THE ROLE OF THE AUSTRALIAN CRIME COMMISSION IN POLICING INDIGENOUS VIOLENCE AND CHILD ABUSE

The responsibility for policing domestic crime is traditionally the domain of State and Territory police services. The role of the Australian Crime Commission (ACC) is to provide intelligence and investigative support in relation to certain crime-types that are considered “nationally significant”1 such as serious or organised crime. In 2007, the Australian Crime Commission Act 2002 (Cth) (ACC Act) was amended to enable the ACC’s special powers of coercive examination to be used to investigate Indigenous violence and child abuse.2 This signalled the elevation of these issues to the level of national significance and can be viewed as part of the increasingly dominant position adopted by the federal government and its law enforcement agencies in this arena. The justifications provided for extending the role of the ACC in this context require careful examination to determine the appropriateness (and potential discriminatory impact) of federal involvement in crimes that have traditionally been within the ambit of State and Territory law enforcement.

THE NORTHERN TERRITORY EMERGENCY RESPONSE

The 2007 amendments to the ACC Act that enabled the extension of the ACC’s special investigative powers to Indigenous violence and child abuse were part of the package of legislation that underpinned the Northern Territory Emergency Response (NTER). The NTER is the shorthand title given to a wide-ranging federal government intervention into Aboriginal communities in the Northern Territory. The catalyst for the NTER was the publication of the Little Children are Sacred report,3 which was commissioned by the Northern Territory government in August 2006 following allegations of the widespread sexual abuse of children occurring in Northern Territory Aboriginal communities.4 The report confirmed that child sexual abuse was indeed prevalent in the communities surveyed, and that this was a cause of serious concern among the population of the communities.5 It also contained a number of recommendations to the Northern Territory government about how to address the problem. The Northern Territory government publicly released the report on 15 June 2007. Six days later on 21 June 2007, the then Prime Minister, John Howard, and the Minister for Families, Community Services and Indigenous Affairs, Mal Brough, held a joint press conference in order to “announce a number of major measures to deal with what we could only describe as a national emergency in relation to the abuse of children in indigenous communities in the Northern Territory”.6

In doing so, the Commonwealth government assumed responsibility for an issue that had previously been the responsibility of the Northern Territory government.7 The measures outlined during the press conference were subsequently given legal form and authority by virtue of a package

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1The ACC website describes its mission as follows: “Our purpose is to unite the fight against nationally significant crime”, http://www.crimecommission.gov.au viewed 17 September 2011.
2ACC Act, ss 24A – 36. An examiner has the power to summon witnesses and to compel evidence and the production of documents (ss 28 – 29). These processes specifically abrogate the privilege against self-incrimination, and make it an offence to refuse to comply with an order (s 30).
3Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Ampe Akelyneman Meke Mekarle “Little Children are Sacred”: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) (Little Children are Sacred Report).
4Chief amongst these was an ABC Lateline interview with Nanette Rogers, a Northern Territory Crown Prosecutor based in Alice Springs, who spoke out about the widespread and serious nature of child abuse in Northern Territory Aboriginal communities. “Lateline”, Crown Prosecutor Speaks Out about Child Abuse in Central Australia (TV program transcript, ABC TV, 15 May 2006), http://www.abc.net.au/lateline/content/2006/s1639127.htm viewed 3 June 2008.
5Little Children are Sacred Report, n 3, pp 14, 40, 74-75.
6Interview with the then Prime Minister, John Howard and the Hon Mal Brough, Minister for Families, Community Services and Indigenous Affairs (Press conference, Canberra, 21 June 2007).
7The Commonwealth government had constitutional power under s 122 of the Australian Constitution to implement the intervention in the Territory.
of legislation comprising five Acts, which was presented and debated in the House of Representatives on 7 August 2007 and enacted on 17 August 2007.

One of the fundamental aspects of the NTER was the need to strengthen police resources in Aboriginal communities in the Northern Territory. Governments across the country were asked to second police to the Northern Territory in order to establish a stronger police presence in communities. The Northern Territory government also committed more police to communities. In general, legislation was not required to give effect to the policing aspects of the NTER as these aspects depended on administrative and political support, rather than legislative support. Nevertheless, the NTER legislation did contain some important policing provisions. In particular, the NTER legislation confirmed that the ACC was to play a central role in the monitoring and investigation of Indigenous violence and child abuse generally. Although the amendments to the ACC Act were contained in the NTER legislative package, they had effect throughout Australia.

