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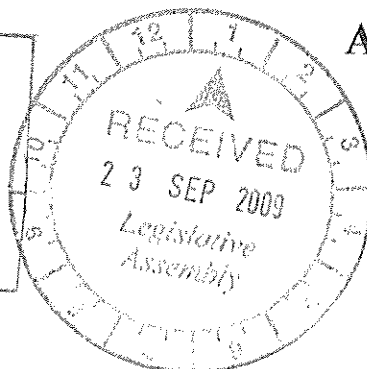
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**Independent Review of the
*Australian Crime Commission (Western Australia) Act 2004***

Sam Vandongen

August 2009

WESTERN AUSTRALIA
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Legislative Assembly
23 SEP 2009
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CHAPTER 1

Introduction

1.1 Statutory Review

1. The *Australian Crime Commission (Western Australia) Act 2004* (WA) (“the State Act”) came into operation on 1 February 2005. The State Act included a provision which required that an independent review be conducted three years after the commencement of the Act.

2. Specifically, section 51 of the State Act provides:

(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.

3. By letter dated 30 June 2009, Mr Sam Vandongen (“the reviewer”) was engaged to conduct the review required by section 51 of the State Act. That letter indicated that a report was to be submitted by 7 August 2009.

1.2 Statement of Requirements

4. The reviewer has been provided with a Statement of Requirements of the review (the “Statement of Requirements”) which is in the following terms:

The Australian Crime Commission (Western Australia) Act 2004 (“the State Act”) provides for the operation of the Australian Crime Commission in Western Australia. The State Act is uniform legislation that is mirrored in all other Australian jurisdictions and complements the Commonwealth Australian Crime Commission Act 2002.

Section 51(1) of the State Act states, "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".

This review has not been conducted within the statutory timeframe and therefore it is required to be completed on an urgent basis.

Without limitation, the reviewer will be required to:

(1) Consult with the key stakeholders, including:

- i. Australian Crime Commission (WA Office);*
- ii. Corruption and Crime Commission; and*
- iii. Specialist Crime Portfolio, WA Police.*

(2) Review the effectiveness of the investigative, management and accountability structures of the Australian Crime Commission (Western Australia) Act 2004; and

(3) Examine whether the roles, powers and structure in the State Act remain appropriate and relevant, having regard to amendments that have since been made in the Commonwealth Act.

5.

CHAPTER 2

The Review Process

2.1 Consultations

6. The review was commenced on 7 July 2009 when the reviewer met with Mr Malcolm Penn at WA Police. At that meeting the reviewer was provided with materials to assist in carrying out the review of the State Act.
7. Having regard to the very short time-frame allowed for the review, and to the limited operation of the State Act (being essentially complementary to the *Australian Crime Commission Act 2002* (Cth) (the “Commonwealth Act”)), no public submissions were sought.
8. In accordance with the Statement of Requirements the reviewer consulted key stakeholders. The reviewer interviewed:
 - (1) a representative of the Australian Crime Commission (the “ACC”) in Perth;
 - (2) a representative of the ACC in Canberra by video-link;
 - (3) senior police officers from the Western Australia Police Specialist Crime Portfolio; and
 - (4) the Principal Legal Officer of the Crime and Corruption Commission.
9. The reviewer also spoke to some members of the legal profession who have had experience in dealing with the ACC.

2.2 Reports and legislation

10. In accordance with the Statement of Requirements the reviewer has considered the the *Australian Crime Commission Amendment Act 2007* (Cth) (the “Commonwealth Amendment Act”).
11. The Statement of Requirements also required that the following reports be considered:
 - (1) The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005.

- (2) The Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008.

12. In addition to that material the reviewer has considered:

- (1) The Report of the Standing Committee on Uniform Legislation and General Purposes in Relation to *The Australian Crime Commission (Western Australia) Bill 2003*, Report 15, June 2004.
- (2) The *Independent Review of the Provisions of the Australian Crime Commission Act 2002: Report to the Inter-Governmental Committee*, Mr Mark Trowell QC, March 2007 (the "Trowell Report").

CHAPTER 3

The Australian Crime Commission (Western Australia) Act: Background and Overview

3.1 The Australian Crime Commission (Western Australia) Bill 2003

13. The *Australian Crime Commission (Western Australia) Bill 2003* (“the State Bill”) was introduced into the Legislative Council on 4 December 2003.
14. The purpose of the State Bill is best illustrated by the following quote from the Explanatory Memorandum:

This Bill provides for the operation of the Australian Crime Commission (the ACC) in Western Australia, repeals the National Crime Authority (State Provisions) Act 1985 and makes consequential amendments to various Acts to effect the transition of the National Crime Authority to the newly created ACC.

The ACC is established under the Commonwealth Act, and came into operation on 1 January 2003.¹ The ACC combines the investigative functions of the former NCA with the criminal intelligence functions of the former Australian Bureau of Criminal Intelligence and the former Office of Strategic Crime Assessments.

The Commonwealth Act replicates the powers that were available to the NCA and enables these powers to be used for both the ACC’s investigatory role and its new criminal intelligence role.

The Commonwealth Act establishes the governance regime for the ACC, including a Board and an office of Chief Executive Officer (CEO) of the ACC.

The Board, which comprises Commonwealth, State and Territory law enforcement representatives, and is responsible for determining national criminal intelligence priorities and overseeing the strategic direction of the ACC, as well as authorising intelligence operations and investigations and the use of special powers.

¹ The Australian Crime Commission was established by the *Australian Crime Commission Establishment Act 2002* (Cth) which amended the *National Crime Authority Act 1984* (Cth). The amended Act was re-named the *Australian Crime Commission Act 2002* (Cth).

The Commonwealth Act also establishes the Inter-Governmental Committee (IGC), which is comprised the Commonwealth Minister and in the case of each participating State, a member to represent that State, being a Minister of the Crown. The IGCACC is responsible for maintaining an appropriate monitoring and oversight role in relation to the ACC.

The Commonwealth Act also continues the coercive examination powers that were available to the NCA.

The Bill and comparable legislation in other States and Territories complement the Commonwealth Act by enabling the ACC to undertake like functions to those under the Commonwealth Act in relation to relevant criminal activity that relates to State or Territory offences. This ensures that the ACC can operate as effectively and seamlessly as possible on a national basis.

The Bill provides for the functions and powers of the ACC, the Board, and the CEO under State law. Akin to the Commonwealth Act, the Bill maintains the powers that were available to the former NCA and enables these powers to be used for both the ACC's investigatory and criminal intelligence roles.

The Bill creates offences for contraventions of the provisions of the Act to facilitate the effective performance of the ACC's functions. These offences reflect equivalent offences that are contained in the Commonwealth Act. The penalties for the offences in the Bill are the same as the penalties for the equivalent offences in the Commonwealth Act.

The Bill will repeal the existing State legislation for the NCA, the National Crime Authority (State Provisions) Act 1985 and consequentially amend numerous other pieces of legislation.

The Bill also contains transitional provisions to facilitate the seamless transition from the NCA to the ACC under State law.

