Law Council
OF AUSTRALIA

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Senator Raff Ciccone
Chair, Parliamentary Joint Committee on Intelligence and Security
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Dear Chair

Questions on Notice: Australian Criminal Intelligence Commission reform package

Thank you for the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security (the **Committee**) at its 3 August 2026 public hearing into the Australian Criminal Intelligence Commission (**ACIC**) reform package 2026. We appreciate the Committee's close engagement with the Law Council's views at the hearing.

The Law Council took two questions on notice during the public hearing.

Question 1

Mr Wallace: In relation to your recommendations, can you identify the specific harm or the systemic failure that the bill would cause, rather than the broad principles that you have problems with?

We thank the Deputy Chair for his question and his expression of appreciation for the work that the Law Council's volunteer advisory committee members undertake.

The Australian Criminal Intelligence Commission Bill 2026 (Cth) (**ACIC Bill**) spans 279 pages and contains 275 provisions. It is lengthy and complex legislation. Aspects of the ACIC Bill—especially its definitions, processes, and procedures—raise both systemic and specific concerns. These are necessarily interlinked. Our submission details how ambiguities in key concepts, when combined with inadequately drafted safeguards may risk the misuse of significantly intrusive powers.

Our submission addresses three overarching concerns with the ACIC Bill in its current form. First, in our view the powers contained in the ACIC Bill have the potential to be accessed too easily, applied to too many people, and applied for reasons too distant from what is conventionally understood as serious and organised crime. Second, questioning by the ACIC can undermine the fairness of a future criminal prosecution. Third, while the

ACIC Bill includes a range of safeguards, we feel that the included measures do not adequately address the misuse or misconduct described in the case law.

Our recommendations make meaningful and constructive suggestions to improve the ACIC Bill's drafting in refining key definitions, supporting the administration of an adversarial criminal justice system, and improving safeguards. Our submission addresses systemic and specific issues. The response that follows highlights several specific harms and systemic risks that our recommendations seek to address.

Specific examples of harms

In preparing our submission, we considered documented examples of problematic conduct by the ACIC and other bodies that exercise similarly intrusive powers. We paid closest attention to cases resolved by the High Court where significant misconduct or misuse of the powers of the ACIC (or bodies with similar powers) were substantiated. We read the provisions of the ACIC Bill against the facts and circumstances described in those cases. The cases that we found most instructive in preparing our submission are:

- *Hammond v Commonwealth* (1982) 152 CLR 188;
- *X7 v Australian Crime Commission* (2013) 248 CLR 92;
- *Lee v New South Wales Crime Commission* (2013) 251 CLR 196;
- *Lee v The Queen* (2014) 253 CLR 455; and
- *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 (***Strickland***).

There are significant advantages in grounding our recommendations and analysis in circumstances drawn from decisions of the High Court. The circumstances that gave rise to the cases listed above ultimately gave rise to significant consequences: criminal prosecutions were stayed, coercive powers were found to have harmed the rights of individuals and damaged the legitimacy and standing of the organisations involved, and additional expense was incurred by the Commonwealth.

The facts of *Strickland*, as set out at [18]–[51] of the judgment of Kiefel CJ and Bell and Nettle JJ, offer a clear and substantiated example of the types of misuse and misconduct we are most concerned by. In brief, after the appellants refused to participate in interviews under caution with the Australian Federal Police (**AFP**), the AFP requested that the Australian Crime Commission (as the agency now known as the ACIC was then named) examine the appellants under compulsion, despite no clear authority for that examination being in place. The examiner was found to be aware that the appellants may be charged, and was found not have to exercised independent judgment and, in the description of the primary judge, merely "rubber stamped" the AFP request.[1] Further, when the examination took place, AFP officers involved in their criminal investigation "watched the examinations from a nearby room".[2] Despite the presence of provisions providing for non-disclosure orders in circumstances where persons might be charged, the examiner was found to have "allowed the product of the examinations to be distributed to all AFP officers involved in the

1 *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, 348 [53] (Kiefel CJ, Bell and Nettle JJ).
2 Ibid 348 [50].

