

Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

5 April 2021

Dear Committee Secretary,

RE: Inquiry into the Operation of the Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019

The Australian National University Law Reform and Social Justice Research Hub (ANU LRSJ Research Hub) welcomes the opportunity to provide this submission to the Joint Committee on Law Enforcement, responding to terms of reference (a) and (d) of the inquiry.

The ANU LRSJ Research Hub is part of the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving the law to promote both social justice and social stability.

Summary of Recommendations:

1. We recommend that item 55 of the Act be repealed.
2. We recommend that the term 'public interest' as contained in Section 7(4A) include a non-exhaustive list of public interest matters to which the Board may have regard when making a determination under Sections 7C(2) or (3), including for example:
 - a. right to privacy;
 - b. right to silence;
 - c. national security including in the prevention and detection of crime; and
 - d. freedom of the media to investigate, inform and comment on matters of public concern and importance.
3. We recommend that Section 7C(4) require disclosure by changing the term 'may' to 'must' and Section 7C(4C) require oversight of Board determinations by another governmental organisation, such as the Inter-Governmental Committee.
4. We recommend an updated statement of compatibility with human rights.

1. Introduction

The Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019 (the SOSI Act) amended the Australian Crime Commission Act 2002 (the ACC Act) to confirm the validity of current and former special Australian Criminal Intelligence Commission (ACIC) operations and special ACIC investigation determinations. It aimed to enable the ACIC to continue to fulfil its statutory functions as Australia's national criminal intelligence agency, without interruption. This submission is concerned with the SOSI Act's engagement with the rule of law and human rights issues.

We further submit that the terms of this inquiry are tinged with bias. Term of Reference (a) asks whether the SOSI Act has "appropriately streamlined the process by which the ACIC Board determines to authorise the ACIC to undertake a special operation or special investigation." However, the characterisation of the SOSI Act as "streamlining" the process is misleading. Retrospectively validating investigations by ACIC does not streamline the process, it simply avoids any legal challenges that might question ACIC's incredibly broad powers. This focus on efficacy, to the extent of retrospectively validating its operations, rather than an emphasis on accountability, is a worrying precedent in administrative law. Indeed, it contradicts the rule of law itself - that nobody is above the law, including the government and its agencies, and those who breach the law must face consequences.

Moreover, the context of the SOSI Act as seemingly being in direct response to one of the commission's targets, CXXXVIII, launching a High Court challenge against the seizure of his mobile phone, arguing that the ACIC board did not properly authorise the investigation, is worrying.¹ Launching retrospective laws which validate past actions violates the rule of law, through the common law's deep disapproval of retrospective laws; indeed in *Polyukhovich v Commonwealth*, Deane J stated that:

The basic tenet of our penal jurisprudence is that every citizen is 'ruled by the law, and by the law alone'. The citizen 'may with us be punished for a breach of law, but he can be punished for nothing else'. Thus, more than two hundred years ago, Blackstone taught that it is of the nature of law that it be 'a rule prescribed' and that, in the criminal area, an enactment which proscribes otherwise lawful conduct as criminal will not be such a rule unless it applies only to future conduct.²

¹ Paul Karp, 'Australian Criminal Intelligence Commission case sparks fears convictions could be overturned' *The Guardian* (online, 14 September 2020) 16
<<https://www.theguardian.com/australia-news/2020/sep/14/australian-criminal-intelligence-commission-case-sparks-fears-convictions-could-be-overturned?fbclid=IwAR2tXB9YgW0ZQyZMHJCTWCFJk9z6kaF2oCAMZkd9iBkcfJ1Vra nAK7gGlw>>.

² *Polyukhovich v Commonwealth* (1991) 172 CLR 501, [27].