15. As described by the Parliamentary Joint Committee on the Australian Crime Commission (the "PJC"), similar legislation has been enacted in each State of the Commonwealth to enable the cooperative scheme which establishes the ACC and provides it with its powers:

Each state and territory has enacted complementary legislation to the ACC Act [Cth]. With the exception of NSW, and allowing for individual State drafting conventions, the state and territory ACC legislation is consistent in structure and content, and incorporates the relevant parts of the Commonwealth legislation,

placing them in the state act. The NSW legislation applies the ACC Act and Regulations to NSW, and includes some specific provisions allowing particular functions and arrangements to apply in NSW.

The state and territory legislation was necessary to enable the ACC and the states to work co-operatively, and to ensure there were no gaps in the constitutional powers available to Commonwealth and State law enforcement agencies. The legislative arrangements underpin the State representation on the Board, and on the Intergovernmental Committee (IGC).²

3.2 The Standing Committee on Uniform Legislation and General Purposes

16. On 4 December 2003, after the second reading of the State Bill in the Western Australian Parliament, it was referred to the Standing Committee on Uniform Legislation and General Purposes (the “Standing Committee”).
17. After conducting a comprehensive review of the State Bill, the Standing Committee tabled its report on 22 June 2004.³ In that report eleven recommendations were made to amend the State Bill. Ten of those recommendations were adopted⁴ and corresponding amendments were made before the State Bill was passed.

3.3 An overview of the State Act

18. The State Act commenced operation on 1 February 2005.
19. The primary purpose of the State Act, as identified by the Standing Committee, was to:

...complement the Australian Crime Commission Act 2002 (Cth) and enable the Australian Crime Commission (the “ACC”) 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).⁵
20. Part 1 of the State Act contains a number of preliminary provisions, including provisions that set out the definitions of various words and phrases that are used in the State Act.
21. Part 2 of the State Act contains provisions that confer certain functions and powers on the ACC, the Board of the ACC, and the Inter-Governmental Committee. These

² Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, page 5 (paragraphs 3.15 and 3.16).

³ *Ibid.*

⁴ Including a recommendation that resulted in the inclusion of what is now s51 of the State Act (see above at 1.1).

⁵ Report of the Standing Committee on Uniform Legislation and General Purposes in Relation to *The Australian Crime Commission (Western Australia) Bill 2003*, Report 15, June 2004, Executive Summary, page i.

provisions are necessary as the *Commonwealth Constitution* does not confer any specific legislative power on the Commonwealth in relation to criminal law. The State Act enables the ACC to carry out functions in relation to serious and organised crimes that are, or includes, offences against a law of the State.

22. Central to the conferral of functions and powers on the ACC is s5 of the State Act, which (amongst other things) confers on the ACC the functions of:
 - (1) investigating serious and organised crimes that are or includes offences against a law of the State (an “ACC State investigation”); and
 - (2) undertaking intelligence operations in relation to serious and organised crimes that are or includes offences against a law of the State (an “ACC State intelligence operation”).
23. Section 8 of the State Act also confers on the Board of the ACC the functions of determining whether an ACC State investigation or an ACC State intelligence operation is a “special operation”. A determination by the Board of the ACC that an ACC State investigation or an ACC State intelligence operation is a “special operation” triggers the ACC’s ability to exercise the various coercive powers provided for in Parts 3 and 4.
24. Part 3 of the State Act confers functions and powers on examiners to carry out examinations for the purposes of the functions referred to in paragraph 23 above. It also includes provisions that confer other powers on examiners, provisions that create various offences designed to ensure compliance with the State Act, and provisions to ensure the protection of certain individuals.
25. Part 4 of the State Act contains provisions dealing with the application for, issuing of and execution of search warrants by authorised persons.
26. Part 5 contains provisions that deal specifically with the performance of certain functions and powers by Commonwealth bodies or persons, including the ACC and federal judicial officers. It also contains a provision that confers on the ACC an incidental power to do all things necessary to be done for or in connection with, or reasonably incidental to, the performance of its functions under the State Act.
27. Part 6 contains a number of general provisions, including a provision that is designed to ensure that a person cannot be punished for the same act or omission under both the State Act and the Commonwealth Act, various administrative provisions and a secrecy provision.

28. Parts 7 and 8 contain a number of provisions designed to deal with the transition from the National Crime Authority to the ACC.

3.4 Amendments that have been made to the State Act since its commencement

29. The State Act has only been amended once since its commencement.

30. When the *Legal Profession Act 2008* (WA) commenced on 1 March 2009 it amended section 3(1) of the State Act by adding a definition for the phrase “legal practitioner”.

CHAPTER 4

The Effectiveness of the Investigative, Management and Accountability Structures of the *Australian Crime Commission (Western Australia) Act 2004*

4.1 Introduction

31. In summary, the consultation with the key stakeholders revealed that none of the stakeholders had experienced any problems or identified any significant issues in relation to the effectiveness of the investigative, management and accountability structures of the State Act.
32. This result is consistent with the experience of the Parliamentary Joint Committee on the Australian Crime Commission in the course of its inquiries that led to the publication of its report in 2005: *Review of the Australian Crime Commission Act 2002*.⁶
33. The lack of any specific issues is explicable, in part, by the limited practical operation of the State Act. The State Act is part of a cooperative scheme between the Commonwealth and the States and Territories. The primary source of the powers, functions and accountability mechanisms of the ACC (including the Board of the ACC, examiners and the ACC staff) is the Commonwealth Act. The State Act serves merely to complement the Commonwealth Act and to ensure that legally the ACC and various other Commonwealth bodies and persons have the powers necessary to function as a national body, whether the source of those powers is from the Commonwealth or the States and Territories. That is not to understate the importance of the State Act. This is the desirable outcome in a cooperative scheme where a State statute is conferring powers on a Commonwealth body.
34. A further reason why the key stakeholders did not identify any issues in relation to “the effectiveness of the investigative, management and accountability structures of the State Act” is that the various functions and powers conferred by the State Act have not been utilised to date.

⁶ The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005.

35. As at the date of the review, no determinations have been made pursuant to section 8 of the State Act.⁷ As a result there appear to have been no real opportunities to test the effectiveness of the State Act. In fact the reviewer gained the clear impression that there had never been an occasion on which anyone has had to consult or consider the State Act.

4.2 Issues identified during consultations with stakeholders

36. During the review a number of issues were raised by stakeholders. However, these issues concerned the effectiveness of the overall national scheme, rather than the State Act.

37. These issues included:

- (1) The desirability of legal practitioners representing a number of different witnesses in the same examination;
- (2) Whether the Chief Executive Officer, as opposed to examiners, should have the power to revoke non-publication directions made by examiners pursuant to section 25A(9) of the Commonwealth Act;⁸
- (3) The adequacy of the penalties that are currently prescribed for contraventions of the various ACC Acts;⁹
- (4) The desirability of a power to certify persons for contempt of the ACC for not fulfilling their obligations under the ACC Acts;¹⁰ and
- (5) The need to clarify whether a person appearing as a witness at an examination can make a 'blanket claim' of privilege pursuant to section 30(4)(c) of the Commonwealth Act, or whether such a claim needs to be made after each question.¹¹

38. As these issues are concerned with the overall effectiveness of the national scheme, they are outside the scope of this review. Hence they have not been addressed in detail in this report.

