Law Council
OF AUSTRALIA

Inquiry into the gathering and use of criminal intelligence

Parliamentary Joint Committee on Law Enforcement

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Acknowledgment

The Law Council acknowledges the assistance of its National Criminal Law Liaison Committee in the preparation of this submission.

Executive Summary

1. Criminal intelligence can be characterised as information which is collected about crime and criminals and evaluated, analysed and disseminated.

2. The collection, correlation, analysis and dissemination of criminal intelligence is one of the Australian Crime Commission's (ACC) functions both generally, and in the context of the National Security Framework (the Security Framework). The Security Framework characterises serious and organised crime as a national security issue and has resulted in the ACC taking on an increasing role in relation to national security matters.

3. The Law Council has previously expressed concerns about the way in which information collected by the ACC is disseminated or shared, particularly information which is collected as a result of the exercise of the ACC's coercive powers. These coercive powers enable the ACC to compel persons to provide information and they limit the application of common law rights such as the privilege against self-incrimination. There is no derivative use immunity in relation to the further use of the information obtained through the use of coercive powers. The lack of derivative use immunity allows this information to be used to gather further information or evidence which can be used in criminal proceedings against the person who provided the information as a result of the use of the coercive powers. Although some restrictions apply to the further use of information or evidence, the Law Council is concerned about the operation of these restrictions.

4. The Law Council has also expressed concerns about the increasing role of the ACC in a number of areas which could be characterised as traditional policing areas.

5. The Law Council has noted the broadening of the scope of the government bodies with which the ACC can share information and has also noted that recent amendments to the *Australian Crime Commission Act 2002* (Cth) (the ACC Act) have allowed the ACC to share information with private sector bodies. The Law Council has expressed some concerns about the protections which apply to the sharing of information with these bodies.

6. In the context of this inquiry into the gathering and use of criminal intelligence, the Law Council focuses on:

   - The ACC's role and objectives within the context of the National Security Framework; and

   - The ACC's criminal intelligence capability, particularly its powers to collect and share criminal intelligence.

7. The Law Council submits that the Parliamentary Joint Committee on Law Enforcement (the Committee) should consider whether there could be greater reference to rule of law principles in the role and objectives of the ACC in the context of the Security Framework.

8. The Law Council also submits that the Committee should consider the nature of the information and intelligence which is increasingly able to be shared by the ACC as a result of recent amendments to the ACC Act and that it should monitor this matter to assess whether there are adequate protections in relation to this sharing.

Introduction

9. The Law Council is pleased to provide the following submission to the Committee in response to its inquiry into the gathering and use of criminal intelligence.

10. The Law Council notes that the terms of reference for the inquiry are:

    To inquire into the capacity of the Australian Crime Commission (ACC) and the Australian Federal Police (AFP) to gather, use and share criminal intelligence to reduce the threat and impact of serious and organised crime. In that context the Committee will consider the:

    - Role and objectives of the ACC within the context of the National Security Framework.
    - ACC's criminal intelligence collection capability, including resourcing, expertise, powers, and criminal intelligence community networks.
    - Adequacy of the ACC's criminal intelligence holdings.
    - Availability and accessibility of ACC's criminal intelligence.
    - Interoperability of Australian law enforcement agencies in relation to criminal intelligence holdings.

11. In this submission, the Law Council will focus on:

    - The ACC's role and objectives within the context of the National Security Framework; and
    - The ACC's criminal intelligence capability, particularly its powers to collect and share criminal intelligence.

12. The Law Council notes that it has raised concerns relating to the ACC's role and powers in previous submissions and correspondence in relation to the:

    - *Crimes Legislation Amendment (Powers and Offences) Bill 201*1;
    - *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*;
    - Inquiry into the future impact of serious and organised crime on Australian society;
    - *Australian Crime Commission Amendment Act 2007*;
    - Review of specific provisions of the *National Crime Authority Act 1984* and the *Australian Crime Commission Act 2002*;
    - Review of the *Australian Crime Commission Act 2002*. [1]

[1] See submission to Inquiry into the Crimes Legislation Amendment (Powers and Offences) Bill 2011 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=11E3A222-FE64-D392-C734-E3098E9E5359&siteName=lca; See submission to *Inquiry into Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=32FA19A0-1E4F-17FA-D244-DEF1F2F0AD95&siteName=lca;

13. The Law Council's previous submissions raised concerns relating to:

- Compliance with statutory requirements by the ACC;
- The justification for extension of the powers of the ACC;
- The justification for the limitation of common law rights in the application of the ACC's coercive powers;
- The need for greater protection for information obtained as a result of the exercise of the ACC's coercive powers;
- The need for proportionality between the threats being addressed by the ACC and its powers.

