons associated together solely or partly for purposes in pursuit of which 2 or more Schedule 1 offences are committed, the commission of each of which involves substantial planning and organisation.</p> <p>Schedule 1 to the <i>Corruption and Crime Commission Act 2003</i> contains the following offences:</p>	<p>“serious and organised crime” means an offence -</p> <p>(a) that involves 2 or more offenders and substantial planning and organisation;</p> <p>(b) that involves, or is of a kind that ordinarily involves the use of sophisticated methods and techniques;</p> <p>(c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind;</p> <p>(d) that is an offence of a kind prescribed or an offence that involves any of the following:</p>
<p><i>Criminal Code</i></p> <p>Section 143 - Attempting to pervert justice</p>	<p>Perverting the course of justice</p>
<p>Section 145 - Aiding prisoners to escape</p>	<p>N/A</p>
<p>Section 147 - Permitting escape</p>	<p>N/A</p>
<p>Section 278 - Wilful murder (definition of)</p>	<p>Violence</p>
<p>Section 279 - Murder (definition of)</p>	<p>Violence</p>
<p>Section 283 - Attempt to murder (except if the</p>	<p>Violence</p>

circumstances of the attempted murder or intended killing are such that, if it were carried out, the crime committed would be infanticide)	
Section 292 - Disabling in order to commit an indictable offence etc	Violence
Section 293 - Stupefying in order to commit indictable offence	N/A
Section 294 - Acts intended to cause grievous bodily harm or prevent arrest	Violence
Section 296 - Intentionally endangering safety of persons travelling by railway	N/A
Section 296A - Intentionally endangering safety of persons travelling by aircraft	N/A
Section 298 - Causing explosion likely to endanger life	N/A
Section 332 - Kidnapping	N/A
Section 393 - Assault with intent to rob (except in circumstances in which the maximum penalty that can be imposed is imprisonment for 14 years)	Violence
Section 398 - Attempts at extortion by threats (in circumstances in which the maximum penalty that can be imposed is imprisonment for 20 years)	Extortion
Section 451A(1) - Endangering the safe use of an aircraft	N/A
Section 454 - Causing explosion likely to do serious injury to property	N/A
Section 557 - Making or possession of explosives under suspicious circumstances	N/A
Section 563A - Property laundering	Money laundering
<i>Criminal Property Confiscation Act 2000</i>	N/A
Section 50(1) - Prohibited dealings	
<i>Firearms Act 1973</i>	Firearms
An offence against regulations made under section 6(1) of the <i>Firearms Act 1973</i> that -	

<p>(a) is committed in respect of 2 or more firearms; or</p> <p>(b) is committed in respect of a firearm and in association with the commission, by the same or any other person, of an offence against section 65(4aa) of the <i>Police Act 1892</i>.</p> <p>Section 6(1) of the <i>Firearms Act 1973</i> relates to the prohibition acquisition, sale, possession, or use of any firearm, silencer or other contrivance of a similar nature, or ammunition, whether licensed under the Act or not.</p>	
<p><i>Misuse of Drugs Act 1981</i></p> <p>An offence referred to in section 32A(1)(b) which relates to drug trafficking.</p>	Illegal drug dealings
N/A	Theft
N/A	Fraud
N/A	Tax evasion
N/A	Currency violations
N/A	Illegal gambling
N/A	Obtaining financial benefit by vice engaged in by others
N/A	Bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory
N/A	Bankruptcy and company violations
N/A	Harbouring of criminals
N/A	Forging of passports
N/A	Armament dealings
N/A	Illegal importation or exportation of fauna into or out of Australia
N/A	Cybercrime
N/A	Matters of the same general nature as one or more of the matters listed above

	<p>and</p> <p>(e) that is punishable by imprisonment for a period of 3 years or more,</p> <p>but —</p> <p>(f) does not include an offence committed in the course of a genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the commission of a serious and organised crime other than an offence so committed; and</p> <p>(g) does not include an offence the time for the commencement of a prosecution for which has expired;</p>
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APPENDIX 6
OFFENCES OF DISCLOSURE

APPENDIX 6

OFFENCES OF DISCLOSURE

Uniform Legislation and General Purposes Committee

Recommendation 1: The Committee recommends — That the amendments in the Schedule (Appendix 1) be made to the Bill.

14 PARTS 3, 4, 5

- 14.1 The Committee can add nothing that is useful to the PJC's discussion of the relevant Cth Act's provisions. The Committee notes that federal magistrates now have authority to issue warrants.