⁷ The list of determinations that is publicly available from the ACC does not purport to include any determinations made under s8 of the State Act. This was confirmed by the representatives of the ACC during consultations.

⁸ Section 25A(10) of the Commonwealth Act provides that the Chief Executive Officer may revoke such a direction, but the Act is silent as to whether an examiner may revoke their own direction. This is mirrored in the State Act in s18(10).

⁹ This issue was also dealt with in the Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pages 37-41; in the Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, pages 43-51; and in the Trowell Report.

¹⁰ Ibid.

¹¹ Section 23(4)(c) of the State Act.

39. However, if at any time the Commonwealth Act is amended to deal with any or all of these issues, then consideration will need to be given to whether such amendments should be reflected in the State Act.
40. As the issue of whether it is desirable that the ACC have the power to certify persons for contempt has been specifically dealt with by the PJC and may lead to amendments to the Commonwealth Act shortly, this issue has been more fully dealt with below.
41. In addition to these issues, further questions were raised with the reviewer during consultations which concerned the effectiveness and efficiency of the ACC as an agency. However, these issues did not directly concern the effectiveness of the State Act and were outside the scope of this review. Hence, none of those issues have been dealt with in this report.

4.3 Issues identified in the Parliamentary Joint Committee on the Australian Crime Commission's, *Review of the Australian Crime Commission Act 2002*, November 2005

42. On 20 July 2005, the PJC adopted terms of reference with a view to conducting a review of the Commonwealth Act pursuant to section 61A of that Act. The terms of reference were as follows:

Pursuant to Section 61A, the Committee will review the operation of the Australian Crime Commission Act 2002, with particular reference to:

- 1. The effectiveness of the investigative, management and accountability structures established under the Act, including:*
 - a. the Australian Crime Commission;*
 - b. the Chief Executive Officer;*
 - c. the Examiners;*
 - d. the Australian Crime Commission Board;*
 - e. the Intergovernmental Committee; and*
 - f. the Parliamentary Joint Committee on the Australian Crime Commission.*
- 2. Whether the roles, powers and structure granted to the Australian Crime Commission under the Act and associated legislation remain appropriate and relevant to meeting the challenge of organised crime in the 21st Century.*

3. *The need for amendment of the Act.*

4. *Any other related matter.*

43. As can be seen, the terms of reference were expressed in similar terms to the Statement of Requirements for this current review. However, the extent of the review that was carried out by the PJC was significantly broader than the scope of this review, as it examined issues such as whether the rationale for creation of the ACC remains, the overall purpose of the ACC, the structure of the ACC (including the Board, the Chief Executive Officer, the examiners, and the Inter-Governmental Committee), the accountability of the ACC, the ACC's resources, and the results achieved by the ACC.
44. The PJC produced a report in November 2005 (the "PJC 2005 Report").¹² Overall, the PJC said:
- The ACC Act is three years out from its commencement. From the submissions and evidence, there appear to be no major structural issues which require amendment or attention.*¹³
45. This is consistent with the reviewer's own findings arising out of the consultations referred to Chapter 2.
46. However, in that report the PJC did make eighteen recommendations.¹⁴
47. None of those recommendations were directly relevant to, or even made reference to, the State Act or to any of the other complementary state acts but the PJC made three recommendations to amend the Commonwealth Act.¹⁵ If those recommendations to amend the Commonwealth Act are enacted, then it may require consequential amendments to the State Act. Hence those three issues have been considered within the scope of this review.
48. In Recommendation 1 of the PJC 2005 Report it was noted that it is currently unclear whether an examiner can summons a person to give evidence at an examination pursuant to section 28 of the Commonwealth Act in circumstances in which that person has been charged with a criminal offence or is the subject of confiscation proceedings. Section 28 of the Commonwealth Act is in similar terms to section 19 of the State Act hence any amendment to that provision in the Commonwealth Act

¹² The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005.

¹³ The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, page 113.

¹⁴ The recommendations are set out in Annexure A.

¹⁵ Recommendations 1, 10 and 18.

would arguably mean that the State Act should be amended if it is to remain uniform with the Commonwealth Act.

49. Concern was expressed to the PJC that the coercive powers of the ACC might be used to force an accused person to divulge their defence before a trial. On the other hand, it was recognised that the ACC's functions should not be unnecessarily curtailed.¹⁶
50. In striking a balance between these two competing interests the PJC recommended the development of legislation to ensure that a person summonsed by the ACC, at a time when they are the subject of criminal or confiscation proceedings, may only be examined in relation to matters quarantined from those material to the pending proceedings.
51. In Recommendation 10 of the PJC 2005 Report, the PJC sought to enhance its own effectiveness in overseeing the operations of the ACC, particularly in relation to its ability to access and obtain information. The PJC decided that this could best be achieved by the use of an independent investigator, such as the Commonwealth Ombudsman.
52. The Commonwealth Ombudsman is currently only responsible pursuant to section 55AA of the Commonwealth Act for providing a briefing to the PJC about the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* (Cth). The PJC recommended extending that responsibility to include any matter relating to the operations of the ACC.
53. While the issue was not addressed by the PJC, in order to ensure that this recommendation is given its full effect, the various state acts may need to be amended to ensure that the function of briefing the PJC in relation to ACC State investigations and ACC State intelligence operations is conferred on the Commonwealth Ombudsman.
54. In Recommendation 18 of the PJC 2005 Report, the PJC recommended that regulatory changes, or if necessary legislative changes, be introduced to allow persons summonsed for an examination to be eligible for legal aid from the legal aid commissions, subject to the usual means tests.
55. This recommendation was made because it was recognised that legal aid is not available for ACC proceedings from the State and Territory Legal Aid

¹⁶ The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pages 25-26.

Commissions, and in response to a submission made by the Legal Aid Office of the ACT.¹⁷

56. These are sound recommendations. However, at the date of this review the Federal Government has not provided a response to the PJC 2005 Report¹⁸ and no amendments have been made to the Commonwealth Act as a consequence of these recommendations.
57. In light of this, and given that the State Act is intended to be complementary to the Commonwealth Act, the reviewer does not recommend that amendments in line with the recommendations made in the PJC 2005 Report be made to the State Act at this stage. Instead the Federal Government's response to the PJC 2005 Report should be monitored. If any amendments are ultimately made to the Commonwealth Act as a result of that report it is recommended that amendments be made to the State Act.

Recommendation 1

The Federal Government's response to the PJC 2005 Report, and any consequential amendments that are made, be monitored by an appropriate government agency to ensure that timely consideration be given to any consequential amendments that should be made to the State Act.

58. The reviewer has identified a further issue concerning section 22(2) of the State Act that arises out of Recommendation 18 of the PJC 2005 Report, in relation to Legal Aid funding.
59. In the event that people summonsed for an examination by the ACC are eligible to apply for funding from Legal Aid (WA) then a further amendment to the State Act would be required.
60. Section 22(1) of the State Act prohibits the disclosure of certain information in particular circumstances. When a summons or notice is issued under sections 19 or 20 of the State Act, then pursuant to section 21, the summons or notice may include a notation prohibiting disclosure. Section 22(1) of the State Act then prohibits a person from disclosing certain information in relation to the summons or notice.
61. Section 22(2) provides for certain exceptions to the prohibition against disclosure in section 22(1). However, whilst section 22(2) expressly allows a person to make a

¹⁷ The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005, pages 29-30 and 114.

