



Crimes Legislation Amendment Bill 2010

Margaret Harrison-Smith
Law and Bills Digest Section

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Crimes Legislation Amendment Bill 2010

Date introduced: 29 September 2010

House: Senate

Portfolio: Home Affairs

Commencement: Sections 1 to 3, Schedules 1, 2 and 4, and provisions not covered elsewhere, commence on the day the Act receives the Royal Assent. Schedule 3 commences the day after the Act receives the Royal Assent.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

The main purposes of this Bill are to strengthen the powers of the Australian Crime Commission (ACC) Chief Executive Officer (CEO) in dealing with ACC employees who engage in serious misconduct or corruption, and to strengthen the powers of Commonwealth law enforcement agencies to gather, examine and use evidence in the investigation and prevention of criminal offences.

Background

History of the Bill

An earlier version of the Crimes Legislation Amendment Bill 2010 (the Bill) was introduced into the House of Representatives during the term of the 42nd Parliament. However, that version of the Bill lapsed on 19 July 2010 on the proroguing of Parliament. This Bill replicates the earlier Bill.

In his second reading speech, the Minister for Home Affairs, Senator the Hon. Joe Ludwig, said that, consistent with the Government's 'Organised Crime Strategic Framework',¹ the Bill 'reflects the Government's continuing commitment to strengthening our agencies' capabilities to fight serious and organised crime'.²

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1. See The Hon. Robert McClelland MP (Attorney-General) and the Hon. Brendan O'Connor MP (Minister for Home Affairs), *Organised Crime Strategic Framework*, joint media release, 25 November 2009, viewed 28 October 2010. http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_25November2009-OrganisedCrimeStrategicFramework.
 2. Senator the Hon. Joe Ludwig (Minister for Home Affairs), 'Second reading speech: Crimes Legislation Amendment Bill 2010' Senate, *Debates*, 29 September 2010, p. 265, viewed 28 October 2010, http://parlinfo.aph.gov.au/parlInfo/search/summary/summary.w3p;query=BillId_Phrase%3As765%20Title%3A%22se

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The Minister also said that the Bill ‘builds on’ measures in the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* and the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010*.³

The first of these Acts made significant amendments to laws relating to organised crime, including unexplained wealth. It also enhanced police powers relating to controlled operations, assumed identities and witness protection, introduced a new joint commission offence, and allowed for increased access to telecommunications interception for criminal organisation offences.⁴

The second Act facilitated the changes made by the first Act and introduced new offences for criminal association and committing crimes for a criminal organisation.⁵

Outline of the Bill

The Bill contains four Schedules.

Schedule 1 proposes amendments to the *Australian Crime Commission Act 2002* (the ACC Act) and the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). The amendments will align the powers of the ACC CEO with those of the AFP Commissioner in dealing with an ACC employee who engages in serious misconduct damaging to the self respect or morale of ACC staff, or to the reputation of the ACC.

Schedule 2 proposes amendments to the ACC Act to allow greater flexibility in the appointment of examiners.⁶ The amendments will enable the reappointment of examiners for an unlimited number of five year terms and the appointment of part-time as well as full-time examiners. The Explanatory Memorandum suggests that this will better meet ACC needs by permitting the use of different examiners for different purposes and enabling the appointment of examiners in different regions of Australia.⁷

Schedule 3 proposes amendments to Part 1AA of the *Crimes Act 1914* (Search, Information Gathering, Arrest and Related Powers). The Schedule has three Parts.

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3. Senator the Hon. J Ludwig (Minister for Home Affairs), ‘Second reading speech: Crimes Legislation Amendment Bill 2010’, op. cit., p. 263.
4. See M Biddington, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, Bills digest, no. 31, 2009-10, Parliamentary Library, Canberra, viewed 28 October 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd031.pdf>
5. See M. Biddington, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009*, Bills digest, no. 68, 2009-10, Parliamentary Library, Canberra, viewed 28 October 2010, <http://www.aph.gov.au/library/pubs/bd/2009-10/10bd068.pdf>
6. Examiners are appointed under section 46B of the ACC Act. Section 24A provides that examiners may conduct an examination for the purposes of a special ACC operation or investigation (defined in subsection 4(1) of the Act).
7. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 2.