15 PART 7 — SECTION 18B

- 15.1 Section 18A(1) requires or permits, depending on whether the matter falls under sections 17 or 18, the NCA to endorse a summons or notice forbidding disclosure of receipt or anything relating to its content. The circumstances for non-disclosure may be specified.
- 15.2 Section 18A(2) describes the circumstances that justify the notation. Essentially, they are to ensure a fair trial, avoid prejudice to an investigation, or protect a person's reputation, or where it is considered to be in the public interest.
- 15.3 The public interest ground permits a very broad discretion which, were the Committee to be examining the 1995 Amendment Act that inserted section 18A, would most likely be reported with recommended criteria as to what, in context, might be seen as "contrary to the public interest" bearing in mind that this provision allows for a gag on a person's communication with others, including spouses and family members. The public interest leaves too wide a discretion and, in effect, enables any summons or notice to be made subject to section 18A(1).
- 15.4 Section 18B(1) creates an offence for unauthorized disclosure of a summons or notice to which section 18A applies. Section 18B(2) lists the types of disclosure that are not to be subject to subsection (1).
- 15.5 As currently enacted, section 18B(2)(e) provides —
- (2) *Subsection (1) does not prevent the person from making a disclosure —*
- (e) *if the person is a legal practitioner —*
- (i) *for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client; or*
- (ii) *for the purpose of obtaining the agreement of another person under section 19 (3) to the legal practitioner answering a question or producing a document at a hearing before the Authority.*

Fifth Report

- 15.6 Clause 32 amends paragraph (e) by deleting subparagraph (e)(i). The PJC deals with the Cth Act equivalent in ¶5.23-25 of its report. The PJC, despite the Law Council's deep concern, accepted the provision as placing lawyers in a different position to that of other "professionals" consulted by a client on receipt of a section 18A(1) notice. The Federal Government saw no reason for lawyers to be treated differently and stated that legal professional privilege was not affected by the repeal.
- 15.7 Section 18B(2)(b) permits a person receiving a non-disclosure notice to consult a legal practitioner. Paragraph (e)(i) is where such a notice is served on the legal practitioner, the reverse situation to paragraph (b). The matter in the notice may relate solely to the legal practitioner's own affairs or, as is the case under paragraph (e)(i), it may involve a client's affairs in which case the client would be informed of receipt.
- 15.8 The point may be made that accountants, doctors and other professionals do not usually sit at the Bar Table as advocates - lawyers are retained for that purpose. The Committee believes that the intent behind the amendment is to prevent a lawyer from providing a client with an early warning that the NCA is investigating the client's affairs or activities. The question is therefore to ascertain where the public interest lies. Is it with the NCA as it goes about investigating serious and organized crime? Or is the lawyer/client relationship of such a nature that the State ought not to attempt to restrict the free exercise of communication within that relationship?
- 15.9 The House may wish to consider and decide the issue that arises from this amendment.

16 INCREASED PENALTIES

- 16.1 The Committee notes that penalties generally will be increased substantially when this Bill becomes law. Given the NCA's operational sphere and the seriousness of the offences investigated by the NCA, the Committee sees nothing unreasonable in what is proposed.

17 REVIEW OF ACT

- 17.1 The Cth Act is to be reviewed after 5 years' operation to assess whether any improvement in the NCA's operation is attributable to the abolition of the defence of reasonable excuse, the abrogation of derivative use immunity, and the increased investigatory powers conferred. The review is to include the appropriateness of retaining one or more of these provisions.
- 17.2 The report is to go to the Inter-Governmental Committee and, with that Committee's comments (if any), be transmitted to the Commonwealth Minister responsible for the NCA. The report must then be tabled in the Senate and the House within 15 sitting days of the Minister receiving the report.

APPENDIX 7
CONTEMPT

APPENDIX 7

CONTEMPT

Uniform Legislation and General Purposes Committee

and our liberty. If we hold dear those concepts - freedom, liberty and justice - then we must support a system that enshrines those rights and privileges.”⁴

- 12.14 Mr Levy submitted that “When we start to erode any one of those rights and privileges, we start to undermine the fundamental precepts of our system of justice.”⁵
- 12.15 The Committee notes Mr Levy’s submission that the current provisions of the State Act are workable.