14. The Law Council has been particularly concerned with the extension of the role of the ACC in relation to areas of law which could be regarded as areas of traditional policing and with the leakage of the use of its coercive powers into such areas. These concerns are relevant to the aspects of the inquiry into criminal intelligence which the Law Council addresses in this submission.

The meaning of criminal intelligence

15. The United Nations Office on Drugs and Crime's Criminal Intelligence Manual for Analysts defines 'information' as 'knowledge in raw form' and 'intelligence' as:

- Information that is capable of being understood;
- Information with added value; and
- Information that has been evaluated in context to its source and reliability.[2]

16. Intelligence analysis is characterised as collecting and utilising information, evaluating it to process it into intelligence and then analysing that intelligence to produce products to support informed decision-making.[3] Criminal intelligence analysis is characterised as a philosophy which approaches the investigation of

See submission to Inquiry into the *Crimes Legislation (Serious and Organised Crime) Bill (No 2) 2009* at Letter to Parliamentary Joint Committee on Australian Crime Commission regarding the Inquiry into the future impact of serious and organised crime in Australia, 21 February 2007
See submission to *Inquiry into the Australian Crime Commission Amendment Act 2007* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=68090002-1C23-CACD-223F-AFB924F50984&siteName=lca; see Submission to *Review of Specific Provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C75D7CA-1C23-CACD-228D-4894BE9D37CC&siteName=lca; See Submission to *Review of the Australian Crime Commission Act 2002* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C746416-1C23-CACD-2274-11BC27E1F0AA&siteName=lca

[2] See http://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf at p 1

[3] See http://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf at p 1

crime and criminals by using the intelligence and information collected concerning them.[4]

17. The ACC Act does not include a definition of criminal intelligence, but defines 'intelligence operation' as:

    "…an operation that is primarily directed towards the collection, correlation , analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity but that may involve the investigation of matters relating to federally relevant criminal activity".[5]

18. The ACC's 2010-11 Annual Report describes some of the sources of criminal intelligence in the following terms:

    "Seized computer files, surveillance results, answers received through ACC coercive examinations, details from covert human sources (informants), suspicious financial transactions – we compile and analyse many forms of intelligence to shed light on the profile and activities of serious and organised crime in Australia."[6]

19. Serious and organised crime is defined under the ACC Act in terms of an offence:

    - That involves 2 or more offenders and substantial planning and organisation; and
    - That involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and
    - That is committed, or is of a kind ordinarily committed in conjunction with other offences of a like kind; and
    - That is a particular prescribed offence or type of offence under prescribed legislation or is an offence involving activities including theft, fraud, money laundering, illegal drug dealings, violence or cybercrime (among other activities) and that is punishable by 3 years imprisonment or more.[7]

20. The collection, correlation, analysis and dissemination of criminal intelligence is one of the ACC's functions both generally,[8] and in the context of the Security Framework, as discussed below.

Relevant provisions of the Australian Crime Commission Act

The establishment and the role of the ACC

21. The ACC was established in 2003 as a successor to the National Crime Authority and is said to have been formed in response to identified weaknesses in the capacity of traditional policing to combat sophisticated organised crime effectively. In its 2005

[4] See http://www.unodc.org/documents/organized-crime/Law-Enforcement/Criminal_Intelligence_for_Analysts.pdf at p 7
[5] Section 4
[6] See http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/1011/ACC_AR_Master-copy.pdf
[7] Section 4
[8] Section 7A of the *Australian Crime Commission Act 2002* (Cth)

review of the ACC Act, the then Parliamentary Joint Committee on the ACC (PJACC) observed that the ACC: undertakes investigations that operate across jurisdictional boundaries; is equipped with necessary specialist expertise and resources; and is able to focus exclusively on organised crime rather than street crime/volume crime.[9] Since the 2005 review, a number of amendments have broadened the functions of the ACC.[10]

22. The 2005 review also observed that one of the considerations behind a separate ACC was the long standing objection to granting police forces coercive powers such as the capacity to compel: attendance by any person at an examination, to produce documents and to answer questions.[11]

23. The ACC is able to undertake intelligence operations and investigations authorised by the ACC Board (the Board). The Board may also determine that such operations and investigations are *special* operations and *special* investigations. ACC examiners can conduct examinations of persons using coercive powers for the purpose of special operations and investigations.

