



## Attorney General; Minister for Corrective Services

Our Ref: 35-05808

Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Department of the Senate  
P O Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

### **Inquiry into the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009.**

Thank you for the opportunity to provide a submission on the Crime Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009.

Whilst most of the provisions are consistent with and provide support to this State's response to organised crime, I do have some concern regarding the proposed amendments to the *Australian Crime Commission Act 2002*, contained in Schedule 7, to create a contempt offence and confer jurisdiction on the Federal Court and the State and Territory Supreme Courts to deal with alleged contempt of the Australian Crime Commission as if it were contempt of court.

First, this aspect of the Bill deals with an issue which is currently being considered by the Australian Law Reform Commission in its reference on Royal Commissions and Official Inquiries and Chapter 19 of its Discussion Paper (July 2009) proposes that the "proposed [Commonwealth] *Inquiries Act* should provide that, where a person fails to comply with a notice or a direction of a Royal Commission or Official Inquiry, or threatens to do so, the chair of the inquiry may refer the matter to the Federal Court of Australia. The Court, after hearing any evidence or representations on the matter certified to it, may enforce such a notice or direction as if the matter had arisen in proceedings before the Court." As the Bill has provisions along similar lines (though with the addition of conferring federal jurisdiction on Supreme Courts), I assume that you will not be deferring the passage or coming into operation of these provisions until after the Commission has issued its final report and recommendations.

Second, proposed section 34A(b) will provide that a legal practitioner will be in contempt of the Australia Crime Commission if that practitioner "is required to answer a question or produce a document at an examination before an examiner, and both of the following apply: (i) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner; (ii) he or she refuses to comply with the requirement and does not, when required by the examiner, give the examiner the name and

address of the person to whom or by whom the communication was made." In contrast to this Bill, section 30(4) protects the principle against self-incrimination and also section 30(9) of the Act expressly indicates that, for purposes of a section 30 offence of failure of a legal practitioner to answer questions or provide documents, "privileged communication" does "not affect the law relating to legal professional privilege." That is, proposed section 34A appears to prevail over legal professional privilege. As a general principle I do not support statutory overriding of legal professional privilege or the negation of the above principle. However, in the context of criminal investigations and alleged offences, there may need to be some appropriately tailored exceptions.

Third, proposed section 34D(1) will enable an Australian Crime Commission examiner who "proposes to make an application under subsection 34B(1) in respect of a person, he or she may, during the hearing concerned, direct a constable to detain the person for the purpose of bringing the person before the Court to which the application was made for the hearing of the application". That is, despite some protections in proposed subsections (2), (3) and (4); a legal practitioner could be placed in detention before they are convicted of contempt for refusing to produce a document to which legal professional privilege would otherwise apply. The attachment to your letter suggests that the advantage of such immediate detention is that the possibility of this occurring would "motivate compliance" with the requests of the examiner. In my view, unless there are compelling empirical statistics and examples to support the need for such deterrence, this aspect ought, at least, to be amended to provide for contempt applications to be dealt with expeditiously by the courts rather than immediate detention at the behest of an examiner.

I trust the above will assist in the Committee's Inquiry into the Crimes Legislation (Serious and Organised Crime) Bill (No 2) 2009.

Yours sincerely



C. Christian Porter MLA  
ATTORNEY GENERAL; MINISTER FOR CORRECTIVE SERVICES

- 9 OCT 2009