

11 April 2008

Dr Jaqueline Dewar
Secretary
Parliamentary Joint Committee
on the Australian Crime Commission
Parliament of Australia
Parliament House
Canberra, ACT 2600.

Dear Dr Dewar,

Inquiry into the Australian Crime Commission Amendment Act 2007

Thank you for inviting Liberty Victoria to make a submission to the above inquiry on the above Act (the "Amendment Act").

The submission begins with a point which is as important as it is obvious. The inquiry is one that should have been held *before* the passage of the Amendment Act and not now after the fact. The impact of the Amendment Act, especially its retrospective validation of previously invalid summonses and notices to produce documents issued by the ACC, creates a new factual environment which to some extent pre-empts a proper consideration of the important policy issues raised by the Amendment Act. The omelette created by this legislation cannot now be unscrambled and a better one cooked in its place. Let us therefore hope that there is no repeat in the new Parliament of the precipitous legislative process by which the Amendment Act was passed.

Liberty's views on the provisions of the Amendment Act are as follows, referring to the items of Schedule 1 to the Act:

Items 1, 3, 4, 6 and 13

These items amend various provisions of Part II of Division 2 the Australian Crime Commission Act 2002 (the "Principal Act") to permit functions conducted by an examiner in relation to a particular examination to be performed by different examiners. Liberty has no objection to these provisions.

| | | | | |
|--|---|--|---|------------------------------------|
| President Julian Burnside QC | Vice Presidents Jamie Gardiner Anne O'Rourke | Michael Pearce SC Prof Spencer Zifcak | Secretary Agusia Kapitaniak | Treasurer Robert Niemann |
| Committee Liz Curran Dr Di Sisely Timothy Warner | Kristen Hilton Marian Steele Jonathan Wilkinson | Sarah Kemeny Dr Larry Stillman | Assistant Secretary Georgia King-Siem | Lucie O'Brien Brian Walters SC |

Item 2

This item made the contentious amendment to s 28(1A) of the Principal Act to permit ACC examiners to record in writing the reasons for the issue of a summons after the issue of the summons. This amendment is bad policy for a number of reasons:

- A body invested with the far-reaching coercive powers of the ACC should be held to the strictest procedural standards. At a time when sloppy law enforcement has been exposed in cases such as those of Dr Haneef, Vivian Alvarez Solon and Cornelia Rau, it seems extraordinary for the Parliament to relax law enforcement standards in this fashion.
- The examiner must, of course, still form the requisite opinion that it is reasonable in all the circumstances to issue the summons *before* the issue of the summons. If there is time to attend to the paperwork of issuing a summons it is scarcely credible that there will not be time to record the reasons for it.
- There should be no doubt about whether a proper basis exists for the issue of a summons at the time it is issued. The amendment permits the ACC to “fudge” that by issuing summonses when there is no proper basis and later manufacturing one. It thus opens the door to abuses of power by the issue of summonses with no proper basis.

Liberty therefore recommends that the amendment made to s 28(1A) by the Amendment Act be repealed so that the provision revert to its previous requirement that reasons be recorded before the issue of a summons.

Item 5

This item added new subsection (8) to s 28 to provide that the failure to comply with s 28(1A) or (2) or s 29A does not invalidate a summons. Similar considerations apply to this amendment. It bears repeating that it is extraordinary in the present climate for the Parliament to relax procedural standards for law enforcement agencies. Section 28(8) should be repealed.

Item 7

This item made like amendments to s 29A (dealing with notices to produce documents) as those made to s 28(1A). Liberty likewise considers the amendment should be repealed.

Item 8

This item adds new subsection (5) to s 29 containing similar validating provisions for notices to produce documents as s 28(8). It too should be repealed.

Item 9, 11, 13 and 14

No objection.

Item 10

This item gave the amended s 28(1A) retroactive application so that it validated summonses issued before the amendment which failed to comply with s 28(1A) as it stood before the amendment. It goes without saying that Liberty opposes this provision. However, Liberty recognises that it would be unsatisfactory for previously invalid summonses validated by item 10 to become again invalid. Accordingly, if Liberty's

recommendation is accepted to return s 28(1A) to its pre-amendment form, item 10 should continue in force.

Item 12

This item makes like provision to item 10 for the amendment to s 29. The same considerations apply as under item 10.

If you have any queries please direct them to the author on (03) 9225 8840 or email@michaelpearce.com.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Michael Pearce', written in a cursive style.

Michael Pearce SC
Vice-President