24. Examiners are legal practitioners with at least 5 years experience, who are appointed for periods up to 5 years. They are appointed after consultation by the responsible Minister with the Inter-Governmental Committee on the ACC (IGC).[12] They stand apart from the police and ACC staff involved in ACC operations or investigations.

25. The Board is made up of relevant office holders from the AFP, each State and Territory police force, the Attorney-General's Department, the Customs and Border Protection Service, the Australian Securities and Investment Commission, the Australian Security and Intelligence Organisation (ASIO) and the Australian Taxation Office. The Chief Executive Officer (CEO) of the ACC is also a non-voting member of the Board. The IGC consists of the relevant Commonwealth Minister and State and Territory Ministers.[13]

26. The Board provides strategic direction; determines priorities; authorises operations and investigations, including special operations and investigations; establishes task forces; disseminates strategic intelligence assessments to relevant stakeholders and reports to the IGC.[14]

The role of ACC Examiners

27. ACC examiners can exercise coercive powers in the context of special operations and investigations. Examiners can issue summonses for persons to appear at an examination under section 28 of the ACC Act and for such persons to produce documents or things at the examination. Examiners can also issue notices to other persons to produce documents or things to an examiner or a member of staff of the ACC under s 29.

[9];See Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005 at p 9

[10] For example, amendments made by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergence Response and Other Measures) Act 2007* (Cth)

[11];See Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005 at p 12

[12] See sections 7, 7A, 24A, 46B

[13] See sections 7B and 8

[14] See s 7C

28. The Law Council and others have previously raised concerns that there has been "leakage" of the coercive powers to supplement ordinary police investigations and proceedings.[15] The Law Council maintains these concerns.

29. If the person does not attend the examination, does not answer questions or does not cooperate or produce documents or things at the examination, he or she will be guilty of an offence under section 30. There is significant erosion of the common law privilege against self-incrimination under section 30 with no derivative use immunity being provided. The lack of provision for derivative use immunity means that evidence or information subsequently gathered as a result of evidence or information obtained under the coercive powers may be used against the person in criminal proceedings, subject to directions by the examiner, as discussed below. The Law Council has previously raised concerns about the lack of derivative use immunity in section 30.[16] The Law Council maintains these concerns.

30. A person refusing to answer questions, cooperate or produce documents or things at an examination may also be referred to a prescribed court to be dealt with for contempt under sections 34A to 34D as an alternative to being prosecuted for an offence, such as the offence under section 30. A number of persons have been imprisoned for contempt since the relevant provisions were introduced into the ACC Act in February 2010. [17]

31. Section 25A of the ACC Act provides that the examination must be held in private and the examiner may give directions about persons who may be present. This section also demonstrates the extraordinary nature of ACC processes in comparison to ordinary police investigations, which result in court proceedings that are generally conducted in public.

32. The Law Council has taken the view that evidence or information obtained pursuant to the coercive powers should be subject to more stringent sharing restrictions than evidence or information obtained through other means and continues to maintain that view.[18] However, the Law Council acknowledges that recent amendments to the ACC Act have clarified particular protections for the sharing of information and evidence obtained through the use of coercive powers. Nevertheless, these protections are reliant on relevant assessments by the ACC's Chair or CEO and on relevant directions being given by examiners.[19] The Law Council submits that the Committee should consider the adequacy of these protections in the context of the current inquiry or in the near future. This issue is discussed further below.

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[15] See Submission to *Review of the Australian Crime Commission Act 2002* at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C746416-1C23-CACD-2274-11BC27E1F0AA&siteName=lca; see Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002,* November 2005 at pp 21-24

[16] See Submission to *Review of the Australian Crime Commission Act 2002,* note 16

[17] For example, see *Hannaford v HH* [2012] FCA 560; See also Australian Crime Commission Annual Report 2011-12, http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/chair1011/ACC_Chair_Report_4.pdf at p 50

[18] Law Council correspondence with the Minister for Home Affairs, 6 August 2010 and with the Attorney-Generals' Department 20 December 2010 and 16 August 2011; See also submission to Inquiry into the Crimes Legislation Amendment (Powers and Offences) Bill 2011 at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=11E3A222-FE64-D392-C734-E3098E9E5359&siteName=lca

[19] See the *Crimes Legislation Amendment (Powers and Offences) Act 2012*, which amended s 59 of the ACC Act and inserted s 59AA, s59AB and s 59AC into the ACC Act. The information sharing allowed pursuant to s

The role and objectives of the ACC within the context of the National Security Framework

33. As noted above, the ACC was formed to combat sophisticated organised crime and was provided with powers not available in traditional policing.