Western Australian Police Service and National Crime Authority

- 12.16 At the Committee’s hearing on September 25 2002 Mr Bennett submitted that the right to silence is a narrow concept. He stated that “*If people want to confess, they are perfectly entitled to do so, but they should not be obliged to do so.*”⁶ He stated that the right to silence is confined to this narrow concept that “*No one should be obliged to convict himself out of his own mouth.*”⁷
- 12.17 Mr Bennett expressed his belief that the amendments in the Bill do not destroy the pillars upon which the criminal justice system rests. He submitted that the NCA does not deal with “*...mums and dads or somebody who had an unfortunate experience on the way home and was involved in a fatal accident...*” but rather with “*...organised criminals who make it their business to attack our society to advance their interests at the expense of ours. We are not playing a game of chess; we are fighting for our society.*”⁸
- 12.18 Mr Bennett submitted that the criminals at the level at which the Bill is focused have to be controlled. He submitted that the Bill protects the rights and liberties of the community, but allows law enforcement access to those people who are the target of NCA investigations.

13 CONTEMPT OF NCA

- 13.1 There is a preliminary issue that should be dealt with. The validity of the conferral of jurisdiction on State Supreme Courts under section 35 of the Cth Act was raised before the PJC. In accordance with the Council’s own usage so too, the Committee does not question the validity of legislation of any participating jurisdiction. Any challenge to legislative capacity is a matter for the High Court. The Committee is aware that the conferral of jurisdiction on State courts was queried by witnesses appearing before the PJC.

⁴ Transcript of evidence taken at Perth, September 18 2002, p 6.

⁵ Ibid.

⁶ Transcript of evidence taken at Perth, September 25 2002, p 11.

⁷ Ibid.

Fifth Report

- 13.2 Clause 7 of the Bill repeals section 25 of the State Act and inserts a new section 25. Whether it is more appropriate to describe “contempt” of the NCA as “hindering or obstructing” is moot.
- 13.3 The amendment makes no sense until it is read in context of the Cth Act. Based on the NCA’s evidence to the PJC, the actual intent of the change is to provide a swift, coercive ability to force recalcitrants to answer questions or produce documents. The NCA made the observation to the PJC that prosecutions for such failures occurred, in many cases, quite sometime after the event and in any case the answers were never given or documents failed to materialize.
- 13.4 Resorting to contempt proceedings means that the (State) Supreme Court has other ways of persuading people to cooperate; for example, imprisonment until there is a change of heart, unlimited fines. Whether, as a matter of law, the Supreme Court has the requisite jurisdiction was raised before the PJC but, for reasons given above, is not an issue for the Committee.
- 13.5 The real issue that presents itself here is why, if prosecutions for non-compliance are punitive, does the State Act continue to create the offences when, accepting the evidence before the PJC as accurate, it is much more effective (and productive) to charge an uncooperative person with contempt? If the objective is to obtain information, sometimes by employing coercive means, rather than punishing for non-compliance but still leaving the NCA without the information, it seems sensible to recast the applicable provisions by —
- 13.5.1 deleting the offence provisions in the proposed amendments to sections 18 and 19; and
- 13.5.2 enacting a new section 25 that permits the NCA *ex parte* to refer a case of non-compliance to the Supreme Court, which is authorized in its discretion (after hearing the person concerned on application or summons) to make an order requiring compliance.
- 13.6 It is the failure to comply with the Court’s order that would then constitute the contempt able to be dealt with in the exercise of inherent jurisdiction.
- 13.7 Further provision could be made creating offences of hindering or obstructing NCA proceedings (however described), but they would be criminal offences, not a contempt.
- 13.8 The Committee suggests that this is a more coherent approach to ensuring compliance by coercion and making any contempt that of the Court, not the NCA.

⁸ Ibid.

*Uniform Legislation and General Purposes Committee***Recommendation 1: The Committee recommends — That the amendments in the Schedule (Appendix 1) be made to the Bill.****14 PARTS 3, 4, 5**

- 14.1 The Committee can add nothing that is useful to the PJC's discussion of the relevant Cth Act's provisions. The Committee notes that federal magistrates now have authority to issue warrants.

