The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009 [Provisions]

November 2009

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ABBREVIATIONS

ACC	Australian Crime Commission
ACC Act	*Australian Crime Commission Act 2002*
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investment Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ATO	Australian Taxation Office
the Bill	Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
Customs	Australian Customs and Border Protection Service
DPP	Commonwealth Director of Public Prosecutions
Law Council	Law Council of Australia
NWPP	National Witness Protection Program
NSW	New South Wales
PJC	Parliamentary Joint Committee on the Australian Crime Commission
POC Act	*Proceeds of Crime Act 2002*
Police Associations	Australian Federal Police Association and the Police Federation of Australia
SCAG	Standing Committee of Attorneys-General

the Sherman report	*Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*
SMS	short message service
TIA Act	*Telecommunications (Interception and Access) Act 1979*
TOCC	United Nations Convention against Transnational Organised Crime
the Trowell report	*Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*
WP Act	*Witness Protection Act 1994*

RECOMMENDATIONS

Recommendation 1

7.11 The committee recommends that proposed section 390.3 of the Criminal Code be amended by limiting its application to circumstances where the accused intended that the association would facilitate the criminal conduct or proposed criminal conduct.

Recommendation 2

7.12 The committee recommends that the defences in proposed subsection 390.3(6) of the Criminal Code be amended by:

- **replacing the existing defences for legal practitioners with a more general defence that the association was only for the purpose of providing legal advice or representation; and**
- **adding a general defence where the association was reasonable in the circumstances.**

Recommendation 3

7.15 The committee recommends that proposed paragraph 390.4(1)(b) of the Criminal Code be amended to provide that 'the person intended the provision of the support or resources would aid the organisation to engage in conduct constituting an offence against any law.'

Recommendation 4

7.16 The committee recommends that the maximum penalty for an offence under proposed section 390.4 of the Criminal Code should be the maximum penalty for the offence the accused intended to support.

Recommendation 5

7.20 The committee recommends that subsections 3K(3A) and 3K(3B) of the Crimes Act should provide for equipment to be moved for examination for an initial period of no longer than seven days.

Recommendation 6

7.21 The committee recommends that subsection 3L(1) of the Crimes Act should require that, before operating electronic equipment at warrant premises to access data, an officer executing the warrant must have reasonable grounds to suspect that the data constitutes evidential material.

Recommendation 7

7.27 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

CHAPTER 1
INTRODUCTION

Summary of key amendments

1.1 On 17 September 2009, the Senate referred the provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill (No.2) 2009 (the Bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 26 October 2009. The Senate subsequently extended the reporting date to 16 November 2009.

1.2 The Standing Committee of Attorneys-General (SCAG) agreed at its meetings in April and August 2009 to a comprehensive national response to combat organised crime.[1] On 17 September 2009, the committee reported on the first package of amendments aimed at implementing the Commonwealth's commitment to this SCAG agreement.[2]

1.3 This Bill is the second package of amendments designed to implement the SCAG agreement and it seeks to enhance the Commonwealth's 'ability to effectively prevent, investigate and prosecute organised criminal activity, and target the proceeds of organised crime.'[3] An officer of the Attorney-General's Department outlined the purpose of the Bill in more detail:

> Organised crime has impacts for Australian governments, the economy, businesses and the wider community. Organised criminal networks are involved in a range of criminal activities and have become an increasingly complex threat in the modern global environment. These groups are also less readily identifiable than they once were, instead operating in loose, fluid networks. To meet this threat, it is critical that our laws for the investigation of criminal activity, the confiscation of criminal assets and the detection of money laundering are as effective as possible, and it is also important that offence regimes are effective in disrupting and deterring involvement in organised crime at all levels.[4]

1.4 In particular, the Bill contains provisions:

(a) to amend the *Proceeds of Crime Act 2002* (the POC Act) (Schedule 1);

(b) to broaden the powers under the *Crimes Act 1914* (the Crimes Act):

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1 Standing Committee of Attorneys-General, *Communiqués*, 17 April 2009 and 7 August 2009 available at: http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes (accessed 28 September 2009).

2 *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009.

3 The Hon Robert McClelland MP, Attorney-General, *House Hansard (Proof)*, 16 September 2009, p. 11.

4 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 1.

(i) to allow material seized or produced under Part IAA of the Act to be shared between, Commonwealth, state, territory and foreign law enforcement agencies; and

(ii) to access data stored on, or accessible from, electronic equipment that is seized under a search warrant (Schedule 2);

(c) to increase protection for current and former participants in, and officers involved in the operation of, the National Witness Protection Program (NWPP) (Schedule 3);

(d) to create criminal organisation and association offences (Schedule 4);

(e) to alter existing money laundering (Part 1 of Schedule 5), bribery (Schedule 8) and drug importation (Schedule 9) offences; and

(f) to amend the *Australian Crime Commission Act 2002* (the ACC Act) (Schedule 7).[5]

1.5 The Bill also makes urgent amendments to preserve the right of Victorian defendants, charged with Commonwealth offences, to challenge a finding that they are unfit to plead (Schedule 6) as well as various minor and consequential amendments (Part 2 of Schedule 5 and Schedules 10 and 11).[6]

Conduct of the inquiry

1.6 The committee advertised the inquiry in *The Australian* newspaper on 23 September 2009, and invited submissions by 9 October 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to 80 organisations and individuals inviting submissions.