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Part 1 will extend the application of certain search-related provisions in the Crimes Act that presently apply only to warrants for premises, to search warrants in relation to a person. Amongst other things, the amendments will provide for orders to be made requiring a person to provide information and assistance with accessing or copying data from a computer or data storage device moved or seized under a warrant in relation to a person.⁸

Part 2 will:

- insert rules about when documents produced under Division 4B (Power to obtain information and documents) must be returned to the person who produced them or the owner
- streamlines and extends provisions governing applications for, and determination of, various orders relating to things seized and documents produced; and
- allow the AFP Commissioner to delegate functions relating to the return of things seized and documents produced.

Part 3 will provide police with a power to fingerprint and photograph lawfully arrested persons when taking them into custody in relation to a Commonwealth offence attracting a period of imprisonment of 12 months or more. Police will not be required to satisfy a 'reasonable necessity' threshold for the use of the power. The Explanatory Memorandum says that the amendments will:

- provide a fast and reliable way of confirming the identity of suspects
- improve record keeping processes for arrests; and
- ensure the admissibility of arrest records in court proceedings.⁹

Schedule 4 proposes amendments to the *Australian Federal Police Act 1979* (AFP Act) to enable the AFP Commissioner to make a payment in special circumstances that arise out of, or in relation to a person's employment as a member of the AFP.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 17 November 2010. Details of the inquiry are at http://www.aph.gov.au/senate/committee/legcon_ctte/crimes_legislation_amendment_43rd/index.htm

The Bill has also been reviewed by the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee).¹⁰ Details of the Committee's report are at <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d08.pdf>

8. Ibid.

9. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 18.

10. Senate Standing Committee on the Scrutiny of Bills, Alert Digest No. 8, 2010, p. 22.

The views of the Scrutiny of Bills Committee and of submitters to the inquiry by the Legal and Constitutional Affairs Committee are referred to in the Key Provisions section of this Digest.

Financial implications

The Explanatory Memorandum states that the proposed amendments will have no financial implications.¹¹

Key provisions

Schedule 1 – Amendments relating to ACC dismissal powers

Part 1 — Amendment of *the Australian Crime Commission Act 2002*

Item 2 inserts **proposed new section 47A**. The section relates to where:

- the ACC CEO terminates the employment under subsection 29 (1) of the *Public Service Act 1999* (PS Act) of an ACC employee who is a Commonwealth public servant,¹² and
- the CEO believes on reasonable grounds that the public servant has engaged in serious misconduct that is having or is likely to have a damaging effect on the professional self respect or morale of ACC members or the reputation of the ACC.

Where the CEO considers on reasonable grounds that one or more of these conditions has been satisfied, he or she can issue a declaration under **proposed subsection 47A(2)**.

‘Serious misconduct’ is defined in **proposed subsection 47A(8)** as:

- corruption
- a serious abuse of power
- a serious dereliction of duty; or
- any other seriously reprehensible act or behaviour whether or not the person is acting or purporting to act in the course of his or her duties as a staff member.¹³

Proposed subsection 47A(3) provides that the effect of a declaration will be to remove the termination and the declaration from the ambit of the *Fair Work Act 2009* (Fair Work Act)

11. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 3.

12. The termination power under the PS Act is an existing power of the ACC CEO with respect to Commonwealth public servant employees. Proposed section 47A will not apply to other members of staff such as consultants. The CEO will continue to rely on current powers for the dismissal of such staff.