¹⁸ The Speaker's Schedule of Outstanding Government Responses to Reports of House of Representatives and Joint Committees, *House of Representatives Hansard*, 24 June 2009, page 7241.

disclosure to a legal practitioner for the purposes of obtaining legal advice, it does not contemplate a disclosure being made to an officer of Legal Aid WA who is not a legal practitioner.

62. In view of the way in which Legal Aid WA operates, this represents a practical barrier to a person making an application for legal aid. An application for Legal Aid is assessed by an officer of Legal Aid WA who is not a legal practitioner. Hence if a person is issued with a summons or notice under the State Act which includes a notation prohibiting disclosure, then in order to apply for Legal Aid to obtain legal advice, the person would be breaching section 22 of the State Act which prohibits the disclosure of certain information.
63. This issue has been specifically addressed in the Commonwealth Act. Section 29B(4) specifically allows a person to make a disclosure to a “legal aid officer” for the purpose of obtaining legal advice or representation relating to a summons or notice.
64. However, this provision is not reflected in the State Act.
65. Accordingly, the reviewer recommends that section 22 of the State Act be amended to reflect section 29B(4)(c) of the Commonwealth Act.

Recommendation 2

Section 22 of the State Act be amended to reflect section 29B(4)(c) of the Commonwealth Act.

CHAPTER 5

Amendments Made to the Commonwealth Act Since the Commencement of the State Act

5.1 Amendments to the Commonwealth Act

66. There have been a number of Acts of the Commonwealth that have made amendments to the Commonwealth Act since the commencement of the State Act. Those Acts are listed in Annexure B.
67. Given that the State Act has been amended once since its commencement¹⁹, and then only in a relatively insignificant way, an issue arises as to whether the amendments that have been made to the Commonwealth Act have had any impact on the appropriateness or relevance of the roles, powers and structure provided for in the State Act.
68. The reviewer has considered each of the Acts listed in Annexure B. Most of the amendments that have been made to the Commonwealth Act by these Acts have not had any impact on the appropriateness or relevance of the State Act. Accordingly, they are not relevant to this review.
69. However, the effect of two of the acts which amended the Commonwealth Act do need to be mentioned, namely:
- (1) the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (the “NTNER Act”); and
 - (2) the *Australian Crime Commission Amendment Act 2007* (the “Amendment Act”).

5.2 The Amendments to the Commonwealth Act by the NTNER Act

70. On 7 August 2007 the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007* was introduced into the House of Representatives. According to the Explanatory Memorandum, its purpose was to “provide for the Australian Government’s response to the national emergency confronting the

¹⁹ See paragraphs 29 - 30 above.

welfare of Aboriginal children in the Northern Territory, and other measures, by amending existing Commonwealth legislation.”

71. Certain provisions in the Bill were designed to effect amendments to the Commonwealth Act in order to enable the ACC to undertake an intelligence operation or an investigation (an operation/investigation), or a special operation/investigation (in which case the full range of ACC special coercive powers may be used), into indigenous violence or child abuse.
72. The NTNER Act came into operation on 18 August 2007.
73. Relevant to this review are the amendments that the NTNER made to sections 4(1), 55A and 55B of the Commonwealth Act.²⁰
74. The effect of those amendments is to extend the provisions that give Commonwealth consent to the conferral of duties, functions and powers made under the various State ACC Acts (including the State Act). Specifically, the amendments express the Commonwealth’s consent to the conferral of duties, functions and powers in relation to serious violence or child abuse committed by or against, or involving, an Indigenous person.
75. Currently the State Act only confers duties, functions and powers on the ACC in relation to ‘serious and organised crime’.²¹ If the State wished to confer duties, functions and powers on the ACC in relation to serious violence or child abuse committed by or against, or involving, an Indigenous person then specific amendments to the State Act would be required.
76. The amendments have been made to the Commonwealth Act to ensure that should a State decide to amend its ACC Act to confer such duties, functions and powers on the ACC then the Commonwealth consent will already be in place.
77. The question of whether the State Act should be amended so as to confer duties, functions and powers on the ACC in relation to serious violence or child abuse committed by or against, or involving, an Indigenous person is a matter of government policy and is clearly beyond the scope of this review.
78. For that reason the reviewer makes no recommendations arising out of the amendments that were made to the Commonwealth Act by the NTNER Act.

²⁰ The relevant amendments are set out in Annexure C. The NTNER Act also made other amendments to the Commonwealth Act, including amendments that enabled the ACC to gain information from State government agencies and to extend the period of appointment of examiners. These amendments are not relevant to this review.

²¹ As defined in s3(1) of the State Act.

5.3 The Amendments to the Commonwealth Act by the Amendment Act

79. In order to carry out its functions, the ACC is provided with coercive powers that enable it to obtain information that may not otherwise be accessible. Sections 28 and 29 of the Commonwealth Act, respectively, empower examiners to summons witnesses and to obtain documents by notice in writing.²²
80. These coercive powers are exercised by examiners who are appointed pursuant to section 46B of the Commonwealth Act. The procedures that an examiner must follow before issuing a summons or a notice are set out in sections 28 and 29 of the Commonwealth Act.
81. Prior to the amendments that were made to the Commonwealth Act by the Amendment Act, an examiner had to be satisfied that it was reasonable to issue a summons or notice *and* was required to record in writing the reasons for the issue of the summons or the notice. However, the Commonwealth Act did not specifically provide for when the reasons were required to be recorded in writing.
82. In *ACC v Brereton* [2007] VSC 297, Smith J examined these provisions. The case concerned a challenge by the ACC to a decision of a Magistrate to refuse to set aside a subpoena that had been issued to the ACC. The subpoena had been issued for the production of documents which recorded the reasons for the issue of a summons pursuant to section 28 of the Commonwealth Act. In the course of determining the ACC's challenge Smith J held that for a summons to be valid the reasons for its issue must have been recorded in writing *prior to* the issue of the summons.
83. A desire to change the effect of this decision, led to the enactment of the Amendment Act²³.
84. The effect of the Amendment Act can be summarised as follows:
- It removed the requirement for ACC examiners to record in writing their reasons for issuing a summons to appear at an examination or for issuing a notice to produce documents before issuing the summons or notice. Instead the ACC Act now allows examiners to record their reasons:*
- (a) before the issue of the summons; or*
- (b) at the same time as the issue of the summons; or*
- (c) as soon as practicable after the issue of the summons.*

²² Prior to the enactment of the Amendment Act these provisions were reflected in the State Act: ss19 and 20.

²³ The relevant provisions of the Amendment Act, which commenced on 29 September 2007, are set out in full in Annexure D.

It inserted a validation provision which provides that even where an examiner has not recorded his or her reasons for issuing a summons, either as soon as practicable after issuing the summons or at all, the summons is nonetheless valid.

It inserted a provision which gives the validation provision retrospective effect. The result is that previously invalid summonses issued prior to the Amendment Act are rendered valid, despite a failure to record written reasons in compliance with the terms of the ACC Act.