Further, the *Guide to Framing Commonwealth Offences* states that “an offence should be given retrospective effect only in rare circumstances and with strong justification”.³ Therefore, the retrospective extension of coercive powers ought to be capable of ascertainment, which does not appear to be the case. Independent Rex Patrick submitted that Parliament cannot allow the ACIC board to approve orders to summon any person to appear and provide information on “vague, broad and subjective” public interest grounds.⁴ This is reflective of the fact that Section 7C of the SOSI Act empowers ACIC to authorise future special operations and investigations in relation to alleged criminal activity “at whatever level of generality the Board considers appropriate”. Particularly when combined with a significant lack of transparency surrounding ACIC Board decisions, as will be further expanded on in this submission, these broad powers are of grave concern.

This submission will detail the issues that stem from the SOSI Act regarding retrospectivity, the public interest, the transparency of board decisions, and human rights. It will also make four recommendations, which are as follows:

1. We recommend that item 55 of the Act be repealed.
2. We recommend that the term ‘public interest’ as contained in Section 7(4A) include a non-exhaustive list of public interest matters to which the Board may have regard when making a determination under Sections 7C(2) or (3), including for example:
 - a. right to privacy;
 - b. right to silence;
 - c. national security including in the prevention and detection of crime; and
 - d. freedom of the media to investigate, inform and comment on matters of public concern and importance.
3. We recommend that Section 7C(4) require disclosure by changing the term ‘may’ to ‘must’ and Section 7C(4C) require oversight of Board determinations by another governmental organisation, such as the Inter-Governmental Committee.
4. We recommend an updated statement of compatibility with human rights.

2. Retrospectivity

The *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* (the SOSI Act) introduces various amendments to the *Australian Crime Commission Act 2002* (the ACC Act). In particular the amendments respond to concerns about the validity of ACIC determinations in the case of *CXXXVII v Commonwealth*.⁵ In responding to the previous

³ Attorney-General’s Department, ‘A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers’ (2011) 15.

⁴ Paul Karp, ‘Australian Criminal Intelligence Commission case sparks fears convictions could be overturned’ *The Guardian* (online, 14 September 2020) 16
<<https://www.theguardian.com/australia-news/2020/sep/14/australian-criminal-intelligence-commission-case-sparks-fears-convictions-could-be-overturned?fbclid=IwAR2tXB9YgW0ZQyZHMJtWCFJk9z6kaF2oCAMZkd9iBkcfJ1Vra nAK7gGlw>>.

⁵ Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 65 of 2019-20, 4 December 2019) 3.

validity concerns, the SOSI Act seeks to validate all past and present special investigations and special operations.⁶ Provisions of the SOSI Act apply to ACIC Board determinations that were made before the Act and which are currently, and apart from the provisions in the SOSI Act, invalid or ineffective because the determinations did not satisfy the requirements of the ACC Act.⁷ The provisions in the SOSI Act, mainly item 55, made these determinations and anything done in relation to them, valid and effective and they are taken to have always been valid and effective as the determination satisfied the requirements in the ACC Act.⁸ The effect of these provisions in the SOSI Act is to validate otherwise unlawful conduct.⁹ Not only does the SOSI Act validate unlawful conduct, it also applies the validation retrospectively.

Australia, as a common law jurisdiction, has generally disapproved strongly of retrospective laws, especially those with a criminal nature. This disapproval comes from a rule of law justification that a person should only be punished for a breach of the current law and nothing else.¹⁰ This is because it is seen as “abhorrent to impose criminal liability on a person for an act or omission which, at the time it was done or omitted to be done, did not subject the person to criminal punishment”.¹¹ Therefore, retrospective laws are inconsistent with the rule of law. While the SOSI Act doesn’t explicitly introduce a retrospective criminal law applying to individuals, it still has consequences as special investigations and special operations are in relation to criminal activity. By validating all current and former special operations and investigations, it alters existing legal rights as well as affecting the capacity of some persons to challenge coercive executive action against them.¹² This imposes an unjustified burden on those subject to the governmental action. It creates a situation whereby people will not know what their legal rights are because they can and will be altered at any time by the government.