13. The Explanatory Memorandum suggests that the definition ‘will limit the power to make a declaration to the most serious abuse of power, position or the most serious cases of misconduct or corruption’, Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 9.

except Part 3-1 and Division 9 of Part 3-3).¹⁴ This means that provisions relating to unfair dismissal and notice of termination under the Fair Work Act will not apply.

The AFP Commissioner has a similar existing declaratory power under section 40K of the AFP Act. The application of the Fair Work Act is also confined in relation to the power to Part 3-1 and Division 9 of Part 3-3.¹⁵

The Community and Public Sector Union opposes the proposed amendment:

All Australian Public Service employees employed under the [PS Act] have access to the unfair dismissal protections and procedures of the Fair Work Act. This includes employees working in areas of the highest security clearance and other sensitive areas.¹⁶

A declaration must be in writing (**proposed paragraph 47A(5)(a)**), made within 24 hours of the termination decision (**proposed paragraph 47A(5)(b)**), and the public servant must be given a copy (**proposed subsection 47A(6)**). The ACC CEO must also give a written report to the Minister and the ACC Board (**proposed subsection 47A(7)**).

A declaration will be a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).¹⁷ While the subjective nature of employment-related decisions can make their review difficult, the proposed definition of 'serious misconduct' would be helpful to anyone seeking judicial review, as well as to the ACC CEO.¹⁸

Whereas the report to the Minister and the Board must provide details of the grounds for the CEO's belief (**proposed section 47A(7)**), the contents of the declaration are not specified beyond that it indicate that the ACC CEO have the belief referred to in subsection 47A(1) (subsection

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14. Part 3-1 of the Fair Work Act, which it is proposed would continue to apply, deals with general protections such as work place rights, while Division 9-9 deals with payments during periods of industrial action.
 15. Subsection 69B(1) of the *Australian Federal Police Act 1979*. Section 40K does not limit the application of the Fair Work Act. This is achieved by section 69B of the AFP Act. Although subsection 69B(2) of the Act extends the application of the Fair Work Act's unfair dismissal provisions to the termination of AFP employees under s 28 of the AFP Act, the Explanatory Memorandum, Australian Federal Police Bill 1999 (p.17), explains that if administrative review of the declaration decision is successful, 'the termination is taken to be a general termination under section 28 and is open to challenge under the unfair dismissal provisions of the [then] workplace Relations Act'. See: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r928_ems_26f68b25-973c-493f-bcbd-b194553b4807/upload_pdf/26418\[1\].pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r928_ems_26f68b25-973c-493f-bcbd-b194553b4807/upload_pdf/26418[1].pdf;fileType=application%2Fpdf)
 16. Community and Public Sector Union submission to inquiry into the Crimes Legislation Amendment Bill 2010, p. 1, viewed 31 October 2010, http://www.aph.gov.au/senate/committee/legcon_ctte/crimes_legislation_amendment_43rd/submissions.htm
 17. Judicial review relates to the legality rather than the merits of a decision. Grounds of review set out in section 5 of the *Administrative Decisions (Judicial Review) Act* include breach of the rules of natural justice, error of law, that in making the decision the decision maker took into account irrelevant considerations or failed to take into account relevant ones.
 18. Termination decisions with respect to all Commonwealth public servants under section 29 of the PS Act are not open to review under that Act: subsection 33(1). Nor are they subject to merits review by the Administrative Appeals Tribunal. However the Fair Work Act does apply: see section 8 of the PS Act and the note to subsection 29(1).

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47A(2)). However, the termination notice from the ACC CEO under section 29 of the PS Act would be required to specify the grounds relied on for the termination.¹⁹

Item 3 provides that **proposed section 47A** will apply only to terminations effected after the day the Act receives the Royal Assent.

Item 4 proposes an amendment to section 59 of the ACC Act to prevent the ACC CEO from delegating his or her power under proposed section 47A.

