

Chapter 2

Key Issues

2.1 This chapter examines the key issues arising from the Bill and then outlines the committee's views and recommendations. The term 'post-charge' is used to indicate both 'post-charge' and 'post-confiscation application' while the term 'pre-charge' is used to indicate both 'pre-charge' and 'pre-confiscation application'.

2.2 Of the five submissions received, three supported the Bill¹ while two raised concerns about the Bill.² Critics of the Bill questioned the general legality of allowing post-charge examinations and hearings and raised specific concerns about some of the substantive provisions proposed by the Bill that would allow disclosure of information obtained in a post-charge examination or hearing to prosecutors.³

Constitutional validity of the Bill

2.3 This chapter will not attempt to examine the constitutional validity of the Bill given that the committee did not receive sufficient evidence about this issue. However, it is noteworthy that three submissions pointed to the severability clauses that have been included in the Bill. These submissions acknowledged that the inclusion of the severability clauses would imply that the drafters of the Bill expected that key provisions of the Bill could be made subject to judicial scrutiny should the Bill be passed in its current form.⁴ The New South Wales Director of Public Prosecutions (NSW DPP) submitted:

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...⁵

1 NSW Office of the Director of Public Prosecutions, *Submission 1*, p. 1; Australian Commission for Law Enforcement Integrity, *Submission 2*, p. 1; Commonwealth Director of Public Prosecutions, *Submission 3*, p. 1.

2 Law Council of Australia, *Submission 4*, p. 4; Australian Human Rights Commission, *Submission 5*, p. 3.

3 Law Council of Australia, *Submission 4*, pp 3–4; Australian Human Rights Commission, *Submission 5*, pp 3–5.

4 NSW Office of the Director of Public Prosecutions, *Submission 1*, p. 1; Law Council of Australia, *Submission 4*, p. 9; Australian Human Rights Commission, *Submission 5*, p. 8.

5 NSW Office of the Director of Public Prosecutions, *Submission 1*, p. 1.

The need for a balance to be reached

2.4 Both the Law Council of Australia (LCA) and the Australian Human Rights Commission (AHRC) posed the question of whether the stated aims of the Bill, to protect the community from serious and organised crime and to prevent corruption in law enforcement agencies, are sufficient to justify the extent to which the Bill would infringe upon common law principles protecting the rights of an accused to a fair trial.⁶ The LCA acknowledged that the provisions of the Bill are 'rationally connected' to the specified objectives of the Bill, but argued that the Bill represents a disproportionate response to its aims, notwithstanding the purported safeguards integrated into the Bill.⁷ The AHRC stopped short of challenging the validity of the Bill but argued that the Bill in its current form would not provide an appropriate balance between the investigation functions of ACC and ACLEI and the rights of an accused person. The AHRC recommended that the Bill should be amended, to provide greater protections to an accused person.⁸

2.5 A contrasting view was formed by the PJCHR, which concluded that:

The committee considers that the powers granted to the ACC and LEI Commissioner to compulsorily question a person who has been charged with an offence significantly limits the right to a fair trial, in particular, the principle of equality of arms and the protection against self-incrimination. However, the statement of compatibility provides a detailed justification of why these powers are considered reasonable and necessary. On balance, having considered the relevant safeguards provided in the bill, the committee considers that the limitation on fair trial rights has been justified.⁹

The significance of charging a person with an offence

2.6 The AHRC highlighted that the time that a person is charged with an offence is significant as it represents the time at which the investigation process must give way to the judicial process, which falls into the exclusive domain of the courts. The AHRC, paraphrasing judicial authority, stated that:

The conduct of an inquiry, particularly a compulsory examination, in parallel to a person's criminal prosecution would ordinarily constitute a contempt of court because the inquiry presents a real risk to the administration of justice.¹⁰

6 Law Council of Australia, *Submission 4*, pp 7–8; Australian Human Rights Commission, *Submission 5*, p. 8.

7 Law Council of Australia, *Submission 4*, pp 8, 11.

8 Australian Human Rights Commission, *Submission 5*, pp 11–12.

9 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament*, 13 May 2015, p. 56 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-second_Report_of_the_44th_Parliament (accessed 22 May 2015).