Furthermore, by retrospectively validating previous breaches of the law, the government is demonstrating that the government is above the law. A cornerstone of the rule of law and the Australian legal system is that no one is above the law and breaches of laws have consequences. The effect of the provisions in the SOSI Act outlined above, completely disregard this position. This sets a dangerous precedent for government accountability. If government actions that breach current laws will be retrospectively validated it provides no incentive for any government bodies or institutions to comply with the laws initially. This represents a blatant disregard by the government of the rule of law. Laws exist to regulate the conduct of everyone in society, regardless and especially because of the power the government

⁶ Explanatory Memorandum, Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (Cth) 15.

⁷ Explanatory Memorandum, Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (Cth) 15.

⁸ Explanatory Memorandum, Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019 (Cth) 15.

⁹ Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 65 of 2019-20, 4 December 2019) 11.

¹⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (Final Report No 129, December 2015) 362, [13.14].

¹¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws* (Final Report No 129, December 2015) 362, [13.14].

¹² Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 65 of 2019-20, 4 December 2019) 11.

holds, laws need to apply to them as well. To retrospectively validate governmental actions that breached laws is an unjustified encroachment on citizens' rights and freedoms especially given the coercive powers that can be utilized under the SOSI Act.

Therefore, we recommend that item 55 of the SOSI Act be repealed. The special investigations and special operations that item 55 validated should be re-examined in accordance with the current procedure for approving special operations and special investigations. This would allow for an examination of the legal rights of those who are subject to special rights and special investigations. It would also ensure that government action was appropriately scrutinized and that the government would not be perceived as being above the law. This would align with the rule of law and the general disapproval of retrospectivity in Australia.

Recommendation 1: We recommend that item 55 of the Act be repealed.

3. Substantiating the Term 'Public Interest'

We recommend the term 'public interest' as it appears in Section 7(4A) be substantiated to include a list of public interest matters set out in the SOSI Act. We recognise that the work of the ACIC, and in particular its Board, requires by its very nature, secrecy and standards of accountability that necessarily differ from those applicable to other areas of government. However, at the same time, public confidence in the legality, effectivity and efficiency of the work of the ACIC and the ACIC Board must be maintained. A non-exhaustive list of public interest matters to which the ACIC Board may refer when making a determination under Sections 7(2) or (3), may through the provision of greater transparency, instill increased confidence and understanding of the work of the ACIC .

The term 'public interest' is one of the most frequently used terms in the lexicon of public administration and yet 'it is arguably the least defined and least understood' with the identification of the appropriate public interest in any particular case being no easy task.¹³ In its 1987 report on the draft Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs (Committee) stated "'public interest" is a phrase that does not need to be, indeed could not usefully, be defined'.¹⁴ 'Public interest' according to the Committee is a 'convenient and useful concept for aggregating any number of interests that may bear upon a disputed question'.¹⁵ The Australian Law Reform Commission similarly characterised 'public interest' in their consideration of *Serious Invasions of Privacy in the Digital Era*, noting that to prescribe a definition of public interest might necessarily cause the concept to

¹³ Chris Wheeler, 'The public interest we know it's important but do we know what it means' (2006) 48 *Australian Institute of Administrative Law Forum*, 12 <<http://www5.austlii.edu.au/au/journals/AIAdminLawF/2006/2.pdf>>.

¹⁴ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Operation and Administration of the Freedom of Information Legislation* (Report, December 1987).

¹⁵ Ibid.

be overly general, overly confined or inflexible.¹⁶ In line with these authorities, we concur that the term ‘public interest’ should not be defined. However, as noted by the Australian Law Reform Commission, ‘there is precedent in Australian law and in regulation for providing guidance on the meaning of “public interest”, including the public interest exemptions in the Freedom of Information Act 1982 (Cth)’.¹⁷

The public interests that will perhaps most commonly conflict with the functions of the ACIC as contained in Section 7C(1) is privacy. As noted by the Parliamentary Joint Committee on the Australian Crime Commission, being the predecessor to the ACIC, ‘the actions of the ACC [Australian Crime Commission] have the potential to impact profoundly on the individual citizen’s freedom and privacy’.¹⁸ Further, the right to privacy in one’s private and family life is enshrined in Article 8 of the European Convention on Human Rights.¹⁹ In the absence of a human rights legal framework in Australia, it is important that the functions of the ACIC be tempered by ensuring that rights such as privacy are expressly recognised as a countervailing factor to the public interest contained in Section 7(4A). A number of other matters of public interest may conflict with the functions of the ACIC as contained in Section 7C (1), these are listed in the recommendation below.