The NTER and the ACC

The ACC’s role in policing Indigenous violence and child abuse in fact begins earlier than the NTER rollout. In 2006, the ACC’s National Indigenous Violence and Child Abuse Intelligence Task Force was announced. The taskforce’s role was limited to intelligence-gathering; special investigative powers of coercive examination would only be potentially available if the intelligence suggested serious or organised criminal activity. The amendments contained in the NTER package of legislation were required because the previous definition of “federally relevant crime” as “serious or organised crime” did not expressly allow the ACC’s coercive investigative powers to be extended to issues of Indigenous violence and child abuse. The 2007 amendments to the ACC Act overcame this obstacle by deleting reference to “serious and organised crime” and replacing this with the term “relevant crime”. The definition of “relevant crime” included inter alia “Indigenous violence or child abuse”, which was defined (in the 2007 amendments) as “serious violence or child abuse committed by or against or involving an indigenous person” (emphasis added). This definition was extremely broad, giving the ACC a wide mandate in relation to “Aboriginal criminality”. The ACC Act was again amended in 2010 to confine the scope of investigation to “serious violence or child abuse committed against an Indigenous person”. This revised definition appears in a package of amending legislation designed to reinstate the application of the Racial Discrimination Act 1975 (Cth) to the NTER. The tighter definition was considered necessary to ensure that the ACC’s powers are

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8 The NTER legislation passed included the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth), the Northern Territory National Emergency Response Act 2007 (Cth), the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth), the Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007-2008 (Cth), and the Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007-2008 (Cth).


10 If serious or organised crime was suggested, the ACC Board can approve a special intelligence operation in which the use of coercive examinations is allowed. See ACC Act, ss 7C, 24A.

11 The relevant amendments are found in the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth), Sch 2, Pt 1.

12 Amendments are found in the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010 (Cth), Sch 7.

13 Section 4(1) of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth) designated the provisions of the Act as “special measures” for the purposes of the Racial Discrimination Act 1975 (Cth), but s 4(2) excluded the provisions from the operation of Pt II of the Racial Discrimination Act 1975.

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“directed at cases where the victim is Indigenous, and will be used for the benefit of those victims”\textsuperscript{14} and are thereby able to be adequately justified as a “special measure” permitted under s 8 of the \textit{Racial Discrimination Act 1975 (Cth)}.

As a result of the 2007 changes to the ACC Act detailed above, the ACC Board approved a special intelligence operation on Indigenous violence and child abuse in February 2008. This is the process required in order for coercive powers of examination to be specifically available to an investigation. This special intelligence operation was originally approved until 31 December 2008, but was subsequently extended on two occasions until it eventually ceased in 2010.\textsuperscript{15} At that point the Indigenous Violence and Child Abuse Special Intelligence Operation (No 2) was approved, which extends until 30 June 2012.\textsuperscript{16} Thus, the ACC’s role in policing Indigenous violence and child abuse has now been in place for five years and has grown substantially in scope since the original taskforce was created in 2006.

An additional aspect of the NTER legislation that has received little attention is the involvement of the ACC in the regulation of publicly funded computers in prescribed areas.\textsuperscript{17} The relevant provisions are found in Pt 3 of the \textit{Northern Territory National Emergency Response Act 2007 (Cth)}. These provisions were explained as necessary to ensure that publicly funded computers were not used to access pornographic materials,\textsuperscript{18} but in fact they extend beyond pornography. Part 3 creates a regulatory framework around the use of publicly funded computers that requires the development of acceptable use agreements and a register of users to be kept.\textsuperscript{19} Section 29 of the \textit{Northern Territory National Emergency Response Act 2007 (Cth)} requires a responsible person to conduct an audit of the computer at least every six months, and more often if he or she “knows or is reckless that material that contravenes a law … is stored on, or has been accessed by, the computer”, and the results of this audit must be provided to the ACC within 14 days after the audit. The provision of audit reports to the ACC provides the ACC with intelligence that may be relevant to the prevention of violence and child abuse in communities. At the same time, it has the potential to provide intelligence to this policing agency that lies far beyond this scope.

