



AUSTRALIAN  
**CRIMINAL  
INTELLIGENCE  
COMMISSION**

# Independent National Security Legislation Monitor

Review of questioning and detention powers in relation to terrorism (*Australian Crime Commission Act 2002* coercive examination powers)

Australian Criminal Intelligence Commission submission

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## Introduction

The mission of the Australian Criminal Intelligence Commission<sup>1</sup> (ACIC) is to make Australia safer through improved national ability to discover, understand and respond to current and emerging crime threats and criminal justice issues, including the ability to connect police and law enforcement to essential policing knowledge and information. The ACIC is uniquely equipped as Australia's national criminal intelligence agency with investigative, research and information delivery functions. The ACIC works closely with a broad range of national and international partners to achieve its mission.

The ACIC welcomes the opportunity to make a public submission to the Independent National Security Legislation Monitor's (INSLM) review of questioning and detention powers in relation to terrorism. This submission addresses the ACIC's use of coercive examination powers in relation to terrorism under the *Australian Crime Commission Act 2002* (ACC Act). The contents of this submission are unclassified and suitable for public release.

This submission addresses the role of the ACIC in the whole of government response to terrorism, including how the ACIC works with its partners and how it uses its coercive powers to help respond to national security threats.

## ACIC's role in the whole of government response to terrorism

The links between terrorism and organised crime, including Australians who finance terrorist activities and the issue of Australians going overseas to fight and support terrorist activities in places like Syria and Iraq, are emerging and complex problems. Working under ACIC Project Ridgeline,<sup>2</sup> the ACIC is increasing the national understanding of the evolving threat posed by foreign fighters, identifying previously unknown threats, and contributing to domestic monitoring and disruption activities. Under Project Ridgeline, the ACIC:

- employs its coercive powers and other specialist capabilities to generate information and intelligence, which can be used to inform partner agency operations into national security matters
- uses specialist data analytics tools to proactively identify persons of potential interest
- prepares information reports concerning foreign fighters and counterterrorism
- prepares intelligence briefs that assist in the profiling and identification of potential terrorism threats
- contributes to timely advice about potential issues.

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<sup>1</sup> The Australian Crime Commission (ACC) is now also known as the Australian Criminal Intelligence Commission (ACIC). The *Australian Crime Commission Act 2002* (Cth) and the regulations under that Act set out the legal foundation for the ACC/ACIC, including how the agency may be named as well as the functions, responsibilities and powers of the agency, its CEO, Board, examiners and members of staff. The acronym ACIC is used in this document to refer to the ACC as it exists on and from 1 July 2016 except in terms incorporating the acronym ACC that are defined in that form in the Act.

<sup>2</sup> Established under the ACIC Board approved National Security Impacts from Serious and Organised Crime No. 2 Special Operation (NSISOC No 2 SO) Determination.

In this way the ACIC contributes to Australia's response to national security threats.

## ACIC governance and oversight mechanisms

The ACIC has extensive internal governance and external oversight arrangements, which ensure the agency discharges its obligations under the ACC Act and other laws. As a Commonwealth statutory authority the ACIC has responsibilities and obligations under the *Public Service Act 1999* and the *Public Governance, Performance and Accountability Act 2013*.

The ACIC is part of the Attorney-General's portfolio and is accountable to the Minister for Justice, Minister Assisting the Prime Minister on Counter-Terrorism.

External scrutiny includes the ACIC Board, the Inter-Governmental Committee on the ACC consisting of Commonwealth, state and territory police ministers, and the Parliamentary Joint Committee on Law Enforcement.

The Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity and the Australian National Audit Office also form part of the ACIC's external scrutiny framework.

Further, specific to coercive powers, as recently as last year, the Commonwealth Parliament reviewed the ACIC's coercive powers in the context of the *Law Enforcement Legislation Amendment (Powers) Act 2015*. This Act amended the ACC Act to clarify, among other things, the nature and extent of both the ACIC's coercive powers and the use that can be made of examination material. As part of Parliament's consideration, the Senate Legal and Constitutional Affairs Committee examined the legislation to ensure that the legislation contained appropriate safeguards for protecting the rights of individuals and that it was proportionate and necessary in the context of the functions and powers of the ACIC.

## Examinations

The ACIC Board approves work priorities and authorises the ACIC to undertake intelligence operations or investigate matters relating to federally relevant criminal activity. The Board may also determine that such operations or investigations are 'special'. In accordance with the ACC Act and supporting instruments, the ACIC may only conduct coercive examinations for the purpose of a special investigation or special operation.

