

CHAPTER 3

SEARCH AND INFORMATION GATHERING POWERS

Provisions in the Bill

3.1 Part IAA of the Crimes Act sets out the main search, information gathering and arrest powers that police use to investigate Commonwealth offences (as well as territory offences and state offences with a federal aspect).¹ Schedule 2 of the Bill proposes to amend the Crimes Act by inserting a comprehensive regime for:

- the use and sharing of things that are seized, and documents that are produced, under Part IAA (proposed section 3ZQU);
- operating seized electronic equipment and compensation for damage to electronic equipment (proposed sections 3ZQV and 3ZQW); and
- the return of things seized under Part IAA (proposed sections 3ZQX to 3ZQZB).²

3.2 Schedule 2 would also make various changes to the Crimes Act provisions relating to searches of electronic equipment found at search warrant premises.³

Exchange of information

3.3 The Explanatory Memorandum argues that there is currently uncertainty in relation to how material that has been seized or produced under Part IAA of the Crimes Act may be used.⁴ In relation to material that has been seized, the Explanatory Memorandum notes that:

Subsection 3F(5) currently provides that a thing that has been seized can be made available to ‘officers of other agencies’ if it is necessary to do so for the purpose of investigating or prosecuting an offence to which the [thing relates]. This provision limits the ability of the officer who seized the thing sharing the seized material with State or Territory police officers for the purpose of investigating a State offence. ...The provision also prevents seized things being shared with foreign agencies for the investigation of an Australian offence.⁵

3.4 The Explanatory Memorandum states that, to enable police to properly perform their duties, it is important that things or documents that are lawfully acquired

1 Explanatory Memorandum, p. 67.

2 Item 9 of Schedule 2; Explanatory Memorandum, p. 67. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the Crimes Act.

3 Sections 3K to 3LB.

4 Explanatory Memorandum, p. 68.

5 Explanatory Memorandum, p. 68.

under Part IAA are able to be used or shared for ‘any necessary purpose connected with, or related to, law enforcement functions and activities’.⁶

3.5 The Bill would insert proposed subsection 3ZQU(1) in the Crimes Act to set out purposes for which material seized or produced under Part IAA of the Act may be used by, or shared between, state or territory police officers, AFP officers and other Commonwealth officers.⁷ These purposes include:

- preventing, investigating or prosecuting an offence against a law of the Commonwealth, an offence against a law of a territory or a state offence that has a federal aspect;⁸
- proceedings under the POC Act;
- proceedings under state or territory criminal asset confiscation legislation where the proceedings relate to a state offence that has a federal aspect;⁹
- proceedings, applications or requests relating to control orders and preventative detention orders under Part 5.3 of the Criminal Code; and
- investigating or resolving certain complaints, or allegations of misconduct or corruption against law enforcement officers.¹⁰

3.6 Proposed subsection 3ZQU(1) is intended to provide a direct legislative basis for the use or sharing of material obtained under Part IAA of the Crimes Act but this provision would not override other Commonwealth, state or territory laws that allow seized material to be used or shared for other purposes.¹¹

3.7 While proposed subsection 3ZQU(1) would be limited to the sharing of material between state or territory police officers, AFP officers and other Commonwealth officers, proposed subsection 3ZQU(5) would permit these officers to share material seized or produced under Part IAA of the Act with:

- state and territory law enforcement agencies;¹² and
- foreign law enforcement, intelligence gathering or security agencies.¹³

6 Explanatory Memorandum, p. 69. See also Explanatory Memorandum, pp 71-72; AFP, *Submission 10*, pp 10-11.

7 Explanatory Memorandum, p. 69.

8 See the definition of ‘offence’ in subsection 3C(1) and the definition of ‘State offences that have a federal aspect’ in section 3AA. Offences under the *Defence Force Discipline Act 1982* are specifically excluded from the definition of ‘offence’.

9 See the definition of ‘corresponding law’ in section 338 of the POC Act and regulation 6 of the *Proceeds of Crime Regulations 2002*.

10 Proposed subsection 3ZQU(1); Explanatory Memorandum, pp 70-71.

11 Proposed subsections 3ZQU(2), (3) and (4); Explanatory Memorandum, p. 71.

12 Proposed subsection 3ZQU(7) would define ‘State or Territory law enforcement agency’ for the purposes of proposed section 3ZQU.

13 Explanatory Memorandum, pp 72-73.

3.8 Proposed subsection 3ZQU(5) would provide that information may be shared for the same purposes as those outlined in proposed subsections 3ZQU(1) to (3) as well as additional purposes including:

- preventing, investigating or prosecuting an offence against a law of a state or territory; and
- proceedings under state or territory criminal asset confiscation legislation.¹⁴

3.9 Proposed subsection 3ZQU(5) is exclusive and thus would not permit sharing of material for other purposes. Furthermore, it would not permit the sharing of material for the investigation of foreign offences.¹⁵

Searches of electronic equipment

Operating equipment that is seized or moved

3.10 Section 3L of the Crimes Act currently details the powers of officers executing a warrant in relation to electronic equipment found at the search warrant premises and, in particular, authorises officers to operate equipment at the warrant premises to access data held in, or accessible from, the equipment. In addition, section 3K allows a thing found at the warrant premises to be moved to another place for examination or processing to determine if it may be seized under the warrant. However, if the executing officer seizes or moves the electronic equipment there are no provisions governing how the equipment can be used, and what material may be accessed from it, when it is no longer on the warrant premises.¹⁶

3.11 Proposed section 3ZQV would provide that where electronic equipment is seized under Part IAA of the Crimes Act, or moved from warrant premises under section 3K, the equipment may be operated at any location for the purpose of determining whether data held on, or accessible from, the equipment is evidential material.¹⁷ This provision would allow, for example:

- operation of a computer to access documents or photos saved on the computer's hard drive; or
- operation of a mobile phone to access short message service (SMS) or voicemail messages.¹⁸

3.12 Proposed section 3ZQV would extend to 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).¹⁹

14 Explanatory Memorandum, pp 72-73.

15 Explanatory Memorandum, pp 73-74. The *Mutual Assistance in Criminal Matters Act 1987* would continue to govern assistance provided in relation to the investigation of foreign offences.

16 Explanatory Memorandum, pp 69 and 74. 'Executing officer' is defined in subsection 3C(1) and is essentially the constable responsible for executing the warrant.

17 Explanatory Memorandum, p. 74.

18 Explanatory Memorandum, p. 74. See also AFP, Submission 10, pp 9-10.

3.13 Proposed section 3ZQW would provide for the payment of compensation for any damage resulting from the use of electronic equipment under section 3ZQV.²⁰

Moving equipment for examination or processing

3.14 The Bill would also make several changes to section 3K which allows things to be moved from the warrant premises to another place for further examination. The first of these changes would be to amend paragraph 3K(2)(a) by replacing the existing test that there are reasonable grounds to *believe* that the thing contains or constitutes evidential material, with a test that there are reasonable grounds to *suspect* this, before the thing may be moved.²¹ The Explanatory Memorandum argues that the ‘reasonable grounds to believe’ test creates operational difficulties for law enforcement agencies particularly where a significant amount of material written in a foreign language is located:

In these situations, the executing officer, due to their inability to understand its contents, may be unable to form a belief on reasonable grounds that the material contains or constitutes evidential material.²²

3.15 Subsection 3K(3) currently requires an executing officer to inform the occupier of the search warrant premises of the place and time at which the thing that has been moved will be examined or processed; and allow the occupier, or the occupier’s representative, to be present during the examination or processing. The Explanatory Memorandum argues that these requirements:

...can pose a security concern in some cases by allowing a person suspected of serious offences, including serious and organised crime, to be present with forensics and other police staff during an examination. There is also a risk that sensitive information about investigative practices and procedures could be revealed.²³

3.16 The Bill would insert a new subsection 3K(3AA) which would waive these requirements if the executing officer believes complying with them would endanger the safety of a person or prejudice an investigation or prosecution.²⁴

3.17 In addition, the Bill would extend the time period that a thing may be moved to another place for examination from 72 hours to 14 days.²⁵ The Explanatory Memorandum states that this extended period is necessary because of the increased time required to forensically search data stored on electronic equipment particularly

19 Proposed subsection 3ZQV(3); Explanatory Memorandum, p. 74.

20 Explanatory Memorandum, p. 75.

21 Item 12 of Schedule 2; Explanatory Memorandum, pp 81-82.

22 Explanatory Memorandum, p. 82.

23 Explanatory Memorandum, p. 82.

24 Item 13 of Schedule 2; Explanatory Memorandum, p. 82.

25 Item 14 of Schedule 2; Explanatory Memorandum, pp 82-84.

where a large amount of data stored on multiple devices is seized, the material is encrypted or the material is in a foreign language.²⁶

3.18 The Explanatory Memorandum notes that the Crimes Act currently contains no equivalent provision to section 3L governing the use of electronic equipment after it has been moved from the warrant premises under subsection 3K(2). The Bill would insert a new section 3LAA to set out what officers executing the warrant are able to do if they move electronic equipment for further examination.²⁷ In particular, proposed section 3LAA would allow an officer to:

- operate equipment to access data from the equipment including data that is not physically located on that particular equipment;²⁸
- copy any or all data held on the equipment if the officer suspects on reasonable grounds that any data held on the equipment constitutes evidential material;²⁹ and
- seize the equipment if it contains evidential material or put this material in documentary form and seize the documents.³⁰

Operating equipment at the warrant premises

3.19 Items 16 to 19 of Schedule 2 would broaden the powers under section 3L to operate electronic equipment at the warrant premises to access and copy data. One of the changes made by these provisions would be to remove the requirements that, before operating the electronic equipment to access data, officers executing the warrant must have reasonable grounds to believe that:

- the data might constitute evidential material; and
- the equipment can be operated without damaging it.³¹

3.20 The Explanatory Memorandum argues that this will enable an officer, when executing a warrant, to search a computer in the same way a desk or filing cabinet would be searched for documents.³²

3.21 In addition, these provisions would change the test for when data found on electronic equipment can be copied from reasonable grounds to believe that any data

26 Explanatory Memorandum, p. 83. Under subsection 3K(3A), an executing officer can currently seek extensions of the 72 hour period from an issuing officer (such as a magistrate). Item 15 of Schedule 2 would limit each extension to a maximum of 7 days.

27 Item 20 of Schedule 2; Explanatory Memorandum, p. 86. The powers in this section would be conferred on ‘the executing officer or a constable assisting’. ‘Constable assisting’ is defined in section 3C and can include a person who is not a constable but who has been authorised by the relevant executing officer to assist in executing the warrant.

28 Proposed subsection 3LAA(1); Explanatory Memorandum, p. 86.

29 Proposed subsection 3LAA(2); Explanatory Memorandum, pp 83 and 87.

30 Proposed subsection 3LAA(4); Explanatory Memorandum, p. 87.

31 Item 16 of Schedule 2; Explanatory Memorandum, p. 84.

32 Explanatory Memorandum, p. 84. See also AFP, *Submission 10*, p. 5.

accessed might constitute evidential material to reasonable grounds to suspect that the data constitutes evidential material.³³ The Explanatory Memorandum states that:

The ‘reasonable grounds to believe’ test is the same test that the executing officer or constable assisting must apply in determining whether a thing that is not specified in the warrant may be seized under paragraph 3F(1)(d). If an executing officer or constable assisting genuinely holds ‘reasonable grounds to believe’ the thing is evidential material, then it is questionable why they would elect to copy the thing for further analysis under section 3L(1A) when they would already have grounds to seize the thing under section 3F.³⁴

Return of seized material

3.22 The Bill would rationalise the provisions in the Crimes Act relating to the return of things seized under Part IAA of the Act. In particular:

- existing sections 3ZV and 3ZW would be replaced by proposed sections 3ZQX to 3ZQZ;
- subsections 3UF(4) to (7) and (9) would be replaced by proposed section 3ZQZA; and
- section 3UG would be replaced by proposed section 3ZQZB.³⁵

3.23 While these provisions in the Bill are based upon the existing provisions in the Crimes Act, they would make some substantive changes. For example, existing section 3ZV of the Crimes Act imposes the obligation to return the thing that is seized on the constable who seized the thing.³⁶ In addition, only the constable who seized a thing under section 3T may apply for an order under existing section 3ZW that the thing may be retained beyond 60 days from the seizure.³⁷ The proposed provisions would impose the obligation to return items on the Commissioner of the AFP and the commissioner would have the power to apply for extensions.³⁸ However, the commissioner would be able to delegate these functions to an AFP or state or territory police officer.³⁹

3.24 In addition, the new provisions would allow a thing to be retained if it is required for any of the purposes listed in proposed section 3ZQU or for other judicial

33 Item 17 of Schedule 2; Explanatory Memorandum, pp 84-85.

34 Explanatory Memorandum, p. 84.

35 Explanatory Memorandum, pp 75-80.

36 Explanatory Memorandum, p. 76. Subsections 3UF(5) and (9) impose this obligation on ‘the police officer who is for the time being responsible for the thing’.

37 Explanatory Memorandum, p. 76. Subsection 3UF(9) allows ‘the police officer who is for the time being responsible for the thing’ to apply for a similar extension under section 3UG.

38 Proposed sections 3ZQX, 3ZQY, 3ZQZ, 3ZQZA and 3ZQZB; Explanatory Memorandum, pp 76, 77, 78, 79 and 80.

39 Item 10 of Schedule 2 (proposed new section 3ZW); Explanatory Memorandum, pp 76 and 80-81.

or administrative review proceedings.⁴⁰ This is a broader basis for retention of things than the existing tests. For example, the existing test for return of things seized under Divisions 2 or 4 of Part 1AA is that the reason for its seizure no longer exists or it is decided that it is not to be used in evidence.⁴¹

Issues raised in submissions

Support for the proposed amendments

3.25 The Police Associations supported the amendments to the search warrant provisions of the Crimes Act and noted that the amendments address operational difficulties relating to both the examination of electronic equipment, and the use and sharing of documents and material lawfully seized under warrant.⁴²

3.26 Similarly, Mr Quaadvlieg of the AFP told the committee:

The bill proposes amendments to the current search warrant provisions that relate primarily to the use, sharing and retention of seized material and the examination and processing of electronic equipment for evidential material. These amendments will enhance the mechanisms used to investigate criminal activity, and of particular importance to the AFP are those amendments that provide mechanisms to access and search electronic equipment. We view these amendments as critical, as advances in technology have resulted in law enforcement agencies becoming increasingly reliant on examination of electronic equipment as a source of evidence...⁴³

3.27 The AFP also provided a more specific explanation of why the provisions relating to the examination of electronic equipment require amendment:

The existing search warrant provisions pertaining to the examination of computers on warrant premises were introduced in the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* when personal computers were not as widely used as they currently are. Furthermore, computers were more expensive, cumbersome and potentially fragile if moved. Tests that were imposed for police to examine computers on warrant premises were designed to ensure that electronic equipment was only operated to establish whether it contained evidential material where the officer believed the equipment could be operated without causing damage. Today electronic equipment is quite readily able to be accessed, copied and moved by police ...with negligible risk of any damage to the equipment.

40 Proposed subsections 3ZQX(1), 3ZQY(1), 3ZQZ(2), 3ZQZA(2) and 3ZQZB(3).

41 Paragraph 3ZV(1)(a); Explanatory Memorandum, p. 77. Subsection 3ZV(1) does not require the return of the thing if it is forfeited or forfeitable to the Commonwealth; or is the subject of a dispute as to ownership. These provisions would be replicated in proposed sections 3ZQX and 3ZQY.

42 *Submission 3*, p. 3.

43 *Committee Hansard*, 29 October 2009, p. 3.

As a consequence of further advances in technology, particularly the exponential increase in the storage capacity of computers, a number of limitations have been identified with the existing search warrant provisions in Part 1AA, specifically those relating to electronic equipment.⁴⁴

3.28 Mr Quaedvlieg noted that the sheer volume of data law enforcement officers confront when conducting a search can prevent them making a reasonable assessment of whether it is evidential material:

It is not unusual for us to encounter data wells which are in excess of one terabyte. Equating one terabyte in a physical sense, it would cover the arena of the Melbourne Cricket Ground by one metre deep in totality. ...As you can imagine, our practical ability to make any assessment whatsoever in the field, with that type of technology and that ...scope of data holdings, is difficult.⁴⁵

3.29 The AFP submitted that the proposed amendments contained in Schedule 2 of the Bill relating to the examination and processing of electronic equipment would address the deficiencies of the existing search warrant provisions in the Crimes Act.⁴⁶ For example, the AFP supported reducing the threshold for police to copy and take away data accessed by operating equipment at warrant premises on the basis that:

During the execution of a search warrant it may not be practicable to search all electronic equipment owing to the volume and complexities of the computer system and time restrictions. For this reason, the capacity to copy and take data away from the premises after a preliminary examination is an important mechanism necessary for police to conduct their investigations efficiently. Copying data will avoid the disruption that the seizure of a computer can cause to a person or business and mitigate any potential loss that may be suffered by an occupier.⁴⁷

3.30 Similarly, the AFP stated that the existing 72 hour limit for examining or processing equipment which is moved under section 3K poses operational difficulties and welcomed the proposed amendments to increase the time period from 72 hours to 14 days.⁴⁸ The AFP outlined factors which have increased the length of time required to forensically examine electronic equipment including:

- the increasing number and range of electronic devices founds at warrant premises and the increased storage capacity of those items; and
- the increased prevalence of security software and encryption technology.⁴⁹

44 *Submission 10*, pp 4-5. See also Ms Chidgey, *Committee Hansard*, 29 October 2009, pp 10-11.

45 *Committee Hansard*, 29 October 2009, p. 11.

46 *Submission 10*, p. 5.

47 *Submission 10*, pp 5-6. See also Mr Quaedvlieg, *Committee Hansard*, 29 October 2009, p. 11; *Answers to questions on notice*, 9 November 2009, p. 9.

48 *Submission 10*, pp 7-8.

49 *Submission 10*, pp 7-8. See also *Answers to questions on notice*, 9 November 2009, pp 10-11.

3.31 Where equipment is moved for examination under section 3K, subsection 3K(3) requires that the occupier of the warrant premises be informed of when and where the examination will be conducted and have the opportunity to be present. The NSW Department of Premier and Cabinet was generally supportive of the changes proposed by the Bill but suggested, in addition, that subsection 3K(3) should be repealed because it ‘may present a security and methodological risk’.⁵⁰

Concerns about the proposed amendments

3.32 By contrast, the Law Council expressed a number of concerns about the proposed amendments to the Crimes Act. Firstly, the Law Council opposed removing the existing requirement in subsection 3L(1) that, before operating electronic equipment at warrant premises to access data, an officer executing the warrant must have reasonable grounds to believe the data might constitute evidential material. The Law Council challenged the argument that this amendment simply allows electronic equipment to be searched in the same way a desk or filing cabinet would be searched:

[A] computer is materially different from a desk or filing cabinet – both in terms of the volume and type of material it may contain and in terms of the fact that it may allow access to data held off-site at multiple secondary locations. The privacy implications of searching a computer and all data accessible from it are considerably more far-reaching than the privacy implications of searching a desk or filing cabinet.

For this reason alone, the Law Council submits that a search warrant should not be regarded as a blanket authorisation to operate a computer found on warrant premises and to access any and all of the data available from it. Some further threshold test, whether it be a reasonable belief or a reasonable suspicion, that the operation of the computer is likely to provide access to evidential material should have to be satisfied.⁵¹

3.33 Secondly, the Law Council opposed the proposed amendment to subsection 3L(1A) which would allow data accessible from electronic equipment at warrant premises to be copied if an officer executing the warrant has reasonable grounds to suspect that the data constitutes evidential material. The Law Council argued that the test for when data may be copied should be the same as the test for when items may be seized (that is reasonable grounds to *believe* that the data is evidential material):

Contrary to the justification provided in the Explanatory Memorandum, the Law Council submits that copying and removing data under sub-section 3L(1A) is akin to seizing the data. It is not a preliminary or lesser step.

Copying data from electronic equipment located at the search premises is intended to be a practical and more convenient alternative to seizing the equipment itself. ...As such, the Law Council submits that the test for when data can be copied should be the same as the test for when a thing may be

50 *Submission 14*, p. 1.

51 *Submission 12*, p. 21. See Explanatory Memorandum, p. 84.

seized, that is, reasonable grounds to believe that the data constitutes evidential material.⁵²

3.34 Thirdly, the Law Council was concerned by 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. While the Law Council acknowledged the operational difficulties caused by the existing 72 hour limit, the Law Council submitted that:

[T]he extended timetable proposed does not take account of the financial impact and disruption that the removal of equipment can have on a business.

In the circumstances, the Law Council submits that seven days, with the possibility of extension on application, is a more reasonable timeframe. This would be consistent with the equivalent NSW provision, section 75A(2) of the *Law Enforcement (Powers and Responsibility) Act 2002*.⁵³

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

53 *Submission 12*, p. 25.