

The Senate

Legal and Constitutional Affairs
Legislation Committee

Law Enforcement Legislation Amendment
(Powers) Bill 2015 [Provisions]

June 2015

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Chapter 1

Introduction

1.1 On 26 March 2015, the Hon Mr Michael Keenan MP, Minister for Justice, introduced the Law Enforcement Legislation Amendment (Powers) Bill 2015 (the Bill) into the House of Representatives.¹

1.2 On 14 May 2015, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 18 June 2015.²

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 1 June 2015. Details of the inquiry were also made available through the committee's website at http://www.aph.gov.au/senate_legalcon.

1.4 The committee received 5 submissions in response to this inquiry. The submissions are listed at Appendix 1 to this report and are available on the committee's webpage. The committee would like to thank all those who submitted to the inquiry.

Background to the Bill

Case law

1.5 The Explanatory Memorandum to the Bill (EM) notes that the powers of the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI) to conduct examinations and hearings have been affected by a number of recent cases including *X7 v Australian Crime Commission*³ (X7 case), *R v Seller and McCarthy*⁴ (Seller case), *Lee v NSW Crime Commission*⁵ (Lee No 1 case) and *Lee v R*⁶ (Lee No 2 case).⁷

The X7 case

1.6 On 26 June 2013, a majority of the High Court of Australia (HCA) in the X7 case held that the *Australian Crime Commission Act 2002* (Cth) (ACC Act) did not

1 *Votes and Proceedings*, No. 111, 26 March 2015, p. 1244.

2 *Journals of the Senate*, No. 94, 14 May 2015, pp 2598–2599.

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

4 *R v Seller and McCarthy* [2013] NSWCCA 42; (2013) 273 FLR 155.

5 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196.

6 *Lee v R* [2014] HCA 20; (2014) 88 ALJR 656.

7 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 2.

authorise an examiner appointed under the ACC Act to require a person charged with, but not yet tried for, an indictable Commonwealth offence to answer questions about the subject matter of the offence. The majority of the HCA reasoned that if the provisions of the ACC Act were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge they would effect a fundamental alteration to the process of criminal justice, given the accusatorial nature of criminal justice.⁸ The majority of the HCA stated that:

This is not to decide that statute can never effect fundamental alterations to the process of criminal justice...But such an alteration can only be made if it is made clearly by express words or necessary intendment.⁹

1.7 A majority of the court held that the ACC Act does not expressly or impliedly effect such an alteration.¹⁰ In his second reading speech, Mr Keenan explained that:

...following the decision in X7, the Crime Commission has stopped examining anyone who had been charged with an offence where the questioning might touch on the subject matter of the charges. This has already prevented the Crime Commission from obtaining valuable intelligence about the methodologies and activities of those involved in serious criminal activity, including recruiters and facilitators of foreign fighters and their links with other individuals.¹¹

Practical unfairness

1.8 In the Seller case, which preceded the X7 case, the New South Wales Court of Criminal Appeal (NSWCCA) held that the use of material by the Commonwealth Director of Public Prosecutions (CDPP) derived from a compulsory examination conducted by the ACC did not, of itself, justify a permanent stay of proceedings, without proof that the dissemination would result in a fundamental defect in the trial process, by prejudicing the accused's right to a fair trial.¹²

1.9 In contrast, in relation to the use of post-charge material by a prosecutor, the HCA stated in the Lee No 2 case:

These appeals do not fall to be decided by reference to whether there can be shown to be some "practical unfairness" in the conduct of the appellants' defence affecting the result of the trial. This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the

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

9 *X7 v Australian Crime Commission* [2013] HCA 29 at [119]; (2013) 248 CLR 92.

10 *X7 v Australian Crime Commission* [2013] HCA 29 at [142] and [147]; (2013) 248 CLR 92 per Hayne and Bell JJ (Kiefel J agreeing).

