

Chapter 2

Key issues

2.1 A number of key issues were raised in submissions during the inquiry. While the committee did not receive any evidence on the majority of the amendments, the committee has considered each schedule of the bill.

Mutual assistance

2.2 Schedule 1 of the bill seeks to enable the government to provide assistance in criminal matters to the International Criminal Court (ICC) and international war crimes tribunals (IWCT) in an equivalent manner to the current assistance it provides to foreign countries in criminal law matters under existing mutual assistance legislation. The Law Council of Australia (LCA) did not raise any objections to the amendment itself, observing that it '...merely extends the availability of information to bodies like ICC and IWCTs obtained through existing processes contained in Australian law'.¹

2.3 Schedule 2 of the bill seeks to increase consistency between the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (the MA Act) and the *Proceeds of Crime Act 2002* (Cth) (the POCA). The LCA did not note any issues with the amendment, however, they reiterated general concerns with the POCA, including: the unavailability of restrained assets to fund legal costs, the use of coercive examinations powers, and the standard of proof required to restrain and seize assets.²

2.4 Schedule 3 of the bill amends the *Extradition Act 1988* (Cth) to ensure that magistrates and judges have sufficient powers to make orders necessary for the conduct of extradition proceedings. No concerns were raised with this aspect of the bill by submitters.

2.5 Schedule 4 of the bill amends the *Foreign Evidence Act 1994* (Cth) (FE Act), extending the application of the FE Act to certain criminal (and related civil) proceedings in the external territories and Jervis Bay Territory. No concerns were raised with this aspect of the bill by submitters.

Vulnerable witnesses

2.6 Schedule 5 of the bill clarifies the offence of publishing any material that identifies, or is likely to identify, vulnerable witnesses or complainants without leave of the court. The amendment ensures that the identification of a child complainant, who is not a witness in the proceedings, will now also be an offence. The amendment is supported by the LCA, which notes that the amendment will be of benefit in cases

1 Law Council of Australia (LCA), *Submission 5*, p. 8.

2 LCA, *Submission 5*, p. 8.

such as '...serious sexual exploitation, human trafficking, slavery and slavery-like practices such as forced marriage proceedings'.³

2.7 Anti-Slavery Australia (ASA) also supports the proposed amendments in Schedule 5 to improve protections for vulnerable witnesses and complainants. According to the ASA:

...the safety of vulnerable witnesses and complainants must be ensured so that human trafficking, slavery and slavery-like offences can be successfully prosecuted. Victims and witnesses are often reluctant to give evidence, as they or their families may have been subjected to, or threatened with violence.⁴

2.8 The Commonwealth Director of Public Prosecutions (CDPP) shares the view that it is appropriate for vulnerable witnesses to be given protections and support in proceedings before the courts.⁵

Slavery-like offences

2.9 Schedule 6 of the bill expands the definition of debt bondage to include the situation where one person's '...personal services are pledged by another person, as security for the other person's debt'.⁶ Currently, a person that pledges the services of another person under their control can be considered to be in a condition of debt bondage, however, the person whose services are pledged cannot.

2.10 The bill also moves the offence of debt bondage from Division 271 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) to Division 270. This will allow it to be recognised as one of the slavery-like offences criminalised under Division 270. Further, the bill expands the evidence that can be taken into account by a trier of fact to include, for instance, evidence such as personal circumstances in '...determining whether a person was incapable of understanding the nature and effect of a marriage ceremony, and whether a person was significantly deprived of personal freedom'.⁷

2.11 ASA supports the proposed amendments. ASA explain in their submission that debt bondage remains the most common form of forced labour and that '...women and children are particularly vulnerable to this form of exploitation, as they may be bonded as a result of the debt of an authoritative member of the family'.⁸ ASA consider that '...the extension of the definition of debt bondage in the Criminal Code will ensure that Australia has the tools to combat this grave abuse of human rights'.⁹

3 LCA, *Submission 5*, p. 8.

4 ASA, *Submission 2*, p. 2.

5 ASA, *Submission 2*, p. 3.

6 Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016, Explanatory Memorandum (EM), p. 29.