AFP investigation and the [Commonwealth Director of Public Prosecutions (**CDPP**)] without any restriction".[3] Kiefel CJ and Bell and Nettle JJ ultimately concluded that:

> *To condone such grossly negligent disregard of statutory protections and fundamental rights as occurred in these cases would be to encourage further negligent infractions of … strict statutory requirements … and thus of the common law right to silence. In effect, it would be to imply that, short of intentional or advertent reckless disregard of the ACC Act, ACC officers might proceed however negligently in violation of the Act and the protections which it expressly affords to examinees, and therefore however much in violation of a suspect's common law right to silence, confident in the knowledge that this Court would wave through the results on condition only that there be a change of prosecutorial team and such trial directions as it might be hoped would ameliorate the prejudice thereby caused to the persons whose statutory and common law rights have thus been abused. To allow the prosecutions of the appellants to proceed in these cases would so much bring the administration of justice into disrepute that the prosecutions should be stayed.*[4]

Our view is that the draft legislation does not sufficiently guard against the kind of misuse of powers described in that case and many of our recommendations are designed to ensure that similar conduct is not possible under reformed legislation for the ACIC. It is our view that the ACIC Bill should be drafted in a manner that takes clear and identifiable steps to comprehensively prevent such circumstances from recurring in future. We are concerned that the ACIC Bill is not as comprehensive as it might be, given that *Strickland* demonstrates clearly that legislative prohibitions on certain conduct are necessary but not sufficient to guard against this kind of misuse.

Recommendations 5–9, 11–18 and 20 respond to the type of misconduct exemplified by the facts of *Strickland*. In preparing these recommendations we attempted to make practical suggestions to render the circumstances described in *Strickland* significantly more difficult to engineer. Specifically, we draw attention to the following examples of issues that arose in *Strickland* and that are not comprehensively addressed in the ACIC Bill:

- the definition of "combat" in the ACIC Bill does not preclude using ACIC powers primarily for the purpose of supporting gathering evidence under compulsion to support investigations and prosecutions: recommendation 5;
- the definition of imminent charge (which enlivens post-charge protections) can still be gamed by examiners not knowing or not seeking to ascertain whether a charge is imminent: recommendations 6 and 17;
- the decision to release information to prosecutors resides with the ACIC unless there is knowledge of post-charge status (see above): recommendation 17;
- the test for the attachment of non-disclosure notations does not contain an objective element. This means decisions are based on whether the examiner is satisfied that circumstances exist, but they are not required to inquire or ground their satisfaction on matters that a person in the position of the examiner would consider reasonable: recommendation 18;

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3 Ibid 364 [94].
4 Ibid 370-1 [107].

- there is no requirement to vary directions where examiners or the Director-General become aware of changes in criminal proceeding status: recommendation 19;
- there is no requirement that information sharing with other agencies be assessed as reasonably appropriate or necessary: recommendation 7;
- there is no express provision in the ACIC Bill that specifies that examiners possess and should exercise independence in decision making from other parts of the ACIC: recommendation 14; and
- provisions concerning who is allowed to be present at an examination do not expressly exclude investigators or prosecutors in a relevant criminal proceeding nor does section 72 of the ACIC Bill expressly exclude remote participation or monitoring of an examination: recommendation 20.

Systemic concerns

A theme of the Law Council's evidence, both at the hearing and through our submission, is that, while issues may arise with the drafting of specific provisions in the ACIC Bill, there are also systemic issues that arise from how those provisions operate together. To address these concerns, our submission makes further practical recommendations that would improve the safeguards contained in the ACIC Bill, protect against misuse, and support compliance with the rule of law. We consider these factors to be systemic matters, which in this context we mean matters that address both the systems (including enabling definitions, institutional design principles, as well as processes and procedures) proposed by the ACIC Bill and how the ACIC interacts with principles that underpin the criminal justice system, including the rule of law.

Our aim is to ensure that a reconstituted ACIC might be directed to the public policy goal of gathering intelligence about serious, organised crime in a manner that is both appropriate but limited to what is necessary to achieve that important outcome for the community. When we seek to address specific concerns with the drafting, this is informed by examples drawn from case law and the practical experience of members of our advisory committees.

The ACIC Bill, which would establish a criminal intelligence agency without ensuring a clear and distinct boundary between criminal intelligence and law enforcement, raises complex rule of law questions. Our recommendations are guided by our *Policy Statement on Rule of Law Principles*.[5] Relevant principles are:

- that the law must be both readily known and available, and certain and clear;
- that all people are entitled to the presumption of innocence and to a fair and public trial;
- that everyone should have access to competent and independent legal advice; and
- that the Executive should be subject to the law and any action undertaken by the Executive should be authorised by law.[6]

In his oral evidence to the Committee, Mr Game SC offered a summary of our systemic concerns with the drafting of the legislation. First, he explained the consequences to the

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5 Law Council of Australia, *Rule of Law Principles* (Policy Statement, March 2011).
6 See ibid.

administration of justice where there is a failure to sufficiently distinguish the activities and purposes of "criminal intelligence" from traditional law enforcement and prosecution with certainty and precision. Second, Mr Game's evidence also accurately summarised a theme of our submission—that the drafting of some provisions of the ACIC Bill should be tightened to avoid ambiguities and opportunities for misuse or misconduct. While we do not go so far as to say that these concerns raise concerns of "systemic failure" in the drafting of the ACIC Bill, we recommend that the legislative drafting be refined to bring the proposed systems, institutional design, and protections better into conformity with the rule of law.