11 The Hon Mr Michael Keenan MP, *House of Representatives Hansard*, 26 March 2015, p. 3555.

12 *R v Seller and McCarthy* [2013] NSWCCA 42 at [112] and [114]; (2013) 273 FLR 155 per Bathurst CJ (Bellew J agreeing).

prosecution having the appellants' evidence before the Commission in its possession.¹³

1.10 However, in *Bartlett v R* (Bartlett case),¹⁴ in the Supreme Court of Western Australia, Justice Heenan distinguished the judgment of the HCA in the Lee No 2 case. Justice Heenan held that even where the Crown Prosecutor was in possession of the transcript of a compulsory examination, a criminal trial of the examinee could go ahead if he or she would not suffer any actual or potential prejudice. In the Bartlett case, on the facts, Justice Heenan concluded that the accused did not suffer any prejudice, because the compulsory examination was conducted without objection and without the invocation of a claim for limited privilege.¹⁵

1.11 Justice Kaye of the Supreme Court of Victoria in *R v Jacobson (Ruling No 4)*¹⁶ cited the reasoning of Justice Heenan in the Bartlett case and held, on the facts, that the Lee No 2 case did not prevent the Victorian Director of Public Prosecutions from having access to the transcript of an examination of the accused conducted under section 19 of the *Australian Securities Investments Commission Act 2001* (Cth), as no practical prejudice or unfairness could be shown.¹⁷

Confiscation proceedings

1.12 When examining the scope of power of the Supreme Court of New South Wales to order the examination of a person under paragraph 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW), the majority of the HCA in the Lee No 1 case found that the provisions of that Act clearly abrogated any privilege against self-incrimination, irrespective of whether or not an examinee had been charged with a criminal offence. The majority of the HCA held that where Parliament uses sufficiently clear words, a statute can abrogate the right to silence for civil matters, such as confiscations.¹⁸

1.13 In the case of *Commissioner of the Australian Federal Police v Zhao*,¹⁹ the HCA unanimously accepted that the provisions of the *Proceeds of Crime Act 2002* (Cth) (PoC Act) relating to restraining orders and forfeiture orders contemplated that such civil orders may be made regardless of whether a person is charged with a similar criminal offence.²⁰ However the HCA concluded that this would not impact on a court's discretion to order a stay of forfeiture proceedings where the court has

13 *Lee v R* [2014] HCA 20 at [43]; (2014) 88 ALJR 656 per *curiam*.

14 *Bartlett v R* [2014] WASC 277; (2014) 287 FLR 402.

15 *Bartlett v R* [2014] WASC 277 at [46] and [48]; (2014) 287 FLR 402 per Heenan J.

16 *R v Jacobson (Ruling No 4)* [2014] VSC 508; (2014) 290 FLR 143.

17 *R v Jacobson (Ruling No 4)* [2014] VSC 508 at [39]–[40]; (2014) 290 FLR 143 per Kaye J.

18 *Lee v NSW Crime Commission* [2013] HCA 39 at [55] per French CJ, at [144] per Crennan J and at [331]–[335] per Gageler and Keane JJ; (2013) 251 CLR 196.

19 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 89 ALJR 331.

20 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 at [34] per *curiam*; (2015) 89 ALJR 331.

determined that those proceedings would create a real risk of prejudice to the criminal trial.²¹

Parliamentary Joint Committee Inquiry

1.14 In March 2012, the Parliamentary Joint Committee on Law Enforcement (PJCLE) tabled its report on Commonwealth unexplained wealth legislation and arrangements (PJCLE Report) in the House of Representatives.²² The PJCLE Report made 18 recommendations in total. Recommendations 3 and 4 concerned the use of ACC compulsory examinations to support unexplained wealth proceedings under the PoC Act and recommended that:

...the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002* be amended as necessary to make clear that the Australian Crime Commission's examination material can be used as evidence in proceedings under the *Proceeds of Crime Act 2002*...[and] that the *Proceeds of Crime Act 2002* be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.²³

Purpose of the Bill

1.15 The EM notes that the Bill seeks to amend the ACC Act and the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) to more precisely clarify:

...the circumstances in which the ACC and Integrity Commissioner are able to use their powers to conduct examinations and hearings, to disclose information obtained directly and indirectly from examinations and hearings and the uses to which such information may be put.²⁴

1.16 In his second reading speech, Mr Keenan stated that the Bill is also designed to:

...more clearly authorise the Crime Commission to conduct examinations in the context of ongoing confiscation proceedings under the *Proceeds of Crime Act 2002*, and set out when that material may be used in those proceedings. These changes respond to recommendations 3 and 4 of the Parliamentary Joint Committee on Law Enforcement's 2012 inquiry into unexplained wealth. This delivers on the government's election

21 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 at [47] per curiam; (2015) 89 ALJR 331.

