



Law Enforcement Legislation Amendment (Powers) Bill 2015

Senate Legal and Constitutional Affairs Committee

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Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affairs' (the Committee) Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (the Bill).
2. This submission highlights the importance of the right to a fair trial and the privilege against self-incrimination to our system of justice. It considers whether the limitations in the Bill are justifiable and the potential for it to be beyond the legislative power of the Commonwealth to enact. It also makes some observations about the *Australian Crime Commission Act 2002* (Cth) (ACC Act) and
3. The Bill amends the ACC Act and the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) to enhance the powers of Australian Crime Commission (ACC) examiners to conduct examinations, and the Integrity Commissioner, supported by the Australian Commission for Law Enforcement Integrity (ACLEI) to conduct hearings.
4. The Bill significantly limits the right to a fair trial, particularly by affecting the equality of arms principle and the protection against self-incrimination. Specifically, 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.
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.
6. Notwithstanding a number of safeguards contained in the Bill to protect the right to a fair trial, there is a real risk that the administration of justice will be interfered with by requiring a person to answer questions, on pain of punishment, designed to establish that he or she is guilty of the offence with which he or she is charged or has unlawfully acquired funds or assets.¹ The fact that a person may be examined, in detail, as to the circumstances of the alleged offence or confiscation proceedings, is very likely to prejudice a person in his or her defence.²
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 to enact. Regardless of the question of Constitutional validity, the Bill, as currently drafted, is a disproportionate response to the legitimate aims of the Bill to prevent and prosecute serious and organise crime and corruption.
8. The Law Council's primary recommendations include:

¹ *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ (with whom Mason and Murphy JJ agreed).

² *Ibid.*

- (a) the Bill should not be passed in its current form and the examination of a person charged or imminently to be charged by the ACC or Integrity Commissioner should be deferred until after the disposition of any charges;
- (b) a comprehensive review of the ACC Act should be conducted 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
- (c) the Minister should clarify to the Parliament that this Bill in its entirety is within the power of the Commonwealth Parliament to enact, and address the specific comments made by Chief Justice French, Justice Crennan, Justice Hayne and Justice Bell in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

9. In the alternative, the Law Council recommends:

- (a) the Bill should require authorisation from a Federal Court judge 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;
- (b) examination or hearing questioning should be limited to the purported purposes for conducting the examination or hearing, that is, for the investigation of serious and organised crime or corruption;
- (c) 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 in the particular circumstances of the case of maintaining an examinee's confidentiality;
- (d) the definition of 'imminent' should include where an ACC examiner or the Integrity Commissioner reasonably believes that a person with authority to commence a process for prosecuting the person for an offence or to commence a confiscation proceeding has decided to commence, but not yet commenced the process;
- (e) consideration be given to whether there should be a separate definition of 'prosecutor' for the disclosure of examination material provisions and derivative material provisions;
- (f) a disclosure register should be kept which documents the timing of disclosure and the identity of persons to whom disclosure has been made;
- (g) the default position should be that the safeguards in the Bill apply as though the person has claimed the privilege against self-incrimination unless the privilege is expressly waived; and
- (h) the threshold for issuing a direction under subsection 25A(9A) of the ACC Act and subsection 90(2) of the LEIC Act should be that an ACC examiner or the Integrity Commissioner must give a direction about examination material if the failure to do so 'might reasonably be expected to prejudice the examinee's fair trial' where a person 'has been, or may be, charged with an offence'.

Constitutional and common law right to a fair trial

10. The right to a fair trial is a 'central pillar of our criminal justice system'³ and a 'cardinal requirement of the rule of law'.⁴ As noted by the Australian Law Reform Commission (ALRC), a 'fair trial is designed to prevent innocent people being convicted of crimes. It protects people's life, liberty and reputation'.⁵ The right to a fair trial is 'commonly manifested in rules of law and of practice designed to regulate the course of the trial'.⁶
11. The right to a fair trial is a fundamental common law right.⁷ Section 80 of the Constitution provides a limited guarantee of a trial by jury for a trial on indictment of any offence against any law of the Commonwealth. The concept of the separation of powers may also provide some limited protection of the right to a fair trial. Chapter III of the Constitution implies that Parliament cannot make a law which 'requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.⁸ Justice Gaudron in *Nicholas v The Queen* (1998) noted:
- In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.*⁹
12. In *Commissioner of the Australian Federal Police v Zhao*¹⁰ it was also held that the interests of justice are not served by requiring a person to defend forfeiture proceedings or pursue exclusion proceedings before his or her criminal proceedings are finalised, especially since the Commissioner would suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings.
13. The right to a fair trial is also protected by the 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.¹¹

³ *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

⁴ Tom Bingham, *The Rule of Law* (Penguin UK, 2011) ch 9.