1.7 The committee received 14 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.8 The committee held a public hearing in Canberra on 29 October 2009. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://www.aph.gov.au/hansard.

Acknowledgement

1.9 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Structure of the report

1.10 The structure of the report is as follows:

- Chapter 2 reviews the provisions amending the *Criminal Code Act 1995* (the Criminal Code) to create new organised crime offences and to alter the existing offences relating to money laundering, bribery and drug importation;
- Chapter 3 considers the proposed changes to the Crimes Act;

5 Explanatory Memorandum, pp 1-4.

6 Explanatory Memorandum, pp 157-164 and 190-205.

- Chapter 4 looks at the amendments relating to the Australian Crime Commission (ACC);
- Chapter 5 examines the proposed amendments to the POC Act
- Chapter 6 outlines the provisions related to the NWPP; and
- Chapter 7 contains a summary of the views of the committee and its recommendations.

Note on references

1.11 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

CHANGES TO THE CRIMINAL CODE

Provisions in the Bill

2.1 The Bill contains provisions which would introduce new organised crime offences into the Criminal Code as well as altering the existing offences relating to money laundering, bribery and drug importation.

Organised crime offences

2.2 Schedule 4 of the Bill would amend the Criminal Code to create new organised crime offences to:

> ...target persons who associate with those involved in organised criminal activity, and those who support, commit crimes for, or direct the activities of, a criminal organisation.[1]

2.3 The specific proposed offences are:

- associating in support of serious and organised criminal activity (proposed section 390.3);
- supporting a criminal organisation (proposed section 390.4);
- committing an offence for the benefit of, or at the direction of, a criminal organisation (proposed section 390.5); and
- directing the activities of a criminal organisation (proposed section 390.6).[2]

2.4 Proposed subsection 390.1(1) would define various terms used in relation to these offences.[3]

Association offences

2.5 Proposed section 390.3 would create two offences targeting association in support of serious and organised criminal activity. Under proposed subsection 390.3(1), it would be an offence:

(a) to associate on two or more occasions with another person;

(b) where:

(i) the accused knew that the other person engages, or proposes to engage, in conduct that is an offence against any law;

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1 The Hon Robert McClelland MP, Attorney-General, *House Hansard (Proof)*, 16 September 2009, p. 11. See also Explanatory Memorandum, pp 3 and 129. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the Criminal Code.

2 The submission from the Commonwealth Director of Public Prosecutions provides a very useful outline of the elements of each offence: *Submission 8*, pp 5-9.

3 Explanatory Memorandum, p. 129.

(ii) the associations facilitate the engagement, or proposed engagement, by the other person in the conduct that is an offence;

(iii) the offence involves two or more persons; and

(iv) the offence is a constitutionally covered offence punishable by imprisonment for at least 3 years.[4]

2.6 Proposed subsection 390.3(2) would create a repeat offence which would apply where a person has already been convicted of an offence under proposed subsection 390.3(1). It would require proof of the same elements as the offence under proposed subsection 390.3(1), except that the accused need only have associated with the other person once or more. Both offences would be punishable by a maximum penalty of three years imprisonment.[5]

2.7 The term 'associate' would be defined to mean 'meet or communicate (by electronic communication or otherwise).'[6] Under this definition, it would not be necessary for the association to be in person, for example, the association could occur through mobile phone text messages or via email.[7]

2.8 Proposed subsection 390.1(1) would define 'constitutionally covered offence punishable by imprisonment for at least 3 years'. This phrase is used to ensure that:

- there is a connection between the new association offences and Commonwealth constitutional power; and
- conduct will only be captured by these offences where a person associates with persons who are involved in committing serious organised crime (that is offences punishable by imprisonment for at least three years or for life).[8]

2.9 The term 'constitutionally covered offence' would include Commonwealth offences, state offences that have a federal aspect, territory offences and foreign offences that are constituted by conduct that would constitute an Australian offence, if it occurred in Australia. 'State offences that have a federal aspect' would be defined by proposed section 390.2 and essentially means state offences that involve Commonwealth matters such as telecommunications, postal services or trade and commerce.[9]

2.10 The proposed association offences would require, not only proof that the person associated with a person involved in serious organised criminal activity, but also proof that the association in some way helped, or enhanced the ability of, the

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4 Explanatory Memorandum, p. 135.

5 Explanatory Memorandum, pp 134-135.

6 Proposed subsection 390.1(1); Explanatory Memorandum, p. 130. See also the definition of 'electronic communication' in proposed section 390.1(1).

7 Explanatory Memorandum, p. 136.

8 Explanatory Memorandum, p. 131.

9 Explanatory Memorandum, pp 131 and 134; New South Wales Attorney-General, *Submission 13*, p. 1.

second person to engage in the criminal activity.[10] The Explanatory Memorandum gives the following example of the type of conduct which would be captured by proposed subsection 390.3(1):

> Person A meets with person B on two or more occasions. Person B is proposing to engage in an illegal operation with four other people involving the import into Australia of commercial quantities of border controlled drugs... Person A works at the airport through which person B proposes to import the drugs, and knows that Person B proposes to engage in the illegal importation. The purpose of person A's meetings with person B is to provide advice on how person B may circumvent the airport security system as part of the operation. In doing so, person A is reckless as to whether his advice will help person B to engage in the illegal importation.[11]