10 Australian Human Rights Commission, *Submission 5*, p. 12.

2.7 The AHRC argued that any proposal to allow post-charge examinations or hearings would need to be carefully scrutinised, as an accused person would lose the control over the way in which he or she wished to answer the charge(s). Further, an accused would face even more hindrances if material from those post-charge processes were disclosed to prosecutors.¹¹

2.8 The LCA took a similar position, stating:

...there remains a real risk that a person who is examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice his or her defence. An accused person should not be forced to divulge his or her position prior to trial or to assist law enforcement officers in gathering supplementary information to aid in his or her prosecution.¹²

2.9 The LCA recommended that the Bill should be amended to:

...require authorisation from a Federal Court [J]udge before an ACC or Integrity Commissioner summons is issued to a person who is subject to criminal proceedings, and for that Judge to prescribe limitations on the matters which may be covered by the examination.¹³

2.10 ACLEI noted that prosecutorial proceedings may be quite lengthy, especially if the accused contests the charge(s), engages in pre-trial arguments and/or institutes appeals prohibiting post-charge examinations. It follows that any restriction of post-charge investigatory processes would have the potential to delay and significantly inhibit investigations.¹⁴

2.11 The statement of compatibility notes that prohibiting post-charge investigatory processes would hamper the effectiveness of the ACC and ACLEI to investigate serious and organised crime and corruption respectively. The statement of compatibility points out that such a restriction would force the ACC and ACLEI to conduct pre-charge investigations, which may alert a person of interest to impending charges or proceedings and allow that person to dispose of incriminating material, disperse or hide criminal proceeds or notify other potential persons of interest.¹⁵

2.12 The CDPP emphasised that the case law relating to post-charge investigations remains unclear and has been used as a defence, leading to temporary or permanent stay applications. The CDPP stated that:

This is creating very considerable delays for affected prosecutions and has placed an enormous strain upon the resources of the CDPP and investigative agencies. Because case law is necessarily confined by its facts,

11 Australian Human Rights Commission, *Submission 5*, pp 12–13.

12 Law Council of Australia, *Submission 4*, p. 11.

13 Law Council of Australia, *Submission 4*, pp 4, 11.

14 Australian Commission for Law Enforcement Integrity, *Submission 2*, p. 6.

15 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 12, 15.

the judgments arising from those challenges will be at best incrementally clarifying and at worst inconsistent. Amending legislation is the only cure.¹⁶

Specific provisions of the Bill

2.13 The provisions of the Bill that raised the most concerns were proposed subsections 25A(9A) and 30(5) and proposed sections 25C, 25D and 25E of the ACC Act, equating to proposed subsections 90(2) and 96(4) and sections 96AB, 96AC and 96AD of the LEIC Act.

Non-disclosure directions

2.14 As noted in chapter 1, proposed subsections 25A(9A) of the ACC Act and 90(2) of the LEIC Act would require an examiner or the Integrity Commissioner to direct that examination or hearing material must not be disclosed if the disclosure might prejudice a person's safety or would reasonably be expected to prejudice the fair trial of the examinee or witness, where the examinee or witness has been charged with a related offence or a charge is imminent.

2.15 Both the LCA and AHRC recognised that the proposed subsections would reduce the number of circumstances where a non-disclosure direction would be required, thereby potentially compromising a person's right to a fair trial.¹⁷ The AHRC argued that, under the proposed subsections:

...if there was no imminent charge but there was a real prospect of a future charge, there would be no requirement on an examiner to make a direction...The Explanatory Memorandum asserts that "the only time at which...prejudice could occur is where the examinee has either been charged with an offence or where such a charge is imminent". As a result, it suggests that it is unnecessary to require a non-publication direction if charges are not already imminent. The Commission disagrees with this analysis...a non-publication direction remains appropriate where there is a real prospect of future charges.¹⁸

2.16 The LCA also commented on the change in the threshold from 'might prejudice' to 'would reasonably be expected to prejudice' the fair trial of the relevant person, by stating:

This amendment would introduce confusion between the juxtaposition of the word 'would' with 'reasonably be expected'. In addition, it would be a very high threshold to meet with the potential for an accused's fair trial rights to be unduly compromised.¹⁹

2.17 The EM notes that the proposed amendments are intended to give an examiner and the Integrity Commissioner greater certainty about the circumstances in which he

16 Commonwealth Director of Public Prosecutions, *Submission 3*, p. 3.

17 Law Council of Australia, *Submission 4*, pp 17–18; Australian Human Rights Commission, *Submission 5*, pp 17–18.

18 Australian Human Rights Commission, *Submission 5*, p. 18.

19 Law Council of Australia, *Submission 4*, pp 17–18.

or she would be required to make a non-disclosure direction. The EM goes on to reason that an examiner or the Integrity Commissioner 'should not be required to make a direction to protect against unforeseeable risks that the disclosure or use of examination [or hearing] material may prejudice' the fair trial of the examinee or witness. The EM also states that the change is intended to clarify that the:

...only person whose trial may be prejudiced by the disclosure or use of examination [or hearing] material is the examinee [or witness]. The only time at which that prejudice could occur is where the examinee [or witness] has either been charged with an offence or when such a charge is imminent.²⁰

Disclosure of post-charge material and post-charge derivative material

2.18 The AHRC identified that the insertion of new subsections 24A(2) and 25A(6A) of the ACC Act (equating to proposed subsections 82(1A) and 83(2A) of the LEIC Act respectively) would, if constitutionally valid, be sufficient to overcome the decision of the HCA in the X7 case. The AHRC then noted that proposed section 25C of the ACC Act (equating to proposed section 96AB of the LEIC Act) would allow for disclosure of post-charge examination (or hearing) material while proposed section 25D of the ACC Act (equating to proposed section 96AC of the LEIC Act) would allow for disclosure of post-charge derivative material. The AHRC argued the Bill is 'overly permissive' in providing mechanisms for the disclosure of post-charge examination or hearing material and derivative material to prosecutors.²¹ The AHRC questioned whether such disclosures could ever be considered to be in the interests of justice, given the decisions of the HCA in the Lee No 2 case and the X7 case, and recommended a prohibition on disclosure of post-charge material and post-charge derivative material to a prosecutor of the examinee or witness.²² The AHRC cited that the only example provided in the EM, of where such disclosures may be considered appropriate, is where the derivative material is exculpatory. The AHRC argued that this example provides 'an unconvincing rationale for creating a mechanism for such disclosure',²³ as the disclosure of exculpatory evidence obtained under compulsion also:

...has the potential to prejudice the trial of an accused both by disclosing defences that may be raised and by allowing the prosecution to direct further investigations to be conducted in advance of the trial to modify the prosecution case in light of those anticipated defences.²⁴

20 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 45, 87.

21 Australian Human Rights Commission, *Submission 5*, pp 14–17.

22 Australian Human Rights Commission, *Submission 5*, pp 15, 17.

23 Australian Human Rights Commission, *Submission 5*, p. 16.

24 Australian Human Rights Commission, *Submission 5*, p. 15.

2.19 The CDPD reasoned that the Bill does not propose to 'create' a mechanism for disclosure, by stating that:

At a conceptual level, the Bill does not seek to expand the framework within which compulsorily obtained material can be provided to the prosecution by the ACC or ACLEI, or to expand the uses to which the prosecution may put such material...²⁵

2.20 ACLEI submitted a similar view, by concluding that:

The Bill does not give ACLEI any new coercive powers or expand current powers. Rather—having regard to the decisions and guidance of the High Court in relation to the fair trial principle—the measures restore, clarify and suitably restrain the Integrity Commissioner's coercive information-gathering powers to the way they were originally intended to operate.

The Bill...specifically permits investigators to use hearing material to find admissible evidence for prosecutions; and places a structure of rules in place to enable the dissemination of hearing and derivative material to prosecutorial authorities in a way that will protect a person's right to a fair trial.²⁶

2.21 Furthermore, as noted in chapter 1, any disclosure of post-charge material or post-charge derivative material could only be permitted under a court order made under new proposed subsections 25E(1) of the ACC Act or 96AD(1) of the LEIC Act, where the court determined that the disclosure would be required in the interests of justice. Furthermore, under proposed subsections 25E(3) of the ACC Act and 96AD(3) of the LEIC Act, the proposed disclosure powers are not intended to restrict a court's power to make any orders that it deems necessary to ensure that an examinee or witness receive a fair trial. ACLEI submitted that this:

...clarifies that the court remains responsible for overseeing the process relating to the prosecution of a person, and has the opportunity to scrutinise a particular area of decision-making that would otherwise have the potential to affect the fair trial of the witness.²⁷

2.22 The statement of compatibility explains that:

These provisions ensure that the court hearing the charges against the examinee or witness retains control over its proceedings to ensure that they are fair.²⁸

25 Commonwealth Director of Public Prosecutions, *Submission 3*, p. 3.

26 Australian Commission for Law Enforcement Integrity, *Submission 2*, pp 7–8.

27 Australian Commission for Law Enforcement Integrity, *Submission 2*, p. 7.

28 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 11.

2.23 The LCA challenged whether a judge would be in a reasonable position to determine whether a disclosure would be required in the interests of justice. The LCA stated that:

...because there has not yet been an order by the court to determine that the material may be lawfully...disclosed to a prosecutor, neither the prosecutor of the charge [n]or the defence will be able to make representations to the court about whether disclosure will be in the interests of justice. A judge would be required to make a determination as to whether a disclosure would be in the interests of justice only on the basis of information provided by the ACC or the Integrity Commissioner without any knowledge of what the defence case may be. Therefore, the purported safeguard of allowing a court determination in the interests of justice in these circumstances may not be sufficient to protect the right to a fair trial.²⁹

2.24 The EM clarifies that the question of whether an order would be required 'in the interests of justice' would need to be determined with regard to the nature and content of the material sought to be disclosed, the circumstances of the case and the extent to which disclosure of the material may prejudice the fair trial of the examinee or witness or the safety of any person.³⁰ The CDPP stated that a court would be in a reasonable position to make such a determination, stating that:

To the extent that disclosure of post-charge material may be required, it is appropriate that this decision is made by the court. There are clear precedents for this type of court-supervised process.³¹

2.25 The CDPP also provided a reassurance that on a practical level it did not expect to seek access to post-charge material as a matter of course. The CDPP explained that:

Unless the material is admissible as evidence in court, the CDPP's experience is that any benefit derived from access to that material is outweighed by the exposure of the prosecution process to an additional avenue of collateral attack.³²

Committee views and recommendations

2.26 The committee agrees with the submission of the LCA that the right to a fair trial acts as a 'central pillar' of Australia's criminal justice system and a 'cardinal requirement of the rule of law'.³³ The committee believes that a person's right to a fair trial should only be limited if the limitation is reasonable, necessary and proportionate to a legitimate goal.

29 Law Council of Australia, *Submission 4*, p. 13.

30 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 52, 96–97.

31 Commonwealth Director of Public Prosecutions, *Submission 3*, p. 4.

32 Commonwealth Director of Public Prosecutions, *Submission 3*, pp 4–5.

33 Law Council of Australia, *Submission 4*, p. 5.

2.27 The committee accepts that compelling a person, under threat of criminal sanctions, to answer questions after he or she has been charged with a related offence, or made the subject of confiscation proceedings, could affect the extent to which he or she could enter the trial or proceedings on an equal footing to the prosecuting authority. Furthermore, the disclosure of post-charge examination or hearing material could have the effect of limiting the person's right not to incriminate him or herself.

2.28 With that in mind, the committee acknowledges the two main issues that arise from the Bill:

- Should the ACC and ACLEI be permitted to conduct an examination or a hearing after the person subject to the process has been charged with a related offence or such a charge is imminent?
- Should the ACC and ACLEI be allowed to disclose information received from post-charge examinations and hearings, subject to the relevant safeguards, to a prosecutor?

Permitting post-charge examinations and hearings

2.29 The committee notes that the Bill was drafted to clarify the original intention behind the ACC Act and the ACLEI Act, to allow for post-charge investigations. The committee emphasises that the X7 case and related cases have brought the validity of post-charge investigations into question. This has had a significant negative impact on the operations of the ACC and ACLEI, limiting their effectiveness to protect the community from serious and organised crime and to prevent corruption in law enforcement agencies. In the committee's opinion the objectives of the Bill are legitimate, and the proposed provisions of the Bill provide a necessary, reasonable and proportionate means of achieving those objectives.

2.30 However, the committee notes that the Bill does not include any safeguards to limit the proposed power to conduct post-charge examinations and hearings. It follows that an affected person would have limited recourse to the courts in circumstances where a post-charge investigation unduly interferes with that person's right to a fair trial. Therefore, the committee suggests the government to consider adding a provision to the Bill as recommended by the LCA to require an ACC examiner or the Integrity Commissioner to seek the authorisation of the Federal Court prior to commencing a post-charge examination or hearing.³⁴ Such a provision could help to ensure that a court would retain a level of discretion over post-charge investigations and, as such, would provide a further safeguard to the right to a fair trial.

Permitting post-charge disclosures

2.31 Although the Bill proposes to allow the ACC and ACLEI to disclose, to a prosecutor, information obtained through a post-charge examination or hearing, it also contains a number of safeguards. These safeguards include the requirement for non-disclosure directions and the requirement that a court order must precede a disclosure. These safeguards protect the rights of the individual who has been charged

34 Law Council of Australia, *Submission 4*, p. 11.

or for whom a charge is imminent and give a court full discretion over whether the relevant disclosure could be made, in the interests of justice. Furthermore, courts would retain all powers that would ensure the fair trial of a person charged with an offence related to the subject matter of the investigation or for whom a such a charge is imminent.

2.32 The committee takes the view that overall the Bill strikes a fair and appropriate balance between the need to protect the right to a fair trial of an examinee or witness and the need to ensure that the ACC and ACLEI are not adversely hindered in the performance their respective roles.

Recommendation 1

2.33 The committee recommends that the Senate pass the Bill.

**Senator the Hon Ian Macdonald
Chair**