It amended sections 28 and 29 of the ACC Act to allow examiners to substitute for each other in the performance of their functions, for example, to allow a person summonsed to appear before a particular examiner to in fact appear before a different examiner, where the first examiner may be on leave or otherwise unavailable.²⁴

85. None of the amendments to the Commonwealth Act that have been made by the Amendment Act have been replicated by amendments to the State Act to date.

5.4 Consideration of the Amendment Act by the Parliamentary Joint Committee on the ACC and the consequential recommendations of the PJC for further amendments to the Commonwealth Act

86. During the passage of the Amendment Act through both Houses of Parliament concerns were expressed by a number of Members of the Federal Parliament. Hence, the Amendment Act was referred to the PJC.

87. The PJC conducted an inquiry and in September 2008 it produced its report in relation to the Amendment Act: *Inquiry into the Australian Crime Commission Amendment Act 2007* (the “PJC 2008 Report”).

88. The PJC made 10 recommendations²⁵, many of which sought to either repeal some of the provisions that had been inserted into the Commonwealth Act by the Amendment or to make material changes to them.

89. As at the date of this review, there has been no Federal Government response to the PJC 2008 Report²⁶ and no further amendments have been made to the Commonwealth Act. However, it is possible that some or all of the recommendations of the PJC will be adopted and will result in further amendments being made to the Commonwealth Act.

²⁴ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, paragraph 1.16.

²⁵ *Ibid* at pages ix-x. The recommendations are set out in Appendix E.

²⁶ The Speaker's Schedule of Outstanding Government Responses to Reports of House of Representatives and Joint Committees, *House of Representatives Hansard*, 24 June 2009, page 7241.

90. Nevertheless, it is necessary for this review to consider the amendments made by the Amendment Act, as well as the further amendments that were proposed in the PJC 2008 Report to determine whether any amendments should be made to the State Act. What follows is a discussion of each of the issues raised by both the actual and proposed amendments to the Commonwealth Act resulting from the Amendment Act and the PJC 2008 Report.

Summonses and Notices to be returnable before the same examiner or before any examiner

91. Sections 1, 3, 4 and 6 of the Amendment Act amended sections 28 and 29 of the Commonwealth Act to introduce some flexibility into the process of issuing summonses and notices. Both section 28 and section 29 originally provided that an examiner could only issue summonses and notices that were returnable before the same examiner. The amendments to the Commonwealth Act now allow an examiner to issue a summons or notice that is returnable before any examiner.
92. None of these provisions were the subject of any criticism or other comment in the PJC 2008 Report. The amendments address a practical issue arising within the ACC. It is obviously practical for a summons or notice to be made returnable before any examiner rather than requiring it to be returned before the same examiner who caused it to be issued.
93. Sections 19 and 20 of the State Act are currently in the same terms as sections 28 and 29 of the Commonwealth Act were prior to the Amendment Act. Hence, if a notice or summons is issued pursuant to the State Act, it must be returned before **the same** examiner, rather than being returned before **any** examiner. This means that a summons or notice cannot be dealt with unless the examiner who issued them is available at the time. This could lead to matters not being dealt with expeditiously if the examiner is not available at the time of the return of the summons or the notice. Therefore, it is desirable that the same amendments made to sections 28 and 29 of the Commonwealth Act be made to sections 19 and 20 of the State Act.

Recommendation 3

Section 19(1) of the State Act be amended by omitting the words “the examiner” and substituting them with the words “an examiner”.

Recommendation 4

Section 19(4) of the State Act be amended by:

- omitting the words “the examiner intends to question the person” and substituting them with the words “the person is to be questioned”; and
- omitting the words “the examiner” (last occurring) and substituting them with the words “an examiner”.

Recommendation 5

Section 20(1)(a) of the State Act be amended by omitting the words “the examiner” and substituting them with the words “an examiner”.

Time for recording the examiner’s decision to issue a summons or notice

94. As a result of the decision in *ACC v Brereton* (supra) the Amendment Act made amendments to sections 28(1A) and 29(1A) of the Commonwealth Act by adding the following words at the end of each provision:

The record is to be made:

- (a) before the issue of the summons; or
- (b) at the same time as the issue of the summons; or
- (c) as soon as practicable after the issue of the summons.

95. For the reasons set out in the PJC 2008 Report there was considerable concern expressed by a number of people about the inclusion of these words.²⁷

96. The PJC comprehensively dealt with the arguments for and against the amendments that were made to sections 28(1A) and 29(1A). The reviewer agrees with the identification of the issues and the conclusion of the PJC in its 2008 Report. As a result there is no reason to revisit those issues in this review. It is sufficient to summarise what was said by the PJC as follows:

(1) A body, such as the ACC, that is invested with intrusive coercive powers should not be allowed to exercise those powers without appropriate audit and record mechanisms.²⁸

(2) The requirement to record reasons in writing evidences the examiners’ compliance with the Act. If that requirement does not arise before the exercise of the relevant power then this safeguard is diminished.

²⁷ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, paragraphs 2.1 to 2.101.

²⁸ *Ibid* at paragraph 2.36.

97. These concerns are clearly valid. If requiring an examiner to make a written record of his or her reasons for issuing a summons or a notice is to be an effective means of accountability then it is logical that the reasons should be reduced to writing before such powers are exercised.
98. In Appendix 4 of the PJC 2008 Report, proposed amendments to sections 28(1A) and 29(1A) were set out. The proposed amendments, if adopted, make it clear that examiners are obliged to record in writing their reasons for issuing a summons or a notice *before* issuing the summons or notice.²⁹
99. Sections 19 and 20 of the State Act should not be amended in the terms of the Amendment Act as it allows examiners to retrospectively justify their decisions to issue a summons or a notice.
100. The appropriate amendment is that proposed by the PJC in Recommendation 2 of the PJC 2008 Report³⁰. In the event that the Commonwealth Act is amended in accordance with Recommendation 2 of the PJC 2008 Report then it is appropriate that sections 19 and 20 of the State Act (which reflect sections 28 and 29 of the Commonwealth Act) be amended in the same terms. This will ensure that the requirements in sections 19 and 20 of the State Act that an examiner make a written record of his or her reasons for issuing a summons or notice are also effective as a means of ensuring accountability in the context of the exercise of State powers.

Recommendation 6

In the event that sections 28(1A) and 29(1A) of the Commonwealth Act are amended in accordance with Recommendation 2 of the PJC 2008 Report³¹, then sections 19 and 20 of the State Act be amended in the same terms.

Validation of the issue of summonses or notices which don't comply

101. Sections 28(8) and 29(5) were included in the Commonwealth Act by the Amendment Act. The effect of these provisions is to ensure that a failure:
- (1) to comply with the requirement to record in writing the reasons for the issue of a summons or notice (section 28(1A) and section 29(1A));

²⁹ The proposed amendments to s29(1A) appeared to contain a drafting error. The amendments referred to a "summons" when they should have referred to a "notice".

³⁰ Subject to the proposed amendment to s29(1A) being corrected to deal with the drafting error noted in footnote 30.

³¹ Subject to the proposed amendment to s29(1A) being corrected to deal with the drafting error noted in footnote 30.

(2) to ensure that each summons is accompanied by a copy of the relevant determination made by the Board of the ACC which gives rise to the power to conduct the examination (section 28(2)); and

(3) to comply with the requirements of section 29A, which concerns the prohibition against the disclosure of information about a summons or notice, does not invalidate summonses and notices that have been issued.