2.11 Proposed paragraph 390.3(6)(a) would create a defence to the new association offences where the association is with a close family member and relates only to a matter that could reasonably be regarded as a matter of family or domestic concern.[12] There would also be defences under proposed paragraphs 390.3(6)(b) to (f) where the association occurs:

(a) in a place being used for public religious worship and takes place in the course of practicing a religion;

(b) only for the purpose of providing aid of a humanitarian nature;

(c) only for the purpose of providing legal advice or legal representation in connection with:

  (i) criminal proceedings;

  (ii) proceedings relating to the declaration of an organisation under state and territory criminal organisation laws; or

  (iii) proceedings for a review of a decision relating to a passport or other travel document.[13]

2.12 Finally, to ensure a person does not face a multiplicity of charges concerning the same course of conduct, proposed subsection 390.3(7) would provide that a person who is convicted of an offence under proposed subsection 390.3(1) is not liable to be punished for an offence under that subsection for other conduct that takes place at the same time, or within 7 days before or after, the conduct the conviction relates to.[14]

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10 Explanatory Memorandum, pp 128 and 136.

11 Explanatory Memorandum, p. 135.

12 Explanatory Memorandum, pp. 130, 131, 132-134 and 138. See also the definitions of 'close family member', 'child', 'de facto partner', 'parent', 'stepchild' and 'step-parent' in proposed subsection 390.1(1).

13 Explanatory Memorandum, pp 138-139. See also *Answers to questions on notice*, 9 November 2009, pp 3-6.

14 Explanatory Memorandum, pp 139-140.

Criminal organisation offences

2.13 Proposed sections 390.4, 390.5 and 390.6 would create offences related to criminal organisations. The Explanatory Memorandum notes that the intent of the provisions creating criminal organisation offences is to criminalise varying levels of involvement in a criminal organisation, with penalties that reflect the spectrum of less to more serious involvement.[15] Unlike the criminal organisation offences under New South Wales and South Australian legislation, the offences are not based on involvement in particular declared or prescribed organisations.[16] Instead, the offences will require a determination by the court on a case-by-case basis that the particular group is a criminal organisation.[17] The Explanatory Memorandum explains the rationale for this approach:

> While traditionally organised crime groups have been tightly structured, hierarchical groups, modern organised crime groups are increasingly loose, fluid networks who work together in order to exploit new market opportunities. Given this trend towards looser, more transient networks, it can be difficult to declare or proscribe criminal groups with any degree of certainty.[18]

2.14 The criminal organisation offences have the following common elements:

(a) the organisation must consist of two or more members;

(b) the aims or activities of the organisation must include facilitating the engagement in, or engaging in, conduct constituting an offence against any law, where that offence is:

  (i) for the benefit of the organisation; and

  (ii) punishable by imprisonment for at least 3 years; and

(c) the activities of the accused must relate to an offence which is a constitutionally covered offence punishable by imprisonment for at least 12 months.[19]

2.15 Proposed subsection 390.1(1) would define: 'constitutionally covered offence punishable by imprisonment for at least 12 months'. Once again, the use of this phrase is intended to ensure that:

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15 Explanatory Memorandum, pp 129 and 140.

16 Criminal organisation offences have been introduced in New South Wales by the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* and in South Australia by the *Serious and Organised Crime (Control) Act 2008 (SA)*. Note that in *Totani v State of South Australia* [2009] SASC 301, the South Australian Supreme Court held that subsection 14(1) of the *Serious and Organised Crime (Control) Act 2008 (SA)*, which requires the Magistrates Court to make control orders against members of declared organisations, is invalid.

17 Explanatory Memorandum, pp 128 and 129.

18 Explanatory Memorandum, p. 129. See also proposed paragraph 390.1(3)(a); Explanatory Memorandum, p. 134.

19 Explanatory Memorandum, p. 141, 144 -145 and 148-149. The phrase 'for the benefit of' the organisation is defined in proposed subsection 390.1(1) and is discussed below.

- there is a connection between the new criminal organisation offences and Commonwealth constitutional power; and
- conduct will only be captured by these offences where, for example, a person is supporting a criminal organisation to commit *serious* offences (that is offences punishable by imprisonment for at least 12 months or for life).[20]

Supporting a criminal organisation

2.16 In addition to these common elements, proposed section 390.4 would require proof that:

- the accused intentionally provided material support or resources to the organisation or a member of the organisation; and
- 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 an offence.[21]

2.17 Under proposed section 390.4, a person may be convicted of supporting a criminal organisation where there is a risk that the provision of support or resources will aid the organisation to commit a crime, even if the support or resources does not actually aid the commission of a crime.[22]

2.18 The Explanatory Memorandum gives the following example of conduct that would constitute this offence of supporting a criminal organisation:

> 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...[23]

2.19 The offence of supporting a criminal organisation would be punishable by a maximum of five years imprisonment.[24]

Committing an offence for the benefit of, or at the direction of, a criminal organisation

2.20 Proposed section 390.5 would create offences where a person commits an offence:

- for the benefit of a criminal organisation; or
- at the direction of a criminal organisation or a member of the organisation.[25]

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20 Explanatory Memorandum, pp 130-131.

21 Explanatory Memorandum, pp 140-141. This offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months. See also *Answers to questions on notice*, 9 November 2009, p. 7.