7 EM, p. 29.

8 Anti-Slavery Australia (ASA), *Submission 2*, p. 4.

9 ASA, *Submission 2*, p. 4.

2.12 The Uniting Church in Australia strongly supports the amendments to expand the definition of debt bondage to '...cover the condition of a person whose personal services are pledged by another person as security for the other person's debt'.¹⁰

Relevant evidence

2.13 Schedule 6 also seeks to expand the application of the existing relevant evidence provision in Division 270 of the Criminal Code. The amendment will enable a trier of fact to consider relevant evidence (for example, personal circumstances) in deciding whether a person was capable of understanding the nature and effect of a marriage ceremony, and whether a person was significantly deprived of personal freedom.

2.14 The CDPP add that '...[g]iven the nature of the offence, it is sensible and appropriate to include debt bondage as a slavery-like offence'.¹¹ The CDPP shares the view that it will be helpful to expand the categories of relevant evidence which the trier of fact may consider:

There are many factual situations in which it will be highly relevant to consider the economic or personal relationship between the alleged victim and another person (apart from the alleged offender). The amendments ensure that a proper focus is given to an assessment of the impact of the forces acting on the victim. The amendments remove artificial restrictions on the class of persons exerting those forces as well as broadening the circumstances in which the relevant evidence factors may be considered.¹²

2.15 The LCA also support the expanded application of the existing relevant evidence provision.¹³

War Crimes Act

2.16 Schedule 7 of the bill will 'streamline' the reporting requirements the *War Crimes Act 1945* (Cth). If the amendment is passed, the Attorney-General would only be '...required to report to Parliament on the operation of the Act if an investigation or prosecution is commenced or carried out in the preceding financial year'.¹⁴ Currently, the Attorney-General must report annually to the Parliament on the operation of the Act. No issues were raised by submitters regarding this aspect of the bill.

AFP Act amendment

Views of the AFPA

2.17 Schedule 8 of the bill amends section 30A(2) of the *Australian Federal Police Act 1974* (Cth) to extend the period of time that the Australian Federal Police (AFP)

10 Uniting Church in Australia (UCA), *Submission 3*, p. 3.

11 Commonwealth Director of Public Prosecutions (CDPP), *Submission 4*, p. 5.

12 CDPP, *Submission 4*, p. 5.

13 LCA, *Submission 5*, pp. 10–11.

14 EM, p. 30.

Commissioner is authorised to postpone an employee's date of resignation in cases that involve allegations of serious misconduct or corruption, for example, where there is an ongoing investigation into the employee's conduct. The power of the AFP Commissioner to postpone an employee's date of resignation is currently 90 days; the amendment seeks to extend this time period to 180 days.

2.18 According to the Explanatory Memorandum (EM), the government considers it appropriate to increase the length of time available to ensure that an internal investigation can be finalised before an employee resigns. This is because if the AFP has not made a decision about termination when they resign, their record will not reflect the findings of the investigation.

2.19 According to the EM, the government considers that the amendment is:

...an appropriate and reasonable extension to better support the AFP's integrity framework. Information about termination of employment for serious misconduct is critical to mitigate integrity and security risks, particularly given the breadth of government agencies that are involved in combating crime. The amendment also contributes to broader public sector resilience to the 'insider threat'.¹⁵

2.20 The AFP and the Australian Federal Police Association (AFPA) expressed opposing views about the amendment in their submissions. The AFPA submitted that there is '...no practical justification for the existence of this provision, and certainly not for its increase to 180 days'.¹⁶ According to the AFPA, for employees that are the subject of serious allegations of misconduct, it is 'not uncommon for employees to be suspended for up to two years'.¹⁷

2.21 The AFPA raise questions about the proposed amendment on several grounds in their submission. In their view, there is a lack of evidence regarding:

...why the existing provision that allows the Commissioner to extend an employee's resignation date by 90 days is inadequate, including any data or specific cases. There is no information, for example, on the number of occasions the existing power has been exercised by the Commissioner.¹⁸