102. The PJC concluded, in summary, that these provisions could negate the safeguards that are contained in sections 28(1A), 28(2) and 29(1A) and eliminate a means of scrutiny and accountability. In particular, the PJC said that it “strongly believes that there must be reasons for decision available for review by those authorities empowered to scrutinise the actions of the examiners in issuing summonses and notices”.³²

103. The PJC’s conclusions are compelling. Sections 28(8) and 29(5) have had the effect of effectively eliminating some important statutory safeguards that previously provided a means of ensuring that examiners are accountable for the exercise of the coercive powers that are invested in them.

104. For the reasons that are set out in the PJC 2008 Report, sections 19 and 20 of the State Act should not be amended to include provisions reflecting sections 28(8) and 29(5) of the Commonwealth Act.³³

Recommendation 7

Sections 19 and 20 of the State Act not be amended to include provisions that reflect sections 28(8) and 29(5) of the Commonwealth Act.

Role of the Commonwealth Ombudsman in relation to the ACC

105. Recommendations 4, 9 and 10 of the PJC 2008 Report concern the role of the Commonwealth Ombudsman in ensuring that the ACC, and in particular its examiners, are accountable when exercising their powers.

106. Recommendation 4 of the PJC 2008 Report focussed on s29B of the Commonwealth Act (section 22 of the State Act). That provision creates an offence that is committed by the disclosure of certain information relating to summonses or notices

³² Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, paragraph 2.72.

³³ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, paragraphs 2.57 to 2.72.

issued by examiners pursuant to sections 28 and 29 of that Act. A person is prohibited from disclosing such information when an examiner has included a notation in a summons or notice pursuant to section 29A (section 21 of the State Act).

107. There are some exceptions to the prohibition against disclosure, including disclosure to a lawyer. However, there is no express exception that allows a person to make a complaint to the Commonwealth Ombudsman, who has some role to play in relation to the oversight of the ACC and its examiners.
108. For this reason the PJC recommended that section 29B of the Commonwealth Act be amended to include an exception which permitted a person to make a disclosure of relevant information to the Commonwealth Ombudsman.
109. Having regard to the reasoning of the PJC it seems appropriate that if such an amendment is made to the Commonwealth Act then an amendment should be made to section 22 of the State Act.

Recommendation 8

In the event that section 29B Commonwealth Act is amended in accordance with Recommendation 4 of the PJC 2008 Report³⁴, then section 22 of the State Act be amended in similar terms.

110. Recommendations 9 and 10 in the PJC 2008 Report propose that the Commonwealth Ombudsman be required to inspect the examiners' records to ensure compliance with the requirements of the proposed sections 28(1A) and 29(1A) of the Commonwealth Act.³⁵ Further, it is proposed that the Commonwealth Ombudsman be required to provide a briefing to the PJC about the use of the powers in sections 28 and 29 of that Act.
111. In the PJC 2008 Report, the PJC clearly sets out the rationale for the amendments proposed in relation to sections 28(1A) and 29(1A) of the Commonwealth Act and these recommendations appear to be appropriate. If implemented they would have the effect of strengthening the PJC's own role in ensuring that the ACC remains accountable for the exercise of its coercive powers.
112. In the event that amendments are made to sections 28(1A) and 29(1A) of the Commonwealth Act then, in line with Recommendations 9 and 10 in the PJC 2008

³⁴ Subject to the proposed amendment to s29(1A) being corrected to deal with the drafting error noted in footnote 30.

³⁵ See paragraphs 94 - 100 above.

Report, amendments should also be made to sections 19 and 20 of the State Act to reflect these amendments to the Commonwealth Act.

113. Such amendments should confer on the Commonwealth Ombudsman a function in relation to the inspection of records made by examiners in the course of issuing summonses and notices pursuant to sections 19 and 20 of the State Act. Further, the amendments should also confer a function of providing an annual briefing to the PJC about the exercise of the powers in sections 19 and 20 of the State Act.

Recommendation 9

In the event that the Commonwealth Act is amended to give effect to Recommendations 9 and 10 of the PJC 2008 Report³⁶, then the State Act be amended in similar terms.

Retrospective validation of the issue of summonses or notices

114. Sections 10 and 12 of the Amendment Act deem that summonses and notices issued pursuant to sections 28 and 29 of the Commonwealth Act are “as valid, and [are] taken always to have been as valid, as [they] would have been if [the Commonwealth Act] had provided that the record [of reasons] could be made after the issue of the [summonses or notices]”. The purpose of these provisions was to retrospectively validate the issuing of summonses and notices where they may have been issued in circumstances in which the examiner had not recorded his or her reasons in writing beforehand.
115. For reasons set out in the PJC 2008 Report³⁷ the PJC recommended that sections 10 and 12 of the Amendment Act should be repealed.
116. There is no need to consider this recommendation further in the context of this review. Sections 10 and 12 of the Amendment Act do not have any direct effect on the operation of the State Act. In any event, no issue of retrospective validation arises since, on the basis of what the reviewer has learnt during the review, no summonses or notices have been issued under State Act.

Power to certify persons for contempt

117. The issue of whether the ACC should be given the power to certify persons for contempt was previously dealt with by the PJC in the PJC 2005 Report. At that time the PJC concluded that it was not appropriate for ACC examiners to be invested with

³⁶ Subject to the proposed amendment to s29(1A) being corrected to deal with the drafting error noted in footnote 30.

³⁷ Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, paragraphs 3.1 to 3.68.

contempt powers. The PJC decided that such powers were appropriate only to courts.

118. However, in the PJC 2008 Report a different conclusion was reached and Recommendations 6 and 7 were designed to implement “a limited statutory definition of contempt and a statutory power of referral” to a court.³⁸
119. In reaching Recommendations 6 and 7, the PJC appeared to be influenced by the conclusions of the Trowell Report, as well as evidence that delays in the prosecution of persons for offences under the Commonwealth Act have the potential to undermine the deterrent effect of the available penalties and unreasonably hinders the conduct of special investigations.
120. For the reasons given by the PJC there appears to be a strong argument in favour of the introduction of contempt-like powers into the legislation governing the operation of the ACC.
121. It is notable that such powers exist in Part 10 of the *Corruption and Crime Commission Act 2003 (WA)*.

Recommendation 10

In the event that the Commonwealth Act is amended in accordance with Recommendation 6 of the PJC 2008 Report³⁹, then similar amendments be made to the State Act.

Statutory review every five years

122. The PJC recommended that Section 61A of the Commonwealth Act be amended to require the Minister to cause an independent review of the Commonwealth Act to be carried out every five years. Clearly this recommendation is not directly relevant to the operation of the State Act.
123. Any changes that are made to the Commonwealth Act as a result of such a review should, of course, be monitored by the State with a view to determining whether complementary amendments ought be made to the State Act.

³⁸ Ibid at page 49.

³⁹ Subject to the proposed amendment to s29(1A) being corrected to deal with the drafting error noted in footnote 30.