Recommendation 2:

We recommend that the term ‘public interest’ as contained in Section 7(4A) include a non-exhaustive list of public interest matters to which the Board may have regard when making a determination under Sections 7C(2) or (3), including for example:

- (a) right to privacy;
- (b) right to silence;
- (c) national security including in the prevention and detection of crime; and
- (d) freedom of the media to investigate, inform and comment on matters of public concern and importance.

4. Increased Transparency of Board Determinations

¹⁶ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Discussion Paper 80, March 2014)

<<https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-dp-80/8-balancing-privacy-with-other-interests/meaning-of-public-interest/>>.

¹⁷ Ibid.

¹⁸ Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice* (ALC Report 108, May 2008)

<<https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/37-agencies-with-law-enforcement-functions/australian-crime-commission/>>.

¹⁹ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8.

In addition to the Section 7C(4A) recommendation above, further transparency as to the ACIC Board's determination process may be attained in Section 7C(4) by requiring disclosure, and Section 7C(4C) by requiring oversight of the ACIC Board's determinations. The Bill amended these sections to give the ACIC Board significant discretion as to the level of generality and content of the information surrounding special operations and investigations. The *Australian Crime Commission Act 2002* (Cth) (superseded) provided a more transparent approach requiring minimum disclosure obligations. We recommend that the drafting of Section 7C(4) require disclosure by changing the term 'may' to 'must'. Further, we recommend Section 7C(4C) require oversight by another governmental organisation, such as the Inter-Governmental Committee, to ensure the balance between public disclosure and secrecy, as necessarily required by the nature of the Australian Crime Commission's work, is achieved.

A change in the wording of Section 7C(4) to replace the term 'may' with 'must', would provide a more detailed record of why Board decisions were made allowing for review. The Senate Standing Committee for the Scrutiny of Bills expressed concern about unreviewable bills due to a lack of reasoning.²⁰ The amended sections allow the ACIC Board to restrict the ability for these decisions to be scrutinised and no other avenues for reasoning is given. If under Section 7C(4) the ACIC Board does not decide to disclose information, they also may restrict the information provided under Section 7C(4C) as it is to a level of generality the ACIC Board deems appropriate. The Committee stated that decisions which 'have a substantial impact on a person's rights and interests' should generally be available for judicial review.²¹ Although being the subject of a special investigation or operation would have a 'substantial impact', this does not come under judicial review but should still require oversight in some form.

We understand that the ACIC Board's members are high-level law enforcement officials from various departments and the Chair is the Commissioner of the Australian Federal Police.²² The ACIC Board has the experience and knowledge in order to make decisions on what details are necessary and the level of generality. Once again, we acknowledge that the work the ACC does needs to be dealt with discretion however there does need to be some form of transparency to instil public confidence in the integrity of the organisation and its processes. Even if these records are not publicly available, the processes still need to be there in case of overreach of power.

Strong and effective oversight mechanisms do not stand in opposition to national security arrangements, they are an essential part of them. We recommend a subsection be included in Section 7C(4C) to include oversight from an independent body to balance security concerns

²⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *The Work of the Committee during the 40th Parliament February 2002-2004* (Report, June 2008) 63-64.

²¹ Ibid 66.