34. Since its formation, the role of the ACC has expanded incrementally through numerous amendments to the ACC Act. For example, in 2007, amendments were made to the ACC Act to bring Indigenous violence and child abuse within the scope of the ACC's intelligence gathering and investigative operations.[20]

35. In 2008, the then Prime Minister, the Hon Kevin Rudd MP, delivered the first National Security Statement (the Security Statement) to the Commonwealth Parliament.[21] The Security Statement outlined a number of recognised national security threats or challenges but also asserted that a number of "non-traditional threats or new security challenges" were growing, including organised crime.[22] The Security Statement also outlined an initiative to enhance coordination among Commonwealth agencies to combat serious and organised crime.[23]

36. The Security Statement also referred to the need to preserve accountability, civil liberties and the rule of law in the following terms:

    "Our national security interests must also be pursued in an accountable way, which meets the Government's responsibility to protect Australia, its people and its interests while preserving our civil liberties and the rule of law. This balance represents a continuing challenge of all modern democracies seeking to prepare for the complex national security challenges of the future. It is a balance that must remain a conscious part of the national security process. We must not silently allow any incremental erosion of our fundamental freedoms."[24]

37. Australia's National Security Framework (the Security Framework) was developed as a result of the Security Statement.[25] The Security Framework outlines governance arrangements in relation to national security matters, including the National Intelligence Coordination Committee, which involves the AFP and the ACC with a number of other Government departments and agencies. The Security Framework also provides for the determination of national security priorities and national intelligence priorities. The ACC is one of the agencies which support the Office of National Assessments in the process of developing these priorities.[26]

38. Following the Security Statement, the ACC began aligning its criminal intelligence priorities with the national intelligence priorities.[27] The ACC was also involved in the development of the Commonwealth's Organised Crime Strategic Framework (the

[20] See amendments made by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National*
[21] See http://www.royalcommission.vic.gov.au/getdoc/596cc5ff-8a33-47eb-8d4a-9205131ebdd0/TEN.004.002.0437.pdf
[22] Ibid at p 21
[23] Ibid at p 22
[24] Ibid at p 9
[25] See http://www.anao.gov.au/html/Files/BPG%20HTML/Audit%20Report%20No%2029%202010%2011/6/5/index.html
[26] Ibid
[27] See ACC Annual Report 2008-09 at http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/0809/ACC_AR_0809%20COMPLETE.pdf, p 6

Organised Crime Framework), which was also developed as a response to the Security Statement.[28]

39. The ACC's 2009-10 Annual Report notes that it has been accepted as a "new member of the national security community". [29] The ACC's 2010-11 Annual Report also notes that as a result of the identification of organised crime as a national security issue in the Security Statement, the ACC contributes to the national security community through:

    - The Organised Crime Framework (Classified);
    - The Organised Crime Threat Assessment (the Threat Assessment), which is part of the suite of strategic intelligence products that comprise the *Picture of Criminality in Australia* (Classified);
    - The Commonwealth Organised Crime Response Plan (the Commonwealth Plan) (Classified).[30]

40. The ACC's 2010-11 Annual Report suggests that the criminal convergence between serious and organised crime and other national security threats has been manifested overseas in events such as the 2002 Bali bombings, which were funded by gold robberies and cash smuggling, and the 2004 Madrid bombings, which were funded by drug trafficking. However, the report also notes that, in Australia, links between organised crime and terrorism are generally focused on specific needs such as providing false documentation and money laundering. It suggests that the "richest intelligence picture possible" needs to be developed "to inform prevention, intervention, policy and legislative decisions" in relation to serious and organised crime and national security threats.[31]

41. Another public document produced by the ACC, *Organised Crime in Australia*, which is an unclassified version of the Threat Assessment, notes that while there is a significant convergence between terrorism and serious and organised crime overseas, there has been little local evidence of such convergence.[32]

42. While there may be little evidence of significant convergence between terrorism and serious and organised crime, the Commonwealth Government and the ACC have clearly determined that the ACC has a role in relation to national security matters, including gathering information and producing strategic intelligence products in relation to such matters.