CHAPTER 6

Conclusion

124. As has been noted already, very few issues concerning the State Act were identified during the review.
125. A few amendments have been made to the Commonwealth Act and some of these amendments should be reflected in the State Act now. Others have been considered by the PJC and the PJC has recommended that further amendments should be made to the Commonwealth Act. The Federal Government is yet to respond to those recommendations and the amendments have not been made.
126. In the event that these or other amendments are made to the Commonwealth Act, it will be necessary to consider whether consequential amendments should be made to the State Act. For that reason there should be ongoing monitoring of the Commonwealth Act to ensure that any amendments that are made are identified and considered in a timely manner.
127. Whilst the ongoing monitoring of amendments to the Commonwealth Act will ensure that the State Act continues to fulfil its complementary purpose, it would be prudent to ensure that a further independent review of the State Act be carried out within a fixed period of time. Although it appears as though the provisions of the State Act have not yet been invoked by the ACC, that position may change. If those provisions are invoked then this may, in turn, raise issues concerning the operation of the State Act.
128. Further, future ACC operations that invoke the provisions of mirror legislation that is in force in other states may also raise issues that are relevant to the operation of the State Act.
129. For these reasons the reviewer recommends that there be another independent review of the State Act within 5 years. Such a review will require an amendment being made to the State Act.

Recommendation 11

Section 51 of the State Act be amended to require that a further independent review of the operation and effectiveness of the State Act be undertaken within 5 years of this review.

ANNEXURE A

Recommendations: The Parliamentary Joint Committee on the Australian Crime Commission, *Review of the Australian Crime Commission Act 2002*, November 2005

Recommendation 1

The Committee recommends that the Attorney General's Department and the Australian Crime Commission develop legislation as a matter of urgency to ensure that a person summonsed by the ACC, at a time when they are the subject of criminal or confiscation proceedings, may only be examined in relation to matters quarantined from those material to the pending proceedings.

Recommendation 2

The Committee recommends that both the summons and the memorandum be revised to ensure that as far as possible, recipients understand what is required of them, and that procedures allowing adjournments for the purpose of seeking legal advice be included in the ACC's examination practice.

Recommendation 3

The Committee recommends that the ACC develop without delay, a practice and procedure manual for the benefit of practitioners and those summoned for examination or to produce documents.

Recommendation 4

The Committee recommends that the ACC in consultation with the Attorney General's Department identify barriers to information sharing, and where regulatory or legislative remedies are necessary these be developed and implemented.

Recommendation 5

The Committee recommends that the ACC consider statutory proposals to amend the ACC Act to provide categories of ACC officers with the necessary identified powers, including such matters as the powers to apply for or execute a warrant, and the right to carry a firearm. These should replace the current system of the use of Australian Federal Police special constable provisions.

Recommendation 6

The Committee recommends that the ACC Act be amended to provide for the appointment of the Commissioner of Taxation to the ACC Board.

Recommendation 7

The Committee recommends that formal arrangements be instituted to confirm the current practice of reporting allegations of misconduct to relevant accountability organisations, including the PJC, the IGC, the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity.

Recommendation 8

The Committee recommends that formal arrangements be put in place to require the Commonwealth Director of Public Prosecutions to notify the Commonwealth Ombudsman, and the proposed Australian Commission for Law Enforcement Integrity of any allegations of misconduct by officers of the ACC.

Recommendation 9

The Committee recommends that the CEO of the ACC direct, in the ACC Policy and Procedures, that in any case where the ACC procedurally has a choice of regulatory regime for the use of investigatory powers, it adopts as a matter of practice, the Commonwealth protocols.

Recommendation 10

The Committee recommends that section 55AA of the Australian Crime Commission Act 2002 be amended to broaden the scope of the Commonwealth Ombudsman's briefing to the PJC to include any matter relating to the operations of the ACC.

Recommendation 11

The Committee recommends that the ACC Act 2002 be amended to provide explicit requirements to Board agencies to provide enumerated classes of information to the PJC on the ACC.

Recommendation 12

The Committee recommends that the Australian Commission for Law Enforcement Integrity Bill, when introduced, include provisions that provide for scrutiny of the agency's operations by this Committee.

Recommendation 13

The Committee recommends that the Parliament create a new Parliamentary Joint Committee on Commonwealth Law Enforcement, with jurisdiction to supervise the operations of the Australian Crime Commission, the Australian Federal Police and other Commonwealth law enforcement agencies.

Recommendation 14

The Committee recommends that the legislation for the creation of the Australian Commission for Law Enforcement Integrity includes provision for the Committee to refer matters to the Commission for investigation, with a requirement to report to the Committee on the results of such investigations. This ensures the completeness and effectiveness of arrangements for scrutinising the operations of agencies, and - were its jurisdiction expanded as recommended above - prevents the Committee's workload from becoming too great for effective Parliamentary supervision of the relevant agencies.

Recommendation 15

The Committee recommends that where priority issues involving the ACC arise, the Commonwealth continue to grant funds on a 'once-off basis' when this occurs between budgetary cycles.

Recommendation 16

The Committee recommends that the issue surrounding the employment of secondees be addressed as a priority. Any review should address the standardisation of salary and working conditions through the development of a common secondment arrangement, as well as the implications of this system on the integrity and disciplinary framework.

Recommendation 17

The Committee recommends that Section 46B of the Australian Crime Commission Act 2002 be amended to provide that the maximum number of examiners allowed to work with the Commission at any one time be limited to three. The Committee also recommends that a further provision be inserted allowing the regulations to review and prescribe a higher number of examiners if and when the need arises.

Recommendation 18

The Committee recommends that regulatory, or if necessary legislative changes be introduced to allow persons summonsed for an Examination to be eligible for legal aid from the legal aid

commissions, subject to the usual means tests.

ANNEXURE B

Acts Amending the *Australian Crime Commission Act 2002* (Cth)

1. *Telecommunications (Interception) Amendment Act 2006*
2. *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006*
3. *Law Enforcement Integrity Commissioner (Consequential Amendments) Act 2006*
4. *Statute Law Revision Act 2007*
5. *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*
6. *Australian Crime Commission Amendment Act 2007*
7. *Superannuation Legislation Amendment (Trustee Board and Other Measures) (Consequential Amendments) Act 2008*
8. *Customs Legislation Amendment (Name Change) Act 2009*
9. *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*

ANNEXURE C

Amendments Effected by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007*

Schedule 2—Law enforcement

Part 1—Australian Crime Commission

Division 1—Indigenous violence or child abuse

Australian Crime Commission Act 2002

1 Subsection 4(1)

Insert:

child means any person who is under 18 years of age.

2 Subsection 4(1)

Insert:

child abuse means an offence relating to the abuse or neglect of a child (including a sexual offence) that is punishable by imprisonment for a period of 3 years or more.

3 Subsection 4(1) (definition of *federally relevant criminal activity*)

Repeal the definition, substitute:

federally relevant criminal activity means:

- (a) a relevant criminal activity, where the relevant crime is an offence against a law of the Commonwealth or of a Territory; or
- (b) a relevant criminal activity, where the relevant crime:
 - (i) is an offence against a law of a State; and
 - (ii) has a federal aspect.

4 Subsection 4(1)

Insert:

Indigenous person means a person (including a child) who is:

- (a) a person of the Aboriginal race of Australia; or
- (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

5 Subsection 4(1)

Insert:

Indigenous violence or child abuse means serious violence or child abuse committed by or against, or involving, an Indigenous person.