22 *Votes and Proceedings*, No. 98, 19 March 2012, p. 1328.

23 Parliamentary Joint Committee on Law Enforcement, *Report on inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp 39, 43 at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/2010-13/unexplained_wealth/report/index (accessed 20 May 2015).

24 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 2.

commitment to implement the outstanding recommendations of the committee's report.²⁵

Key provisions of the Bill

1.17 The Bill comprises two schedules which propose amendments to the ACC Act and the LEIC Act and make a consequential amendment to the *Public Interest Disclosure Act 2013* (Cth). Schedule 1 of the Bill proposes amendments that would affect ACC examination powers, while Schedule 2 of the Bill proposes amendments that would affect the investigation powers of the Integrity Commissioner.

1.18 The EM notes:

As the powers of ACC examiners and the Integrity Commissioner are expressed in a very similar manner in the ACC Act and LEIC Act, the Bill will make similar amendments to both Acts.²⁶

Extension of examination and hearing powers

1.19 Proposed subsections 24A(2) of the ACC Act and 82(1A) of the LEIC Act would specify that examinations and hearings could be conducted either pre-charge and pre-confiscation application or post-charge and post-confiscation application.²⁷

1.20 Proposed subsections 25A(6A) of the ACC Act and 83(2A) of the LEIC Act would empower an ACC examiner or the Integrity Commissioner to ask questions of an examinee or witness, or request the production of documents, relating to the subject matter of any charge or imminent charge.²⁸

1.21 Proposed sections 25B of the ACC Act and 96AA of the LEIC Act would allow specified entities to use or disclose material from examinations and hearings to obtain derivative material, irrespective of the nature of the material or when the material was used or disclosed.²⁹

1.22 Under proposed sections 25C and 25D of the ACC Act and 96AB and 96AC of the LEIC Act, once an examinee or a witness has been charged with an offence, or if a charge is imminent, examination or hearing material, or material derived from the examination or hearing, may be disclosed to the relevant prosecutor with a court order from the court hearing the charges, made under proposed subsection 25E(1) of the ACC Act or 96AD(1) of the LEIC Act.³⁰

25 The Hon Mr Michael Keenan MP, *House of Representatives Hansard*, 26 March 2015, p. 3556.

26 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 8.

27 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 12 and Sch 2 item 8.

28 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 12 and Sch 2 item 8.

29 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 29.

30 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

Other key provisions

1.23 Proposed subsections 25A(9A) of the ACC Act and 90(2) of the LEIC Act would remove the need for an examiner or the Integrity Commissioner to issue a direction prohibiting the disclosure or use of examination or hearing material on grounds that a failure to do so might prejudice a person's reputation.³¹

1.24 The Bill also proposes to increase the penalties for breaching secrecy and non-disclosure obligations to imprisonment for two years or 120 penalty units or both.³² The Statement of Compatibility in the EM (statement of compatibility) states that this would make the penalties in the ACC Act and the LEIC Act for unauthorised disclosure consistent with penalties for similar offences in other Commonwealth legislation.³³

1.25 Finally, the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee) briefly commented on the Bill in its *Alert Digest No. 5 of 2015*. The Scrutiny of Bills Committee noted that pursuant to sub-item 37(1) of Schedule 1 and sub-item 38(1) of Schedule 2, the proposed provisions of Part 1 of Schedule 1 and Schedule 2 would generally apply to all uses and disclosures of examination material and derivative material that are made, and summonses that are issued, at or after the amendments commence. The Scrutiny of Bills Committee noted that the EM states that 'the amendments are intended to apply irrespective of whether the relevant examination occurred before or after the commencement' of the relevant Schedules.³⁴ The Scrutiny of Bills Committee sought:

...the Minister's advice as to the rationale for applying these amendments to material that was generated from examinations (or hearings) conducted prior to the commencement of the provisions.³⁵

1.26 As at the time of drafting, the minister's response was not available.

Human rights implications of the key provisions

1.27 The key provisions of the Bill would engage the human rights contained in articles 14 (the right to a fair trial and protection against self-incrimination), 17 (the right to privacy) and 19 (the right to freedom of expression) of the International

31 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 14 and Sch 2 item 17. See also Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 22.

32 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 items 15, 22, 23, 28, 30, 32, 41 and Sch 2 items 5, 16, 18, 22, 23, 34.

33 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 8, 26.

34 See Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 62, 101.

35 Senate Standing Committee on the Scrutiny of Bills, *Alert Digest No. 5 of 2015*, 13 May 2015, pp 15–16.

Covenant on Civil and Political Rights (ICCPR).³⁶ However, as noted by the Parliamentary Joint Committee on Human Rights (PJCHR) in its *Twenty-second report of the 44th Parliament*, a limitation of a human right may be permitted if it is necessary, reasonable and proportionate to a legitimate objective that is sought and the limitation incorporates effective safeguards to prevent misuse of the limitation.³⁷

1.28 The statement of compatibility acknowledges that the Bill would engage the rights in article 14 of the ICCPR by:

- authorising post-charge examinations and hearings;
- authorising post-confiscation application examinations and hearings;
- authorising the derivative use of examination and hearing material; and
- modifying the categories of criminal proceedings in which hearing material may be used by the Integrity Commissioner against a witness.³⁸

1.29 The statement of compatibility explains that the Bill would engage the right to privacy by:

- changing the circumstances in which a direction must be made about the disclosure or use of examination or hearing material; and
- authorising post-charge examinations and hearings.³⁹

1.30 Finally, the statement of compatibility notes that the right to freedom of expression would be engaged through the proposed increases in penalties for breaching secrecy and other non-disclosure provisions in the ACC Act and the LEIC Act.⁴⁰

Proposed safeguards

1.31 The current ACC Act and LEIC Act already limit the purposes for which an examination or a hearing may be conducted and the Bill proposes to extend these limitations to post-charge examinations and hearings and to post-confiscation application examinations and hearings. Under the ACC Act, an examiner may only conduct an examination in support of a special operation or special investigation⁴¹ and

36 *International Covenant on Civil and Political Rights*, articles 14(1), 14(3)(g), 17 and 19(2) at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 22 May 2015).

37 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament*, 13 May 2015, p. 54 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).

38 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 9, 15.

39 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 21–22.

40 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 25.

41 *Australian Crime Commission Act 2002* (Cth), s. 24A.

may only ask questions relevant to that special operation or special investigation.⁴² Under the LEIC Act, the Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue⁴³ and may only ask questions relating to a corruption issue at the hearing.⁴⁴ The statement of compatibility notes that these provisions mean that examiners and the Integrity Commissioner may not exercise their powers 'for the purposes of bolstering' a prosecution or a confiscation proceeding against an examinee or witness.⁴⁵

1.32 Furthermore, under proposed paragraph 28(1)(d) of the ACC Act, before issuing a summons (including a post-confiscation application summons) to a person who has already been charged with an offence, an examiner would have to be satisfied that the summons would be reasonably necessary for the purposes of the relevant special operation or special investigation, irrespective that the person has been charged or a charge is imminent.⁴⁶ Similarly, under proposed paragraph 83(1)(d) of the LEIC Act, the Integrity Commissioner would need to have reasonable grounds to suspect that evidence, documents or things produced under or resulting from a summons would be necessary for the purposes of the corruption investigation, even though the person has been charged or a charge is imminent.⁴⁷