43. The ACC's 2010-11 Annual Report notes that its strategic intelligence products inform and influence decisions and actions within the ACC and among agencies involved in law enforcement and the Organised Crime Framework as well as at the Security Framework level.[33] Key strategic intelligence products include the Threat Assessment and the *Organised Crime in Australia* report.

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[28] Ibid
[29] See http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/0910/ACC_AR_2009-10.pdf at p 9
[30] Ibid at t p 41
[31] See http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/1011/ACC_AR_Master-copy.pdf at pp 44-45
[32] See http://www.crimecommission.gov.au/publications/organised-crime-australia/organised-crime-australia-2011-report at pp 33-35
[33] See http://www.crimecommission.gov.au/sites/default/files/files/annual_reports/1011/ACC_AR_Master-copy.pdf at p 59

44. The Law Council is pleased that the ACC has made the *Organised Crime in Australia* report publicly available as it increases the transparency and accountability of the ACC. The report provides important information on the broad range of matters that the ACC regards as serious and organised crime threats, including information on the three threats regarded as current priorities, being threats related to amphetamine-type stimulants, money laundering and identity crime. Other areas of law that the report discusses include other drug use and trafficking; various areas of fraud; people trafficking and people smuggling.

45. The *Organised Crime in Australia* report notes that the *Picture of Criminality* assessments informed the development of the Organised Crime Framework and guide the Commonwealth Plan and other initiatives such as the National Organised Crime Response Plan (the National Plan), which has been agreed by the Commonwealth, State and Territory Governments.

46. The Law Council is also pleased that 'overviews' of the Organised Crime Framework, the Commonwealth Plan and the National Plan have been publicly released.[34] However, the Law Council is disappointed that all of these public documents contain little emphasis on the role of the ACC and the Government in promoting the rule of law in response to the threats posed by serious and organised crime and in the context of the Security Framework.

47. The Law Council is pleased that one of the strategic principles in the National Plan 'overview' is that:

    "All governments should ensure that new policy development and operational activity are proportionate to the risk context, based on evidence and respect the rule of law."[35]

48. The Law Council submits that the Committee should consider whether there should be greater reference to proportionality and rule of law principles in the role and objectives of the ACC in the context of the Security Framework.

49. The Law Council notes that the Government appointed an Independent National Security Legislation Monitor (the Monitor), Bret Walker SC on 21 April 2011. The Monitor's functions include reviewing the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation (CT Laws) and other related laws, and consideration of whether they contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or national security or both, and remain necessary.[36]

50. The Law Council draws the Committee's attention to the Monitor's first report of 16 December 2011 and the Monitor's view that the response to terrorism and national security must involve consideration of standards that apply to ordinary crime. As the Monitor states:

    "Departure from the standards of legality and civility that are regarded as proper for so-called ordinary crime, in order to deal with supposedly extraordinary aspects of terrorist crime, involves accepting the claims of terrorists themselves to be special…

[34] See http://www.ag.gov.au/Publications/Pages/Organisedcrime.aspx
[35] See http://www.ag.gov.au/Documents/National%20Organised%20Crime%20Response%20Plan%20-%20Final%20Outline%283%29.PDF at p 9
[36] See Independent National Security Legislation Monitor, Annual Report, 16 December 2011 at http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

It may be that here lies a paradox. It may be that terrorism is best countered…by ensuring it can be effectively investigated, prevented, or disrupted, and when detected by prosecuting and punishing it as just another kind of ordinary serious crime."[37]

51. The Monitor also suggests that it is best to assess CT laws on the premise that:

    "…they must and can comply with Australia's obligations (such as they are) to join in the global countering of terrorism and also with Australia's undoubted obligations to respect the human rights of individuals."[38]

52. The Monitor also comments on the use of national security intelligence in CT Laws in the context of the right of an accused to know the evidence against him or her. The Monitor states that:

    "The dilemma of national security intelligence, being information (not always admissible as evidence) usually gathered surreptitiously and inherently of significance for national security, looms large for the CT laws." [39]

53. While the Law Council acknowledges that the Monitor's comments are made in the context of his function to review CT laws, it considers that these comments are also appropriate for consideration by the Committee in relation to the role and objectives of the ACC within the context of the Security Framework. The Law Council particularly notes the inclusion in the Security Statement of the reference to the need to preserve civil liberties and the rule of law.