²² *Australian Crimes Commission Act 2002* (Cth) ss 7B(2)-(3).

with considerations of public disclosure. The nature of the ACC's work deals with a level of confidentiality so this proposal balances secrecy whilst instilling confidence as it ensures determinations are subject to independent review. This may however be a somewhat less efficient system but it is justified because of the very large impact the actions have on the lives of Australian citizens and the Australian public need to have confidence in the organisations that seek to protect them. Australia's security organisations have oversight, through the Inspector-General of Intelligence and Security (IGIS) who reviews the operational activities. The IGIS provides assurance to the public that the intelligence community is acting in a proper way and must "clear [agencies] or bring [them] to task... if allegations of improper conduct are made".²³ If there is oversight of sensitive information within Australia's intelligence community it should be feasible to have similar ACC oversight. The Inter-Governmental Committee already does some ACC monitoring and could play a larger role in providing oversight for special operations and investigations determinations.²⁴

Recommendation 3:

We recommend that Section 7C(4) require disclosure by changing the term 'may' to 'must' and Section 7C(4C) require oversight of Board determinations by another governmental organisation, such as the Inter-Governmental Committee.

5. Human Rights

The *Human Rights (Parliamentary Scrutiny) Act* 2011 requires that a statement of compatibility must be prepared with respect to any bill that comes before the Parliament. This statement of compatibility must include an assessment of whether the bill is compatible with human rights. 'Human rights' is taken to mean the rights and freedoms recognised by seven international instruments to which Australia is a party, specified in s 3(1).

The Minister for Home Affairs prepared a statement of compatibility for the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill* 2019 (the Bill) In this statement, the Minister alleges that the Bill does not engage human rights as it 'does not expand or otherwise alter the powers available in the course of special investigations or special operations', as the ACC Act already provides for ACIC to undertake special investigations or operations. We acknowledge and confirm that the Bill does not alter the power available in the course of special investigations or operations. However, this does not mean that the Bill 'does not engage human rights', as is alleged by the Minister.

²³ Cat Barker et al, 'Oversight of Intelligence Agencies: a Comparison of the Five Eyes Nations' (Research Paper, Parliamentary Library, Parliament of Australia, 15 December 2017) 14.

²⁴ Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice* (ALC Report 108, May 2008)
<<https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/37-agencies-with-law-enforcement-functions/australian-crime-commission/>>.

Under the ACC Act, the designation of an investigation as ‘special’ enlivens the power to force people to produce documents or items or submit to an examination, with penalties of up to five years in prison for failure to attend and answer questions. The Bill expands this power, enabling the ACIC Board to deem an investigation ‘special’ after it has been commenced. This in theory enables the ACIC to engage in these coercive activities without prior consent from its Board. A person who is forced to produce documents or submit to an investigation does not have a way of knowing whether the question being asked has any connection to an investigation that is currently being conducted, or that is currently deemed as ‘special’.

We submit that this power may not be compatible with the rights and freedoms recognised by the *International Covenant on Civil and Political Rights* (the Covenant), an international instrument recognised in s3(1). Article 14 of the Covenant establishes that in the determination of a criminal charge, a person should not be compelled to testify against himself or to confess guilt. This confirms that the privilege against self-incrimination is not only an important common law principle, but also a human rights obligation. The criminalisation of failing to attend an examination and answer questions may give rise to a situation where a person is compelled to testify against themselves, to avoid further conviction. Therefore, there is a clear need for evaluation as to whether the Bill is compatible with Article 14 of the Covenant.

There is a suggestion that because the Bill is simply an amendment of the ACC Act, which contains the substantive material on special investigations, there is no need to engage with human rights. However, the ACC Act was created in 2002. The requirements for statements of human rights compatibility was only mandated in 2011. As such, there is no statement of compatibility with human rights norms accompanying the ACC Act. In light of this, and considering the essential nature of the privilege against self-incriminating, there is a clear need for further engagement with the statutory obligation to provide a statement of compatibility with human rights for the Bill.

For these reasons, we recommend a more comprehensive statement of compatibility with human rights, particularly engaging with the International Covenant on Civil and Political Rights.

Recommendation 4:

We recommend an updated statement of compatibility with human rights.