1.33 The proposed subsections 25A(9A) of the ACC Act and 90(2) of the LEIC Act would require an examiner or the Integrity Commissioner to issue a direction preventing the disclosure of examination material or hearing material taken in private if the examinee or witness has been charged with an offence or a charge is imminent, and the disclosure would reasonably be expected to prejudice the fair trial of the examinee or witness.⁴⁸ Under proposed subsections 25A(14A) of the ACC Act and 90(6) of the LEIC Act, a disclosure made in contravention of such a direction would be a criminal offence punishable by imprisonment for two years and/or a fine of 120 penalty points.⁴⁹

1.34 As noted above, post-charge material and post-charge derivative material could only be disclosed under proposed sections 25C and 25D of the ACC Act and 96AB and 96AC of the LEIC Act with a court order from the court hearing the charges. Additionally, under proposed subsections 25E(1) and 25E(3) of the ACC Act and 96AD(1) and 96AD(3) of the LEIC Act, the court would only be able to make a

42 *Australian Crime Commission Act 2002* (Cth), ss. 25A(6).

43 *Law Enforcement Integrity Commissioner Act 2006* (Cth), ss. 82(1).

44 *Law Enforcement Integrity Commissioner Act 2006* (Cth), ss. 83(3).

45 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 10, 13–14.

46 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 17.

47 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 2 item 9.

48 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 14 and Sch 2 item 17.

49 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 15 and Sch 2 item 18.

disclosure order if it were satisfied that the disclosure would be required in the interests of justice. Moreover, the proposed provisions would not affect a court's power to make any orders necessary to ensure that the examinee or witness receives a fair trial.⁵⁰ The statement of compatibility notes 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'.⁵¹

1.35 Proposed subsections 30(4) to 30(5A) of the ACC Act and 96(3) to 96(4A) of the LEIC Act would provide a qualified direct use immunity for examination or hearing material obtained by compulsion at criminal, confiscation or sentencing proceedings. That is, the specific information elicited using compulsory powers would not be admissible in proceedings against the examinee or witness. However, under the ACC Act the examinee would be required to claim a privilege against self-incrimination before the evidence becomes inadmissible.⁵²

1.36 Finally, under proposed subsections 25H(4) of the ACC Act and 96AG(4) of the LEIC Act, the proposed provisions would not affect a court's power to make any orders necessary to prevent prejudice to the proper administration of justice.⁵³

50 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

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

52 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 26 and Sch 2 item 26.

53 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

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**

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.

Appendix 1

Public submissions

- 1 NSW Office of the Director of Public Prosecutions
- 2 Australian Commission for Law Enforcement Integrity
- 3 Commonwealth Director of Public Prosecutions
- 4 Law Council of Australia
- 5 Australian Human Rights Commission

Appendix 2 – Glossary¹

Term	Meaning
Examinee	The person who gives evidence in an examination conducted by an ACC examiner.
Witness	The person who gives evidence in a hearing conducted by the Integrity Commissioner.
Examination or hearing material	Material that comes directly out of the examination of a person or a hearing in relation to the person.
Derivative material	Any information, document or thing that is identified, understood or created because of, or based on, examination or hearing material.
Pre-charge	The time before a person is charged with an offence or the time after those criminal charges have been resolved.
Post-charge	The time when the person has been charged with an offence (or such charges are imminent).
Pre-charge material	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place pre-charge.
Pre-charge derivative material	Derivative material that was derived from pre-charge examination or hearing material.
Post-charge material	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place post-charge.
Post-charge derivative material	Derivative material that was derived from post-charge material.
Pre-confiscation application	The time before confiscation proceedings under proceeds of crime legislation have commenced against a person or the time after those proceedings have been resolved.
Post-confiscation application	The time when confiscation proceedings under proceeds of crime legislation are ongoing against a person (or such proceedings are imminent).
Pre-confiscation application material	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place pre-confiscation application.
Post-confiscation application material	Examination or hearing material that comes from the examination of a person, or a hearing in relation to a person, which took place post-confiscation application.

¹ Taken from Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 7–8.

