CDPP
Australia's Federal Prosecution Service

Hearing into the *Law Enforcement Legislation Amendment (Powers) Bill 2015*

SUBMISSION BY THE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

4 JUNE 2015

Introduction

1. The Office of the Commonwealth Director of Public Prosecutions (CDPP) was established under the *Director of Public Prosecutions Act 1983* (Cth). The CDPP prosecutes offences against Commonwealth law in accordance with the *Prosecution Policy of the Commonwealth*. The types of offences prosecuted by the CDPP include drug importation, money laundering, commercial law offences (e.g. insider trading and other market offences), fraud on the Commonwealth (e.g. tax, Medicare and social security fraud), human exploitation (e.g. people smuggling, sexual servitude, child sex tourism and child pornography), cybercrime, corruption of Commonwealth public officials, foreign bribery and terrorism. Matters are referred to the CDPP by Commonwealth investigating agencies. These include, for present purposes, the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI).

2. The CDPP was consulted by the Attorney-General's Department in relation to the drafting of the *Law Enforcement Legislation Amendment (Powers) Bill 2015* (Bill). For the reasons set out below, the CDPP supports the Bill.

Purpose of the Bill

3. The aim of the Bill is to clarify, for future matters:

- the power of the ACC to conduct compulsory examinations pursuant to Part 2, Division 2 of the *Australian Crime Commission Act 2002* (ACC Act);

- the power of the Integrity Commissioner, supported by ACLEI, to conduct compulsory hearings pursuant to Part 9, Division 2 of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act); and

- the uses to which information and material obtained through the exercise of those compulsory powers may be put.

4. This clarification is urgently required following a number of recent court decisions, most notably by the High Court in *Lee v R* (2014) 88 ALJR 656 (*Lee No.2*) and *X7 v ACC* (2013) 248 CLR 92 (*X7*), and by the NSW Court of Criminal Appeal (CCA) in *R v Seller; R v McCarthy* [2013] NSWCCA 42 (*Seller & McCarthy*)[1], which have raised questions about the scope of those powers as intended by Parliament and as expressed in those Acts (refer Explanatory Memorandum (EM), pp 2, 28).

5. Central to those decisions is the so-called "accusatorial principle". In *Lee No. 2* the High Court (per French CJ, Crennan, Kiefel, Bell and Keane JJ at [32]) expressed that principle as follows:

> "Our system of criminal justice reflects a balance struck between the power of the state to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that "no attempt to whittle it down can be entertained" *albeit its application may be affected by a statute expressed clearly or in words of necessary intendment*. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice." (emphasis added, citations omitted)

6. The effect of this statement by the High Court - and the case law which preceded it - is that whilst Parliament can abrogate a fundamental common law protection such as the principle against self-incrimination it can only do so by "express words or necessary intendment"[2]. Equally, the dissemination to prosecution authorities of the answers to questions given by an accused under compulsion, or evidence derived from those answers, can only occur with clear legislative authority for such dissemination. The same goes for any other act the effect of which would be to fundamentally alter the position of the prosecution vis-à-vis the accused in a criminal trial, for example, by giving the prosecution pre-trial notice of an accused's likely defence or version of relevant events.[3]

7. The compulsory powers invested in the ACC and ACLEI under their respective Acts are rare but not unique. There are a number of Commonwealth and State Acts where, for strong public interest reasons, Parliament has seen fit to abrogate an individual's privilege against self-incrimination and to regulate the use to which information and material obtained through compulsory processes may be put. In this respect, it is not a function of the CDPP to make policy decisions as to what the law should or should not be. The CDPP's concern is to ensure that whatever balance Parliament sees fit to enact, the language of the legislation expresses that intention with irresistible clarity so that criminal investigations and prosecutions can proceed confidently and efficiently within the framework of the law.

8. In recent years prosecutions involving accused persons who have been compulsorily examined by the ACC have been weighed down by unsustainable levels of legal uncertainty. The Bill seeks to address that uncertainty.

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[1] see also *R v Seller; R v McCarthy* [2015] NSWCCA 76
[2] see *X7* at [71]
[3] see *Lee No.2* at [51]

Need for the Bill

9. The CDPP estimates that there are at least 11 matters in which the decisions in *Lee (no.2)*, *X7* and/or *R v Seller; R v McCarthy* (2013) 273 FLR 155 are, or may be, the subject of defence challenges to the prosecution, including through temporary and permanent stay applications. 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, the judgments arising from those challenges will be at best incrementally clarifying and at worst inconsistent. Amending legislation is the only cure.

10. Most importantly from a CDPP perspective, the Bill is intended to make it clear that:

    - where it is lawful to do so, pre-charge examination or hearing material given by an accused to an investigating agency may be disclosed to the prosecution, even if that material is not directly admissible as evidence against the accused.