6 Subsection 4(1)

Insert:

relevant crime means:

- (a) serious and organised crime; or
- (b) Indigenous violence or child abuse.

Note: See also subsection (2) (which expands the meaning of *relevant crime* in certain circumstances).

7 Subsection 4(1) (definition of *relevant criminal activity*)

Repeal the definition, substitute:

relevant criminal activity means any circumstances implying, or any allegations, that a relevant crime 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.

8 Subsection 4(1) (note at the end of the definition of *serious and organised crime*)

Repeal the note.

9 Subsection 4(1)

Insert:

serious violence means an offence involving violence against a person (including a child) that is punishable by imprisonment for a period of 3 years or more.

10 Subsection 4(2)

Omit “serious and organised crime” (wherever occurring), substitute “relevant crime”.

11 Paragraph 7C(4)(b)

Omit “the serious and organised crime is, or the serious and organised crimes are or include”, substitute “the relevant crime is, or the relevant crimes are or include”.

12 Application

The amendment made by item 11 applies to determinations made under subsection 7C(2) or (3) of the *Australian Crime Commission Act 2002* on or after the day on which this item commences.

13 Paragraphs 55A(2)(a), (2)(c), (4)(a), (5)(a), (5B)(a) and (5C)(a)

Omit “the serious and organised crime is, or the serious and organised crimes are or include”, substitute “the relevant crime is, or the relevant crimes are or include”.

14 Paragraph 55B(a)

Omit “the serious and organised crime is, or the serious and organised crimes are or include”, substitute “the relevant crime is, or the relevant crimes are or include”.

ANNEXURE D

Amendments Effected by the *Australian Crime Commission Amendment Act 2007*

Schedule 1—Amendments

Part 1—General amendments

Australian Crime Commission Act 2002

1 Subsection 28(1)

Omit “the examiner”, substitute “an examiner”.

2 At the end of subsection 28(1A)

Add:

The record is to be made:

- (a) before the issue of the summons; or
- (b) at the same time as the issue of the summons; or
- (c) as soon as practicable after the issue of the summons.

3 Subsection 28(3)

Omit “the examiner intends to question the person”, substitute “the person is to be questioned”.

4 Subsection 28(3)

Omit “the examiner” (last occurring), substitute “an examiner”.

5 At the end of section 28

Add:

- (8) A failure to comply with any of the following provisions does not affect the validity of a summons under subsection (1) of this section:
- (a) subsection (1A) of this section, in so far as that subsection relates to the making of a record;
 - (b) subsection (2) of this section;
 - (c) section 29A, in so far as that section relates to a summons under subsection (1) of this section.

6 Paragraph 29(1)(a)

Omit “the examiner”, substitute “an examiner”.

7 At the end of subsection 29(1A)

Add:

The record is to be made:

- (a) before the issue of the notice; or
- (b) at the same time as the issue of the notice; or
- (c) as soon as practicable after the issue of the notice.

8 At the end of section 29

Add:

- (5) A failure to comply with any of the following provisions does not affect the validity of a notice under subsection (1) of this section:
 - (a) subsection (1A) of this section, in so far as that subsection relates to the making of a record;
 - (b) section 29A, in so far as that section relates to a notice under subsection (1) of this section.

9 Application of amendments—section 28 of the *Australian Crime Commission Act 2002*

The amendments of section 28 of the *Australian Crime Commission Act 2002* made by this Part apply in relation to a summons issued after the commencement of this item.

10 Validation—summons under subsection 28(1) of the *Australian Crime Commission Act 2002*

- (1) This item applies to a summons under subsection 28(1) of the *Australian Crime Commission Act 2002* if:
 - (a) the summons was issued before the commencement of this item; and
 - (b) apart from this item, the summons would be invalid because the record referred to in subsection 28(1A) of that Act was made after the summons was issued.
- (2) The summons is as valid, and is taken always to have been as valid, as it would have been if that Act had provided that the record could be made after the issue of the summons.

11 Application of amendments—section 29 of the *Australian Crime Commission Act 2002*

The amendments of section 29 of the *Australian Crime Commission Act 2002* made by this Part apply in relation to a notice issued after the commencement of this item.

12 Validation—notice under subsection 29(1) of the *Australian Crime Commission Act 2002*

- (1) This item applies to a notice under subsection 29(1) of the *Australian Crime Commission Act 2002* if:
 - (a) the notice was issued before the commencement of this item; and
 - (b) apart from this item, the notice would be invalid because the record referred to in subsection 29(1A) of that Act was made after the notice was issued.
- (2) The notice is as valid, and is taken always to have been as valid, as it would have been if that Act had provided that the record could be made after the issue of the notice.

ANNEXURE E

Recommendations: The Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007, September 2008*

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

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

discontinued and that Sections 10 and 12 of the *Australian Crime Commission Amendment Act 2007* be repealed.

Recommendation 6

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

Recommendation 7

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

Recommendation 8

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

Recommendation 9

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

Recommendation 10

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

ANNEXURE F

Recommendations

Page 17:

Recommendation 1

The Federal Government's response to the PJC 2005 Report, and any consequential amendments that are made, be monitored by an appropriate government agency on an ongoing basis to ensure that timely consideration will be given to whether any amendments should be made to the State Act.

Page 18:

Recommendation 2

In the event that amendments are made to the Commonwealth Act as a result of the PJC 2005 Report, and consequential amendments are made to the State Act, section 22 of the State Act be amended to reflect s29B(4)(c) of the Commonwealth Act.

Page 23:

Recommendation 3

Section 19(1) of the State Act be amended by omitting the words "the examiner" and substituting them with the words "an examiner".

Page 24:

Recommendation 4

Section 19(4) of the State Act be amended by:

- omitting the words "the examiner intends to question the person" and substituting them with the words "the person is to be questioned"; and
- omitting the words "the examiner" (last occurring) and substituting them with the words "an examiner".

Recommendation 5

Section 20(1)(a) of the State Act be amended by omitting the words “the examiner” and substituting them with the words “an examiner”.

Page 25:

Recommendation 6

In the event that ss28(1A) and 29(1A) of the Commonwealth Act are amended in accordance with Recommendation 2 of the PJC 2008 Report, then ss19 and 20 of the State Act be amended in the same terms.

Page 26:

Recommendation 7

Sections 19 and 20 of the State Act should not be amended to include provisions that reflect ss28(8) and 29(5) of the Commonwealth Act.

Page 27:

Recommendation 8

In the event that s29B Commonwealth Act is amended in accordance with Recommendation 4 of the PJC 2008 Report then s22 of the State Act be amended in the same terms.

Page 28:

Recommendation 9

In the event that the Commonwealth Act is amended to give effect to Recommendations 9 and 10 of the PJC 2008 Report, then the State Act be amended in the same terms.

Page 29:

Recommendation 10

In the event that the Commonwealth Act is amended in accordance with Recommendation 6 of the PJC 2008 Report, then similar amendments be made to the State Act.

Page 31:

Recommendation 11

Section 51 of the State Act be amended to require that a further independent review of the operation and effectiveness of the State Act be undertaken within 5 years of this review.