Recommendations 1–4, 10, 19, and 21–29 in our primary submission respond to systemic matters that arise due to the drafting of definitions, processes, and procedures.

In our view, the powers contained in the ACIC Bill can be accessed too easily, applied to too many people, and for reasons too distant from what is conventionally understood as serious and organised crime. A key aspect of this problem is the scope of threshold definitions in the ACIC Bill, in particular recommendations 1–4 in our primary submission that respond to what we perceive as shortcomings with the definition of "serious and organised crime". This provision reads:

> ***10 Meaning of serious and organised crime***
>
> *(1) For the purposes of this Act,* ***serious and organised crime*** *means a federal offence that may have been committed, may presently be being committed, or may in future be committed, in circumstances involving:*
>
> *(a) 2 or more offenders; and*
>
> *(b) substantial planning or organisation; and*
>
> *(c) the use of sophisticated methods and techniques.*
>
> *(2) A* ***federal offence*** *is an offence:*
>
> *(a) against a law of the Commonwealth; or*
>
> *(b) against a law of a State that has a federal aspect;*
>
> *that is:*
>
> *(c) punishable by imprisonment for a period of 2 years or more; or*
>
> *(d) prescribed by the rules.*

Recommendation 1—"a federal offence that may have been committed, may presently be being committed, or may in future be committed"

The definition of "serious and organised crime" can be enlivened by mere speculation about offending even where the conduct or persons subject to intelligence collection are engaged in lawful and benign conduct, because subsection (1) encompasses an "offence that may have been committed, may presently be being committed, or may in future be committed".

We remain concerned that the current drafting has the potential to form the basis for exercising significant powers based on the mere speculative possibility that a crime may have been committed, or might be committed, without any requirement for a threshold such as a reasonable belief. In our view, the current drafting collapses empirical description and conjecture about past, present, or future activity without the inclusion of any thresholds of certainty.

Recommendation 2—"substantial planning or organisation"

The drafting of paragraph 10(1)(b) refers to "substantial planning or organisation", where substantial refers only to the quantity of the effort rather than any qualities attached to that planning or organisation. The Explanatory Memorandum notes the provision:

> *… is not intended to capture opportunistic criminal offending but the types of insidious and systemic criminality that causes widespread and detrimental harm to the Australian community and economy.*[7]

The provision may be satisfied by substantial ineffectual or inconsequential planning, but risks not necessarily capturing those activities that are made significantly easier to organise through communications technologies, such as "crime as a service". The point here is that the drafting needs to be considered if it is possible to see inconsequential effort enliven a limb of the definition, but swift but consequential organisation not necessarily falling within the definition. Recommendation 2 proposes a materiality threshold be included to try and resolve this issue.

Recommendation 3—"sophisticated methods and techniques"

Whether a method or technique can be described as "sophisticated" (as referred to in paragraph 10(1)(c)) is not defined in the ACIC Bill, and therefore the ordinary meaning applies. We are concerned that this approach leaves the door open to a broad application of this provision: for example, by classifying routine technologies—such as encrypted messaging or the use of a large language model—as examples of "sophisticated" techniques and methods. While the end user experience of certain technologies or communication platforms may appear straightforward, the underlying stack of technologies and mathematics are not.

The issue here is not necessarily how particular technologies are characterised, but to draw attention to an ambiguity about the quality of the definition as a functional threshold for accessing extraordinary powers. If it is not possible to reliably predict what kinds of activity might meet an assessment of "sophistication", this suggests improvement is required. Our view is that the current drafting functions more effectively to enable access to the intrusive powers of the ACIC rather than providing a clear and certain constraint threshold where the criminal offending is itself sophisticated.

