



**Submission by the
Commonwealth Ombudsman**

**INQUIRY INTO NATIONAL SECURITY
LEGISLATION AMENDMENT BILL 2010
AND THE PARLIAMENTARY JOINT
COMMITTEE ON LAW ENFORCEMENT
BILL 2010**

Submission by the Acting Commonwealth Ombudsman, Ron Brent

April 2010

1 INTRODUCTION

On 18 March 2010, the Senate referred the Parliamentary Joint Committee on Law Enforcement Bill 2010 (PJC-LE Bill) and the National Security Legislation Amendment Bill 2010 (NSLA Bill) to the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) for inquiry and report by 15 June 2010. The Committee has invited submissions on the Bills by 30 April 2010. This submission is provided to assist the Committee in its inquiry and report to the Senate.

The first part of the submission addresses the Ombudsman's role as envisaged under the PJC-LE Bill and sets out for the Committee the oversight functions performed by the Ombudsman regarding the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) use of covert powers and the current gaps in reporting to the Parliamentary Joint Committee on the ACC and the proposed PJC-LE. I note the submission by the Ombudsman, Prof. John McMillan, to the PJC on the ACC dated 18 August 2005, relating to these matters (as they affected the ACC) (copy attached).

The second part of the submission addresses the potential for overlap with the proposed broadening of the functions of the Inspector-General of Intelligence and Security (IGIS) under the NSLA Bill.

2 BACKGROUND

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- reviewing statutory compliance by enforcement agencies in relation to:
 - telecommunications interceptions and access to stored communications under the *Telecommunications (Interception and Access) Act 1979*
 - use of electronic surveillance devices under the *Surveillance Devices Act 2004*
 - conduct of controlled operations under Part 1AB of the *Crimes Act 1914*

The Ombudsman is responsible for reporting to the Parliament biannually and annually respectively on law enforcement agency (including the AFP and ACC) activities under the *Surveillance Devices Act 2004* and Part 1AB of the *Crimes Act 1914*.

The Ombudsman is also responsible for reporting annually to the Attorney-General on enforcement agency (including the AFP and ACC) compliance with the record keeping and destruction requirements relating to telecommunications interceptions as well as the record keeping and destruction requirements relating to access to stored communications (e.g. email, SMS, etc) under the *Telecommunications*

(Interception and Access) Act 1979 and may report on other instances of non-compliance by officers of the law enforcement agencies.

All of these reports are informed by the Ombudsman's regular inspections of the records of a range of law enforcement agencies, including the AFP and the ACC.

3 PARLIAMENTARY JOINT COMMITTEE ON LAW ENFORCEMENT BILL 2010

The Ombudsman has an obligation under s 55AA of the *Australian Crime Commission Act 2002* to brief the present PJC on the ACC at least annually about the ACC's involvement in controlled operations under the Crimes Act during the preceding 12 months. The proposed PJC-LE Bill (s 10) provides that the Ombudsman is to brief the PJC-LE about the ACC's and the AFP's involvement in such controlled operations at least once a year.

In my view, it would benefit the PJC-LE if the Ombudsman's obligation to brief it extended to providing information about his oversight activities relating to telecommunications interceptions, stored communications access and use of surveillance devices by the AFP and the ACC.

The decision to restrict the matters about which it is proposed that the Ombudsman brief the PJC-LE may stem from the differing reporting regimes that apply to the various oversight functions. As noted above, the Ombudsman's controlled operations and surveillance devices reports are tabled directly in Parliament; the telecommunications interception and stored communications reports are provided to the Attorney-General who must include in his annual report to Parliament those matters of concern raised by the Ombudsman.

However, in each case a report is ultimately made to Parliament on issues identified by the Ombudsman's inspection of AFP and ACC records and it would seem appropriate to afford the PJC-LE the opportunity to hear directly from the Ombudsman about the findings and recommendations from his inspection reports.

In past years, the Ombudsman has provided information to the PJC when asked, on the ACC's use of these other covert policing powers. However, at present the Ombudsman is only required to brief on the conduct of controlled operations of the ACC and is not in a position to volunteer information that may be of concern or interest to the PJC in other areas of covert policing and which would inform the PJC's parliamentary oversight role.