The impetus for the proposed provision came from the report of the Parliamentary Joint Committee (PJC) on the ACC on the ACC's Annual Report for 2007-08. In its report, the PJC expressed concern:

... that ACC employees suspected of serious misconduct or corruption remain within the organisation and may seek to jeopardise investigations, thereby potentially compromising the security of the ACC's operations.²⁰

The PJC recommended that the Government:

... review existing arrangements for the suspension and dismissal of Commonwealth law enforcement agency employees believed on reasonable grounds to have engaged in serious misconduct or corruption, and that the Government take action as appropriate, bearing in mind the need to respect the rights of employees.²¹

Neither the PJC in its report, nor the Government in proposing this amendment, have suggested that there have been instances of serious misconduct or corruption in the ACC. In its 2008 submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (ACLEI), ACLEI noted that in the context of its own establishment:

... there was no perception of a significant or systemic problem with corruption in either the ACC or the AFP. The possibility that corruption could develop is ever present, particularly if sufficient deterrence and detection measures were not in place.²²

Part 2 — Amendment of the *Telecommunications (Interception and Access) Act 1979*

19. Subsection 29(2) of the Act.

20. Parliamentary Joint Committee on the Australian Crime Commission, 'Examination of the Australian Crime Commission Annual Report 2007-08', p. 30, viewed 4 November 2010, http://www.aph.gov.au/Senate/committee/acc_ctte/annual/2008/report/report.pdf

21. *Ibid.*, p. 31.

22. Submission by the Australian Commission for Law Enforcement Integrity to the Australian Commission for Law Enforcement Integrity Inquiry into state-based law enforcement integrity agencies, June 2008, p. 5, viewed 3 November 2010, http://www.aph.gov.au/Senate/committee/aclei_ctte/lawenfmod/submissions/sub004.pdf

The Explanatory Memorandum states that **items 5 and 6** will give the ACC:

...the power to use lawfully intercepted information in the same way as the AFP in investigating misconduct and in making termination decisions.²³

Section 67 of the TIA Act provides that an agency can only use lawfully intercepted information for a permitted purpose. **Item 5** inserts **proposed new subparagraphs (iii), (iv), (v) and (vi)** after paragraph (aa)(ii) of the definition of 'permitted purpose' in subsection 5(1) of the TIA Act. The effect of the amendment will be to allow the ACC CEO to use lawfully intercepted information in relation to alleged misbehaviour or alleged improper conduct of a Commonwealth public servant employed by the ACC.

Section 68 of the TIA Act permits one agency to disclose to another agency lawfully intercepted information that 'relates, or appears to relate' to the functions of the recipient agency. **Item 6** inserts **proposed new paragraph (ca)** in section 68 to permit the Chief Officer of another agency to communicate lawfully intercepted information to the ACC where the information relates or appears to relate to an act or omission of an ACC staff member that may give rise to termination action by the ACC CEO.

The application of proposed paragraph (ca) encompasses information about 'a member of the staff of the ACC' and is therefore not limited in to information about Commonwealth public servant s employed by the ACC.

The Explanatory Memorandum says that this is because that agency 'may not be in a position to know how the member of staff is employed by the ACC'. Moreover, the amended definition of 'permitted purpose' will mean that the ACC will only be able to use information relating to public servants.²⁴ If the information is about a consultant or an AFP officer it will not be able to be used. General privacy principles support the limitation of the collection of information to that which is necessary or directly related to a lawful purpose.

There is no guidance provided in the Bill or the Explanatory Memorandum regarding the destruction of material intercepted under proposed paragraph (ca) that does not relate to a Commonwealth public servant employed by the ACC.

Item 7 clarifies that the amendments made to the TIA will apply to information obtained before and after the Act receives Royal Assent. No explanation is provided in the Explanatory Memorandum as to why the application of these new powers should be retrospective.

23. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 11.

24. Ibid. This does not arise under a similar provision for AFP employees under the TIA as they are employed by the Commissioner.

Item 8 requires an independent review into the operation of proposed section 47A and the Part 2 amendments to the TIA Act as soon as practicable after 2 years from their commencement.