22 Proposed subsection 390.4(3); Explanatory Memorandum, p. 142.

23 Explanatory Memorandum, p. 140. See also *Answers to questions on notice*, 9 November 2009, p. 8.

24 Explanatory Memorandum, p. 140.

2.21 An offence is 'for the benefit of' of an organisation if the offence results, or is likely to result, in the organisation or at least one of its members receiving directly or indirectly a significant benefit of any kind.[26] The Explanatory Memorandum notes that the definition is not limited to where an actual benefit is received and that:

> Examples of a significant benefit may include, but are not limited to, direct benefits such as financial benefits or profits from the trafficking and sale of drugs, or more indirect benefits such as instances where a criminal organisation provides protection or security for illegal activities such as illegal gambling or illegal brothels.[27]

2.22 The Explanatory Memorandum suggests that:

> For the offence to be at the direction of a criminal organisation, it will not be necessary to prove that the organisation (or member of the organisation) has specifically instructed that the person commit the underlying offence. It will be sufficient to prove that the organisation or member of the organisation encouraged, in any way, the commission of the underlying offence.[28]

2.23 Both the offences under proposed section 390.5 would be punishable by a maximum of seven years imprisonment.[29]

2.24 The rules against double jeopardy would apply so that a person cannot be convicted of both the underlying offence and an offence under proposed subsection 390.5.[30]

Directing a criminal organisation

2.25 The most serious criminal organisation offences would relate to directing the activities of the organisation. Under proposed section 390.6, it would be an offence to direct one or more activities of a criminal organisation where:

- the activities aid, or there is a risk that they will aid, the organisation to engage in conduct constituting an offence; or
- the activities constitute an offence.[31]

2.26 The Explanatory Memorandum states that to show that a person directed the activities of the organisation it would be sufficient:

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25 Explanatory Memorandum, pp 143-144. The offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months.

26 Proposed subsection 390.1(1); Explanatory Memorandum, pp 131-132.

27 Explanatory Memorandum, p. 132. See also pp 145 and 147; subsection 390.5(7).

28 Explanatory Memorandum, p. 145.

29 Explanatory Memorandum, p. 143.

30 Explanatory Memorandum, p. 147. Proposed subsection 390.5(6) would ensure that this is the case in relation to a foreign offence, while section 4C of the Crimes Act prevents a person being punished twice under two Australian offences for the same conduct.

31 Explanatory Memorandum, pp 147-148. In either case, the offence must be a constitutionally covered offence punishable by imprisonment for at least 12 months.

> ...to prove that the activities were encouraged in any way, for example, where the direction was implied. This element will be satisfied whether the person directs one or more specific members of the organisation, or directs the organisation generally (such as by sending an email or text message to many or all members of an organisation).[32]

2.27 The offence of directing the activities of a criminal organisation would be punishable by a maximum of 10 years imprisonment where the activities may aid the organisation to commit an offence, and a maximum of 15 years imprisonment where the activities constitute an offence.[33]

Telecommunications interception warrants

2.28 Finally, Item 4 of Schedule 4 would amend the definition of 'serious offence' in section 5D of the *Telecommunications (Interception and Access) Act 1976* (TIA Act) so that telecommunications interception warrants are available for the investigation of the proposed organised crime offences.[34]

Other proposed changes to the Criminal Code

2.29 In addition to inserting the new organised crime offences, the Bill proposes changes to existing offences under the Criminal Code relating to money laundering, bribery and drug importation.

Money laundering

2.30 Part 1 of Schedule 5 of the Bill would remove limitations on the scope of money laundering offences:

- to enable them to apply to the full extent of the Commonwealth's constitutional power in this area; and
- to extend the geographical jurisdiction of the offences.[35]

2.31 In particular, these proposed changes include repealing the application provisions with respect to offences relating to the laundering of proceeds of crime. At present, the money laundering offences under Division 400 of the Criminal Code are limited to conduct that has a link to a constitutional head of power because:

- the money or property is proceeds of crime, or could become an instrument of crime, in relation to an indictable offence with a constitutional link;[36] or
- the dealing with the money or property occurs in the course of importation or exportation, by means of a postal, telegraphic or telephonic service, or in the course of banking.[37]

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32 Explanatory Memorandum, p. 149.

33 Explanatory Memorandum, p. 148.

34 Explanatory Memorandum, pp 129 and 151-152.

35 Explanatory Memorandum, p. 3.

36 Specifically, a Commonwealth, territory or foreign offence, or a state offence to the extent that it is a law with respect to external affairs: subsections 400.2(1) and (3).

2.32 The Explanatory Memorandum notes that these limitations are not necessary in relation to offences relating to the laundering of proceeds of crime because these offences are wholly supported under the external affairs power by reference to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[38] However, an application provision would be retained with respect to money laundering offences related to dealing with instruments of crime because these offences are not covered by that convention.[39]

2.33 Item 23 of Schedule 5 would extend the geographical jurisdiction applicable to the money laundering offences in Division 400 by replacing existing section 400.15. This section already applies extended geographical jurisdiction - category B (as set out in section 15.2 of the Criminal Code) to money-laundering offences.[40] The new section 400.15 would replicate the extended jurisdiction currently applicable to the money laundering offences. In addition, new section 400.15 would provide that a person is guilty of the money laundering offences in situations where the person engages in money laundering outside Australia, and the money or other property is the proceeds of crime, or could become an instrument of crime, in relation to an Australian offence.[41] This amendment would enable the prosecution of a person who launders money or property related to Australian offences overseas, even if the person is not an Australian citizen or resident, provided there is a corresponding offence in the overseas country.[42]