In my view, the Bill should be amended to provide that the Ombudsman should brief the PJC-LE on all matters concerning the AFP and ACC that are subject to Ombudsman scrutiny to better inform the PJC-LE in its role and strengthen the external accountability frameworks in which the ACC and AFP operate.

4 NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010

I note the proposed broadening of the Inspector General of Intelligence and Security's (IGIS) functions (s 9 of the *Inspector-General of Intelligence and Security Act 1986*) to include Commonwealth agencies in relation to an inquiry into an intelligence or security matter.

As responsibility for matters of national security and intelligence falls across a broad spectrum of government agencies it is reasonable for the IGIS to be able to fully inquire into an intelligence or security matter across all Commonwealth agencies thus ensuring that there are no artificial barriers restricting the IGIS from fully discharging its responsibilities.

I also note the consequential amendment to *the Inspector-General of Intelligence and Security Act 1986* under s 16 permitting the IGIS to consult with the Auditor-General and Ombudsman before commencing an inquiry into a Commonwealth agency (formally agency), having regard to the functions of the Ombudsman and the Auditor-General in relation to that Commonwealth agency.

The Ombudsman functions are quite extensive. The Ombudsman is responsible for investigating complaints about most Commonwealth agencies and outsourced service providers and for conducting own motion investigations into matters of administration by the agencies. The Ombudsman is also the Law Enforcement Ombudsman and as well as complaint and own motion investigations in respect of the AFP and ACC also inspects and reports annually to the Parliament about the AFP's handling of complaints and inspects AFP and ACC records relating to the use of covert powers (as discussed above).

Given the Ombudsman's broad responsibility for matters relating to the AFP and ACC, there is potential for duplication of effort or for concurrent investigations to interfere with each other if notice of an IGIS inquiry is not given.

The National Security Legislation Amendment Bill 2010 should be amended to require (rather than merely permit) the IGIS to advise the Ombudsman when an inquiry into AFP, ACC or other Commonwealth agencies' activities, which concern this office, is being conducted. This would ensure that proper consideration is given to the Ombudsman's jurisdiction and that potential duplication or unintentional interference with each others' efforts is avoided.

Our ref: A/2005-2403673

18 August 2005

Mr Jonathan Curtis
Committee Secretary
Parliamentary Joint Committee on the Australian Crime Commission
Parliament House
Canberra ACT 2600

PARLIAMENTARY JOINT COMMITTEE ON
THE AUSTRALIAN CRIME COMMISSION

REC'D: *Cth Ombudsman*

FROM: *18 AUG 05*

AUTHORISED FOR PUBLICATION:

SECRETARY:

Dear Mr Curtis

Review of the Australian Crime Commission Act 2002

I make this submission to the review being conducted by the Parliamentary Joint Committee on the Australian Crime Commission (PJC) of the *Australian Crime Commission Act 2002* (the Act). I would be happy to discuss any aspect of the submission with the PJC.

Summary

I consider that the external accountability framework in which the Australian Crime Commission (ACC) operates has been effective in bringing about increased compliance and best practice within the ACC. However, I note that my obligation to brief the PJC under section 55AA of the Act is limited to the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* and does not, of itself, enable me to brief the PJC on the results of other inspections.

I believe that the external accountability structures within the Act could be strengthened by amending section 55AA of the Act to broaden the scope of my briefing to the PJC to any matter relating to the ACC. This would enable my briefing to cover the ACC's performance across all areas inspected, complaints received, and any other matter coming to the attention of my office in the discharge of its duties. I believe that providing a more detailed briefing would in turn enable the PJC to more effectively perform its duties.

Introduction

The Commonwealth Ombudsman's jurisdiction in relation to the ACC is to:

- (a) investigate complaints made about the ACC
- (b) conduct own motion investigations into a matter of ACC administration, and
- (c) conduct inspections of the ACC's records relating to its use of intrusive powers (such as telecommunications interception, controlled operations and surveillance devices).