Schedule 2 – Amendments relating to appointment of ACC examiners ***Australian Crime Commission Act 2002***

Item 1 proposes omission of the words ‘a special’ from subsection 46A(3) of the ACC Act. Subsection (3) presently permits the CEO to make arrangements as to the examiner who is able to exercise his or her powers under the Act in relation to a special ACC operation/investigation. The proposed amendment will enable the ACC CEO to make arrangements with examiners in relation to any ACC operation or investigation. It will also remove apparent inconsistency with existing provisions of the Act which do not confine examiners powers to ‘special’ operations.

Item 3 proposes the addition of **proposed new subsection 46A(4)** requiring the ACC CEO to notify the Minister in writing on a six monthly basis of each arrangement made with examiners under subsection 46A(3) of the ACC Act.

Item 5 proposes an amendment to subsection 46B(4) to allow an examiner to be appointed for a period of up to five years. The number of reappointments would be unlimited, but each appointment would not be permitted to exceed five years. Currently, examiners can be appointed for a total of up to 10 years.

The Explanatory Memorandum explains that the proposed amendment will provide greater flexibility and enable the retention of experienced examiners.²⁵

The Law Council of Australia does not support this amendment, noting the significant role of examiners in ensuring that the ACC’s coercive powers are used appropriately. The Council argues that a limitation on the number of times an examiner could be reappointed would:

- remove the incentive for examiners to exercise their authority in a way that might lead to their reappointment
- preserve a degree of separateness from the ACC as an institution; and
- militate against the development of an organisational culture which ‘might tolerate unethical, unlawful or corrupt practices’.²⁶

According to the Council:

25. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, pp. 14, 15.

26. Law Council of Australia submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment Bill 2010, p. 2, viewed 10 November 2010, http://www.apf.gov.au/senate/committee/legcon_ctte/crimes_legislation_amendment_43rd/submissions.htm

There is no reason why the ACC's desire for continuity and experience should suddenly be regarded as trumping the need for structural safeguards which mitigate against the misuse and overuse of the [ACC's] coercive powers.²⁷

Item 8 proposes the repeal of subsection 46B(5) and the insertion of **proposed new subsection (5)** providing for the appointment of both full and part-time examiners. Among the advantages said to flow from this will be the potential to draw from a pool of examiners and to use examiners with particular skills in particular operations.²⁸ The ACC currently only has four full-time examiners and:

[t]he need for an examiner can fluctuate depending on the status of a particular investigation or operation.²⁹

Items 9, 10 and 11 propose amendments to section 46D to preserve current leave of absence entitlements for full-time examiners and to entitle part-time examiners to leave of absence on the terms determined by the ACC CEO.

Items 12 proposes the retention in section 46G of the current prohibition on outside paid employment for full-time examiners, unless approved by the Minister.

Item 13 inserts proposed new subsections 46G(2) and (3) which will:

- prohibit a part-time examiner from engaging in paid employment that, in the CEO's opinion, conflicts with the proper performance of their duties; and
- empower the CEO to require the provision of outside employment information by a part-time examiner.

Items 14 to 15 preserve existing provisions for the termination by the Governor-General of the employment of a full-time examiner. **Item 17** will insert **proposed new subsection 46H(2)** which will provide that failure to comply with **proposed new subsections 46G(2) and (3)** will be grounds for terminating the employment of a part-time examiner.

The Explanatory Memorandum says that these amendments will allow the CEO to gain information on the outside employment of part-time examiners before engaging them in particular work and to determine whether or not there is a conflict of interest.³⁰

The Law Council does not support provision for part-time examiners in its current form:

... if allowance is to be made for the appointment of part-time ACC examiners then it must only be on a permanent part-time basis with fixed remuneration per annum.³¹

27. Ibid., p. 3.

28. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 15.