2.34 The Australian Federal Police (AFP) submitted that the current more limited geographical jurisdiction for money laundering offences has frustrated the prosecution of people involved in drug related, money laundering activities:

> A number of money laundering investigations have revealed overseas based persons and syndicates who are aiding and abetting the laundering of money generated by criminal activity in Australia by moving cash generated from criminal activity out of Australia. These overseas based individuals provide the means for criminal groups in Australia to move proceeds of crime generated in Australia out of the country. These

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37 Paragraphs 51(i), (v) and (xiii) of the Constitution; section 400.2 and subsection 400.9(3); Commonwealth Director of Public Prosecutions, *Submission 8,* p. 10.

38 CETS No.141 at: http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm (accessed 13 October 2009). See particularly article 6 which relates to laundering offences.

39 Explanatory Memorandum, pp 154 and 156; Item 4 and 19 of Schedule 5. See also Commonwealth Director of Public Prosecutions, *Submission 8,* p. 10.

40 The geographical jurisdiction of offences under section 15.2 includes where, for example, the conduct constituting the offence occurs outside Australia but the accused is an Australian citizen or resident at the time of the offence.

41 More specifically, the offence must be a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence, or a Northern Territory indictable offence. These terms are all defined in subsection 400.1(1).

42 Explanatory Memorandum, pp 156-157; AFP, *Submission 10*, p. 13.

individuals currently achieve this with little risk of prosecution to themselves in Australia or in their home country.[43]

Penalties for bribery offences

2.35 Schedule 8 would increase the penalties under the Criminal Code for the offences of bribing a foreign public official, bribery of a Commonwealth public official and a Commonwealth official receiving a bribe.[44] The existing penalties for these offences are a maximum of 10 years imprisonment or a maximum fine of $66,000 for an individual, and $330,000 for a body corporate, or both imprisonment and a fine.[45]

2.36 The Bill would not alter the maximum terms of imprisonment for these offences but would increase the maximum fines. In the case of individuals, the maximum fine would be 10,000 penalty units ($1,100,000).[46] In the case of a body corporate, the maximum fine would be the greatest of:

- 100,000 penalty units ($11,000,000);
- three times the value of any benefit that was directly or indirectly obtained from the conduct constituting the offence; or
- if the court cannot determine the value of the benefit, 10% of the annual turnover of the body corporate.[47]

2.37 The Explanatory Memorandum explains that the inclusion of significant monetary penalties is intended to deter and punish bribery of public officials in both the international and domestic spheres and that the existing financial penalties may be perceived as 'a cost of doing business' when transactions worth millions of dollars are involved.[48]

Drug importation

2.38 Schedule 9 of the Bill would extend the definition of 'import' in Division 300 of the Criminal Code to include not only bringing a substance into Australia but also 'dealing with a substance in connection with its importation'. The Explanatory Memorandum explains that the effect of this amendment would be to allow Commonwealth drug importation offences to capture a broader range of criminal

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43 *Submission 10*, p. 13. See also Mr Roman Quaedvlieg, Acting Deputy Commissioner, AFP, *Committee Hansard*, 29 October 2009, p. 3.

44 Explanatory Memorandum, pp 3, 184 and 186.

45 Sections 70.2 and 141.1; section 4B of the Crimes Act; Explanatory Memorandum, p. 184. Section 4B of the Crimes Act allows a court to impose a pecuniary penalty for a Commonwealth offence. The penalty is calculated according to the formulas set out in that section and may be in addition to, or instead of, a penalty of imprisonment.

46 Items 1, 3- 6, of Schedule 8; Explanatory Memorandum, pp 184 and 186.

47 Items 1, 3, 4 and 6 of Schedule 8; Explanatory Memorandum, pp 185 and 186.

48 Explanatory Memorandum, pp 184 and 186. See also *Answers to questions on notice*, 9 November 2009, p. 1.

activity.[49] The proposed amendments are a response to a decision of the New South Wales Court of Criminal Appeal which gave a narrower interpretation to the term 'import' than to the term 'importation' as it was used in relation to the previous drug importation offences in the *Customs Act 1901*.[50]

2.39 The Explanatory Memorandum gives examples of the type of conduct it is intended the new definition of 'import' would capture including:

- packaging the goods for importation into Australia;
- transporting the goods into Australia;
- recovering the imported goods after landing in Australia;
- clearing the imported goods;
- unpacking the imported goods; and
- arranging for payment of those involved in the importation process.[51]

Issues raised in submissions

Organised crime offences

2.40 Several submissions to the inquiry related to the proposed organised crime offences with some supporting the offences and others raising concerns about them. The Australian Federal Police Association and the Police Federation of Australia (the Police Associations) supported the proposed organised crime offences and noted that:

> [The offences] go a long way in addressing crime emanating from organised crime groups that adapt, diversify, and have flexible non-hierarchical structures. Organised crime groups often have 'sub contract' type arrangements. They can be transient in nature with some members not even being aware of the existence of other persons. This allows the higher level members of the activity to distance themselves from the overt elements of the crime, thus creating difficulties for investigating officers to charge the leaders of the crime groups. Compartmentalisation remains one of the distinguishing characteristics of these organised crime groups.
>
> ...Often, participants in the various levels are insulated from one another, making it difficult for law enforcement to gain meaningful assistance from those arrested.[52]

2.41 However, the Police Associations argued that the Criminal Code should also be amended to include an offence of recruiting persons to engage in criminal activity based on section 351A of the *Crimes Act 1900 (NSW)* or similar to the offences in Division 270 and 271 of the Criminal Code which deal with slavery, sexual servitude,

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49 Explanatory Memorandum, pp 3 and 188.