Recommendation 4—the seriousness of offences

The ACIC Bill currently anchors the federal offence component of the definition of "serious and organised crime" in Commonwealth, or State and Territory offences punishable by a maximum penalty of 2 years' imprisonment. As noted in our primary submission, at [52]–[53], this is a lower threshold than the current legislation (which is calibrated at a maximum penalty of 3 years' imprisonment). The Independent National Security Legislation Monitor has recommended that significantly intrusive powers should not be enlivened by "relatively minor offending",[8] and should only be available for offences with a maximum penalty of 5 years' imprisonment.[9] We agree. Such intrusive powers should not

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7 Explanatory Memorandum, Australian Criminal Intelligence Commission Bill 2026 (Cth), [201]

8 Jake Blight, Data Disruption, *Network Activity and Account Takeover Powers: Review of Surveillance Legislation Amendment* (Identify and Disrupt) Act 2021, Independent National Security Legislation Monitor (Report, 1 September 2025) [10.18].

9 Ibid [10.22].

be accessible to intelligence collection concerning offences deemed by the Parliament to have the equivalent gravity to opening a post box without permission.[10] These powers should not be extendable to other less serious offences by regulation.

Recalling the expansive definition of when a federal offence "may occur", the effect of anchoring intrusive powers on minor offending operates to lower the threshold at which these intrusive powers can be exercised. The current definition is sufficiently expansive to enable the use of these powers to investigate serious criminal offending because conduct may be preparatory to more serious offences without necessarily amounting to those offences. The absence of effective thresholds that constrain the use of extraordinary powers to investigate minor offences is concerning. The ACIC Bill's definition of serious and organised crime must be anchored in serious criminal offending to justify the extraordinary powers that are enlivened on satisfaction of that definition.

Hypothetical scenario

The following scenario draws together issues raised in our submission about the ACIC's powers, the risks such powers pose to traditional criminal justice processes, and the capacity for misuse that accompanies such powers when definitions and thresholds are not sufficiently limited. Section 122.4 of the Criminal Code prohibits the disclosure of information by current and former Commonwealth officers where a duty of non-disclosure is present. This offence is punishable by imprisonment for a maximum period of 2 years. Consider a scenario concerning a story in a newspaper revealing potential misconduct within a Commonwealth Department.

Because the information contained in the article was confidential, police officers suspect that a Commonwealth official may have disclosed that information to the journalist using an encrypted medium. However, there is no evidence that this suspected communication took place at all. The Minister issues an authorisation to use the ACIC's coercive powers to protect the security of Commonwealth information from organised criminals seeking to subvert the Government. The authorisation states that investigating encrypted leaks of sensitive materials is in the public interest as a form of sophisticated criminality because leaks undermine the integrity of the confidential information held by the Commonwealth. The authorisation also states that it is in the public interest to collect intelligence about possible communications concealed in ways that impede Commonwealth policing methods for investigating serious and organised crime—whether those communications may have occurred in the past, may be occurring now, or may occur in future.

The police seek information about the disclosure. The police interview the journalist who published the story, but the journalist refuses to answer questions about their source or reporting methods beyond "no comment". The police then approach an examiner, who was a staff member of the ACIC until the day of their appointment as an examiner, and request the use of coercive powers against the journalist who published the story to supplement their investigations. The examiner asks no questions about any intentions to charge the journalist with a criminal offence. The examiner agrees with the police assessment and proceeds to issue a summons to the journalist requiring them to attend an examination, and a notice to produce all computers and phones used by the journalist in the past 12 months. The examiner chooses to have the police investigating officers present at the examination, and fails to identify them as such during the examination. In

[10] See *Criminal Code Act 1995* (Cth) s 471.1(2).

addition to requiring the journalist to answer questions and provide the items listed in the notice to produce, the examiner makes an assistance order to facilitate access to password-protected devices and accounts. The examiner applies the less onerous protections that apply where an examination is understood to be "pre-charge".[11]

The journalist is examined under oath, where they face contempt of the ACIC or criminal proceedings for failure to comply with the requirements of the notice to produce (including providing assistance to access devices and information) or fail to answer questions truthfully about their sources and methods. Their privilege against self-incrimination has been abrogated. The journalist's chosen legal representative is the newspaper's in-house counsel. The examiner realises on the day that it may be advantageous to examine the in-house counsel in future and excludes them from the examination because representing the journalist may prejudice that future examination. They do not disclose the reason for exclusion. The journalist engages replacement legal representation an hour before the examination commences, however that representative is less prepared than the in-house counsel would have been to represent their new client.

The ACIC can use information found on devices and information given in response to questions under examination to find subsequent evidence to advance a prosecution for conspiracy to disclose Commonwealth information against the journalist, as well as information concerning a secrecy offence. What they find through an examination may not be directly admissible as evidence, but questioning under compulsion where the privilege against self-incrimination has been abrogated means the journalist's strategy for defending against any future criminal charges is made considerably more difficult. At the same time, any information obtained under examination makes the task of investigating and substantiating the elements of those criminal offences easier, by providing additional information to the police and prosecution service. The hearing is subject to non-disclosure obligations so that the journalist is not permitted to disclose that the ACIC sought information concerning a source within the public service.