15 PART 7 — SECTION 18B

- 15.1 Section 18A(1) requires or permits, depending on whether the matter falls under sections 17 or 18, the NCA to endorse a summons or notice forbidding disclosure of receipt or anything relating to its content. The circumstances for non-disclosure may be specified.
- 15.2 Section 18A(2) describes the circumstances that justify the notation. Essentially, they are to ensure a fair trial, avoid prejudice to an investigation, or protect a person's reputation, or where it is considered to be in the public interest.
- 15.3 The public interest ground permits a very broad discretion which, were the Committee to be examining the 1995 Amendment Act that inserted section 18A, would most likely be reported with recommended criteria as to what, in context, might be seen as "contrary to the public interest" bearing in mind that this provision allows for a gag on a person's communication with others, including spouses and family members. The public interest leaves too wide a discretion and, in effect, enables any summons or notice to be made subject to section 18A(1).
- 15.4 Section 18B(1) creates an offence for unauthorized disclosure of a summons or notice to which section 18A applies. Section 18B(2) lists the types of disclosure that are not to be subject to subsection (1).
- 15.5 As currently enacted, section 18B(2)(e) provides —
- (2) *Subsection (1) does not prevent the person from making a disclosure —*
- (e) *if the person is a legal practitioner —*
- (i) *for the purpose of complying with a legal duty of disclosure arising from his or her professional relationship with a client; or*
- (ii) *for the purpose of obtaining the agreement of another person under section 19 (3) to the legal practitioner answering a question or producing a document at a hearing before the Authority.*

APPENDIX 8
RECOMMENDATIONS - CONTEMPT

APPENDIX 8

RECOMMENDATIONS - CONTEMPT

APPENDIX 1

SCHEDULE

Amendments recommended to clauses 4, 5 and 7 of the National Crime Authority (State Provisions) Amendment Bill 2002

Clause 4

Page 3 — to delete lines 8 – 29.

Clause 5

Page 5 — to delete lines 11 – 27.

Clause 7

Page 7 — to insert after line 3 the following —

“

25. Hindering or obstructing Authority — contempt of Court

- (1) Where a person refuses or fails to comply with a notice served under section 18 or contravenes section 19(1), (2), or (3), the Authority may apply *ex parte* to the Court or a Judge for an order requiring that person to answer questions or produce documents for the purposes stated in the Authority's application. The Authority is to serve a copy of the application on the person against whom an order is sought under this subsection at the time it is made.
- (1a) An application under subsection (1) is to state the type of function the Authority is performing with a copy attached of the reference approved by the Inter-Governmental Committee, and provide a general description of the documents sought or answers required.
- (1b) An order is not to be made without the Court or a Judge first providing the person who is the subject of the application an opportunity to appear and provide any relevant explanation for the person's failure, refusal, or non-compliance, or the person's argument against making the order sought.
- (1c) The grant or refusal of an order is to be decided by the Court or a Judge on the sole ground of whether or not the person concerned had an honest belief that his or her failure, refusal, or non-compliance was justified by law, regardless of the existence or otherwise of the law said to justify that honest belief.
- (1d) On being satisfied that the person had no honest belief as required under subsection (1c), the Court or a Judge must make an order in

Uniform Legislation and General Purposes Committee

terms of the application together with directions (if any) as to its operation.

- (1e) A person who contravenes an order made under subsection (1d) may be dealt with as for contempt of that Court.

”

Page 7 line 6 — delete “(1)” and substitute “(2)”. (*Clerk’s amendment*)

Page 7 — to insert after lines 16 the following —

“ but this subsection does not apply to a person against whom an order is made under subsection (1d) unless the Court or a Judge directs that the person be dealt with under this subsection rather than as for contempt of court. ”

APPENDIX 9

TABLE A - *AUSTRALIAN CRIME COMMISSION ACT 2002* (CTH)

APPENDIX 9

TABLE A - AUSTRALIAN CRIME COMMISSION ACT 2002 (CTH)

Notes to the *Australian Crime Commission Act 2002*

Table A

44 Transitional—section 28 of the *National Crime Authority Act 1984*

To avoid doubt, the amendments made by this Schedule do not affect the validity of a summons in force under section 28 of the *National Crime Authority Act 1984* immediately before the commencement of this item, so long as the investigation to which the summons relates is an investigation relating to a federally relevant criminal activity.

45 Transitional—section 29 of the *National Crime Authority Act 1984*

To avoid doubt, the amendments made by this Schedule do not affect the validity of a notice in force under section 29 of the *National Crime Authority Act 1984* immediately before the commencement of this item, so long as the investigation to which the notice relates is an investigation relating to a federally relevant criminal activity.

National Crime Authority Legislation Amendment Act 2001 (No. 135, 2001)

4 Review of effect of this Act

- (1) The Minister must cause a person (the ***responsible person***) to review, and to report in writing about, the operation of the *National Crime Authority Act 1984* (the ***NCA Act***) and the *Australian Crime Commission Act 2002* (the ***ACC Act***) as affected by the following provisions of this Act:
 - (a) items 1, 3, 5, 11 and 13 of Schedule 1 (the ***provisions that remove the defence of reasonable excuse***);
 - (b) item 12 of Schedule 1 (the ***provision that removes the derivative-use immunity***);
 - (c) items 7, 12 and 15 of Schedule 1 (the ***provisions that increase the penalties for non-compliance***).
- (2) The responsible person must be someone who, in the Minister's opinion, is suitably qualified and appropriate to conduct the review and make the report.