50 *Campbell v R* [2008] NSWCCA 214 at paras 101-102 and 123-128; Commonwealth Director of Public Prosecutions, *Submission 8*, pp 12-13; Explanatory Memorandum, p. 188.

51 Explanatory Memorandum, p. 189. See also AFP, *Submission 10*, p. 13.

52 *Submission 3*, pp 3-4.

deceptive recruiting, people trafficking and debt bondage.[53] The Police Associations argued that servitude and debt bondage are equally applicable to drug addicts recruited to participate in narcotic importations and other vulnerable people recruited to commit offences.[54]

2.42 In contrast to the position of the Police Associations that the organised crime offences should be more expansive, the Law Council of Australia (Law Council) argued that the proposed offences:

> ...are unnecessary and potentially expose people to sanction not on the basis of their individual conduct but on the basis of their associations or proximity to an offence or offender.[55]

2.43 The Law Council submitted that the existing provisions in the Criminal Code providing for extended criminal liability and creating money laundering offences, combined with the civil forfeiture regime under the POC Act, 'already provide law enforcement agencies with sufficient scope for targeting the activities of those who finance, facilitate and/or profit from organised crime.'[56] For example, the Law Council noted that when the money laundering offences under section 400.3 are combined with the conspiracy provision in section 11.5 of the Criminal Code:

> ...the result is that it becomes possible to successfully prosecute a person for conspiring to handle or transfer money where there is a risk that the money may be used to facilitate an offence and the person is reckless or negligent as to that risk.[57]

2.44 The Law Council argued that the proposed organised crime offences 'alter the very principles of criminal responsibility' and submitted that:

> If every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised.[58]

2.45 The New South Wales (NSW) Attorney-General supported 'strong Commonwealth measures to deal with the threats posed by serious and organised crime' but raised some specific issues about the organised crime offences. One of these related to the inclusion of 'State offences that have a federal aspect' within the definitions of 'constitutionally covered offence'. The Attorney-General submitted that,

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53 *Submission 3*, p. 5. Section 351A of the *Crimes Act 1900 (NSW)* creates offences where a person recruits another person to carry out, or assist in carrying out, a criminal activity.

54 *Submission 3*, p. 5.

55 *Submission 12*, p. 4.

56 *Submission 12*, p. 6. Sections 11.1 to 11.5 in Part 2.4 of the Criminal Code extend criminal liability to where a person attempts or conspires to commit an offence, or urges, aids, abets counsels or procures the commission of an offence.

57 *Submission 12*, p. 6.

58 *Submission 12*, p. 7.

while this term appears in other Commonwealth legislation, it is the first time this term will be relevant to the actual commission of an offence:

> As existing usage of the term revolves around the authority to conduct certain investigations, the nature of "state offences that have a federal aspect" have yet to be robustly questioned in the courts. However, given the large penalties applicable to the proposed offences, when contrasted to those that may apply to the underlying offending conduct, it is possible that where prosecutions for the new offences relate to a state offence with a federal aspect, lengthy legal arguments will ensue regarding questions of constitutionality and Commonwealth authority.[59]

Government response

2.46 Contrary to the argument of the Law Council that the existing provisions of the Criminal Code and the POC Act are adequate to combat organised crime, Mr Roman Quaedvlieg, Acting Deputy Commissioner of the AFP argued that the proposed organised crime offences address gaps in existing criminal responsibility provisions:

> The proposed offences are specialised offences designed to combat organised crime that is not fully covered by the current existing criminal responsibility provisions such as conspiracy, complicity, and association. These offences are designed to target the structure, the organisation, the members and the associates of organised crime.[60]

2.47 Furthermore, an officer of the Attorney-General's Department rejected the contention that the offences alter the principles of criminal responsibility:

> ...all of the criminal organisation and association offences in this bill have very clear elements of the offences with significant fault elements that have to be proved, and what will have to be proved for all of them is not a departure from the ordinary principles of criminal law. In fact, the case that will have to be put to a court is quite significant in every case.[61]

Association offences

2.48 Some submitters expressed particular concern about the breadth of the offences that would be created by proposed section 390.3 of the Criminal Code. For example, Dr Andreas Schloenhardt submitted that proposed section 390.3 'risks creating guilt by association' because it does not require some type or degree of involvement of an accused in a criminal organisation:

> An [offence] based on mere association with 'a second person' does not articulate clear boundaries of criminal liability and does not conclusively answer the question as to how remotely a person can be connected to a criminal group and still be liable for participation. Neither the offence description nor the legislative material conclusively explains where association begins and ends. Moreover, nothing in the Bill suggests that it is

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59 *Submission 13*, p. 2.

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

61 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5.