29. Senator the Hon. J Ludwig (Minister for Home Affairs), Second reading speech, op. cit., p. 266.

30. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 16.

31. Law Council submission to Senate Legal and Constitutional Affairs Committee Inquiry, op. cit., p. 4.

This view coincides with the view of the Parliamentary Joint Committee (PJC) on the National Crime Authority in its consideration of the Australian Crime Commission Establishment Bill:

In the proposed structure for the authorisation and use of coercive powers the independence of examiners is a critical safeguard.³²

The PJC recommended:

... that the [Australian Crime Commission Establishment Bill 2002] be amended to provide that no part-time examiners can be engaged on a per-hour or per-diem basis.³³

Schedule 3 – Amendment of the Crimes Act 1914

Part 1 — Amendments relating to warrants issued in relation to persons

Crimes Act 1914

Part 1 makes various amendments to Division 2 (Search warrants) of Part 1AA (Search, information gathering, arrest and related powers) of the Crimes Act in relation to the issue and execution of search warrants. A number of the provisions in Division 2 are limited to warrants for the search of premises. The Explanatory Memorandum states that:

This Part will extend some of these provisions to help police deal more effectively with electronic equipment located during a search under a warrant in relation to a person.³⁴

Items 1-9 propose amendments to section 3K (Use of equipment to examine or process things) so that things found during a search under warrant in relation to a person, as well as things found in relation to warrant premises, can be moved to another place for examination and processing if certain conditions are met, or if the person gives their written consent.

Item 10 proposes an amendment to subsection (1) of section 3L (Use of electronic equipment at premises) to clarify that the section continues to apply only to searches under warrant in relation to premises.

Items 11 and 12 propose amendments to subsections 3LAA(1) and (5). Section 3LAA governs what may be done with electronic equipment moved from warrant premises to another place for examination or processing under subsection 3K(2). The proposed amendments extend the application of section 3LAA to things found under a warrant in relation to a person.

32. Parliamentary Joint Committee on the National Crime Authority, Australian Crime Commission Establishment Bill 2002, November 2002, p. 28, viewed 31 October 2010, http://www.aph.gov.au/senate/committee/acc_ctte/completed_inquiries/2002-04/acc_establishment/report/report.pdf

33. Ibid.

34. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 19.

Items 13 to 15 propose amendments to section 3LA. This section allows a police officer to apply to a magistrate for an order requiring a specified person to provide information or assistance in accessing or copying data from a computer or data storage device. **Item 13** will extend the application of subparagraph 3LA(1)(a)(ii) to a computer or data storage device found under a warrant in relation to a person and moved under subsection 3K(2). **Item 14** makes a similar extension to subparagraph 3LA(1)(a)(iii) in the case of equipment seized under Division 2 under a warrant in relation to a person.

Items 16 – 22 are consequential to the proposed amendments to section 3K.

Sub item 23(2) is a transitional provision providing that the amendment proposed in item 14 applies in relation to anything seized ‘whether before or after this Part commences’. The Scrutiny of Bills Committee expressed concern at the retrospectivity of the provision but noted the detailed explanation provided in the Explanatory Memorandum,³⁵ including that the provision does not create retrospective criminal liability.³⁶

Part 2 — Amendments relating to retention etc. of things seized and documents produced

Crimes Act 1914

This Part proposes three key changes to Part 1AA, Division 4C (Using, sharing and returning things seized and documents produced) of the Act.

Item 39 proposes repeal of section 3ZQZB (Magistrate may permit a thing seized under Division 3A to be retained, forfeited etc.). **Proposed new subsection 3ZQZB(1)** will extend the application of the section to any thing seized or any document produced under Part 1AA of the Act. The section currently only applies to things seized under Division 3A in relation to terrorist acts. The amendment will extend the application of the section to things seized under Division 2 (Search warrants), Division 3 (Stopping and searching conveyances), Division 4 (Arrest and related matters) or to documents produced under Division 4B (Power to obtain information and documents).