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Issues Paper No 46 (2014) 61.

⁶ *Jago v The District Court of NSW* (1989) 168 CLR, 29 (Mason CJ).

⁷ *Dietrich v The Queen* (1992) 177 CLR 292.

⁸ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

⁹ *Nicholas v The Queen* (1998) 193 CLR 173 at [74] per Gaudron J. While Justice Gaudron's comments were made in a dissenting judgment it has subsequently been applied in *Fardon v Attorney-General* (QLD) (2004) 223 CLR 575 and *Bass v Permanent Trustee Co Ltd* 198 CLR 334 at [56]; cited by French CJ in *Cesan v The Queen* [2008] HCA 52 at [70].

¹⁰ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.

¹¹ *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 298 [28] (McHugh J).

Self-incrimination as a fundamental common law right

14. The privilege against self-incrimination is a part of the right to a fair trial and confers immunity from an obligation to provide information tending to prove one's own guilt.¹² It means that:

*... a person is not bound to answer any question or produce any document if the answer or the document would have the tendency to expose that person, either directly or indirectly, to a criminal charge, the imposition of a penalty or the forfeiture of an estate which is reasonably likely to be preferred or sued for.*¹³

15. The privilege against self-incrimination is 'a basic and substantive common law right, and not just a rule of evidence'.¹⁴ This common law privilege reflects 'the long-standing antipathy of the common law to compulsory interrogations about criminal conduct'.¹⁵ It is one element of the broader right to silence.¹⁶

16. In its 2008 report on privilege in federal investigations, the ALRC explained the three categories of the privilege:

*Although broadly referred to as the privilege against self-incrimination, the concept encompasses three distinct privileges: a privilege against self-incrimination in criminal matters; a privilege against self-exposure to a civil or administrative penalty (including any monetary penalty which might be imposed by a court or an administrative authority, but excluding private civil proceedings for damages); and a privilege against self-exposure to the forfeiture of an existing right (which is less commonly invoked).*¹⁷

17. The privilege arose from the common law principle that people should not be compelled to betray themselves.¹⁸ Historically, the privilege developed to protect individuals from being compelled to testify, on pain of torture or excommunication, to their own guilt.¹⁹

18. On one view, the privilege is believed to have been developed 'to ensure that European inquisitorial procedures would have no place in the common law adversary system of criminal justice'.²⁰

¹² *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at [512] (Brennan J).

¹³ *Bridal Fashions Pty Ltd v Comptroller-General of Customs and Another* (1996) 17 WAR 499 [504] (Malcolm CJ, Ipp and Owen JJ).

¹⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136-137 [104] (Hayne & Bell JJ).

¹⁵ *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 [1] (French CJ).

¹⁶ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (McHugh J).

Queensland Law Reform Commission, *The Abrogation of the Privilege against Self-Incrimination*, December 2004, p. 7. Other immunities encompassed by the right to silence include those possessed by people suspected of or charged with a criminal offence from being compelled to answer questions at a police interrogation or that which protects an accused person from having to give evidence at trial. See *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1[30-31] (Lord Mustill).

¹⁷ Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2008) [15.89].

¹⁸ R. Helmholz, 'Introduction' in R. Helmholz (ed), *The privilege against self-incrimination: its origins and development* (University of Chicago Press, 1997).

¹⁹ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 [497 - 498] (Mason CJ and Toohey J).

²⁰ *Azzopardi v R* (2001) 205 CLR 50 [91] (McHugh J).

19. The Queensland Law Reform Commission has usefully indicated that the primary rationales for the principles against self-incrimination include that it is:

- an essential safeguard to prevent abuse of power and to prevent an imbalance that exists between a State and its citizens. The ALRC has noted in this context:
*Because of its resources, the State has a considerable advantage in putting its case against most citizens. Most people dealing with the State are at a substantial organisational, monetary and knowledge disadvantage.*²¹
- to prevent conviction founded on a false confession;
- to protect the accusatorial system of justice;
- to protect the quality of evidence;
- to avoid the unfairness of placing a witness in the position of having to choose between refusing to provide the information in question (thereby risking punishment for contempt of court), providing the information (thereby furnishing evidence of guilt and risking conviction), or lying (thereby risking punishment for perjury); and
- to protect human dignity and privacy.²²

Are the measures in the Bill adequately justified?

