SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Additional Information and Responses to Questions on Notice

Attorney-General's Department, Australian Crime Commission and Australian Federal Police

Hearing 29 October 2009

ADDITIONAL INFORMATION

Reasoning behind bringing in an increase to penalties at this time and status of international obligations (ref: question from Senator Ludlam, at p.5 of the hearing transcript)**:**

The penalties for bribery offences are being increased to address a recommendation of the OECD Working Group on Bribery in International Business Transactions.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) requires signatories to criminalise bribery and to ensure the offence is punishable by 'effective, proportionate and dissuasive criminal penalties'.

In 2006, the OECD issued a report on Australia's implementation of the Convention in accordance with its ongoing review of member jurisdictions. The report recommended, inter alia, that Australia increase its penalties for foreign bribery because the current penalty was not considered 'effective, proportionate, and dissuasive,' considering the potential value of modern business dealings. The current penalty is 10 years imprisonment, which equates to a financial penalty of $66,000 for individuals and $330,000 for a body corporate.

Increasing bribery penalties will implement the final outstanding recommendation from the OECD's 2006 report and is consistent with Australia's international obligations under the Convention.

RESPONSES TO QUESTIONS ON NOTICE

Organised crime offences

Association offences

1. *What difficulties, if any, would arise from amending proposed section 390.3 to provide that the associations must be intended to facilitate the other person engaging in crime?*

2. *Alternatively, should the prosecution have to prove that the person knew that the associations would facilitate criminal conduct?*

Amending the provision to require that the association was intended to facilitate organised crime, or that the person knew that the association would facilitate organised crime, would significantly restrict the application of the offence. The application of intention or knowledge requires the prosecution to prove that a person is aware that the circumstance or result exists or will occur. Where these fault elements apply instead of recklessness, a person can avoid liability even where they are fully aware that his or her association with the other person is highly likely to assist the other person to engage in serious criminal activity.

Under section 5.6 of the *Criminal Code Act 1995*, certain fault elements apply automatically to particular physical elements of offences. For physical elements consisting of conduct, intention is the applicable fault element for that physical element. For physical elements consisting of a circumstance or result, recklessness is the applicable fault element. Commonwealth criminal law practice provides that the automatic fault elements supplied by the Criminal Code should apply unless there is a justifiable reason for departing from them.

For a person to be found guilty of the offence, the prosecution would need to prove that:

(i) the person intentionally associated with another person on two or more occasions
(ii) the person knew that the other person was engaged, or proposed to engage, in conduct that constitutes, or is part of conduct constituting, an offence against any law
(iii) the person was reckless as to the circumstance that the associations facilitated the engagement, or proposed engagement, by the other person in the other persons conduct
(iv) the person was reckless as to the circumstance that the offence against any law mentioned in (ii) involved two or more persons, and
(v) the offence against any law mentioned in paragraph (b) is a constitutionally covered offence punishable by imprisonment for at least three years.

Questions one and two address the relevant fault element for the physical element in paragraphs 390.3(1)(c) and (2)(d) of the proposed association offences (or in the above, paragraph (iii)). That is, that the association/s facilitate the engagement or proposed engagement by the second person in the second person's conduct. Paragraphs (1)(c) and (2)(d) consist of a result.

As indicated above, under section 5.6 of the Criminal Code, the standard fault element for a physical element consisting of a result is recklessness. Accordingly, the prosecution would be required to prove firstly that the defendant was aware of a substantial risk that the associations would facilitate the engagement or proposed engagement by the second person in criminal activity, and secondly that having regard to the circumstances known to the defendant, it was unjustifiable to take the risk.

The application of recklessness allows the offence to capture persons who are aware that this result is highly likely to occur. The application of intention or knowledge would not capture this class of persons.

Under proposed section 390.3, departure is already made from the standard fault elements through the imposition of a higher fault requirement for paragraphs 390.3(1)(b) and (2)(c) (or in the above, paragraph (ii)). Paragraphs (1)(b) and (2)(c) require the prosecution to prove that the second person engages, or proposed to engage, in conduct that constitutes, or is part of conduct constituting, an offence against any law. While these paragraphs involve physical elements consisting of a circumstance, the automatic application of the fault element of recklessness is displaced by subsection 390.3(3), which provides that the fault element applicable to these paragraphs is knowledge. Accordingly, the prosecution would be required to prove that the defendant knew that the second person engages, or proposes to engage, in criminal activity.

Given the prosecution must prove that the defendant knew that the second person was engaging, or proposing to engage, in criminal activity, it is appropriate that the prosecution then be required to prove that the defendant was reckless that his/her associations facilitated that criminal activity.

3. Some submitters have raised concerns that the defences under proposed subsection 390.3(6) are framed too narrowly.[1]

- *Why is it necessary to frame the defences in proposed subsection 390.3(6) in terms of the association being 'only' for the exempted purposes?*

The purpose of the defences is to expressly ensure that certain associations that are solely for a legitimate purpose are not captured by the offence. For example, an exemption exists for associations with a close family member relating only to matters of family or domestic concern. This exemption is intended to apply in situations where, for example, a mother may provide food and lodging for her son. The mother may be aware that her son is involved in organised criminal activity and of a risk that the provision of food and lodging may in some way further this involvement. However, her sole purpose in providing food and lodging is to care for her son.

Not including the requirement that the associations must be 'only' for the exempted purpose would provide a loophole for defendants to abuse. The requirement is necessary to prevent a person from arguing that the associations were partly directed at, for example, matters of family or domestic concern with a close family member, where the associations were also for the purpose of facilitating organised criminal activity.

- *Why doesn't the defence under proposed paragraph 390.3(6)(a) extend to relationships with extended family such as aunts, uncles and cousins?*

This defence does not come into play until the prosecution can prove beyond reasonable doubt the stringent fault elements of the offence, as described above in the response to question two.

Even if the close relative was culpable on all these counts, the defence is available to exempt certain associations in certain scenarios, where the association relates to a matter of family or domestic concern. In practical terms, a mother could know that she is aiding her son's involvement in organised crime by providing food and lodging for her son. The Government has taken the view

1 Dr Saul, *Submission 5*, p. 3; Professor Broadhurst and Ms Ayling, *Submission 6*; p. 5; Law Council, *Submission 12*, p. 10;.

that it should not intrude on families to that extent. However, to extend the exception to the whole extended family would open a loophole that would significantly reduce the effectiveness of the offence.

The defence under proposed paragraph 390.3(6)(a) is limited to associations with close family members which relate only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern. The definition of 'close family member' (subsection 390.1(1)) is limited to:

- the person's spouse or de facto partner
- a parent, step-parent or grandparent of the person
- a child, stepchild or grandchild of the person
- a brother, sister, step-brother or step-sister of the person, and
- a guardian or carer of the person.

It is intended that this defence be limited to associations between immediate family members. Limiting the definition of close family member in this way is consistent with the comparable exception attaching to the Commonwealth offence of associating with terrorist organisations in section 102.8 of the Criminal Code.

It is also consistent with a comparable exception in the New South Wales *Crimes (Sentencing Procedure) Act 1999*, which enables 'non-association' orders to be imposed on persons. Under section 100A of the New South Wales Act, a non-association order cannot generally be imposed on a person which prohibits association with a member of the offender's close family. Close family is limited in the same way as it is defined for the purposes of the proposed association offence.

As the definition extends to guardians or carers, other family members such as aunts, uncles or cousins who have a close relationship with the defendant could also be covered by the defence, where the court decides that the aunt, uncle or cousin was a carer of the person.

- *Can the department please provide examples of the type of associations that are intended to be exempted by the defence for associations which are 'only for the purpose of providing aid of a humanitarian nature'?*

The exception relating to humanitarian aid is intended to apply to persons undertaking humanitarian aid who, through the course of providing such humanitarian aid, associate with a person who is involved in serious and organised crime. Providing for this defence is consistent with the comparable exception attaching to the Commonwealth offence of associating with terrorist organisations in section 102.8 of the Criminal Code.

While situations where it would be necessary may be more easily envisaged in relation to the terrorism offence, there is the potential that it may also be necessary in the organised crime context. One example may be the provision of medical assistance by a doctor to a person involved in organised crime. While the doctor may be aware of a risk that providing such care may allow a person to engage in further criminal activity, the sole purpose of the association would be to provide medical assistance.

- *Why are the defences for legal practitioners in proposed subsection 390.3(6) limited to advice relating to specific types of proceedings?*

The aim of the offence is to criminalise associations that facilitate organised crime. It is well known that organised crime groups utilise the services of professionals such as legal practitioners in order to prosper. Many commercial activities (whether legal or illegal) require the provision of legal advice, such as conveyancing or drafting of contracts. Lawyers have in the past used their professional status to involve themselves in organised crime.

However, it is also fundamental that persons are not prevented from obtaining legal advice in relation to specific matters that could affect their liberty. The specific proceedings listed in subsection 390.3(6) relate to criminal proceedings, declaration proceedings or passport proceedings. All of these proceedings have the potential to significantly impact on a person's liberty (for example, imprisonment arising out of criminal proceedings). To ensure that legal advice is available to persons in relation to such matters, it is important that those providing legal advice are able to do so without fear of prosecution.

- *Does this limitation mean that a legal practitioner who, for example, provided advice in relation to a property conveyance or a tax matter, to a person involved in serious organised criminal activity, may potentially be captured by the proposed association offences?*

Yes. If a legal practitioner associates with a person involved in serious organised criminal activity on two or more occasions, knowing that the person is involved in serious organised criminal activity and is reckless as to the fact that the advice facilitates the engagement by the person in serious organised criminal activity, the person would be guilty of the offence. In terms of the definition of recklessness, it would need to be proven that the person was aware of a substantial risk that the provision of advice would facilitate the second person's involvement in serious organised crime, and having regard to the circumstances known to him or her, that it is unjustifiable to take that risk.

- *How will a legal practitioner make out the defences under proposed subsection 390.3(6) if his or her client refuses to waive legal professional privilege to allow the practitioner to lead evidence about the type of advice provided to the client?*

The Department considers that a legal practitioner may be able to adduce evidence in order to make out the defence under proposed section 390.3(6) notwithstanding that a client refuses to waive legal professional privilege.

Courts are routinely required to determine whether a solicitor/client relationship exists notwithstanding that legal professional privilege is claimed over particular communications. In cases where courts must determine the existence of legal professional privilege, evidence is usually led of the existence of a need for legal advice or representation, the existence of a retainer and the fact that the retainer involved legal advice being sought and/or provided in relation to the general subject matter in question.

Accordingly, any refusal by a client to waive legal professional privilege would not prevent a defendant from adducing evidence of a general nature about the existence of such a relationship between the practitioner and client and the general purpose for which the advice was provided.

- *Is the defence under proposed paragraph 390.3(6)(b) intended to ensure that the association offences are consistent with section 116 of the Constitution which prevents the Commonwealth from making any law 'for prohibiting the free exercise of any religion'?*

- *Why is the defence for associations that take place in the course of practising religion limited to associations that occur 'in a place being used for public religious worship'? Shouldn't all associations that take place in the course of practising religion be excluded?*

The Department is aware of Constitutional limitations and considered the effect of section 116 of the Constitution when developing this exemption. It is not the purpose of the proposed offence to prohibit the free exercise of religion.

It is appropriate to expressly preserve the right of persons to attend public religious worship without the fear of prosecution for potential associations with persons involved in serious and organised crime. Public worship is intended to cover churches and places set aside for religious purposes; for example school halls, parks or stadiums. Exceptions based on location or residential contexts where private religious worship may occur would provide a loophole that could be abused by organised criminals. It is not the intention of the legislation to prevent people practicing religion in their own home. For such meetings to constitute an offence the prosecution would need to prove beyond reasonable doubt that such meetings involved associations that facilitated organised crime.

Limiting the exemption to where the association is in a place being used for public religious worship in the course of practicing religion is consistent with the comparable exception attaching to the Commonwealth offence of associating with terrorist organisations in section 102.8 of the Criminal Code.

- *Given than it is impossible foresee every type of association which should be excluded from the association offences, wouldn't it be better to create a general defence of reasonableness which conferred a discretion on the court to consider whether an association was justified in the circumstances?*[2]

The offence provisions themselves provide considerable safeguards, as they require several stringent elements to be proven by the prosecution beyond reasonable doubt. The offence is limited to associations that facilitate serious and organised crime. That is, the prosecution must prove that the association helped, or enhanced the ability of, the other person to engage in serious organised criminal activity. Legitimate associations that do not involve the facilitation of serious and organised crime will not be captured by the offence.

The specific defences are made available to ensure that the policy objectives of the offences are balanced with the need to expressly protect certain fundamental civil liberties. It is preferable to have specific exemptions set out in the legislation, in order to provide certainty about what conduct would not be captured by the offence. A more general exception may result in the potential for misuse or abuse by those involved in serious and organised crime.

4. *Should proposed subsection 390.3(7) refer to offences under subsection 390.3(2) as well as offences under 390.3(1) as the NSW Attorney-General suggests?*[3]

2 Professor Broadhurst and Ms Ayling, *Submission 6*, pp 5 and 7.

3 *Submission 13*, p. 2.

The Department is considering whether an amendment is necessary to include reference to offences under subsection 390.3(2) in subsection 390.3(7).

Criminal organisation offences

5. *What is your response to Dr Saul's submission that the offence of providing material support or resources to a criminal organisation (proposed section 390.4) is too vague and ill-defined to enable a person to know the scope of their criminal liability?*[4]

The offence of providing material support or resources to a criminal organisation (proposed section 390.4) has a number of specific elements which must be proven by the prosecution for a person to be found guilty of the offence. That is, that:

(i) the person intentionally provided material support or resources to an organisation or a member of an organisation
(ii) the person was reckless as to the circumstance that the provision of the support or resources aided, or there was a risk that the provision of the support or resources would aid, the organisation to engage in conduct constituting an offence against any law
(iii) the person was reckless as to the circumstance that the organisation consists of two or more persons
(iv) the person was reckless as to the circumstance that the organisation's aims or activities include facilitating the engagement in conduct, or engaging in conduct, constituting an offence against any law that is, or would if committed be, for the benefit of the organisation
(v) the offence against any law mentioned in paragraph (d) is an offence against any law punishable by imprisonment for at least 3 years, and
(vi) the offence against any law mentioned in paragraph (b) is a constitutionally covered offence punishable by imprisonment for at least 12 months.

Accordingly, a person will be guilty of the offence where they intend to provide material support or resources to a criminal organisation, reckless that the support will (or could) aid the organisation in committing serious offences. That is, he/she must be aware of a substantial risk that the provision of the support or resources will (or could) aid the organisation to commit criminal offences, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk. Material support or resources is not defined in the provisions – it is intended that the question of whether material support or resources were provided be determined by the court on a case-by-case basis.

The requirement that the support or resources must be 'material' is included to reflect certain recommendations made relating to the comparable terrorism offence in section 102.7 of the Criminal Code (providing support to a terrorist organisation). Recent reviews of this provision by the Security Legislation Review Committee (Sheller Committee) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) concluded that the lack of clarity around the word 'support' may suggest that the offence could extend beyond its original intended application. The PJCIS recommended that the terrorism offence be amended to provide for 'material support' to remove any ambiguity. Accordingly, the proposed criminal organisation offence also includes such a requirement. This will make clear that the level of support required to commit the offence goes beyond mere support and is support that is real and concrete.

The support or resources must aid, or there must have been a risk that the support or resources would aid, the organisation to engage in conduct constituting an offence against any law. The

4 *Submission 5*, p. 3.

intention behind this element is stated in the Explanatory Memorandum accompanying the introduction of the proposed offences. That is, there must be a sufficiently strong link between the provision of the support or resources, and the commission of the offence by the organisation. An example of this type of offence is as follows. Person A is a financial expert. Persons B, C and D are members of a criminal organisation. Person A provides significant advice and training to persons B, C and D on how they might go about engaging in the money laundering of specific illicit profits of crime (in breach of an offence in section 400.4 of the Criminal Code of dealing in proceeds of crime etc – money or property worth $100,000 or more, which carries penalties of up to 20 years imprisonment).

With reference to this example, person A must be reckless as to the fact that his advice and training will be, or that there is a risk that it will be, used by persons B, C and D to commit an offence in relation to dealings with proceeds of crime.

6. *What difficulties, if any, would arise from amending the offence of supporting a criminal organisation (proposed section 390.4) so that it provides that the support must be intended to aid the organisation to commit an offence?*[5]

Amending the provision to require that the support was intended to aid the organisation to commit an offence would significantly restrict the application of the offence. The application of intention or knowledge requires the prosecution to prove that a person is aware that the circumstance or result exists or will occur. Where these fault elements apply instead of recklessness, a person can avoid liability even where they are fully aware that a relevant circumstance or result is highly likely to exist or occur.

Paragraph 390.4(1)(b) of the proposed supporting offence sets out the physical element in question – that the provision of the support or resources aids, or there is a risk that the provision of the support or resources will aid, the organisation to engage in criminal activity. Paragraph 390.4(1)(b) consists of a result – accordingly, the standard applicable fault element is recklessness. Application of the higher fault element of intention would mean that the offence would not apply where a person is aware that it is highly likely that their support will (or could) aid the organisation's criminal activities.

7. *Isn't it inconsistent that a person guilty of the offence of supporting a criminal organisation (proposed section 390.4) is liable to a maximum penalty of five years imprisonment when the offence the support could have aided may only carry a maximum penalty of 12 months imprisonment? Should the offence under proposed section 390.4 be limited to supporting the commission of serious offences?*[6]

The purpose of the proposed criminal organisation offences is to enable law enforcement agencies to better disrupt general patterns of criminal activity and to target those who might play an indirect but enabling role in the commission of serious and organised crime. The offences are aimed at criminalising varying levels of involvement in the activities of a criminal organisation. They criminalise supporting a criminal organisation, to committing offences for a criminal organisation, and then to directing the activities of a criminal organisation, at the higher end of the spectrum of seriousness.

5 See Law Council, *Submission 12*, p. 12.

6 See Law Council, *Submission 12*, p. 12.

Consistent throughout these offences are the elements which define a criminal organisation. For example, in relation to the supporting offence in proposed section 390.4, paragraphs 390.4(1)(c) to (e) set out the elements which require proof that the organisation is a criminal organisation. That is, the organisation must consist of two or more persons and its aims or activities must include facilitating engagement in, or engaging in, the commission of serious criminal offences (carrying maximum penalties of three years or above) for the benefit of the organisation. The defendant must be reckless as to the circumstance that, for example in relation to the supporting offence, the organisation to which they are providing support or resources, is a criminal organisation.

Accordingly, it is appropriate that where a person aids an organisation to commit a criminal offence, where the organisation's aims involve committing serious criminal offences (ie with maximum penalties of three or more years imprisonment), that the specific offence/s which is/are aided be one or more of a wider pool of offences (ie those carrying a maximum penalty of 12 months imprisonment or more). The maximum penalty of five years imprisonment is appropriate to punish those who aid the criminal activities of serious and organised crime groups through the provision of support or resources. This is consistent with the policy intention behind the offences, which is to target serious and organised crime and to deter involvement at all levels.

Search and information gathering powers

8. How do you respond to the Law Council's argument that the test for when data may be copied at warrant premises under subsection 3L(1A) should be the same as the test for when items may be seized (that is reasonable grounds to believe the data is evidential material) because copying data is akin to seizing it?[7]

Under the proposed amendment to subsection 3L(1A), the test for whether data may be copied at warrant premises is reasonable suspicion. This will mean that before an officer makes a copy of data found at a warrant premises, he or she must suspect on reasonable grounds that any data accessed constitutes evidential material.

The Department believes that this is an appropriate threshold. In many circumstances, it would be difficult for an officer to form a belief as to whether data constitutes evidential material. For example, if the material is in a foreign language or large amounts of data are stored on an electronic device, an officer may not be in a position to form a belief on reasonable grounds. However, the officer may suspect on reasonable grounds, for example on the basis of other material seized, that the data constitutes evidential material.

This amendment will also benefit occupiers of the warrant premises as it will allow them to keep possession of the electronic device on which the data is held.

Subsection 3L(1B) of the Crimes Act provides that as soon as it is determined that the data is not required (or is no longer required), the data must be removed from any device in the control of the AFP, and any other reproduction of the data in the control of the AFP must be destroyed.

9. Is the intended effect of amended subsection 3L(1A) to allow officers to copy data from all sources accessible from a computer at the warrant premises, if some data from one source accessible from that computer is reasonably suspected to be evidential material?[8] *For example, if there was a reasonable suspicion that material on a computer's hard drive was evidential*

7 *Submission 12*, pp 22-23. See Explanatory Memorandum, p. 84.

8 *Submission 12*, pp 23-24.

material would the amended provision allow copying of data on a server accessible from that computer?

This is the intended effect of the amended subsection 3L(1A). This amendment will clarify the operation of section 3L to ensure it operates as initially intended when it was inserted in to the Crimes Act by the *Cybercrime Act 2001*(Cth).

As outlined in the Explanatory Memorandum to the Cybercrime Bill, most business computers are networked to other desktop computers and to central storage computers. This means that files physically held on one computer are often accessible from other computers. In some cases these computer networks can extend across different office locations. Accordingly, it is necessary for law enforcement officers executing a search warrant to be able to search not only material on computers located on the search premises but also material accessible from those computers but located elsewhere.

As mentioned above, subsection 3L(1B) of the Crimes Act provides that as soon as it is determined that the data is not required (or is no longer required), the data must be removed from any device in the control of the AFP, and any other reproduction of the data in the control of the AFP must be destroyed.

10. *The Law Council expressed concern about the proposed changes to subsections 3K(3A) and 3K(3B) which would increase the time period that equipment may be moved to another place for examination from 72 hours to 14 days.*[9]

- *Doesn't extending the period that equipment may be moved to another place for examination under section 3K to 14 days mean that the removal of equipment would have a very significant financial impact on any business that uses the equipment?*

Some disruption to the operation of business is unavoidable in circumstances where it is necessary to move electronic equipment from business premises for any period of time. Accordingly, examination of electronic equipment moved under section 3K is conducted as expediently as possible to minimise inconvenience and disruption to owners or users of the equipment.

Section 3K prescribes a maximum period that electrical equipment may be processed and examined after it is moved from warrant premises. Where the examination or processing of seized equipment is completed before the prescribed timeframe lapsing, electronic equipment is returned. Proposed section 3ZQX will require that if the Commissioner is satisfied that a thing seized under Division 2 or 4 is not required, or is no longer required, for a purpose mentioned in proposed section 3ZQU or for other judicial or administrative review proceedings, he or she must take reasonable steps to return it.

- *What difficulties, if any, would arise from providing for an initial seven day period, with the possibility of extension on application?*

The Department believes that the proposed 14 day limit is appropriate. The AFP has advised that this time period is generally necessary for examining or processing equipment moved given the ever increasing use of technology in criminal activity.

Factors that influence the increasing time taken to forensically examine electronic equipment include:

9 *Submission 12*, p. 25.

- the increasing frequency of police operations encountering electronic items
- the increasing number of electronic items found at warrant premises in an operation
- the increasing range of electronic devices that contain data
- the increasing complexity of data storage devices
- increases in data storage capacity
- the prevalence of security software and encryption technology, and
- the need to seek assistance orders for inaccessible computer systems.

These issues are exacerbated where material is seized from multiple premises as part of a single operation.

Lowering the initial timeframe to seven days would mean that police resources would be frequently taken up with the task of seeking extensions to continue examinations.

11. Why doesn't proposed section 3ZQV specify who may operate electronic equipment which is seized or moved from warrant premises?

Proposed section 3ZQV will apply to both electronic equipment seized under Part IAA and electronic equipment moved from warrant premises under section 3K. Section 3ZQU provides that a thing seized under Part IAA may be used by a constable or Commonwealth officer for certain purposes. Section 3LAA provides that the executing officer or constable assisting may operate equipment moved from the warrant premises under section 3K to access data.

Proposed section 3LA will allow a constable to apply to a magistrate for an order requiring a specified person with knowledge of the equipment concerned to provide assistance reasonable and necessary for the constable to do certain things with the equipment, such as access or copy data. This section will apply whether the equipment is on warrant premises, has been moved from warrant premises under section 3K or has been seized under Division 2 of Part IAA.

12. Proposed section 3ZQV would extend to operating equipment to access data that was not held on the equipment, or accessible from it, at the time the equipment was seized or moved (for example, a voicemail message that was recorded after a mobile phone was seized or an email that was sent after a computer was seized).

- *Does this mean that the provision potentially operates more like an interception warrant since it allows real time monitoring of communications as they occur?*[10]

The Explanatory Memorandum to the Bill clarifies the intended operation of section 3ZQV:

> The *Telecommunications (Interception and Access) Act 1979* provides a warrant-based regime for covertly accessing stored communications. For the purposes of that regime, a stored communication is a communication (such as a voice mail) that can only be accessed by the parties to the communication (eg the recipient of the voicemail) or a telecommunications company (upon whose computer server the voicemail is stored).
>
> Accessing voicemail or other electronic data under section 3ZQV (even where the voicemail was received after the mobile phone was seized) is different from accessing a stored communication because the data is being accessed overtly rather than covertly as the individual

10 Professor Broadhurst and Ms Ayling, *Submission 6*, p. 2.

knows that his or her mobile phone has been seized. Section 3Q of the Crimes Act requires the executing officer, or constable assisting, to provide a receipt of all things seized under a warrant.

Proposed section 3ZQV will not provide interception powers. Rather it will clarify that anything on or accessible from electronic equipment seized under Part IAA or moved from warrant premises under section 3K may be accessed after the equipment has been seized or moved, whether or not it was on the equipment at the time of seizure or being moved.

13. *Liberty Victoria has suggested that proposed section 3LA which makes it an offence to fail to comply with an order to assist police to access a computer system should include a defence where a person has made all reasonable efforts to comply with the order.*[11] *Does proposed section 3LA require amendment to ensure a person is not criminally liable in these circumstances?*

The 'reasonable efforts' defence proposed by Liberty Victoria is unnecessary as an assistance order made under section 3LA only requires the person named in the order to provide any information or assistance that is reasonable and necessary. The offence therefore does not apply to anyone who has made reasonable efforts.

14. *How are proposed subsections 3ZQV(2) and 3LAA(1) intended to interact in relation to equipment moved under section 3K? Are the provisions potentially in conflict since subsection 3ZQV(2) specifies a more limited purpose for accessing data held on equipment while subsection 3LAA(1) specifies a more limited range of people who may operate the equipment?*

Proposed section 3ZQV will clarify which data may be accessed from electronic equipment either seized under Part IAA or moved from warrant premises under section 3K. Proposed subsection 3ZQV(2) concerns operating equipment for the purpose of determining whether data that is evidential material is held on or accessible from the equipment. Proposed subsection 3ZQV(5) will specifically provide that section 3ZQV does not limit the operation of other provisions in Part IAA that relate to dealing with items moved under section 3K, which would include proposed section 3LAA.

Proposed Section 3LAA will govern what can be done with electronic equipment moved from a warrant premises under section 3K and data accessed from the equipment once it has been moved. This section will mirror existing provisions governing what can be done with electronic equipment on a warrant premises at subsections 3L(1) to (3). Proposed subsection 3LAA(1) will provide that the executing officer or a constable assisting may access data from the equipment. Proposed subsections 3LAA(2) to (5) will govern what may be done with the equipment or data once that data has been accessed.

The Department does not consider there to be any conflict between proposed subsections 3ZQV(2) and 3LAA(1).

15. *Have there been specific cases where provisions of the Crimes Act*[12] *required the return of material seized under Part 1AA of the Crimes Act and this has caused difficulties in relation to the investigation or prosecution of offences? If so, please provide details of these cases? If not, why are the broader tests for the retention of material set out in the Bill*[13] *required?*

11 *Submission 11*, p. 2.

12 Specifically sections 3UF, 3UG, 3ZV or 3ZW of the Crimes Act.

13 Specifically proposed sections 3ZQX, 3ZQY, 3ZQZ, 3ZQZA and 3ZQZB of the Crimes Act.

There are currently three different schemes in the Crimes Act to govern retention of material seized under Part IAA. Proposed Division 4C will create a centralised scheme for retention of material. The proposed provisions detail when seized material must be returned. These provisions have been broadened to accommodate the new use and sharing provision at proposed section 3ZQU.

Proposed section 3ZQU will provide a comprehensive scheme for the sharing of seized material with other Commonwealth agencies, State and Territory law enforcement agencies and foreign law enforcement and intelligence agencies for a wide range of purposes. This provision is necessary to remove the current uncertainty surrounding whether material seized by law enforcement agencies can be used for a broader range of purposes other than those for which it was seized in the first instance. It will provide a clear mechanism for seized material to be shared between agencies that is designed to allow for the proper investigation of offences with cross jurisdictional boundaries.

The absence of an expanded retention provision would render the new sharing provision unworkable. For example, where an item such as a computer seized by the AFP during the execution of a Crimes Act search warrant relating to a drug importation revealed evidence of a separate state offence, the retention provisions need to allow for the item seized to be retained to allow the receiving State agency under section 3ZQU to use the item in the investigation and potential prosecution of the State offence.

Powers to deal with uncooperative witnesses (*Australian Crime Commission Act 2002*)

16. *The ACC took on notice a question from the committee seeking details of uncooperative witnesses the ACC has dealt with. Can you please provide details of uncooperative witnesses over the past two financial years and the current year to date including:*

    - *what percentage of witnesses are uncooperative;*
    - *a breakdown of the number of uncooperative witnesses by the nature of the lack of cooperation (eg failure to take an oath, produce documents or answer questions);*
    - *what action has been taken in relation to the witness (eg has the witness been charged with offences under the ACC Act); and*
    - *the ultimate outcome of the matter or its current status?*

The following figures have been prepared in relation to non-cooperative conduct that occurred in the period from 1 July 2007 to 1 November 2009. Accordingly, the annual figures vary from published figures based on the date on which persons were charged, convicted or sentenced.

<u>Percentage of witnesses that are uncooperative</u>

The level of non-cooperation varies depending on the type of witnesses examined. For example, members and associates of outlaw motor cycle gangs tend to be particularly unwilling to cooperate in the examination process. As noted during the ACC's appearance on 29 October 2009 there has recently been a marked upward trend in non-cooperation offences.

This is illustrated by the following table:

Year	Non-cooperating witnesses	Total number of examinations	Percentage non-cooperative
2007-08	12	760	1.6
2008-09	13	527	2.5
2009-10	9	195	4.6
Total	34	1 482	2.3

Number of uncooperative witnesses by the nature of the lack of cooperation

The following table demonstrates that the bulk of uncooperative witnesses fail or refuse to answer questions put at an examination:

Year	30(1) Fail to attend examination	30(2)(a) Refuse/fail to take oath	30(2)(b) Refuse to answer question	33 Give false/ misleading answer	35(1)(a) Obstruct/ hinder examiner	Total
2007-08	2	1	7	2		12
2008-09		4	7	2		13
2009-10			7		2	9
Total	2	5	21	4	2	34

Action taken/ultimate outcome/current status of matters

The following table sets out the point each matter that arose since 1 July 2007 has reached in the prosecution process, as at 1 November 2009. While some 21 sentences have been imposed for non-cooperation offences during the period since 1 July 2007, all but four of these have been in respect of offences committed before that date. This illustrates the substantial delay between the commission of a non-cooperation offence and the ultimate imposition of a sentence.

Year of offence	Not yet charged	Charged	Committed for trial	Pleaded guilty	Convicted	Sentenced
2007-08	1	2*	2**	3	1	3
2008-09	1	4	4***	2		1
2009-10	7	2				

* One of these persons was murdered before committal proceedings could be conducted.

** In one of these cases the CDPP subsequently discontinued the prosecution.

*** One other committal hearing for a matter that arose in 2008-09 resulted in charges being dismissed. An ex officio indictment is to proceed in this case.

17. *What difficulties, if any, would arise if proposed section 34D was amended to provide for contempt applications to be dealt with expeditiously by the courts rather than immediate detention at the behest of the examiner?*

Such an amendment would be unlikely to provide an effective substitute for immediate detention. The objective of a contempt procedure in this context is primarily to induce compliance rather than to punish non-compliance. The prospect of action at a future date, even if this can be brought closer than the current process of prosecution, is less likely to have an impact on the mind of a witness who is not disposed to cooperate.

The requirement for immediate compliance arises from the investigative function of examinations, which are used only where traditional policing methods have proved ineffective. The timing of an examination is usually critical in the context of the overall investigation to which it is intended to contribute. Any delay can work to defeat the purpose of the investigation. Operationally, any provision that does not allow for an immediate custodial response provides scope for uncooperative witnesses to continue with their criminal enterprise, dispose of or conceal proceeds of crime or evidence, or intimidate other witnesses before effective action can be taken against them.

18. *Should the power to detain a person under proposed section 34D be limited to where the examiner believes on reasonable grounds that it is necessary in order to secure that person's attendance before the court?*[14]

The rationale for the proposed contempt power is to provide a more immediate mechanism for dealing with uncooperative witnesses. The ability for an examiner to direct a constable to detain a person where he or she proposes to make an application for contempt provides an immediate and enforceable option intended to motivate an uncooperative witness to comply with examination requirements.

The Department does not consider there is a need to limit the proposed provision. If a person is detained under proposed section 34D, an application to a court must be made as soon as practicable. The person detained must also be brought before the court as soon as practicable. It will then be open to the court, under subsection 34D(3), to either direct that the person be released from detention on condition that he or she will appear before the court in relation to the application or order that the person continue to be detained until the application is determined.

19. *The department took on notice a question from the committee seeking a copy of the legal advice obtained by the department in relation to the constitutionality of the proposed contempt provisions.*

The Department obtained legal advice in relation to the ACC contempt provisions contained in the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No. 2) 2009 from the Australian Government Solicitor on 6 April 2009.

The advice is subject to legal professional privilege and the Attorney General has advised that, in accordance with long standing practice, he wishes to claim public interest immunity from disclosure on this basis.

20. *What is the department's response to the Law Council's submission that the law of contempt should only be employed to safeguard and reinforce the authority of courts and not executive bodies such as the ACC?*[15]

The proposed provisions do not provide the same power of contempt to the ACC as is exercised by courts. An ACC examiner would be empowered to refer an individual to a court for acting in contempt of the examiner. It would be for the court to determine whether the uncooperative behaviour amounted to contempt.

This amendment implements recommendations of an independent review of the ACC Act conducted by Mr Mark Trowell QC. In his review report, Mr Trowell QC recommended that the ACC Act be amended to give examiners the capacity to refer an alleged contempt to a superior court to consider and deal with as though it were contempt of that court. Subsequent reports of the

14 Law Council, *Submission 12*, p. 21.
15 *Submission 12*, p. 18.

Parliamentary Joint Committee on the ACC have supported the implementation of this recommendation.

21. *What difficulties, if any, would arise from replacing the proposed contempt provisions in the Bill with provisions modelled on section 70 of the* Australian Securities and Investments Commission Act 2001*?*

As mentioned above, the rationale for the proposed contempt power is to provide a more immediate mechanism for dealing with uncooperative witnesses than the existing offence regime. Witnesses have been prepared to not cooperate with examiners, knowing that no penalty will be imposed for at least 12-18 months. Witnesses are aware that they may also be able to avoid criminal conviction by eventually agreeing to give evidence prior to the completion of the criminal process knowing that the evidence will have lost its value to the investigation by that stage. By delaying when information is provided, a witness is able to frustrate the operation of an ACC investigation.

Under section 70 of the *Australian Securities and Investments Commission Act 2001*, ASIC may certify to the court the failure of a person to comply, without reasonable excuse, with a requirement made under Part 3 of that Act. The court may then inquire into the case and may order the person to comply with the requirement as specified in the order. If the person were to fail to comply with the court order, he or she could then be dealt with for contempt of court.

A provision modelled on section 70 of the *Australian Securities and Investments Commission Act 2001* would add a further step in the process of dealing with uncooperative witnesses. This would provide greater scope for witnesses to frustrate ACC investigations by delaying when information is provided.

Drafting issues

22. *Where a person has been detained in relation to a proposed contempt application, proposed paragraph 34D(2)(a) requires the ACC to make the application in relation to the alleged contempt as soon as practicable. However, under proposed subsection 34B(1) it is an examiner who is empowered to make such an application.*

    - *Should proposed paragraph 34D(2)(a) require the examiner, rather than the ACC, to make an application in relation to an alleged contempt as soon as practicable?*

This appears to be a minor drafting error. The Department will consider an amendment to clarify the operation of section 34D.

- *Should proposed paragraph 34D(2)(b) specify who is responsible for ensuring that a person who is detained under this section is brought before the court as soon as practicable?*

The Department does not consider it necessary to specify who is responsible for ensuring a detained person is brought before a court as soon as practicable.

Accountability and review

23. *Why does new subsection 61A(3) provide that an independent review of the operation of the ACC Act will not be required if any federal parliamentary committee has commenced such a review? Should this provision be limited to reviews conducted by the PJC?*

The Department considers that any Parliamentary review would be sufficient if it is a review of the operation of the ACC Act. Proposed subsection 61A(3) would not apply to broader Parliamentary reviews that merely touch on issues related to the ACC or the ACC Act.

24. *The Bill does not implement the recommendations of the PJC that the Commonwealth Ombudsman should inspect records of ACC examiners to ensure compliance with the ACC Act and that the Ombudsman should provide at least annual briefings to the PJC in relation to the exercise of coercive powers by the ACC.*[16]

    - *Why doesn't the Bill implement the PJC's recommendation in relation to the Ombudsman inspecting the records of ACC examiners to ensure compliance with the ACC Act?*

    - *Is such an amendment under consideration? If so, why hasn't it been included in this Bill?*

The Department is still considering recommendations 9 and 10 of the PJC's report on its *Inquiry into the Australian Crime Commission Amendment Act 2007* in consultation with the Ombudsman's office.

Proceeds of Crime Act 2002

25. *Item 30 of Schedule 1 would amend subsection 77(1) of the POC Act to provide that a compensation order shall not be made if the interest to be compensated is 'an instrument of any offence'. Subsection 77(1) does not currently exclude compensation for legitimately obtained property on the basis that the property is an instrument of an offence.*

    - *Why has this additional test been included in subsection 77(1)?*

Item 30 will, amongst other things, align the grounds for compensation more closely with the tests for forfeiture and exclusion, to ensure that it is not possible for a person to receive compensation for property that has been validly forfeited.

Under the current restraining order and forfeiture provisions, an instrument of a serious offence can be forfeited in non-conviction based proceedings under sections 47 or 49. Where a person has been convicted of one or more indictable offences, an instrument of one or more of those indictable offences can be forfeited under section 48. A person is not entitled to have property excluded under section 73 if the court is satisfied that the property is the instrument of any serious offence (if the forfeiture order was, or would be, made under section 47 or 49) or if it is the instrument of any of the offences to which the forfeiture order relates (if the order was, or would be, made under section 48).

It would be anomalous if a person could apply to be compensated for property that had been validly forfeited, especially where that property could not have been excluded prior to forfeiture. Accordingly, the additional test has been included in proposed paragraph 77(1)(d).

- *How is Item 30 consistent with Item 22 of Schedule 1 which allows exclusion of property from a forfeiture order, in non-conviction based proceedings, provided the property is not 'an instrument of any serious offence'?*

16 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendations 9 and 10 pp 58-59. See also ACC, *Submission 7*, p. 9.

Item 30 is compatible with Item 22 to the extent that those items deal with instruments of an offence under a conviction based forfeiture order.

Item 22 and Item 30 differ in the way that they operate in relation to the instrument of an indictable offence (but not a serious offence) in non-conviction based forfeiture orders. Item 30 does not allow a person to apply for compensation where the interest in property is an instrument of an indictable offence and is inadvertently forfeited under sections 47 or 49. However, Item 22 would allow for that property to be excluded.

- *Should compensation only be excluded where the property is an instrument of an indictable offence, in the case of conviction based forfeitures, or a serious offence, in the case of non-conviction based forfeitures?*

While it may be possible to specify separate tests for compensation (depending on whether the forfeiture was conviction based or non-conviction based), the Department was concerned that this would make the provisions unnecessarily long and complex. It is also desirable to keep the test for compensation in section 77 as closely aligned as possible with the test for compensation in proposed section 94A (Item 57 of Schedule 1, Part 1). A person will still be able to have the instrument of an indictable offence excluded under section 73 where it has been, or will be, forfeited under a non-conviction based order.

26. *What is the department's response to the suggestion from the DPP, in relation to the amendments in Part 1 of Schedule 1, that the requirement to pay compensation and the power to make post forfeiture recovery orders should be conditional on the recipient not having any other outstanding liabilities under the POC Act?*[17]

The Department will consider the suggestion from the DPP. However, as this would involve a significant change to the operation of the Act, it is appropriate that it be considered for a possible future Bill.

27. *The Explanatory Memorandum (pp 33-35) states that proposed sections 180A to 180E of the POC Act would permit the examination of lawyers, accountants, bankers and other advisors of the persons who hold or claim an interest in the relevant property or, in the case of proposed section 180D, of the person against whom a confiscation order was made.*

    - *How do proposed sections 180A to 180E have this effect?*

    - *If the provisions have this effect then what is the justification for permitting the examination of lawyers, accountants, bankers and other advisors?*

The original intention of section 180 was that the provision should have broad application, applying to all persons with possible relevant information about the affairs of the persons specified in the provisions. This is evidenced in the original Explanatory Memorandum to the *Proceeds of Crime Act 2002*:

> This clause provides that where a restraining order is in force, a court may make an order for the examination of any person. That includes a person who owns the property, or who claims an interest in property that is the subject of the restraining order, and a person named in a restraining order as a suspect; further, it includes the spouses of those persons. Those persons and their spouses can be examined about the "affairs" (for example, the interests, transactions,

17 *Submission 8*, p. 3.

and ventures) including the nature and location of any property of any of the persons referred to in paragraphs 181(1)(a)-(c). The person to be examined could also include lawyers, accountants, bankers and other advisers of any of the persons referred to in paragraphs 181(1)(a)-(c).

In keeping with the original intention of section 180, proposed sections 180A to 180E were similarly worded to have a broad application. Professional advisers such as lawyers, bankers and accountants may assist examiners to determine the affairs of the persons specified in provisions 180A to 180E, if, for example, the financial arrangements of those specified persons are not easily determinable, such as a complex trust arrangement or a business.

28. Liberty Victoria has suggested that sections 211 and 218 of the POC Act should be amended to provide a general defence where a person has made all reasonable efforts to comply with a production order or a notice to produce.[18] What is your response?

The Department does not consider a general defence to be warranted for two reasons. First, the applicable fault elements to sections 211 and 218 impose a high threshold for the prosecution to successfully prove that the offence was made out. The prosecution would be required to prove that the person intended not to comply with the notice. If a person has made all reasonable efforts to comply, it would not be possible for the prosecution to prove that the person intended not to comply.

Secondly, if a general defence is included it will dilute the obligation to comply with orders, allowing the recipient of the order to take no action during the specified period as long as they take reasonable steps at some stage. This could also include taking reasonable steps once a prosecution is anticipated or has been commenced thereby frustrating the ability to enforce the offence.

29. Has the department consulted financial institutions in relation to the proposed changes to the POC Act? If so, what, if any, concerns did financial institutions express in relation to these changes and how have these concerns been addressed?

In February 2009, the Department wrote to the Australian Bankers Association. On 10 March 2009, Mr Tony Burke, Director, provided comments to the Department in relation to stored value cards and electronic production of documents.

Stored value cards

Mr Burke advised that bank customer identification programs have been designed to comply with the requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), and that any conflicting obligations would have a major impact on risk management and compliance programs.

The proposed amendments to the Act do not conflict with the reporting obligations imposed by the AML/CTF Act. The intent is that information gathered under obligations imposed by the AML/CTF Act can also be harnessed for the purposes of the Proceeds of Crime Act.

Electronic production of documents

The Department originally proposed that amendments to sections 203 and 214 could require production of information in not less than 72 hours. Mr Burke advised that this time limit may be

18 *Submission 11*, p. 2.

difficult and costly for banks to comply with. On the basis of this advice, the Department extended the minimum production time to not less than three days. This change was designed to accommodate compliance by financial institutions in situations where, for example, a notice was received on a Friday afternoon. Expressing the time period in days will ensure section 36 of the *Acts Interpretation Act 1901* applies to the provisions. The application of subsection 36(2) to these provisions will mean that where a date for the production of documents would fall on a Saturday, Sunday, public holiday or a bank holiday, the production will not be required until the following working day.

Mr Burke proposed that the obligation on financial institutions to provide information be limited to the institution's 'best endeavours', or that a review mechanism be drafted to permit referral of a possible breach of the provision to the Attorney-General before a decision was made to pursue action in relation to the breach. As section 213 notices serve as an important information gathering tool for law enforcement agencies, the Department determined that it was appropriate that the existing penalty provision should remain. However, given the reduced time frame for compliance, the Department determined that a defence provision should be included in lieu of a review mechanism (Items 127 and 139). This will give a person a defence where they have taken all reasonable steps to comply with a notice or order but have been unable to do so within the specified timeframe. This defence will cover the example raised in Mr Burke's comments, which was the difficulty of retrieving stored documents from external archive service providers, with whom fixed performance conditions for retrieval will have been negotiated.

30. *In relation to Item 135 of Schedule 1, which amends paragraph 214(d) of the POC Act, the Explanatory Memorandum (p.43) states that :*

> *The intent of this provision is to place a positive obligation on the authorised officer to consider whether the financial institution is reasonably able to comply with the request being made. This provision is included because the time in which information or documents must be produced has been amended to allow for production in less than 14 days (but no less than three days) after giving the notice.*

- *How does the provision have this effect when it relates to the manner and form in which information or documents are to be provided rather than the time frame?*

- *Is an additional provision required in proposed subsection 214(2) to ensure that the POC Act operates in the manner described in the Explanatory Memorandum?*

The proposed amendment to paragraph 214(d) would require a notice to a financial institution to specify the form and manner in which information or documents are to be provided, having regard to the record-keeping capabilities of the financial institution (to the extent known to the officer).

Some forms of document retrieval enable compliance with obligations in a more limited timeframe (for example, it is likely that downloading electronic records onto a storage device would be performed more quickly and cheaply than manually accessing and printing each page of a record held on a computer). If an authorised officer was aware of the record-keeping capabilities of the financial institution (for example, if the officer had previously requested information of the institution and was aware of the way in which the information was stored, retrieved and provided), he or she could have regard to the record-keeping capabilities of the financial institution and the most expedient way to produce that kind of record.

31. Item 141 of Schedule 1 amends subsection 219(1) of the POC Act to allow monitoring orders to be made in relation to transactions made using a stored value card issued by a financial institution.

- *Should the phrase 'conducted during a particular period' in proposed paragraph 219(1)(a), which relates to monitoring of transactions through an account, also qualify the power to make a monitoring order in relation to transactions made using a stored value card?*

- *If proposed paragraph 219(1)(b) is not qualified by this phrase doesn't the provision allow a judge to make an open ended order for the monitoring of a stored value card?*

The Department considers that the phrase 'conducted during a particular period' is not required in proposed paragraph 219(1)(b) of the Bill. The Department considers that the provision does not allow a judge to make an open ended order for the monitoring of a stored value card, as paragraph 220(1)(c) and subsection 220(2) of the Act limit the period of monitoring.

Paragraph 220(1)(c) provides that a monitoring order must specify the period during which transactions must have occurred. Subsection 220(2) provides that the period must not be for longer than a three month period. Thus, while read in isolation, proposed paragraph 219(1)(b) appears to permit a judge to make a monitoring order in relation to a stored value card for an unlimited period, section 220 limits that period to no greater than three months.

32. Is Item 215 of Schedule 1 of the Bill, which amends subsection 302(a) of the POC Act, required? Isn't it proposed that the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 will repeal section 302?[19]

Section 302 is repealed by Item 70 of Part 5 of Schedule 2 of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Bill No.1). However, Item 70 does not commence until three months after the date of Royal Assent.

Item 215 of Schedule 1of the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009 (Bill No.2) was included as a transitional provision to operate during the period before Item 70 commences (and section 302 is repealed). Thus, if Bill No.2 is passed prior to Bill No.1, Item 215 will commence on the date of Royal Assent of Bill No.1. It will then operate until Item 70 of Bill No.1 commences and repeals section 302 (three months after the date of Royal Assent). If Item 70 of Bill No.1 commences first, Item 215 will never commence, as section 302 will have already been repealed.

Witness Protection Act 1994

33. Liberty Victoria opposed the insertion of proposed section 22C which provides that that the non-disclosure offences in proposed sections 22, 22A and 22B will apply to disclosure of information to a court, tribunal, a Royal Commission or any other commission of inquiry.[20] *Do the existing offences under the section 22 of the WP Act apply to disclosures to courts, tribunals and inquiries?*

The *Witness Protection Act 1994* is currently silent on whether the offences at section 22 apply to disclosures to courts, tribunals and inquiries.

19 Item 70 of Schedule 2 of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.
20 *Submission 11*, p. 3.

In order to ensure the highest level of protection to witnesses and participants, proposed section 22C would clarify that the proposed new non-disclosure offences do generally apply to disclosures to a court, tribunal, Royal Commission or any other commission of inquiry. The offences do not apply to all information about the NWPP or participants. They are designed to protect sensitive information that could, if disclosed, compromise the security of a participant or someone involved in administering the NWPP or adversely affect the integrity of the NWPP.

Subsection 22C(2) provides that section 22C does not affect the operation of subsection 26(3), which allows the Commissioner, a Deputy Commissioner, an AFP employee, a special member of the Australian Federal Police, the Commonwealth Ombudsman or a member of his or her staff to disclose certain information about a participant if it is essential to the determination of legal proceedings. There are also general exceptions to the offences (at subsections 22(5), 22A(5) and 22B(3)) that would apply to disclosures to a court.