\textbf{Why empower the ACC to investigate?}

The fact that the ACC is now provided with power to investigate Indigenous victimisation assumes that violence and child abuse against Indigenous victims is qualitatively or quantitatively different from violence and child abuse directed to non-Indigenous victims. As such, it should be policed differently. This assumption warrants some exploration. Certainly, a recent report confirms again that Indigenous people are more likely to experience violence than non-Indigenous people and that Indigenous children are also more likely to be the subject of substantiated child abuse notifications.\textsuperscript{20} The reasons for these over-representations are complex, and are beyond the scope of this comment, but common explanations include the negative effects of colonisation and of past laws and government policies on Indigenous communities, families and individuals. This history has shaped present

\textsuperscript{14} Explanatory Memorandum, \textit{Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth)}, p 85.
\textsuperscript{15} ACC, \textit{Annual Report 2008-2009}, p 42.
\textsuperscript{17} Section 4 of the \textit{Northern Territory National Emergency Response Act 2007 (Cth)} designates certain areas within the Northern Territory as “prescribed areas”. These include: Aboriginal land (as defined in the \textit{Aboriginal Land Rights (Northern Territory) Act 1976}); roads, rivers, and other waterways that are connected to Aboriginal land; and land granted under the \textit{Lands Acquisition Act 1978 (NT)}. Section 4 also gives the Commonwealth Minister power to declare town camps as prescribed areas, to exempt a designated area from being a prescribed area, and to declare any other area within the Northern Territory a prescribed area.
\textsuperscript{18} Interview with the then Prime Minister John Howard and the Hon Mal Brough, n 6.
disadvantage and dysfunction, which in turn foster risk factors in social environments and individual behaviours. Indigenous people may also be more reluctant to report victimisation to police due to prior negative dealings with police and high levels of distrust of police within these communities. Fear of negative community or family repercussions that may flow from reporting victimisation may also prevent victims from coming forward. Thus, the differences that exist between Indigenous and non-Indigenous victimisation might be understood (at least superficially) as differences in prevalence, in causes and consequences of disadvantage, and in barriers to disclosure, investigation and prosecution.

Prevalence justifies the elevation of the issue to one of “national significance”, and the ACC is presented as a solution to the disclosure, investigation and prosecution barriers. The ACC’s powers may, for example, be used to gather information about sexual and domestic violence without necessarily having to rely on complainant evidence. Strict confidentiality conditions can be applied to coercive examinations that may help to protect the identity of victims and others. The ACC can also compel information from other persons and organisations that may ordinarily be reluctant to participate in police investigations, such as health professionals or government agencies. It is argued that the use of the ACC’s special investigative powers is necessary to overcome barriers that prevent vulnerable or reluctant witnesses from coming forward or co-operating with police.

A potential risk in this context is that the policing focus of the ACC will overshadow the more urgent need for sustained and well-funded initiatives that target the underlying issues that give rise to the crimes committed. Even if it is accepted that Indigenous violence and child abuse is markedly different to similar crimes involving non-Indigenous people, the appropriateness of using the ACC (which is more accustomed to investigating serious cross-border organised crime, such as drug trafficking) to investigate such sensitive cases is questionable. Of greatest concern is that these powers are overtly discriminatory: as it currently stands, throughout Australia the same crime may be subject to different investigative processes solely because of the (presumed) race of the victim involved. There is also a broader issue to be considered here. The involvement of the ACC demonstrates its potential as a convenient federal policing apparatus readily available to the Commonwealth government, particularly when its use is justified as a response to an “emergency”. The ease with which the 2007 amendments were passed demonstrates the ability of the federal government to broaden its domestic policing role in circumstances of purported exigency. The ability of the federal government to empower an agency such as the ACC to police a specific population within Australia on the basis of race alone is particularly concerning and this issue warrants a robust debate.

**CONCLUSION**

There is an urgent need for sustained action directed towards decreasing the over-representation of Indigenous people in violent crime and child abuse. The ACC’s role in policing Indigenous violence and child abuse can be understood as a reflection of an increased federal desire for control over these matters. The ACC’s involvement may deliver some practical benefits, such as the development of a clearer understanding of the barriers that exist to effective policing and prosecution in this context. In addition, it may be that the designation of Indigenous violence and child abuse as a matter of “national significance” warranting the ACC’s attention is an important symbolic statement, keeping these issues on the national agenda. The ACC may simply present as the most convenient policing agency

21 See, for example, Bryant and Willis, n 20, pp 27-63. See also Memmott P, Stacey R, Chambers C and Keys C, *Violence in Indigenous Communities* (Attorney-General’s Department, 2001).


23 Willis, n 22 at 4-5.

24 See, for example, ACC Act, s 29A


available to government to sidestep the various practical policing problems that arise from Australia’s federal structure. Nonetheless, given the ACC’s traditional role in the landscape of law enforcement in Australia and its extensive investigative powers, close attention should continue to be paid to this new and extraordinary federal role in policing Indigenous violence and child abuse, and should not distract from the need to improve investigative performance at the State and Territory level.

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