54. The Law Council submits that the ACC's role and objectives should include addressing not only the threat posed by serious and organised crime to national security but also how its response to this threat is based on proportionality and the rule of law as well as the following matters outlined in the *Organised Crime in Australia* report:

    - Understanding the changes in organised crime and crime markets.
    - Collaborating with law enforcement agencies, government and industry.
    - Increasing public and industry awareness of key organised crime issues.
    - Specialised law enforcement strategies.[40]

55. The Law Council has recently approved a Policy Statement on Rule of Law Principles which articulates some of the key principles that the Law Council uses to evaluate the merits of government legislation, policy and practice in relation to the rule of law. This Policy Statement may be of assistance to the Committee in considering the role and objectives of the ACC in the context of the Security Framework and is attached for that purpose.

[37] Ibid at pp 9-10
[38] Ibid at p 9
[39] Ibid at p 11
[40] See http://www.crimecommission.gov.au/publications/organised-crime-australia/organised-crime-australia-2011-report at pp 94-99

The ACC's powers to collect and share criminal intelligence

56. As discussed above, the ACC has a range of powers to collect criminal intelligence which result in it obtaining information from sources such as seized computer files, surveillance results, details from informants and suspicious financial transaction reports, as well as from the use of its coercive powers.

57. The ACC's powers to collect criminal intelligence range from the power to request information from Commonwealth, State and Territory agencies to executing search warrants and exercising coercive powers to conduct examinations and require the production of documents and things.[41]

58. There are a number of provisions in the ACC Act which allow the sharing of evidence and information. As noted above, criminal intelligence is considered a form of information. Some of these provisions were recently introduced by the *Crimes Legislation Amendment (Powers and Offences) Act 2011* (the Powers and Offences Act) which was assented to on 4 April 2012 with some provisions commencing on 5 April 2012 and some provisions commencing on 25 June 2012. The latter provisions include some of the provisions discussed below relating to broadening the scope of government agencies and bodies with which information can be shared and allowing information to be shared with private sector bodies.

Sharing of evidence

59. Sub-section 12 (1) of the ACC Act requires the CEO to provide any *evidence* that would be admissible in the prosecution of an offence against a law of the Commonwealth, a State or a Territory, which is obtained by the ACC in an investigation or operation, to the relevant Attorney-General, law enforcement agency or person or authority authorised to prosecute the offence.[42]

60. Sub-section 12 (2) allows the CEO to act in a similar manner in relation to *evidence* that would be admissible in confiscation proceedings such as proceedings under the *Proceeds of Crime Act 2002* (Cth).

Sharing of information with the IGC, Ministers and Parliamentarians

61. Section 59 sets out a variety of circumstances in which the ACC may share Information with the Commonwealth Minister responsible for the ACC; the IGC; and members of the parliaments of the Commonwealth, the States and the Australian Capital Territory and the Northern Territory. In some of these circumstances, the Chair of the Board (the Chair) or CEO of the ACC may consider that disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies and is required not to provide the information.[43]

[41] See ss 19A -23, 24A -29 of the ACC Act
[42] Section 4 defines a State to include the Australian Capital Territory and the Northern Territory and a Territory not to include these two territories.
[43] See s-s 59(2) and (5)

Sharing information with government bodies

62. The Powers and Offences Act also inserted section 59AA into the ACC Act. Section 59AA allows the sharing of information with a wide range of government bodies, foreign agencies and international bodies.

63. Sub-section 59AA (1) allows the CEO to share information with a wide range of government bodies and agencies if the CEO considers it appropriate to do so and the CEO considers that the information is relevant to a 'permissible purpose'. It is also a requirement that the disclosure would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply. 'Permissible purpose' refers to one of a number of purposes for sharing information including:

    - Performing the functions of the ACC or the Board;
    - Preventing, detecting, investigating, prosecuting or punishing:
        i) Criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
        ii) Contraventions of a law of the Commonwealth, a State or a Territory imposing a penalty or sanction; or
        iii) Seriously improper conduct (including professional misconduct or misconduct by a public official);
    - Preventing, detecting or investigating threats to national security;
    - Preventing serious threats to an individual's life, health or safety, or to public health or public safety;
    - Enforcing laws (including laws of foreign countries) relating to proceeds of crime and unexplained wealth;
    - Protecting public revenue;
    - Developing government policy;
    - Researching criminology; and
    - Any other purpose prescribed by regulations.[44]

64. The Law Council notes that these purposes are very broad in scope and submits that the Committee should consider the nature of the purposes for which information is being shared in the context of the inquiry into criminal intelligence. While the Committee does not have the power to review particular operations or investigations, it does have the power to monitor and review the performance by the ACC of its functions.[45] As these provisions only commenced recently, the Committee may consider it too early to review their use by the ACC. However, the Law Council submits that the Committee should inquire into the use of these provisions in the near future if it does not do so in the context of this inquiry.