20. In order for a proposed limitation on the right to a fair trial and the privilege against self-incrimination to be adequately justified, it must be:

- consistent with the Constitution and domestic law; and
- necessary and directed towards a legitimate objective that addresses a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient.²³ Additionally, 'a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable under international human rights law'.²⁴

Legitimate objective and rational connection

21. The Explanatory Memorandum to the Bill explains that the Bill is necessary to serve the legitimate aim of protecting the community from serious and organised crime (in the case of ACC examinations) and preventing corruption in law enforcement agencies (in the case of hearings under the LEIC Act).²⁵ The Law Council agrees that these are legitimate and worthy goals. The Law Council also agrees that the measures contained in the Bill are rationally connected to these objectives as the powers may allow information that otherwise would not be obtained through the use of

²¹ Australian Law Reform Commission, *Evidence*, Report No 26 (1985) vol 1, 487.

²² Queensland Law Reform Commission, *The Abrogation of the Privilege against Self-Incrimination*, Report No 59 (2004) 23-31.

²³ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Twenty-second Report of the 44th Parliament* (2014) 54.

²⁴ *Ibid.*

²⁵ Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015 11-12.

ordinary police powers, to assist in disrupting, investigating or prosecuting organised crime and corruption in law enforcement agencies.²⁶

22. However, the Bill raises the question of whether empowering an ACC examiner or the Integrity Commissioner, supported by ACLEI, to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence, is inconsistent with the right to a fair trial, potentially invalid under the Constitution and a disproportionate response.

Validity and proportionality

23. Justice Hayne and Justice Bell in *X7 v Australian Crime Commission* (2013) (X7) noted:

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'.²⁷

24. As the ACC Act was not considered to permit an examination of an accused person about the subject matter of a pending charge, the question of power was not reached for the majority of the High Court in X7.

25. However, the Bill's provisions which would permit an examination of an accused person about the subject matter of a pending charge does give rise to the question of whether it is within legislative power on the basis that it would be inimical to the exclusivity of the exercise of Commonwealth judicial power and contrary to an inviolable feature of the institution of trial by jury in s80 of the Constitution.²⁸ For example, the plaintiff in X7 submitted that:

*the judicial power of the Commonwealth vested by s71 of the Constitution in the closed category of courts described in Ch III is vested on the axiom of obedience to the judicial process. Following a person being charged with an offence against a law of the Commonwealth a curial investigative process commences and continues until the federal controversy joined between the Commonwealth and the person so charged is finally quelled by either a verdict of a jury, a plea of guilty or discontinuance of the charge(s). To repeat and borrow the words of Barton J in **Melbourne Steamship supra** at 346 "The subject matter has passed into the hands of the courts alone."²⁹*

26. A relevant question that may be required to be answered is whether the abrogation of the privilege against self-incrimination in the context of permitting an examination of an accused person about the subject matter of a pending charge is accompanied by adequate safeguards in the Bill to ensure that the fair trial of an accused will not be

²⁶ The Law Council notes that the Parliamentary Joint Committee on Human Rights similarly found that the Bill was directed at legitimate aims and that the measures contained in the Bill are rationally connected to these objectives – see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Twenty-second Report of the 44th Parliament* (2014) 54.

²⁷ *X7 v Australian Crime Commission* (2013) 248 CLR 92, [92] (Hayne and Bell JJ).

²⁸ *Written submissions of the Plaintiff* at [14] in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

²⁹ *Ibid.*

prejudiced.³⁰ A similar assessment is required to be undertaken in terms of considering whether, the measures contained in the Bill are reasonable and proportionate.

27. While the majority of the High Court in *X7* did not consider the extent to which Division 2 of Part II of the ACC Act was Constitutionally invalid on the grounds of being contrary to Ch III of the Constitution, French CJ and Crennan J (in dissent) did so, and found that there were safeguards in the scheme to ensure the fair trial protection in the Constitution is maintained. These safeguards included:

- express provisions abrogating the privilege against self-incrimination by requiring a witness to answer questions after charges had been laid;
- provision of use immunity;
- provisions which enabled the court to restrain, as an abuse of process, the use of derivative material;
- provisions which enabled the court to make orders, other than orders restoring the privilege, to safeguard an examinee's fair trial; and
- a mechanism for limiting the questions asked or the documents or things sought in an examination.

28. The Bill contemplates that it may be reaching beyond legislative power by providing for 16 severability clauses,³¹ which would enable certain provisions to be read as if they had not been enacted, in the event that they are found to be beyond power. These severability clauses highlight the extraordinary nature of the Bill's scheme which imposes significant limitations on the right to a fair trial.