Proposed new subsection 3ZQZB(2) provides that a thing seized under Division 3 or 3A may be retained for the period specified in the order if the magistrate is satisfied that the thing is being used or is required to be used for a purpose mentioned in section 3ZQU (Purposes for which things and documents may be used and shared) or for other judicial or administrative review proceedings.³⁷

The Commissioner is only required to return things seized under Divisions 2 or 4 if satisfied that it is not required or no longer required for a purpose mentioned in section 3ZQU.³⁸ **Item 31** proposes insertion of an equivalent provision in section 3ZQX (When things seized under Division 2 or 4 must be returned) that will apply to Division 4A.)

35. Ibid., p. 25.

36. Senate Standing Committee on the Scrutiny of Bills, op. cit., p.25.

37. The Commissioner is only required to return things seized under Divisions 2 or 4 if satisfied that it is not required or no longer required for a purpose mentioned in section 3ZQU: Explanatory Memorandum, p. 33.

38. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 33.

Proposed new subsections 3ZQZB (3) and (4) provide that if the magistrate is satisfied that the thing or document seized is returned to the owner, the person from whom it was seized or the person who produced it, it would be likely to be used to commit a terrorist act, terrorism offence or serious offence, then the magistrate may grant an order to retain/forfeit/sell (things) or destroy it.

Proposed new subsection 3ZQZB(5) will provide that where a magistrate is not satisfied that a thing or document will be used for terrorist acts, he or she must make an order that the thing or document be returned, as appropriate, to the relevant person.

Proposed new subsection 3QZB(6) and (7) will require the AFP Commissioner to take reasonable steps to discover who has an interest in the thing or document and, if practicable, to notify each of them of the proposed application.

Proposed new subsection 3ZQZB(8) will provide time limits for the making of an application under section 3ZQZB in relation to a thing seized under Division 3..

Item 42 inserts **proposed new subsection 3ZW(2)**. The new subsection will allow the AFP Commissioner to delegate his or her powers, functions or duties under Part 1AA relating to returning things seized and documents produced to Commonwealth officers. The Commissioner can only presently delegate these powers to a police officer.

The Explanatory Memorandum explains that the AFP routinely executes search warrants on behalf of agencies such as Centrelink, the Australian Taxation Office and the Australian Securities and Investments Commission.³⁹ **New subsection 3ZW(2)** provides that the Commissioner would only be permitted to make the delegation if he or she were satisfied on reasonable grounds that the officer is able properly to exercise the relevant powers, functions or duties.

Part 3 — Amendments relating to fingerprints and photographs

Crimes Act 1914

Item 43 proposes the insertion of **proposed new paragraph (3)(ba)** in section 3ZJ (Taking fingerprints, recordings, samples of handwriting or photographs). The effect of the new provision would be to allow police officers of the rank of sergeant or above to take fingerprints or photographs (including video recordings) from a person in lawful custody where the offence is punishable by imprisonment for 12 months or more.

This power would be in addition to existing police powers to do these things:

- with the person's written consent
- where there are reasonable grounds to believe that it is necessary to establish who the person is, identify the person as the person who committed the offence or provide evidence of, or relating to an offence; or

39. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 36.

- where there are reasonable grounds for suspecting that the person has committed another offence.

The Explanatory Memorandum says that the new provision would:

...provide police with a fast and practical way of confirming the identify of arrested persons

and that it would:

... increase certainty in criminal prosecutions based on fingerprint or photographic evidence by reducing delays caused by challenges to such evidence by defendants arguing that there was not a belief on reasonable grounds that it was necessary to take the fingerprint or photograph at the time it was taken.⁴⁰

It should be noted that although the Explanatory Memorandum refers to 'arrested person' in fact the provision applies to 'persons in lawful custody', which is not defined in the Act.⁴¹

The Law Society of South Australia says that though the term 'lawful custody' has been the subject of judicial consideration it:

... is not defined by the Crimes Act. Examples of 'lawful custody' include arrest, pre-charge and ... pre-conviction, while in prison on remand awaiting trial, while in the charge of the court during a superior court trial and while being detained by police under legislation that provides the right to detain for a set period pre-charge.⁴²

The Scrutiny of Bills Committee regards the amendment as a 'significant extension of coercive police powers' which 'has not been fully justified.'⁴³ The Committee:

... seeks the Minister's advice about whether the practical problems identified with the existing provisions could be dealt with through means which are less restrictive of the rights of an arrested person or whether additional safeguards can be implemented such as restricting the circumstances in which the power is authorised (for example to situations where the police have reasonable grounds to suspect that a false name had been given) or as to the use to which information collected routinely on the arrest of a person could be used.⁴⁴

The Law Society of South Australia also says that:

...if identification material, which would otherwise constitute an assault, trespass or breach/invasion of a person's privacy/liberties, is to be compulsorily taken from a person prior

40. Ibid., p. 37.

41. This point is noted by the Law Society of South Australia in its submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Bill, p. 2, viewed 10 November 2010, http://www.apf.gov.au/senate/committee/legcon_ctte/crimes_legislation_amendment_43rd/submissions.htm

42. Law Society of South Australia submission to Senate Legal and Constitutional Affairs Committee Inquiry, *ibid.*

43. Senate Standing Committee on the Scrutiny of Bills, *op. cit.*, p. 26.

44. *Ibid.*

to conviction, there should be the safeguard of proper cause to do so (as is presently the case).⁴⁵

In the absence of consent, this proposed new subsection would be likely to be used by police to the exclusion of other provisions that are linked in their operation to reasonable grounds of necessity or suspicion.

Schedule 4 – Amendments relating to special payments to AFP appointees

Australian Federal Police Act 1979

Item 4 inserts **proposed new Division 3A** (Payments in special circumstances) into the Act.

Proposed subsection 35A(1) will allow the AFP Commissioner to authorise a payment to a person where the Commissioner considers it appropriate to do so because of special circumstances relating to or arising out of the person's engagement as an AFP appointee or another person's engagement as an AFP appointee. This will allow payments to be made not only to people appointed to the AFP, but to others such as the spouses of deceased appointees. The maximum total payment would be \$100,000.

The Explanatory Memorandum states that [guidelines](#) provided by the Australian Public Service Commission for payments under section 73 of the PS Act to Commonwealth public servants may be relevant to the Commissioner's determination of what constitutes 'special circumstances'.⁴⁶

Concluding comments

The new declaration power given to the ACC CEO under Schedule 1 is consistent with the Government's stated desire to combat organised crime.⁴⁷ However, while the exercise of the power is subject to a number of safeguards:

- it is subject to a 'reasonable belief' threshold and to the definition of 'serious misconduct'
- it is non-delegable by the ACC CEO
- the ACC CEO must provide a written report to the Minister and the ACC Board as soon as practicable after making the declaration
- it would be reviewable under the AD(JR) Act,

the proposed amendment removes significant parts of the Fair Work Act including those relating to unfair dismissal.

45. Law Society of South Australia submission to Senate Legal and Constitutional Affairs Committee, op. cit., p. 2.

46. Explanatory Memorandum, Crimes Legislation Amendment Bill 2010, p. 40.

47. Senator the Hon. Joe Ludwig (Minister for Home Affairs), op. cit., p. 263.

The proposed amendments to the Crimes Act by Schedule 3 will be of assistance to police, particularly those in Schedule 3 relating to search warrants and information gathering.

This is also true of the proposed new police powers relating to fingerprints and photographs. However, there is no 'reasonable necessity' threshold to their use and they apply to anyone in 'lawful custody' for an offence punishable by imprisonment for 12 months or more. In view of this, it is suggested that their operation should be the subject of external review after a period of time.

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