[44] Section 4 of the ACC Act
[45] Section 7, *Parliamentary Joint Committee on Law Enforcement Act 2010* (Cth)

65. Sub-section 59AA (2) allows the CEO to share information with ASIO if the CEO considers it appropriate to do so and the information is relevant to security as defined in the *Australian Security Intelligence Organisation Act 1979* (Cth). It is also a requirement that the disclosure would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply. The Law Council submits that the Committee should consider the nature of the purposes for which information is being shared pursuant to this sub-section in the context of this inquiry or in the near future.

Information sharing with private sector bodies

66. Section 59AB provides that the CEO may disclose information to a private sector body corporate that is prescribed or included in a class of bodies corporate prescribed by regulations and that the CEO is required to consider similar matters to those outlined above in relation to disclosure to government bodies, although is required to consider whether the information is 'necessary for' a permissible purpose rather than 'relevant to' one.

67. Section 59AB contains additional requirements for the body corporate to have undertaken in writing to comply with conditions relating to use or further disclosure of the information as specified by the CEO in writing. It also creates offences for non-compliance with such conditions.

68. Section 59AB also contains specific requirements in relation to the disclosure of *personal* information within the meaning of the *Privacy Act 1988* (the Privacy Act) to a body corporate. The Law Council is pleased that these requirements relating to personal information have been included. The Law Council has previously raised concerns about the exemption of the ACC from the Privacy Act.[46] While the Law Council acknowledges that the Attorney-General's Department has advised that the ACC voluntarily complies with the Information Privacy Principles under the Privacy Act as far as possible, [47] the Law Council maintains the view that the Government should develop information-handling guidelines for the ACC as recommended by the Australian Law Reform Commission following its inquiry into the Privacy Act.[48] Such guidelines would complement the requirements in section 59AB.

69. The Law Council acknowledges that the *Organised Crime in Australia* report notes the need for collaboration with the private sector in addressing particular areas of organised crime such as money laundering. Although the Law Council understands the need for such collaboration, it is also concerned that appropriate protections be applied to the sharing of information with the private sector.

Restrictions on evidence and information sharing

70. The Federal Court has determined that the provision of evidence or information pursuant to sections 12 or 59 is subject to any direction given by an examiner exercising coercive powers in relation to maintaining confidentiality of evidence or information obtained in the examination.[49] Section 25A (9) provides that the examiner must give such a direction if the failure to do so might prejudice the safety

[46] See Submission to Inquiry into Privacy Law at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca
[47] Law Council correspondence with the Minister for Home Affairs, 6 August 2010 and with the Attorney-Generals' Department 20 December 2010 and 16 August 2011
[48] See http://www.alrc.gov.au/publications/report-108
[49] See *Australian Crime Commission v OK* [2010] FCA 61

or reputation of a person or the fair trial of a person who has been or may be charged with an offence.

71. The Powers and Offences Act clarified the effect of the Federal Court decision by inserting a note relating to the operation of sub-section 25A (9) into section 59 and a note and a clarifying sub-section in section 12 .

72. The Powers and Offences Act also inserted section 59AC which provides that sections 59, 59AA and 59AB are subject to any confidentiality direction made by an examiner under sub-section 25A (9).