2.22 The AFPA note that, in their view, the amendment should not be made because:

- the extension of time is a resource issue rather than an evidence-based improvement;
- the AFP can continue to investigate matters after an employee has resigned;
- adverse findings against an employee is only one of a number of ways of notifying other agencies about security concerns; and

15 EM, p. 31.

16 Australian Federal Police Association (AFPA), *Submission 1*, p. 2.

17 AFPA, *Submission 1*, p. 2–3.

18 AFPA, *Submission 1*, p. 2.

-
- a criminal investigation can be conducted if an issue is particularly serious.¹⁹

2.23 The AFPA highlighted the personal impact they believe the amendment will have on affected employees. For example, affected individuals may '...lose touch with their colleagues, lose skills and proficiencies, and many consequently suffer from mental health issues'.²⁰ It may also keep '...them out of the workplace for longer periods and potentially prevent[s] them from obtaining other employment or opportunities to move on with their lives'.²¹

Views of the AFP

2.24 The AFP explain in their submission that there have been instances where '...employees under investigation for serious misconduct attempt to resign before their employment can be terminated' and that this is problematic because when a person who is subject to an investigation resigns, the AFP '...no longer has the power to compel information from them'.²²

2.25 The AFP state in their submission that over the past three years, six staff members resigned while an investigation for serious misconduct was ongoing; and three resigned after an investigation had established that serious misconduct had occurred, but before their employment was terminated.²³

2.26 A key rationale for the amendment from the AFP's perspective is maintaining security across Australian Government agencies. If an employee resigns before a finding is made against them and their employment is terminated, future employers may not become aware of their misconduct as an AFP employee:

It is critical that employees who engage in misconduct, including corruption, are not re-employed by other security agencies where they may continue to pose a security and integrity risk. Many government agencies require job applicants to declare the reason for leaving their previous place of employment.²⁴

2.27 The AFP explain in their submission why more than 90 days may be required to properly conduct an investigation of this nature:

...allegations of serious misconduct that prima facie raise issues of employment suitability necessitate more probative evidence and an elevated standard of proof. In particular, more time may be needed...to determine the extent to which the behaviour under investigation has involved other AFP appointees and may be indicative of broader organisational issues.²⁵

19 AFPA, *Submission 1*, p. 3.

20 AFPA, *Submission 1*, p. 3.

21 AFPA, *Submission 1*, p. 4.

22 Australian Federal Police (AFP), *Submission 6*, p. 7.

23 AFP, *Submission 6*, p. 6.

24 AFP, *Submission 6*, p. 8.

25 AFP, *Submission 6*, p. 8.

2.28 The AFP also respond to statements made by the AFPA in their submission, for example, that there are options other than recording an adverse finding on an employee's record that serve to notify other government agencies of security concerns regarding a former employee. According to the AFP, secrecy provisions in the AFP Act '...severely limit the ability of the AFP to disclose information provided...during an investigation into misconduct'.²⁶ Further, if an individual's employment is terminated, the AFP can disclose that fact to other agencies that may be considering employing the individual.²⁷

AFP response to questions on notice

2.29 Prior to the reporting date for this inquiry, questions on notice were provided to the AFP requesting, among other details, quantitative data on the number of employees that resigned while an investigation that involved allegations of serious misconduct or corruption was ongoing. This data is important in terms of understanding the scope of the issue and whether the amendments are necessary and proportionate.