A summary of the sources of this jurisdiction is included at Annexure A. Complaints about the ACC are investigated under the *Ombudsman Act 1976*, which confers general investigative powers across a range of agencies¹. I am happy with this arrangement, and see no need for special legislative arrangements for the investigation of ACC complaints.

The focus of this submission is to comment on the external accountability framework in which the ACC operates, drawing on my experience in investigating complaints and conducting own motion investigations and inspections.

Complaints

For the period 1 July 2004 to 30 June 2005, we received 12 complaints and 3 inquiries². The ACC also made one proactive disclosure to this office, but no action was taken as it was decided that an investigation was not warranted in all the circumstances. The nature of the complaints to our office are summarised in the table below:

Return of property	3
Use of force	1
Surveillance	2
Freedom of Information	2
Inaction	1
Out of jurisdiction	1
Record of interview	1
Corruption	1

In all but two instances, our office made a decision under the *Ombudsman Act* not to investigate the complaints, most commonly for the reason that an investigation was not warranted in all the circumstances.

Own motion investigations

My office has conducted three own motion investigations into the ACC in the past 18 months.

The first investigation was in response to a proactive notification by the ACC, culminating in the release of a report in June 2004 titled "Own motion investigation into a review of the operational and corporate implications for the Australian Crime Commission arising from alleged criminal activity by two former secondees". A follow up investigation of the ACC's implementation of recommendations arising from the initial investigation was conducted, resulting in the release of a further report in November 2004. Copies of the reports were provided to the PJC.

The second investigation was in response to an issue raised by the PJC in October 2003, concerning controlled operations conducted by the ACC under State legislation. These operations are not subject to the inspection and reporting requirements of the *Crimes Act*. A copy of the report will be provided to the PJC shortly.

¹ This is in contrast to the existing model for investigating complaints made about the Australian Federal Police, which are investigated under the more specific *Complaints (Australian Federal Police) Act 1981*. This model, however, is currently being reviewed in light of the recommendations made in the February 2003 report by the Hon. William Kenneth Fisher AO, QC 'A Review of Professional Standards in the Australian Federal Police'.

² An inquiry is an approach to our office that does not result in the making of a complaint or an expression of dissatisfaction with an agency.

The third investigation relates to the ACC's handling of a registered informant (RI), specifically whether the ACC had misled the RI about arrangements for witness protection. The report was finalised in March 2005, but not made public. I leave it to the PJC to decide whether it wishes to see this report on a confidential basis.

Systemic issues arising from these investigations are discussed below under the heading "Accountability Framework".

Inspections

As outlined in Annexure A, this office conducts inspections of the ACC's records relating to telecommunications interception, controlled operations and surveillance devices³.

Inspections have revealed that the ACC is achieving a high level of compliance with legislation regarding telecommunications interception and controlled operations, and I have commended the ACC on its demonstrated initiative and willingness to develop strategies to improve compliance and achieve best practice.

Formal reports of the results of inspections are provided to the Minister in the case of telecommunications interception and surveillance devices, and directly to Parliament in the case of controlled operations.

I note that my obligation to brief the PJC under section 55AA of the Act is limited to the ACC's involvement in controlled operations under Part 1AB of the *Crimes Act 1914* and does not, of itself, enable me to brief the PJC on the results of other inspections.

While I am confident that the existing level of Ministerial scrutiny is effective in bringing about increased compliance and best practice within the ACC, I consider that the accountability framework under the Act could be strengthened by amending section 55AA of the Act to broaden the scope of my briefing to the PJC to any matter relating to the ACC. This would enable my briefing to cover the ACC's performance across all areas inspected, complaints received, and any other matter coming to the attention of my office in the discharge of its duties. I believe that providing a more detailed briefing would in turn enable the PJC more effectively to perform its duties.

Accountability framework

Our limited experience of the ACC is that the CEO, Mr Milroy, is committed to administrative best practice in the ACC's accountability regime. We observe that he has adopted a practice of pro-active disclosure to the Ombudsman of serious complaint or integrity matters, has engaged independent consultants to investigate matters, and has developed a dedicated integrity plan. However, in my view, there are two systemic issues impacting on the accountability framework as outlined below.