Notes to the *Australian Crime Commission Act 2002***Table A**

-
- (3) The review and report must relate to the 5 year period (the *review period*) beginning on the commencement of Part 1 of Schedule 1.
- (4) The review and report must include an assessment of:
- (a) the effects of the following provisions in facilitating the performance of the functions of the Authority and the Australian Crime Commission:
 - (i) the provisions that remove the defence of reasonable excuse;
 - (ii) the provision that removes the derivative-use immunity;
 - (iii) the provisions that increase the penalties for non-compliance; and
 - (b) the extent (if any) to which persons have been unjustifiably prejudiced because of the enactment of:
 - (i) the provisions that remove the defence of reasonable excuse; and
 - (ii) the provision that removes the derivative-use immunity; and
 - (c) the extent (if any) to which courts have imposed increased penalties allowed for by the provisions that increase the penalties for non-compliance.
- (5) The review and report must also include an assessment of any other matter that the responsible person considers relevant to the operation of the provisions of the NCA Act and the ACC Act as affected by the provisions referred to in paragraphs (1)(a) to (c).
- (6) The report must not:
- (a) identify persons as being suspected of having committed offences; or
 - (b) identify persons as having committed offences unless those persons have been convicted of those offences; or
 - (c) reveal the identity of a person, if doing so might prejudice:
 - (i) the safety or reputation of a person; or
 - (ii) the fair trial of a person who has been or may be charged with an offence.
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- (7) The Authority must give all reasonable assistance requested by the responsible person in connection with the carrying out of the review and report.
- (7A) The Chief Executive Officer of the Australian Crime Commission, and members of the staff of the ACC (within the meaning of the ACC Act), must give all reasonable assistance requested by the responsible person in connection with the carrying out of the review and report.
- (8) The following activities by a current or former member of the Authority (within the meaning of the NCA Act) or a current or former member of staff of the Authority (within the meaning of the NCA Act) do not constitute a contravention of section 51 of the NCA Act, if they are carried out for the purposes of assisting the responsible person to carry out the review and report:
 - (a) divulging or communicating information to the responsible person;
 - (b) recording information;
 - (c) providing a record of information to the responsible person.
- (8A) The following activities by the current or former Chief Executive Officer of the Australian Crime Commission or a current or former member of the staff of the ACC (within the meaning of the ACC Act) do not constitute a contravention of section 51 of the ACC Act, if they are carried out for the purposes of assisting the responsible person to carry out the review and report:
 - (a) divulging or communicating information to the responsible person;
 - (b) recording information;
 - (c) providing a record of information to the responsible person.
- (9) The responsible person must provide a reasonable opportunity for members of the public to make submissions to him or her about matters to which the review and report relate. However, the review process must not include any hearings.
- (10) The responsible person must give the report to the Inter-Governmental Committee no later than 6 months after the end of the review period. The report is then to be considered by the

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Committee and given by the Committee, together with such comments on the report as the Committee thinks fit, to:

- (a) the Minister; and
 - (b) the appropriate Minister of the Crown of each participating State.
- (11) After the Minister receives the report and comments from the Inter-Governmental Committee, the Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House.

Schedule 1**17 Saving of sections 32, 32A, 32B and 32C in relation to relevant claims**

- (1) Despite the repeal of sections 32, 32A, 32B and 32C of the *National Crime Authority Act 1984* by item 13, those sections continue to have effect on and after the commencement of that item as if they had not been repealed, in relation to a relevant claim.
- (2) In this item:
relevant claim means a claim, made before the commencement of item 13, that a person is entitled to refuse:
 - (a) to furnish information, or produce a document, pursuant to a notice under section 20 of the *National Crime Authority Act 1984*; or
 - (b) to produce a document pursuant to a notice under section 29 of that Act; or
 - (c) to answer a question put to him or her, or produce a document that he or she was required to produce, under section 30 of that Act; or
 - (d) to comply with a requirement:
 - (i) to answer a question, or to produce a document, at a hearing before the Authority under a law of a State; or
 - (ii) to produce a document pursuant to a notice under a provision of a law of a State that corresponds to section 29 of that Act;