Recommendation:

- **The Minister should clarify to the Parliament that this Bill in its entirety is within the power of the Commonwealth Parliament to enact and address the specific comments made by Chief Justice French, Justice Crennan, Justice Hayne and Justice Bell in *X7*.**

Purported Safeguards

29. The Bill in combination with the ACC and LEIC Acts and the rules of evidence and procedure purports to provide the following safeguards to ensure that the right to a fair trial is maintained in post-charge examinations and hearings:

- express provisions abrogating the privilege against self-incrimination;³²
- limitations on the purposes for which such an examination or hearing may be conducted;³³

³⁰ *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan J).

³¹ See for example clauses 24A(3), 25A(6B), 25B(4), 25C(3), 25D(2), 25E(5), 25F(5), 25H(5), 28(9), 82(1B), 83(7), 96AA(4), 96AB(3), 96AC(2), 96AE(5) and 96AG(5).

³² Paragraph 30(4)(c) of the ACC Act

³³ Under section 24A of the ACC Act an examiner may conduct an examination for the purposes of a special ACC operation/investigation. The examiner may only ask questions about matters relevant to the special

- requirements that an ACC examiner, before issuing a post-charge summons, is to be satisfied that issuing the summons is reasonably necessary for the purposes of the relevant special operation or special investigation even though the examinee has been charged with an offence.³⁴ Similarly, the Integrity Commissioner must have reasonable grounds to suspect that the evidence, documents or things produced under the summons are necessary for the purpose of the investigation, even though the witness has been charged with an offence.³⁵
- requirements that examination and hearing material must not be disclosed in a way that would prejudice the fair trial of the examinee or witness;³⁶
- requirements that examination or hearing material cannot be disclosed to a prosecutor without an order from the court where it would be in the interests of justice;³⁷
- provision of a limited use immunity whereby information provided by a person under examination or a hearing cannot be admitted in evidence against that person in a criminal proceeding, a proceeding for the imposition or recovery of a penalty, or a confiscation proceeding;³⁸
- limitations on the use of derivative material whereby information indirectly obtained from the person during a compulsory examination or hearing cannot be disclosed to a prosecutor without an order from the court that it would be in the interests of justice.³⁹ A court may also make any orders necessary to ensure that an examinee or witness's fair trial is not prejudiced by the prosecutor's possession or use of derivative material.⁴⁰ The operation of the

operation or special investigation (subsection 25A(6)). The Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue (subsection 82(1) of the LEIC Act) and may only ask questions about matters relevant to the corruption issue or another corruption issue (subsection 83(3) of the LEIC Act).

³⁴ New paragraph 28(1)(d) of the ACC Act.

³⁵ New paragraph 83(1)(d) of the LEIC Act.

³⁶ See new subsections 25A(9A) and 25A(14A) of the ACC Act and new subsections 90(2) and 90(6) of the LEIC Act.

³⁷ New section 25C and subsection 25E(1) of the ACC Act. New section 96AB and subsection 96 AD(1) of the LEIC Act.

³⁸ New subsection 30(5) of the ACC Act would set out the general position that answers, documents or things over which an examinee has claimed the privilege against self-incrimination are not admissible in criminal proceedings, proceedings for the imposition of a penalty, or confiscation proceedings. New subsection 30(5A) of the ACC Act would set out the exceptions to that general position, when such answers, documents or things are admissible in those proceedings. The exceptions include permitting the evidence to be used against the person in a confiscation proceeding, if the answer was given, or the document or thing was produced, at the examination at a time when the proceeding had not commenced and is not imminent; or a proceeding about the falsity of an answer or any statement contained in the document. New subsection 96(4A) of the LEIC Act will expand the categories of criminal proceedings in which hearing material is admissible to include a confiscation proceeding, if the answer was given, or the document or thing was produced, at a time when the proceeding had not commenced and is not imminent; or a proceeding for an offence against section 77B (unauthorised disclosure of notice to produce), 92 (unauthorised disclosure of a summons), 93 (failure to attend or do certain things in a hearing) or 94 (obstruction of an Integrity Commissioner's hearing); or a proceeding for an offence against section 137.1 or 137.2 of the Criminal Code (about false or misleading information or documents) that relates to the LEIC Act; or a disciplinary proceeding against the person if the person is a staff member of a law enforcement agency; or a proceeding relating to an application for a person to be dealt with for being in contempt of ACLEI.

³⁹ New section 25D and subsection 25E(1) of the ACC Act and new section 96AC and subsection 96AD(1) of the LEIC Act.

⁴⁰ New subsection 25E(3) of the ACC Act and new subsection 96AD(3) of the LEIC Act.

rules of evidence and procedure in relation to the use of derivative material in a trial are also preserved.⁴¹

30. However, as outlined below, there are a number of difficulties with these purported safeguards, which may well mean that a person's right to a fair trial, in the manner intimated by Justices Hayne and Bell, and as specifically referred to in the dissenting judgment of Chief Justice French and Justice Crennan, in *X7* may well be unduly undermined potentially making the legislation beyond power and/or a disproportionate response.
31. Notwithstanding the purported protections, the Law Council is concerned that 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.
32. For the reasons outlined below, the Law Council's primary recommendation is that the Bill should not be passed in its current form and that the examination of a person charged or imminently to be charged by the ACC or Integrity Commissioner should be deferred until after the disposition of any charges.
33. However, if the Committee is minded not to accept the Law Council's primary recommendation, the Law Council has made a number of alternative recommendations as set out below.
34. If an examination is permitted to occur prior to the resolution of the witness's pending charges, there should be strict regulation of who is present at the examination, what use can be made of the information obtained and the subject matter able to be covered.
35. The Law Council suggests that it would be appropriate to require authorisation from a Federal Court judge 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.

Recommendations:

- **The Bill should not be passed in its current form and the examination of an accused person by the ACC or Integrity Commissioner should be deferred until after the disposition of any charges.**
- **In the alternative:**
 - **the Bill should require authorisation from a Federal Court judge 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.**

⁴¹ New subsection 25G(2) of the ACC Act and new subsection 96AF(2) of the LEIC Act.

Examination or hearing questioning not sufficiently limited to the purported purposes for which an examination or hearing may be conducted

36. Under section 24A of the ACC Act an examiner may conduct an examination for the purposes of a special ACC operation/investigation. The examiner may only ask questions about matters relevant to the special operation or special investigation (subsection 25A(6)). The Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue (subsection 82(1) of the LEIC Act) and may only ask questions about matters relevant to the corruption issue or another corruption issue (subsection 83(3) of the LEIC Act).
37. However, under new subsection 25A(6A) of the ACC Act the matters relevant to the ACC operation/investigation may include:
- (a) the subject matter of *any* charge, or imminent charge, against the witness; and
 - (b) the subject matter of *any* confiscation proceeding, or imminent confiscation proceeding, against the witness.
38. Similar provisions would apply under new subsection 83(2A) of the LEIC Act.
39. This means that where a defendant has been charged or is about to be charged for *any* offence, including a low-level crime, they may be examined about such matters (amongst other matters). Such a broadening undermines the purported safeguard of confining the purposes for which an examination or hearing may be conducted.
40. Further, it raises questions about the extent to which, contrary to intention of Parliament and the legitimate objective of the scheme, fundamental privileges are being overridden, which in effect aid the investigation of low-level crime. The information sharing provisions in the ACC Act, for example, permit sharing for a wide range of purposes, including where activities *might* constitute a criminal offence (which can therefore include low-level crime), protecting public revenue, developing government policy and researching criminology.⁴²
41. The Explanatory Memorandum to the Bill provides:

Examination material, for example, plays an important role in assisting the ACC to develop an understanding of how serious and organised crime operates, to analyse this information with other relevant information and to disseminate it to Commonwealth, State and Territory partner agencies as part of an intelligence product.

*Hearings are similarly important in the context of law enforcement corruption...*⁴³

42. When the measures abrogating the privilege against self-incrimination in the ACC Act were introduced into Parliament in 2001, for example, the second reading speech contained the following comments:

Government is persuaded that these measures are a necessary response to a very serious problem (and) a well thought through and considered approach to a most pernicious evil and the product of wide and lengthy consultation.

⁴² See for example section 59, 59AA and 59AB of the ACC Act.

⁴³ *Ibid*, p. 6. See new subsection 4(1) of the ACC Act and new subsection 5(1) of the LEIC Act.

*The National Crime Authority does not deal with simple street level crime, but with the web of complex criminal activity engaged in by highly skilled and resourceful criminal syndicates.*⁴⁴

43. The abrogation of the privilege against self-incrimination and the circumstances in which a person may be compelled to provide answers are therefore clearly intended to aid in the investigation of criminal activity of a very serious nature.
44. However, the Bill explicitly permits derivative material to be used against the person for a wide variety of offences extending beyond serious and organised crime and corruption.

Recommendation:

- **Examination or hearing questioning should be limited to the purported purposes for conducting the examination or hearing, that is, for the investigation of serious and organised crime or corruption.**

Inconsistency with the equality of arms principle

45. Derivative use immunity is not provided for in the Bill. This means that self-incriminatory material obtained as a result of an examination or hearing may be used to obtain other evidence that would be admissible against the person. Thus the prosecution is able to gain an unfair advantage inconsistent with the equality of arms principle. This principle, as the Explanatory Memorandum notes, requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other parties to the proceedings.⁴⁵
46. It is said that any harm to an individual's right to a fair trial is minimised by the safeguards contained in the Bill.⁴⁶ However, the ability to use derivative material and direct material in confiscation proceedings is what the Bill seeks to permit in relation to advancing the ability to prosecute offences. Further, the amendments would alter the process of a trial by limiting an examinee's defence options.
47. In practice, it may be very difficult for a court, an ACC examiner or the Integrity Commissioner to draw a line about what matters may be prejudicial to the accused and not be in the interests of justice.⁴⁷ For example, even the broad issue of the accused person's acquaintances and associations, habitual place of residence and source of employment and income may be relevant to the pending criminal proceedings. In *R v Seller and McCarthy* (2013) 273 FLR 155; *X7* and *Lee v R* (2014) 88 ALJR 656 the High Court found that the use of evidence derived from examination material in criminal proceedings against the examinee could in some circumstances be unfair.
48. Further, because there has not yet been an order by the court to determine that the material may be lawfully be disclosed to a prosecutor, neither the prosecutor of the

⁴⁴ Second Reading Speech to the *National Crime Authority Legislation Amendment Act*, Senate. Hansard, 7 December 2000, 21028.

⁴⁵ Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015 9.

⁴⁶ See for example Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015 10.

⁴⁷ The Law Council has previously raised some of these concerns in its *Submission to Mr Mark Trowell QC in his Independent Review of the Provisions of the Australian Crime Commission Act 2002*, 30 January 2007.

charge 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.

Recommendation:

- **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 in the particular circumstances of the case of maintaining an examinee’s confidentiality.**
- **The material in question should be disclosed to an accused person in order that informed submissions can be made to the court.**

Imminent charge

49. Under new paragraph 25A(9A)(b) an ACC examiner would be required to give a direction about examination material if the failure to do so would reasonably be expected to prejudice the examinee’s fair trial, if the examinee has been charged with a related offence or such a charge is imminent.

50. ‘Imminent’ would be defined in new subsection 4(1) of the ACC Act to mean:

- (a) a charge against a person is *imminent* if:
 - (i) the person is a protected suspect; or
 - (ii) the person is under arrest for an offence, but has not been charged with the offence; or
 - (iii) a person with authority to commence a process for prosecuting the person for an offence has decided to commence, but not yet commenced, the process; or
- (b) a confiscation proceeding against a person is *imminent* if a person with authority to commence the proceeding has decided to commence, but has not yet commenced, the proceeding.

51. Subparagraph 4(1)(a)(iii) of the ACC Act would apply, for example, if a person with authority to lay the charge has decided to lay, but not yet laid, the charge.

52. Similar provisions would apply under new subsection 5(1) of the LEIC Act.

53. It is unclear how an ACC examiner or the Integrity Commissioner will be in a position to know when a charge is imminent and thus they would be required to give a direction about examination material if the failure to do so would reasonably be expected to prejudice the examinee’s fair trial. That is, there is a risk that an examiner of the Integrity Commissioner may disclose information to a prosecuting authority on the

basis that he or she was not aware that a charge was imminent and that this might jeopardise a person's right to a fair trial.

54. Therefore, there is a need for an ACC examiner or the Integrity Commissioner to actively consider whether a charge or confiscation proceeding is imminent.

Recommendation:

- **The definition of 'imminent' should include where an ACC examiner or the Integrity Commissioner reasonably believes that a person with authority to commence a process for prosecuting the person for an offence or to commence a confiscation proceeding has decided to commence, but not yet commenced the process.**

Definition of 'prosecutor' and 'prosecuting authority'

55. Under new subsection 4(1) of the ACC Act a prosecutor, of an examinee, means an individual:

- (a) who is a prosecuting authority or is employed or engaged by a prosecuting authority; and
- (b) who:
 - (i) makes, or is involved in the making of, a decision whether to prosecute the examinee for a related offence; or
 - (ii) is one of the individuals engaging in such a prosecution of the examinee.

56. A prosecuting authority would mean an individual, or authority, authorised by or under a law of the Commonwealth or of a State or Territory to prosecute an offence.

57. A similar provision would apply under new subsection 5(1) of the LEIC Act.

58. The combined definitions of 'prosecutor' and 'prosecuting authority' are wide enough to capture law enforcement agencies, such as, the Australian Federal Police. This is because law enforcement officers are involved in the making of a decision whether to prosecute. While this broad definition may be suitable for use in the determination of whether a time period is pre-charge or post-charge, it means that pre-charge and some post-charge disclosure may well have a breadth not envisaged by drafters, which does not safeguard the right to a fair trial.

Recommendation:

- **Consideration be given to whether there should be a separate definition of 'prosecutor' for the disclosure of examination material provisions and derivative material provisions.**

Breadth of the definition of 'derivative material'

59. As noted, the Bill authorises the use of derivative material obtained from an examination or hearing and define the circumstances in which examination, hearing and derivative material may be provided to a prosecutor.

60. The term 'derivative material' is used in relation to examination material. The Explanatory Memorandum notes that 'it is intended to be a broad definition and to capture all evidence, information, documents or things that have been obtained from examination material'.⁴⁸ It includes:
- things obtained directly from examination material (eg. a thing whose existence and location the examinee revealed in the examination, or an understanding of a particular set of financial transactions based on an explanation given at the examination);
 - things obtained from a combination of examination material and other material (eg. a hoard of illicit drugs uncovered once evidence directly derived from examination material is fused and analysed with other relevant information); and
 - things obtained indirectly from examination material (eg. child pornography material uncovered from a laptop after the examinee revealed the location of a storage facility, and the storage facility contained a document which recorded the password to the laptop).
61. Hence there is the potential for any information provided by an examinee or witness to be used against the person.
62. New subsection 25D(1) of the ACC Act purports to establish different categories for when a person or body may lawfully disclose derivative material to a prosecutor of the examinee, including where the disclosure is:
- (a) a pre-charge disclosure of the material; or
 - (b) a post-charge disclosure of derivative material obtained from pre-charge examination material (whether from a pre-charge use of that examination material or otherwise); or
 - (c) a post-charge disclosure of derivative material obtained from post-charge examination material, and the disclosure is under an order made under subsection 25E(1).
63. The difficulty with the provision is that a person – who may be innocent – would not be in a position to know when the disclosure falls within a particular category. There is no suggestion, for example, that a register should be kept of disclosure. The effect would be that the ACC is not required to maintain a record of whether the disclosure is pre-charge or post-charge. Furthermore, a charged person would not be in a position to challenge the lawful disclosure of derivative material.
64. Similar problems arise in the context of new subsection 96AC(1) of the LEIC Act.

Recommendation:

- **A disclosure register should be kept which documents the timing of disclosure and the identity of persons to whom disclosure has been made.**

⁴⁸ Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015 31.

Privilege of self-incrimination must be claimed under the ACC Act to enliven safeguards

65. The safeguards under the ACC Act are only enlivened where a person claims the privilege against self-incrimination.⁴⁹ This may be particularly problematic in circumstances where:

- (a) an ACC examiner or the Integrity Commissioner has determined that a person's lawyer should not be present during the course of an examination or hearing;
- (b) an ACC examiner or the Integrity Commissioner does not caution a person regarding their rights to claim the privilege against self-incrimination; or
- (c) if a person does not fully understand the implications of claiming the privilege.⁵⁰

Recommendation:

- **The default position should be that the safeguards in the Bill apply as though the person has claimed the privilege against self-incrimination unless the privilege is expressly waived.**

Threshold for issuing a direction

66. Currently, a direction issued by an ACC examiner under subsection 25A(9) of the ACC Act must be made if the failure to do so 'might prejudice' a person's fair trial (subsection 25A(9A) of the ACC Act). New subsection 25A(9A) would provide that an examiner must issue a direction under subsection 25A(9) if the failure to do so 'would reasonably be expected' to prejudice the examinee's fair trial, if the examinee has been charged with a related offence or such a charge is imminent. The Explanatory Memorandum to the Bill notes that:

This change is intended to give an examiner greater certainty about the circumstances in which he or she is required to make a direction under subsection 25A(9). An examiner should not be required to make a direction to protect against unforeseeable risks that the disclosure or use of examination material may prejudice the examinee's fair trial. The court's power to manage any risk to the examinee's fair trial will ensure that any unforeseeable risks will be appropriately mitigated.⁵¹

67. Similar amendments are proposed in relation to subsection 90(2) of the LEIC Act.

68. 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.

⁴⁹ Subsections 30(4) and 30(5) of the ACC Act.

⁵⁰ Subsection 25A(1) of the ACC Act gives an examiner the power to regulate the conduct of proceedings at an examination. Subsection 25(2) provides that a person giving evidence may be represented by a legal practitioner. Subsection 25A(3) provides that an examination of a person may be held in private and that an examiner has the discretion to direct which person(s) is/are entitled to be present during an examination or part of an examination. Subsection 25A(5) prevents any person being present during an examination without the approval of the examiner.

⁵¹ Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015 45.

69. Further, current subsection 25A(9) of the ACC Act and subsection 90(2) of the LEIC Act apply where there might be prejudice to ‘the fair trial of a person who has been, or may be, charged with an offence’. New subsection 25A(9A) of the ACC Act and new subsection 90(2) of the LEIC Act would, unlike the current provisions, only apply where the examinee has been charged with an offence (or such a charge is imminent) and the examination covered the subject matter of that offence. The Explanatory Memorandum explains the rationale for these changes as follows:

*This change is intended to make clearer the examiner’s obligation to issue a direction to protect a person’s fair trial rights. The only person whose trial may be prejudiced by the disclosure or use of examination material is the examinee. The only time at which that prejudice could occur is where the examinee has either been charged with an offence or when such a charge is imminent.*⁵²

70. These amendments when combined with the problematic definition of an imminent charge (noted above) may also unduly compromise a person’s right to a fair trial. The Law Council does not agree with the proposition that the only time at which prejudice could occur to a person is where an examinee has been charged with an offence or when such a charge is imminent. Difficulties may arise when a close family member, such as a spouse, is examined in relation to charges against their partner.

71. For example, in the case of *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5, the first respondent, ‘Ms Zhao’, was the wife of the second respondent, ‘Mr Jin’. Zhao had not been charged with a criminal offence, although her husband had been charged with dealing with proceeds of crime. The respondents faced the dilemma of having to elect between:

- (a) conceding the forfeiture of their family home so as to preserve Mr Jin’s right to a fair trial in his criminal proceedings; or
- (b) asserting their interest in their property by giving evidence on oath and submission to cross examination in the forfeiture proceedings with a consequential and very real risk of compromise to Mr Jin’s defence in the criminal trial.

72. That is, there was a concern that Ms Zhao who had not been charged with a criminal offence would be required to give evidence that was central to the allegations made against Mr Jin in the criminal proceedings.

73. The High Court held that:

- it may be accepted that criminal proceedings are not an impediment to civil proceedings under proceeds of crime legislation, but it does not follow that it is intended that forfeiture proceedings brought under proceeds of crime legislation will continue where to do so would put a respondent at risk of prejudice in his or her criminal trial; and
- the interests of justice are not served by requiring the second respondent to defend the forfeiture proceedings or pursue the exclusion proceedings before his criminal proceedings are finalised, especially since the Commissioner will suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings.

⁵² Ibid.

74. So far as concerns Ms Zhao, the High Court upheld the decision of the Court of Appeal, that to permit the forfeiture proceedings to proceed against her would produce two sets of proceedings, rather than one. The High Court noted the principle of the common law that seeks to prevent a multiplicity of actions has a long history and cannot be ignored and that this principle was also stated in the County Court Civil Procedure Rules 2008 (Vic).⁵³

Recommendation:

- **The threshold for issuing a direction under subsection 25A(9A) of the ACC Act and subsection 90(2) of the LEIC Act should be that an ACC examiner or the Integrity Commissioner must give a direction about examination material if the failure to do so ‘might reasonably be expected to prejudice the examinee’s fair trial’ where a person ‘has been, or may be, charged with an offence’.**

Observations on the ACC Act

75. The basis for the ACC Act was the enactment of the *National Crimes Commission Act 1982* (Cth) (the NCCA Act 1982). The NCCA Act 1982 was repealed and replaced by the *National Crime Authority Act 1984* (Cth) (the NCA Act 1984), which was amended with the establishment of the ACC through the *Australian Crime Commission Establishment Act 2002* (Cth). Since its enactment in 2002, the ACC Act has been frequently amended to address changes in the serious and organised crime environment.⁵⁴

76. However, the current framework for the ACC and the protections afforded to fundamental common law rights, such as the right to a fair trial, are, in part, fragmented. The Law Council is concerned that this fragmentation may pose a barrier to the effectiveness and appropriateness of the regime.

Recommendation

- **A comprehensive review of the ACC Act should be conducted 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.**

⁵³ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 [48].

⁵⁴ There are approximately 78 items that have amended the Act since the NCA Act 1984 was introduced.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.