

13 January 2012

Committee Secretary
House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

By email. spla.reps@aph.gov.au.

Dear Committee Secretary

**Inquiry into the Crimes Legislation Amendment (Powers and Offences)
Bill 2011**

Please find attached the Rule of Law Institute of Australia's submission on this Bill. We thank you for the opportunity to make this submission.

RoLIA is an independent non-profit entity formed to uphold the rule of law in Australia.

The Institute's objectives are:

- To foster the rule of law in Australia.
- To promote good governance in Australia by the rule of law.
- To encourage truth and transparency in Australian Federal and State governments, and government departments and agencies.
- To reduce the complexity, arbitrariness and uncertainty of Australian laws.
- To reduce the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

Robin Speed

Rule of Law Institute of Australia



SUBMISSION

1. Introduction

The Rule of Law Institute of Australia (RoLIA) thanks the Committee for the opportunity to make a submission in relation to the Crimes Legislation Amendment (Powers and Offences) Bill 2011(Bill).

RoLIA submits that parts of the proposed Schedule 2—Amendments relating to disclosure by the Australian Crime Commission (ACC) to the private sector do not comply with the rule of law:

- 1) A lack of recognition of the presumption of innocence that flows from the Bill's underlying presumption that the view of the ACC as to the guilt of a person is correct and the requirement that the information disclosed is complete, accurate, admissible in court and has been independently verified.
- 2) The practical avoidance of the existing safeguards of the rule of law contained in the Australian Crime Commission Act 2002. Specifically, the ACC is an investigative body that should not directly or indirectly undertake the role of the Director of Public Prosecutions and prosecute for perceived wrongs, nor should the ACC usurp the role of the courts and determine guilt.
- 3) The general lack of transparency, as the whole procedure is highly secretive.

The following submission is in general terms so as to make it more understandable to the general public. Should the Committee require a more detailed legal submission please let us know.

2. Submission

If the Crimes Legislation Amendment (Powers and Offences) Bill 2011 (Bill) is passed, the chief executives of Australian companies should not be surprised to receive a personal telephone call from John Lawler, the boss of the Australian Crime Commission (ACC) requesting an urgent meeting in his office. The chief executive might be asked to tell no one of the call or the requested meeting.

In this hypothetical situation, after agreeing to meet the bemused chief executive might personally research the ACC on the internet. This would confirm that it is the central criminal intelligence government agency in

Australia and is highly secretive with extraordinary powers of investigation. It can summon any one to be examined by its officers. The person summoned is obliged to answer every question under oath, has no privilege against self-incrimination, and in prescribed circumstances can go to jail if he or she discloses to any one (including their family) that they were summoned or gave evidence.

In an article by Susannah Moran (Australian, January, 09 2012) she referred to the Bill's intended operation to allow the ACC to share its secret information with the private sector. According to the article this could mean a "rogue employee" is uncovered and "dealt with."

What is not clear is how the private sector "deals" with the so called "rogue employee", nor how the employee is protected in this process of being "dealt with".

At the start of the requested meeting Mr Lawler might ask the chief executive to sign a written undertaking not to use or further disclose to anyone the information he is about to give except in accordance with conditions imposed by him.

Mr Lawler might then say that the ACC has collected information that a named very senior employee of the chief executives company is guilty of insider trading in shares in the company.

The chief executive might say that he or she has difficulty believing that the employee is guilty but Mr Lawler might say the ACC is satisfied he is.

The chief executive might then ask two critical questions. First, if the ACC is satisfied that the employee is guilty why has it not coordinated with the law enforcement agencies and charges been laid? Second, the company is willing to provide the ACC investigation with any information it has but is it asking the company to dismiss or take other action against the employee?

To this Mr Lawler might reply that he thought it important to provide the information at this stage but it is a matter for the chief executive what to do. It is a condition of providing the information however, that you cannot discuss it with anyone, or use it or give a copy to anyone not expressly authorised in writing by him and then only in accordance with these conditions . If the chief executive breached this condition, he or she may be guilty of a criminal offence and might go to jail for 12 months.

The chief executive leaves the meeting shaking his or her head. The employee concerned is a long term trusted employee. There are legal and moral obligations to respect the employees' rights but there is also a responsibility to the company and shareholders to act when an organisation such as the ACC states its view on such a serious matter.

A more extreme example might occur where a chief executive of a hospital is informed by the ACC that an employed doctor is associated with a terrorist group.

The fatal defect in authorising the ACC to make this disclosure of information gathered in secret to the private sector is the incompatibility between the presumption of innocence of the employee and the assumption in the Bill that the view of the ACC as to the guilt of a person is conclusive and that the information disclosed is complete, accurate, admissible in court and has been independently verified.

At present the ACC Act contains the minimum rule of law safeguards. Namely that the ACC is an investigator and it is a matter for the law enforcement agencies to decide whether to act on the information collected by it. The ACC does not have power to prosecute; that is the role of the independent Commonwealth Director of Public Prosecutions. The ACC does not have the power to find a person has committed a criminal offence and send him to jail; that is the role of the independent courts whose proceedings are open to the Australian public.

Inherent in the Bill is the risk of bypassing these safeguards, sweeping away the presumption of innocence, having the employee damned as a "rogue employee" and having the private sector do the dirty work of "dealing" with the employee; and all behind closed doors. No proper protections are provided to the employee. Nor is an employer protected who dismisses an employee when it turns out the ACC was wrong or its information defective or it failed to disclose the information in its possession disclosing innocence.

It is submitted that the Bill needs to be withdrawn and rethought.

Robin Speed
Rule of Law Institute of Australia