Secondees

The ACC's management of secondees has been identified as an issue in both a complaints and inspection context. The ACC is a 'hybrid' agency that relies on the secondment of law enforcement officers to perform its function in fighting national and organised crime. It is my understanding that while on secondment, law enforcement officers are both a member of the ACC and their 'home' law enforcement agency.

³ Our first inspection of ACC surveillance device records is scheduled to take place in September this year.

As this arrangement allows secondees to exercise powers and functions of both the ACC and their home law enforcement agency, it is important that secondees:

- (a) are conscious of which agency's powers and functions they are relying on, and
- (b) ensure that they comply with the relevant agency's policies, practices and procedures.

This may be practically difficult, and raises the issue of how secondees should address conflicts between agencies.

The short term nature of the secondments has also made it difficult for the ACC to address performance issues after the secondees have returned to their 'home' law enforcement agency.

Recent reports from my office have discussed the need for management systems between the ACC, the ACC Board and the agencies seconding their members to the ACC to develop and implement a performance management structure that is able to deal effectively and efficiently with performance issues. In my view, the absence of these structures can create an 'accountability gap' within which neither the ACC, nor the seconding body, will necessarily assume responsibility to address performance issues.

Cross Border Law Enforcement Powers

The hybrid nature of the ACC caused the Australasian Police Ministers' Council to agree that the Commonwealth Ombudsman should oversee all of the ACC's activities in accessing cross-border law enforcement powers. Currently, the only legislation that confers an oversight function of that kind on the Ombudsman, deals with the ACC's use of surveillance devices under Commonwealth, State or Territory legislation. Consequently, until there is full harmonisation of cross-border law enforcement powers, my office is only able to oversee the ACC's use of State or Territory laws in areas other than surveillance devices through own motion investigations.

My own motion investigation into the ACC's assurance framework for controlled operations conducted under State legislation has illustrated the differing legislative regimes across the jurisdictions. Whilst there is no indication that the ACC is choosing to conduct and/or participate in controlled operations authorised under State legislation to take advantage of the different accountability regimes, the ability to do so represents a potential accountability gap.

This own motion investigation also suggests that the ACC will need to continue to develop its administrative systems to capture the highest standard of transparency in the period while these powers are being harmonised, and maintain those standards in the future. I have suggested that:

- (a) the ACC develop formal arrangements with other law enforcement agencies to ensure that it has access to copies of all relevant documents relating to controlled operations carried out under State legislation, and
- (b) the accountability framework will be strengthened if the ACC considers and documents the policies and procedures used by its officers when conducting controlled operations under State legislation.

Please do not hesitate to contact either myself or the Senior Assistant Ombudsman with responsibility for law enforcement matters, on _____ if you would like to discuss any aspect of the submission.

Yours sincerely

Prof. John McMillan
Commonwealth Ombudsman

Annexure A – Summary of Commonwealth Ombudsman's jurisdiction in relation to the ACC

Category	Legislation	Function
Complaints	<i>Ombudsman Act 1976 (Cth)</i>	Investigate complaints about the ACC's administrative decisions Conduct own motion investigations into the ACC
Inspections	<i>Telecommunications (Interception) Act 1979 (Cth)</i>	Inspect the ACC's records twice each financial year and prepare a report to the Attorney-General once a year
	<i>Part 1AB Crimes Act 1914 (Cth)</i> <i>Australian Crime Commission Act 2002 (Cth) – section 55AA</i>	Inspect the ACC's conduct of controlled operations to determine the extent of compliance with Part 1AB of the Act Report to the Parliament on the adequacy and comprehensiveness of controlled operation reports submitted to Parliament Brief the Parliamentary Joint Committee on the Australian Crime Commission about the ACC's involvement in controlled operations under Part 1AB of the Act
	<i>Surveillance Devices Act 2004 (Cth)</i>	Inspect the ACC's records to determine the extent of compliance with the Act Inspect the ACC's records to determine the extent of compliance with surveillance device laws of a State or Territory Report to the Minister at six monthly intervals
	<i>Surveillance Devices Act 1999 (Vic) – sections 30P and 30Q</i>	Inspect the ACC's records to determine the extent of compliance with the Act and report to the Parliament at six monthly intervals