> not possible to charge a person with attempted association, thus creating liability for acts even further removed from any actual criminal activity, any actual harm, or any potential social danger.[62]

2.49 Dr Schloenhardt contrasted the association offence under proposed section 390.3 with the criminal organisation offences under proposed sections 390.4 to 390.6:

> It is ...more sensible to differentiate the various roles and duties a person may occupy in a criminal organisation and also recognise any special knowledge or intention that person may have — as has been done in proposed ss 390.4–390.6 Criminal Code (Cth). These provisions provide specific offences which criminalise selected key functions within the organisation. Simultaneously, they exclude from liability those types of associations that are seen as too rudimentary to warrant criminalisation. By avoiding the use of broad and uncertain terms, these offences may also escape criticism of vagueness and overbreadth and, in the medium and long term, are more likely to withstand constitutional and other judicial challenges.[63]

2.50 In a similar vein, the Law Council submitted that:

> ...in shifting the focus of criminal liability from a person's conduct to their associations, offences of this type unduly burden freedom of association and are likely to have a disproportionately harsh effect on certain sections of the population who, simply because of their familial or community connections, may be exposed to the risk of criminal sanction. In essence, this offence provision assumes that clear lines can and should be drawn between a certain criminal class and the rest of society. However, this does not reflect the reality of our community where in extended family groups, public housing, the workplace, pubs, clubs and other formal and informal community organisations the lives of many and varied people intersect. Some people have greater choice than others about the extent to which their interaction may include contact with people potentially engaged in criminal activity. ...[P]rovided that such people do not themselves plan, assist or participate in the commission of any particular offence, they should not have to live in the shadow of offence provisions such as these.[64]

2.51 The Law Council identified several specific concerns about the drafting of proposed section 390.3 including that:

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62 *Submission 1*, p. 16. The Attorney-General's Department confirmed that it would be possible to charge a person with attempted association: Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 6.

63 *Submission 1*, pp 16. See also Dr Ben Saul, Sydney Centre for International Law, *Submission 5*, p. 3.

64 *Submission 12*, p. 9.

- the term 'facilitate' is not defined and may therefore encompass 'a wide range of activity which is only of peripheral or minimal relevance to the commission of an offence';[65] and
- there is no requirement that the person charged with the offence know or intend that his or her association with the second person will facilitate the commission of an offence.[66]

2.52 Very similar points were made by Professor Roderic Broadhurst and Ms Julie Ayling who noted that:

> ...while there must be actual facilitation through the association between the two parties, there is no requirement that the facilitation be of substantial effect. The most marginal of acts might suffice, so that the connection between the act of association and the ultimate offence by the second person could be quite tenuous and distant. This problem is exacerbated by the fact that, unlike s.44 of the *Serious Crime Act* 2007 (UK) where an intention to assist in the commission of an offence is required, under s.390.3 the accused need only have been reckless as to whether their association facilitates the second person's conduct...[67]

Defences to association offences

2.53 Some submitters raised concerns that the defences under proposed subsection 390.3(6) are framed too narrowly.[68] For example, Professor Broadhurst and Ms Ayling noted that proposed subsection 390.3(6) provides an exhaustive list of specific types of association to which the section does not apply and thus does not give the court any discretion to consider other types of associations:

> It would seem clear that there could be associations under s.390.3 of the proposed Bill of a type that the legislature has not envisaged (and therefore not listed in subs.(6)), but yet are sufficiently ambiguous as to the nature of the "facilitation" involved that some allowance should be made for the accused to prove that the association was reasonable in the circumstances and therefore s.390.3 should not apply.[69]

2.54 They suggested that a more rational approach to the problem of unforeseen circumstances would be to create a general defence of reasonableness which conferred a discretion on the court to consider whether an association that facilitated an offence was justified in the circumstances. Professor Broadhurst and Ms Ayling noted that

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65 *Submission 12*, p. 9. Under proposed subparagraphs 390.3(1)(c) and 390.3(2)(d), to constitute an offence, the associations must 'facilitate' the other person engaging in crime.

66 *Submission 12*, pp 9-10. It is sufficient if the person is aware of a substantial risk that the association will facilitate criminal conduct.

67 *Submission 6*, pp 4-5. Section 44 of the *Serious Crime Act* 2007 *(UK)* provides that a person commits an offence if he does an act capable of encouraging or assisting the commission of an offence; and he intends to encourage or assist its commission.

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

69 *Submission 6*, p. 5.

section 50 of the *Serious Crime Act* 2007 *(UK)* creates a defence to similar offences where the accused proves that:

- he knew or reasonably believed certain circumstances existed; and
- it was reasonable for him to act as he did in those circumstances.[70]

2.55 The Law Council identified two specific concerns with the proposed defences. Firstly, in relation to the defence for family associations under proposed paragraph 390.3(6)(a), the defence does not extend to relationships with extended family such as aunts, uncles and cousins.[71] Secondly, the Law Council was concerned that the defences for legal practitioners under proposed paragraphs 390.3(6)(d), (e) and (f) are limited to providing advice in relation to particular types of matters. The Law Council submitted that it will be difficult for a legal practitioner to make out these defences 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.[72]

2.56 Conversely, Professor Broadhurst and Ms Ayling argued that it would be possible for the specific exceptions in proposed subsection 390.3(6) to operate too broadly in some circumstances and suggested that this was a further reason for replacing the specific exceptions with a more general defence of reasonableness.[73]