73. The Law Council acknowledges that sub-section 25A (9) allows more specific protection for evidence or information obtained as a result of the exercise of coercive powers by means of the confidentiality directions given by the examiner. The Law Council considers that protection for such information or evidence is appropriate because of the way in which the evidence or information has been obtained and also because of the nature of the evidence or information, which is often personal and sensitive. For example, coercive powers have been used to obtain medical records of Indigenous children.[50] Coercive powers have also been used to obtain details from a person about income, expenditure, travels, associates and possible criminal activity.[51]

74. However, the protection offered by s 25A (9) is subject to a number of limitations. An examiner's directions may be varied or revoked by the CEO although the CEO must not act in this way if to do so might prejudice the safety or reputation of a person or the fair trial of a person who has been, or may be charged with an offence.[52]

75. An examiner's directions may also be subject to action by a federal, State or Territory court if a person has been charged with an offence before such a court and the court considers it desirable that that evidence subject to directions be made available to the person or their legal representative.[53]

76. The effectiveness of the protection offered by sub-section 25A (9) is also dependant on the examiner's consideration of the possible purposes for which the evidence or information will be shared and the possible consequences of the directions. The Law Council is of the view that examiners bear a heavy burden in relation to the consideration of directions and that the Committee should monitor the impact of this burden on examiners.

77. The Law Council also acknowledges that section 51, which is a general secrecy provision, requires the CEO, staff members, Board members, and examiners not to disclose *information* acquired by reason of or in the course of their performance of duties under the Act except for the purposes of or in connection with prescribed legislation.

78. The Law Council also acknowledges that other statutory provisions may apply to protect information collected by the ACC pursuant to other statutory powers such as

[50] See *Australian Crime Commission v NTD8* [2009] FCAFC 86
[51] See *R v Shea* [2010] QCA 339
[52] Sub-sections 25A (10) and (11) of the ACC Act
[53] Sub-sections 25A (12) and (13) of the ACC Act

the *Telecommunications Interception Act 1979* (Cth), although the Law Council has also raised concerns about the extent of such protections.[54]

79. The Law Council submits that the Committee should consider what sort of information is being shared pursuant to the new provisions and whether the sharing of that information is justified. If it is too early to assess the general nature of the information being shared given the recent introduction of some of the relevant provisions, the Law Council suggests that the Committee consider the issue in the near future.

Annual Report requirements

80. The Powers and Offences Act provides for an additional matter to be included by the Chair in the ACC Annual Report produced pursuant to section 61 of the ACC Act. The additional matter relates to the general nature and extent of any information disclosed to a private sector body corporate. The Law Council is pleased about this inclusion as it strengthens the accountability mechanism established by the Annual Report.

81. The Law Council notes that the existing requirement under paragraph 61 (2) (d) of the ACC Act in relation to reporting of the general nature and extent of information disclosed to government agencies is limited to 'a law enforcement agency'. The Law Council suggested in its submission on the *Crimes Legislation Amendment (Powers and Offences) Bill 2011* (the Bill) that this requirement should be expanded given the broadening of the types of government bodies to which information could be disclosed and the permissible purposes for which information could be disclosed pursuant to the Bill.

82. The Law Council suggested that the new Annual Report requirement could simply refer to 'the general nature and extent of any information disclosed by the CEO during that year under section 59AA (government bodies) or 59AB (private sector bodies)'.

83. The Law Council notes that the report against the requirement in paragraph 61 (2) (d) contained in the 2010-11 ACC Annual Report by the Chair simply refers back to the section of the report which describes the ACC's activities.[55] While this section refers to a number of law enforcement agencies, the Law Council considers that the report could provide more specific details of the nature and extent of information disclosed to government and private sector bodies if the suggestion above were adopted and submits that the Committee could make a recommendation in this regard.

Conclusion

84. The Law Council has a number of concerns relating to the increasing role of the ACC, particularly in relation to the Security Framework and the lack of emphasis in a number of key ACC strategic intelligence products on rule of law principles.

[54] See Submission to Inquiry into Privacy Law at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C76B960-1C23-CACD-22C9-D59E0D29BCD4&siteName=lca

[55] See Australian Crime Commission Annual Report 2010-2011 at http://www.crimecommission.gov.au/publications/annual-report/chair-annual-report-2010-11

85. The Law Council submits that the Committee should consider whether there should be greater reference to rule of law principles in the role and objectives of the ACC in the context of the Security Framework.

86. The Law Council has had long standing concerns about the ACC's collection of information, intelligence and evidence though the use of its coercive powers. The Law Council also has a number of concerns about the increasing scope of information and intelligence that the ACC is able to collect and share.

87. The Law Council submits that the Committee should consider the nature of the information and intelligence which is able to be increasingly shared by the ACC as a result of recent amendments to the ACC Act and whether there are adequate protections in place in relation to this sharing.

88. The Law Council thanks the Committee for the opportunity to make a submission to this important inquiry.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.