    - subject to certain limitations, derivative material that has been lawfully obtained from an examination or hearing may be disclosed to the prosecution and is admissible in evidence against the examinee. Whilst there still may be issues identifying precisely what was derived from a particular examination or hearing, this aspect of the Bill should assist in reducing the number and scope of defence challenges which have arisen in prosecutions since the decision in *Seller & McCarthy*.

Outline of the Bill

11. 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, beyond the position which the CDPP understood to exist prior to the aforementioned High Court and NSW CCA decisions.

12. Schedule 1 of the Bill contains the specific amendments proposed to the ACC Act. The key change is a proposed new section 25C which will explicitly enable the ACC to provide examination material to the CDPP pre-charge or before a charge is "imminent" (a defined term in s4(1)), subject to the terms of any non-disclosure direction issued under section 25A(9). Once a person is charged (or if a charge is imminent), a court order will be required before the ACC can provide examination material to the CDPP, even if the examination was conducted pre-charge (see ss 25C(1)(b) and 25E(1)).

13. Under the proposed new section 25D, it is made clear that derivative material derived from a pre-charge examination can be provided to the CDPP either pre-charge or post-charge. However, derivative material obtained from a post-charge examination (or where a charge is imminent) can only be provided to the CDPP by way of court order.

14. The Bill makes it clear that a court may only issue such an order if it is in the interests of justice to do so (s25E(1)). The Bill explicitly preserves a court's power to make any orders necessary to

ensure that an examinee's fair trial is not prejudiced by the possession or use of examination material or derivative material (s25E(3)).

15. Schedule 2 of the Bill contains the amendments proposed to the LEIC Act and is in very similar terms to Schedule 1 given the very similar content of the ACC and LEIC Acts on the subject of compulsory powers (EM, p8).

16. Because most proceedings under the *Proceeds of Crime Act 2002* (POC Act) are now undertaken by the Criminal Assets Confiscation Taskforce which is located within the Australian Federal Police, this submission does not address the amendments proposed within the Bill to the POC Act.

Right to a fair trial

17. The right to a fair trial according to law is a fundamental common law right which all participants in a criminal trial, including the prosecution, have the utmost interest in protecting and promoting. That right intersects most acutely with the power of investigators to obtain answers to questions under compulsion after an accused has been charged with a relevant offence, or at least after such a charge is imminent. Before that point a person is merely a suspect - and may never become a "protected suspect" or "an accused". Before that point an investigation is still incomplete in important respects.

18. It is with this in mind that the Bill distinguishes between "pre-charge" and "post-charge" examinations/hearings as a way of balancing the potential risk for a fair trial with the reality of running an efficient and effective court system. As noted above, the Bill requires that a court order be obtained before material obtained or derived from a post-charge examination or post-charge hearing (i.e. "post-charge material") can be disseminated to the prosecution.

19. There is no such requirement for "pre-charge material". The CDPP considers that it would be completely unworkable, from a prosecution perspective, to require the prosecution to obtain a court order in order to access material obtained or derived from a pre-charge hearing or pre-charge examination. Such material may be provided to the prosecution pre or post laying of charges against the examinee, and a requirement to obtain a court order would risk challenges to significant parts of the evidence relied upon and require the prosecution to be a position to establish the provenance of every piece of evidence.

20. The requirement to obtain a court order for disclosure to the prosecution of post-charge material is not part of the current ACC and LEIC Acts. It is a "new" safeguard which directly addresses the concern that disclosing post-charge material to the prosecution may fundamentally alter the position of the prosecution vis-à-vis the accused with the result that the accused will be unable to obtain a fair trial. 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.

21. How is this provision likely to play out in practice? The CDPP does not expect to seek access to post-charge material as a matter of course. 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.

22. However, the position is different where an accused has entered a plea of guilty to a charge. The question of a trial falls away. The focus of the prosecution and defence shifts to making submissions on sentence whether in mitigation or aggravation. At that point it may be important for the CDPP to review material which has been obtained through a compulsory process to ensure that the circumstances of the offending are accurately presented to the sentencing judge and to counter submissions inconsistent with that position that may be put forward on behalf of the accused. If the accused is willing to become a witness against other persons, it is also important for the prosecution to be able to review previous representations made under oath by the accused to ascertain the reliability and credibility of the prospective witness, and to enable the prosecution to later disclose that material to any other persons charged against whom the examinee will be called by the prosecution as a witness.

23. The CDPP notes that if an accused alleges that the boundary between "pre-charge" and "post-charge" was manipulated by an investigating agency for an improper purpose, and if a court finds the allegation proved, the prosecution may be permanently stayed on the grounds that there was an abuse of process in the sense that the use of the proceedings would bring the administration of justice into disrepute.