

DIRECTOR'S CHAMBERS



DATE

29 May, 2015

Sophie Dunstone
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra
ACT

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015

Thank you for the opportunity to comment on these important amendments. I will confine my comments to the *Australian Crime Commission Act 2002* (the Act). The recent line of authority from the High Court in the decisions of *X7 v Australian Crime Commission* (2013) 248 CLR 92, *R v Seller and McCarthy* (2013) FLR 155 and *Lee v The Queen* (2014) 88 ALJR 656, has created a number of challenges for prosecuting agencies from both a legal and a cost perspective including:

- an increase in the number of applications to the court to stay the proceedings
- the need to assign fresh prosecution teams to cases and
- the high degree of uncertainty as to the law which has had a significant impact on prosecutorial decision making.

Finding a legislative solution to the competing issues for investigating agencies, prosecutors and accused persons raised by this line of authority is without doubt a complex task and any legislative changes are likely to be scrutinised further by the High Court. From this starting point the proposed legislation is to be commended for providing a high level of clarity as to the powers of the Australian Crime Commission (ACC) and the safeguards against the use of those powers that would prejudice a fair trial.

Against this I have some reservations about the drafters approach of expressly flagging in the amendments the provisions that may not survive a legal challenge, for instance clauses 24A (3), 25A (6B), 25C (3) and 25E (5). On one view this approach emphasises the uncertainty in the law by highlighting the parts of the Act that may be construed by the courts as unlawful. Accordingly the law in this respect will remain uncertain until each part is challenged. I can appreciate that it is desirable for the other provisions to remain in force while the contentious parts are disputed. Nevertheless, I am concerned that while this uncertainty remains prosecution agencies will continue to have to grapple with the issues I have referred to above.

One other issue that could be considered inclusion in the Bill is a provision excluding investigators of an offence from an examination about the offence. While it is of paramount

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importance that the prosecutor is quarantined from testimony and information arising from a compulsory examination, this safeguard becomes artificial if an investigator involved in the case is present at the examination. I note that the New South Wales *Crime Commission Act 2012* in section 21A (3) expressly provides that the investigator must not be present whereas s25A of the Act is silent on the presence of investigators.

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions