

Dissenting Report of the Australian Greens

1.1 The Australian Greens do not support the enactment of the Law Enforcement Legislation Amendment (Powers) Bill 2015 (the Bill) as currently drafted.

1.2 As noted in the Majority Report, Bill seeks to amend the *Australian Crime Commission Act 2002* (ACC Act) and the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) to enhance the powers of Australian Crime Commission (ACC) examiners to conduct examinations, and the Law Enforcement Integrity Commissioner (LEIC), supported by the Australian Commission for Law Enforcement Integrity (ACLEI), to conduct hearings.

Introduction of knowingly concerned

1.3 The conduct of hearings by the ACC and the LEIC has previously raised strong human rights and rule of law concerns and has been subject to consideration by this and other parliamentary committees. These non-judicial administrative bodies are invested with exceptional powers—powers to compel a person, under threat of criminal sanctions, to answer questions that could have a material impact on the person's right to a fair trial if he or she is already, or may be, charged with a criminal offence. As noted in the Majority Report this can have the effect of limiting the person's right not to incriminate him or herself.

1.4 The changes proposed in this Bill seek to expand the powers of these bodies to conduct coercive hearings, and deny people the right to silence, even in circumstances where the person has been charged with a criminal offence and faces a judicial process. In so doing, the Bill significantly limits the right to a fair trial, particularly by affecting the equality of arms principle and the protection against self-incrimination. As the Law Council of Australia has summarised, the Bill authorises:

- an ACC examiner to conduct an examination pre-charge, post-charge, pre-confiscation application or post-confiscation application and compel answers to questions relating to an ACC special operation or special investigation into serious and organised criminal activity; and
- the Integrity Commissioner to conduct a hearing pre-charge, post-charge, pre-confiscation application or post-confiscation application and compel answers to questions relating to an investigation into law enforcement corruption.¹

1.5 In such an examination or a hearing, a person cannot refuse to answer a question, or produce a document or thing on the basis that it might incriminate them, or expose them to a penalty.

1 Law Council of Australia, *Submission 4*, p. 3.

Key Issues and Concerns

1.6 The changes also seek to respond a number of judicial findings, including findings in the High Court, that make it clear that the compulsory examination of a person charged with an offence about the subject matter of the pending charge constitutes a fundamental alteration to the process of criminal justice, given the accusatorial nature of criminal justice.² These cases have brought the validity of post-charge investigations into question. This Bill seeks to clarify with clear statutory language that the Parliament intends to alter the process of criminal justice in this fundamental way.

1.7 These are very serious issues that have given rise to concerns by a number of submitters that the changes proposed in the Bill may be open to constitutional challenge. Indeed, the Bill appears to have been drafted with this possibility firmly in mind.

1.8 The Australian Greens take seriously the need to address, disrupt and prevent serious and organised crime. The Australian Greens acknowledge that the coercive examination powers of the ACC and LEIC are not designed to determine a person's guilt or innocence but rather to disrupt and prevent serious and organised crime, and to prevent suspects from disposing of valuable information about current criminal activities, operations and practices of others that may otherwise be lost. The information provided by the ACC and the LEIC suggests that the X7 case³ and other judicial findings⁴ have had a significant negative impact on the operations of the ACC and ACLEI. This is relevant and important information to consider.

1.9 The Australian Greens also take seriously the traditional common law rights that are integral to ensuring that a person receives a fair trial, including the privilege against self-incrimination and the right to silence. These principles, entrenched in both common law and international human rights law authority, are expertly outlined in the submission of the Australian Human Rights Commission to this inquiry.⁵ The right to a fair trial is also protected by the constitutional principle of legality whereby 'clear and unambiguous language is needed before a court will find that the legislature has intended to repeal or amend' this fundamental right.⁶

1.10 Ensuring that a defendant is able to present his or her defence in the manner that he or she chooses is an important component of the concept of equality of arms, and a principle that has defined our criminal justice system for decades. These changes risk providing the prosecution with information that can be used against a

2 *X7 v Australian Crime Commission* [2013] HCA 29 at [118]; (2013) 248 CLR 92.

3 *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92.

4 See for example, *R v Seller and McCarthy* [2013] NSWCCA 42; (2013) 273 FLR 155; *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196; *Lee v R* [2014] HCA 20; (2014) 88 ALJR 656.

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

6 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J) as quoted by Law Council of Australia, *Submission 4*, p. 5.

defendant when he or she is facing serious criminal charges. This is because derivative use immunity is not provided for in the Bill. As a result, material obtained as a result of an ACC examination or LEIC hearing can be used to obtain other evidence that can later be used in court against the person. In other words, the prosecution is able to gain an unfair advantage inconsistent with the equality of arms principle.

1.11 Both the Law Council of Australia and the Australian Human Rights Commission have raised serious concerns with key features of the Bill. These issues have been summarised in the Majority Report. They relate to whether:

- the ACC and ACLEI should 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; and
- the ACC and ACLEI should be allowed to disclose to a prosecutor information received from post-charge examinations and hearings.

1.12 The Majority Report concludes that 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.

Position of the Australian Greens

1.13 The Australian Greens are not confident that a fair and appropriate balance has been struck in this Bill as currently drafted. In particular, the Australian Greens are of the view that until the following pressing concerns are addressed, the Bill should not proceed.

Constitutional validity uncertain

1.14 As the Law Council of Australia explains, despite the existence of some safeguards, there is a real risk that the administration of justice will be interfered with by coercively requiring a person to answer questions designed to establish that he or she is guilty of the offence with which he or she is charged.⁷ This risk also means that there is the potential for certain provisions in the Bill to be beyond the legislative power of the Commonwealth. As noted by Justice Hayne and Justice Bell in *X7 v Australian Crime Commission*:

There may then be a question of legislative power: can the legislature provide for the secret and compulsory examination of an accused person about the subject matter of the pending charge? That question would call for consideration not only of Ch III of the Constitution, but also, and more particularly, of s 80 of the Constitution and what is meant by 'trial on indictment' and the requirement that the trial on indictment of any offence against any law of the Commonwealth shall be 'by jury'.⁸

7 Law Council of Australia, *Submission 4*, p. 3.

8 *X7 v Australian Crime Commission* (2013) 248 CLR 92, [92] (Hayne and Bell JJ).

1.15 As noted by a number of submitters including the NSW Office of the Director of Public Prosecutions, the inclusion of the severability clauses 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.⁹

1.16 This leads to an unsatisfactory level of uncertainty about the state of the law in an area that may have very serious implications for the investigation, disruption and prosecution of serious and organised crime, and for the fair trial rights of those charged with such activity.

Insufficient safeguards to limit power to conduct post-charge examinations and hearings

1.17 The Bill does not include any safeguards to limit the proposed power to conduct post-charge examinations and hearings. This means 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. This is particularly significant given the nature of the proposed changes in the Bill which will significantly expand the circumstances in which such examinations and hearings can be conducted. These changes effectively mean that, where a defendant has been charged or is about to be charged for *any* offence, including a low-level crime, they can be examined about this and other matters.

1.18 The Law Council of Australia has recommended that this particular issue could be addressed by amending the Bill 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.¹⁰ The Majority Report appears to share this concern but has stopped short of recommending an amendment along these lines.

Insufficient safeguards to limit disclosure of prejudicial information to a prosecutor

1.19 The Bill allows the ACC and ACLEI to disclose, to a prosecutor, information obtained through a post-charge examination or hearing. While these disclosure powers come with some safeguards, such as the requirement that a court order must precede a disclosure, they are likely to be of limited practical effect. As the Law Council of Australia notes, this is because the court will be asked to make an order authorising disclosure prior to having the opportunity to hear how such an order may impact on the conduct of the defence case. This led the Law Council to recommend that:

...to protect the right to a fair trial it should be incumbent upon a person or body that may lawfully disclose examination material to establish 'special reasons' that justify to the court why the provision of information to law enforcement or a prosecutor is necessary and outweighs the public interest

9 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.

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

in the particular circumstances of the case of maintaining an examinee's confidentiality.¹¹

Recommendation 1

1.20 In light of the above concerns, the Australian Greens recommend that the Bill be not be passed in its current form.

Recommendation 2

1.21 The Australian Greens also support the following recommendations made by the Law Council of Australia that the Government should:

- **undertake a comprehensive review of the ACC Act which considers whether the Act provides an effective and appropriate framework for the investigation of serious and organised crime and adequate protection of fundamental common law rights, such as, the right to a fair trial; and**
- **clarify to the Parliament that this Bill in its entirety is within the power of the Commonwealth Parliament to enact.**

**Senator Penny Wright
Australian Greens**

11 Law Council of Australia, *Submission 4*, p. 3.