2.30 The AFP initially told the committee that they were unable to provide this data because of the time that would be required to collate it; stating that this would take several weeks:

In order to respond to the Committee's questions on the number of employees that have resigned before the investigation concluded and the number of category three investigations which were unable to be completed due to the resignation of the employee under investigation, a manual search of individual case files and cross checking of HR records would be required. This would take a number of weeks to complete.²⁸

2.31 To allow for this, the committee sought the agreement of the Senate to extend the reporting date for the inquiry by a month to 23 March 2017, and provided further questions on notice to the AFP. The AFP responded after several weeks that they did not have the resources to collate this data and were still unable to answers the questions on notice that were put to them:

...the AFP is unable to provide exact statistics regarding Category 3 investigations in advance of the Committee's reporting deadline of 23 March. This is due to the way in which PRS investigations are recorded and documented in AFP systems. Information about each PRS investigation is recorded in a discrete file on the Police Real-time Online Management Information System (PROMIS). The recording of investigations in PROMIS reflects operational requirements, and does not facilitate systemic review of cases.²⁹

26 AFP, *Submission 6*, p. 8.

27 AFP, *Submission 6*, p. 8.

28 AFP, *Answers to Questions on Notice*, received 14 February 2017.

29 Assistant Commissioner Ray Johnson, AFP, correspondence to the Secretary of the Senate Legal and Constitutional Affairs Legislation Committee, 8 March 2017.

Financial intelligence

2.32 Schedule 9 will enable the Australian Charities and Not-for-profits Commission (ACNC) to have direct access to financial intelligence collected and analysed by AUSTRAC. This will ensure that the sector has access to financial intelligence as will help ensure it is not an area of the financial system that can be taken advantage of by those involved organised crime. The Uniting Church in Australia supports this measure, submitting that it is

...important the ACNC is able to maintain confidence in Australian charities and not-for-profits... and part of that role is not to register charities where key personnel in the charity may have been involved in money laundering or other financial crimes. Having access to AUSTRAC data will allow the ACNC to conduct more thorough due diligence into the registration of charities and not-for-profits.³⁰

2.33 A further aspect of Schedule 9 is to allow travellers who are taking \$10,000 or more out of the country to lodge reports online rather than in written form. There were no issues raised about these aspects of the bill in the submissions that were received.

Australian Crime Commission

2.34 Schedule 10 seeks to amend the *Australian Crime Commission Act 2002* (Cth) to clarify the use of the alternative names and acronyms for the Australian Crime Commission (ACC), allowing it to be referred to as the Australian Criminal Intelligence Commission (ACIC). There were no issues raised about this aspect of the bill in the submissions that were received by the committee.

AusCheck amendments

2.35 Schedule 11 seeks to amend the *AusCheck Act 2007* (Cth) to enable background checks to be conducted for major national events. AusCheck currently conducts background checking services for the Aviation Security Identification Card, Maritime Security Identification Card, and National Health Security check systems.³¹ Existing safeguards, such as those relating to privacy and non-disclosure will remain in place, and no issues were raised about this aspect of the bill in submissions received by the committee.

Committee view

2.36 The committee notes that the vast majority of amendments made by this bill were welcomed by submitters. However, the committee also notes that the provisions of this bill that relate to AFP staff under investigation for serious misconduct or corruption have raised some concerns.

30 UCA, *Submission 3*, p. 3.

31 The Attorney-General's Department, *AusCheck*, <https://www.ag.gov.au/CrimeAndCorruption/AusCheck/Pages/default.aspx> (accessed 7 February 2017).

2.37 The committee has formed the view that some refinement is required to the deferral of resignation scheme that is operable where AFP personnel are under investigation for serious misconduct or corruption. Such refinement should include extending the capacity of the Commissioner or delegate to extend the deferral period where such extension is justified, and the creation of a defined statutory review mechanism.

2.38 The committee is also of the view that the Explanatory Memorandum to the bill should clarify the justification for, and purpose of, the proposed amendments to the scheme.

Recommendation 1

2.39 The committee recommends that after an original 90 day deferral of resignation, the Commissioner (or delegate) have the capacity to approve a further extension of up to 30 days, up to two times (a total 150 day deferral), whilst ensuring each extension is only imposed when properly justified.

Recommendation 2

2.40 The committee recommends that a statutory review of the extended deferral of resignation mechanism be conducted after five years.

Recommendation 3

2.41 Subject to the previous recommendations, the committee recommends that the Senate pass the bill.

**Senator the Hon Ian Macdonald
Chair**