The decision to issue a summons for an examination is a matter for the statutorily appointed ACIC examiner. A summons can only be issued if the examiner considers it is reasonable in all the circumstances to do so, and only for the purposes of an ACIC special operation or special investigation.<sup>3</sup> Once a summons is issued, the examiner has control over the conduct of the resulting examination.

All of the examinations conducted by the ACC/ACIC in relation to terrorism-related activity to date have been for the purpose of the ACIC Board approved National Security Impacts from Serious and

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<sup>3</sup> Where the examination is a post-charge or post-confiscation application examination (as defined in the ACC Act) the examiner must also be satisfied that the examination is reasonably necessary for the purposes of the relevant special investigation or operation even though the matter is a post-charge or post-confiscation application.

Organised Crime No. 2 Special Operation (NSISOC No 2 SO) Determination. Since 2013, the ACC/ACIC has conducted 77 examinations, involving 74 persons, under NSISOC No 2 SO in connection with a range of offences, including suspected terrorism offences. The aim of the NSISOC No 2 SO is to provide a unique perspective of the evolving threats and risks posed by serious and organised crime groups within the national security environment. The NSISOC No 2 SO considers a range of national security matters and their potential or actual convergence with serious and organised crime through terrorism, people smuggling, threats to Australia's border and complex technology enabled crime.

The table below provides a breakdown of the NSISOC No 2 SO examinations by calendar year.

Year	Number of examinations
2012	0
2013	6
2014	28
2015	22
2016 (as at July)	21

The safety of examinees is always paramount in the exercise of ACIC coercive powers. Examinees may face real risk of harm if the fact of their attendance before an examiner and/or the confidentiality of their answers are compromised. The ACC Act contains provisions that emphasise the confidentiality of ACIC examinations (for example, s29A: non-disclosure of service of ACC summons; s25A (3): examination held in private; s25A (9) examiner confidentiality direction). The ACC Act also includes an overarching secrecy provision which prohibits disclosure of any information held by ACIC, including examination information, except in approved circumstances. Consequently, the ACIC takes seriously the need for confidentiality in relation to its preparation around examinations and the use and disclosure of information arising out of examinations.

## How does the ACIC work with its partners?

Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP) are key partners for the ACIC in the NSISOC No 2 SO. In accordance with the NSISOC No 2 SO Board instrument and the provisions of the ACC Act, arrangements have been made for a number of staff members of ASIO and the AFP to be identified by their agency heads as participants in the activities of the NSISOC No 2 SO. These participants are accorded the status of 'members of the staff of the ACIC' and can access information held by the ACIC. Any information accessed in this way that is required for the use of another agency's own functions must be formally disclosed to that agency under the information disclosure provisions contained in the ACC Act.

More generally, the ACIC can disclose information (including examination material (where authorised) and intelligence products based on information held by the ACIC) to relevant partners (including ASIO and the AFP) in accordance with the disclosure provisions of the ACC Act (see sub-sections 59AA(1) and (2) of the ACC Act). This includes information relating to national security.

## Proceedings under the ACC Act

Division 2 of Part II of the ACC Act specifies the powers of an examiner to summon and examine a person, or to require a person to produce documents and other items for the purpose of a special ACC operation/investigation established by the ACIC Board under the ACC Act. The ACIC's coercive powers are supported by:

- a) criminal offences directed at non-compliant conduct of persons in response to the lawful requirements of an examiner. These offences are set out in s25A(14) and s(14A), s29B, s30(6), s33, and s35 of the ACC Act (non compliance offences)
- b) provisions for a court to deal with non-compliant conduct of a person at an examination as a contempt of the ACIC. These provisions are contained in s34A – s34E of the ACC Act (contempt provisions).

There are similar provisions in the *Australian Crime Commission (South Australia) Act 2004* (SA). The *Australian Crime Commission (New South Wales) Act 2003* (NSW) adopts the Commonwealth provisions by reference. Contempt proceedings are only available in other jurisdictions where an examination is conducted under a special ACC operation/investigation relating to 'federally relevant criminal activity', under the ACC Act.

### *Non-Compliance Offences*

The following non-compliance offences are contained in the ACC Act:

- s25A(14) – unauthorised presence at an examination
- s25A(14A) – contravention of examiner's confidentiality directions
- s29B(1) – unauthorised disclosure of a summons by the witness
- s29B(3) – unauthorised disclosure of the existence of a summons or content by a person to whom disclosure is permitted, or was and is no longer permitted
- s30(1) – failure of a witness to attend at an examination and from day to day until excused
- s30(2)(a) – failure by the witness to take an oath or an affirmation
- s30(2)(b) – failure by the witness to answer a question that he or she is required to answer
- s30(2)(c) – failure by the witness to produce a document or thing that he or she is required to produce
- s30(3)(a) – failure of a legal practitioner to answer a question or produce a document
- s30(3)(b) – failure of a legal practitioner to provide the name and address of a person to whom or by whom a privileged communication is made
- s33(1) – knowingly giving evidence that is false or misleading in a material particular
- s35 (1) – obstructing or hindering or disrupting the ACIC or an examiner, or threatening any person present at an examination.

The offences under s30, s33, and s35 are indictable offences punishable by imprisonment for a period not exceeding 5 years or by a fine not exceeding 200 penalty units (one penalty unit is currently valued at \$180 (see s4AA of the *Crimes Act 1914* (Cth))). The remainder are indictable offences punishable by imprisonment for 2 years or 120 penalty units, or both. However, all the non-compliance offences may be dealt with as summary offences punishable by imprisonment for no more than one year and a fine of up to 60 penalty units (see s4J of the *Crimes Act 1914* (Cth))).

In the past five years there have been approximately a dozen prosecutions of non-compliance offences.

Pursuant to s25A(14A) of the ACC Act, it is an offence punishable by imprisonment for two years or 120 penalty units, or both, to contravene an Examiner Confidentiality Direction given under s25A(9). There are equivalent offences under complementary legislation enacted in each State and Territory, though the applicable penalties vary.

In the past five years there have not been any matters referred to the Commonwealth DPP regarding alleged breaches of s25A(14A) of the ACC Act, or the complementary State and Territory legislation.

#### *Contempt Provisions*

ACIC examiners have the power to apply for a witness to be dealt with for contempt of the ACIC in certain circumstances. These applications are heard in either the Federal Court or relevant state or territory Supreme Court.

Section 34A of the ACC Act sets out the circumstances in which a person is in contempt of the ACIC. They are:

- when appearing at an examination, refusing, or failing to:
  - take an oath or affirmation – s34A(a)(i)
  - answer a question he or she is required to answer – s34A(a)(ii) or
  - produce a document in response to a summons – s34A(a)(iii)
- in the case of a legal practitioner appearing as a witness, refusing to provide the name and address of a person in relation to whom the practitioner has asserted a claim of legal professional privilege – s34A(b)
- giving false or misleading evidence – s34A(c)
- obstructing or hindering an examiner – s34A(d)
- disrupting an examination – s34A(e)
- threatening a person present at an examination – s34A (f).

Over the past five years, there have been four contempt proceedings arising from ACIC examinations.

The decision to prosecute a person for a non-compliance offence is made by the Commonwealth Director of Public Prosecutions, but the decision to apply to a court for a person to be dealt with for contempt of the ACIC is made by the examiner presiding at the hearing where the contempt is alleged to have occurred.

## Matters raised in the review

In this submission, the ACIC has explained how it contributes to the whole of government response to national security threats, its oversight and governance mechanisms, how it works with its partners, how examinations are conducted and consequent proceedings under the ACC Act. As such, the ACIC has addressed the matters raised in the course of the INSLM review.

The ACIC submits that all submissions to the review must be considered in light of both the terms of the review and the nature and extent of the INSLM's functions, as identified in s6 of the *Independent National Security Legislation Monitor Act 2010* (INSLM Act). As such, it is submitted that the INSLM's consideration of the ACC Act should be confined to whether the ACC Act, insofar as it relates to Australia's counter-terrorism and national security legislation, satisfies those matters, as relevant, referred to in s6 (1)(b) of the INSLM Act (namely, contains appropriate safeguards for protecting the rights of individuals, remains proportionate to any threat of terrorism or threat to national security, or both, and remains necessary). This consideration must occur against the background (provided in this submission) that the ACIC's use of its coercive powers takes place in the context of the ACIC's functions and powers as set out in the ACC Act and not as part of Australia's counter-terrorism and national security legislation (of which the ACC Act is not a part).

In this regard, the ACIC observes that the Law Council of Australia's submission to the INSLM, in particular the submissions and recommendations contained at pages 28-32, reiterates the Law Council's submission to the Senate Legal and Constitutional Affairs Committee, which was made as part of the Committee's consideration of the *Law Enforcement Legislation Amendment (Powers) Bill 2015*. The matters raised by the Law Council were appropriately considered by the Committee and taken into account when framing the current coercive powers regime in the ACC Act.

Consequently the ACIC submits that the Law Council of Australia's submission and also the submissions of Dr Cosmas Moisidis and the Councils for Civil Liberties do not raise any matters in relation to the ACIC's coercive examination powers that warrant the INSLM's specific attention in the context of the review.