Due to their presence at the examination and on receipt of information obtained from produced devices, police are then able to obtain derivative information. The CDPP are subsequently made aware of that evidence and charge the source under section 122.4 and the journalist with conspiracy to commit an offence under section 122.4.

We question whether such a scenario should be permissible. Greater refinement of the ACIC Bill is needed to ensure that such powers remain more directly focused on types of serious offending that risk causing significant harms and adverse economic consequences to the Australian community.

[11] Australian Criminal Intelligence Commission Bill 2026 (Cth) s 12. See also ss 119 and 120.

Question 2

Senator Ciccone: [I]n terms of what you recommend to disqualify the examiner, you recommend consideration be given to a disqualification provision. Can you expand?

Recommendation 14 of our Submission proposes improvements to the appointment and eligibility provisions concerning examiners. The Chair's question specifically concerns the sub-recommendation that "consideration should be given to including a disqualification provision for examiners". The Law Council undertook to provide additional detail to the Committee as, during oral evidence, we did not have the full text of a relevant comparator provision from the *Australian Security Intelligence Organisation 1979* (Cth) Act (**ASIO Act**) to hand.

Our submission recommends that the qualification provision located at section 251 of the ACIC Bill should be revisited and the standards should be raised to match the qualification requirements of the equivalent position of examiner for the purposes of Division 3 of Part III of the ASIO Act. Under the ASIO Act, the equivalent functions of the examiner are performed by a "prescribed authority". The qualification and appointment provisions for prescribed authorities are set out in section 34AD of the ASIO Act.

The relevant disqualification or ineligibility provision is located in subsection 34AD(2) of the ASIO Act:

> *(2) A person is not eligible for appointment* [as a prescribed authority] *under subsection (1) if the person is:*
>
> *(a) an ASIO employee or an ASIO affiliate; or*
>
> *(b) the Director-General; or*
>
> *(c) an AGS lawyer (within the meaning of the Judiciary Act 1903); or*
>
> *(d) an IGIS official; or*
>
> *(e) a person referred to in subsection 6(1) of the Australian Federal Police Act 1979; or*
>
> *(f) a staff member of a law enforcement agency (other than the Australian Federal Police); or*
>
> *(g) a staff member of an intelligence or security agency.*

Our view is that this provision may provide an appropriate model for designing an appropriate disqualification provision, adjusted to the circumstances of the ACIC. For example, employees, contractors, and secondees of the ACIC should be disqualified from appointment as an examiner. So, too, should the Director-General of the ACIC. We suggest that it may also be appropriate to retain the list of roles that disentitle a person to be appointed as an examiner in paragraphs 34AD(2)(c)–(g) of the ASIO Act.

While subsection 34AD(2) of the ASIO Act provides a starting point for considering what roles ought to give rise to disentitlement for appointment as an examiner, there is scope to improve the quality of the protections provided by a disentitlement provision by extending its operation to persons who had occupied such a position within a specified time frame, such as within the previous 3 years. This would avoid a potential mischief where a

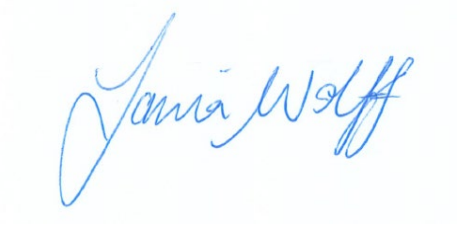
person—who would otherwise be disqualified—resigns from a position that gives rise to ineligibility one day, only to be appointed as an examiner the following day.

Our recommendation 14 is designed to strengthen the independence of the office of the examiner. Clear disqualification or ineligibility provisions improve public trust in the integrity of coercive powers frameworks by disqualifying or rendering ineligible for appointment such persons who are engaged in institutional relationships that may give rise to real or perceived conflicts of interest. Such conflicts arise from the relationship between the ACIC and related entities.

While appointment as a statutory office holder is an improvement over ministerial appointment, we caution that this alone is not a panacea for independence concerns. For example, real or perceived conflicts of interest that arise from professional or institutional relationships cannot be practically addressed through changes to the method of appointment as an examiner but must be addressed by refining the qualification and disqualification provisions.

Thank you once again for the opportunity to respond to this inquiry. Should you wish to discuss this response, please contact Dr Thomas Andrews, Senior Policy Lawyer [redacted]

Yours sincerely



Tania Wolff
President