Drafting issue

2.57 The NSW Attorney-General submitted that there is a drafting error in proposed subsection 390.3(7) which aims to prevent a person facing multiple charges under the association offences for what is essentially the same course of conduct. The Attorney-General pointed out that:

> ...the provision as it is currently drafted only specifically covers offences under 390.3(1). It does not appear specifically to preclude a charge for an offence under 390.3(2) being brought for conduct occurring during the 7-day period following conduct that led to a conviction under 390.3(1).[74]

Government response

2.58 An officer from the Attorney-General's Department rejected the view that the association offence is drafted too broadly:

> ...the association offence in this suite of provisions in the bill not only requires association where the individual knows that the other person is engaged in serious criminal activity but also requires that that person be aware of a substantial risk that their association with that individual will

70 *Submission 6*, pp 5 and 7.

71 *Submission 12*, p. 10.

72 *Submission 12*, p. 10.

73 *Submission 6*, pp 6-7.

74 *Submission 13*, p. 2. See also *Answers to questions on notice*, 9 November 2009, pp 6-7.

> facilitate that person's engagement in serious criminal activity. Those are significant elements to prove.[75]

2.59 The department also rejected the argument that the term 'facilitate' is uncertain or too broad and noted that the term will be given its ordinary meaning of 'assist or support in some way.'[76] In addition, the department submitted to the committee that 'recklessness' is the appropriate fault element to apply in relation to whether the associations facilitate criminal activity:

> ...'recklessness' is defined in the Criminal Code in a way that is actually quite a high threshold. It is below knowledge but it requires awareness of a substantial risk of that result or circumstance occurring and also awareness that it is unjustifiable in ...all the circumstances to take that risk. It is a two-step threshold and not easily satisfied. ...'[R]ecklessness' is the standard fault element that applies to physical elements of offences that are results or circumstances of conduct. It would be the common and default fault element that applies under the Criminal Code to just these kinds of elements of offences.[77]

2.60 The committee queried whether a person providing employment to a person who has been convicted of offences in the past might potentially be caught by the association offences. In response, an officer from the Attorney-General's Department stated that knowledge of the employee's criminal past would not be sufficient to make out the offences:

> ...it is all set against a background of a prosecution needing to prove the case beyond reasonable doubt and prove that the individual that they are prosecuting was aware of a substantial risk. So, in a situation where an employer gives an ex-convict a job without a significant amount of additional information that ...suggested they were aware of a substantial risk that giving them that employment would enable them to engage in crime, merely knowing about their criminal background would be nowhere near enough information for a court to be satisfied beyond reasonable doubt.[78]

2.61 Mr Roman Quaedvlieg, Acting Deputy Commissioner of the AFP, noted that, while there are probably an infinite number of conceivable scenarios where the elements of the association offences could be argued to apply, the aim of the new provisions is to target the upper echelons of organised crime groups:

> ...[A]s senior law enforcement officials we have seen over the last decades any number of individuals that have been promoted through the echelons of criminality to positions they now occupy where they effectively control large numbers of resources and criminal identities and yet remain

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75 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5. See also *Answers to questions on notice*, 9 November 2009, pp 2-3.

76 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 5.

77 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 6. See also p. 5; *Answers to questions on notice*, 9 November 2009, pp 2-3.

78 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 15. See also pp 5-6.

> sufficiently removed from that activity, which makes it difficult for us to try and target them. These provisions may give us some extension of our reach to actually target those higher echelon criminals.[79]

2.62 In addition, the ACC noted that the association offences are intended to target 'trusted insiders' who facilitate organised criminal activity:

> Organised criminals rely on a lot of assistance of professionals such as accountants and other people to assist them with finances and structuring funds and so forth. We have also unearthed a lot of intelligence about the use of, for example, trusted insiders in various business sectors, which is the acquisition of information that might otherwise be confidential or secure to help an organised group in some way, or the provision of particular knowledge or expertise that would assist an organised criminal group defeat law enforcement in their efforts to investigate them. ...Quite often trusted insiders are called 'trusted insiders' because there is a relationship and an element of recklessness or sometimes even absolute intent and knowledge to assist, but they are not actually a party to the offence that might ultimately be committed.[80]

2.63 The Attorney-General's Department responded to concerns that the defences to the association offences are drafted too narrowly. In relation to the defence for family associations, the department submitted that:

> This defence does not come into play until the prosecution can prove beyond reasonable doubt the stringent fault elements of the offence...
>
> 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 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.[81]

2.64 Contrary to the view of the Law Council, the department argued that legal practitioners '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.'[82] The department submitted that:

> ...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.[83]

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79 *Committee Hansard*, 29 October 2009, p. 7.

80 Mr Michael Outram, Executive Director, *Committee Hansard*, 29 October 2009, p. 7.

81 *Answers to questions on notice*, 9 November 2009, pp 3-4.

82 *Answers to questions on notice*, 9 November 2009, p. 5.

83 *Answers to questions on notice*, 9 November 2009, p. 5.

Criminal organisation offences

2.65 Some submissions received by the committee raised specific issues in relation to the proposed criminal organisation offences. Professor Broadhurst and Ms Ayling supported the aim of the criminal organisation offences to 'move beyond the classic conception of criminal organisation[s] as well-structured, long-lasting and often hierarchical groups' to encompass criminal networks. They noted that:

> Criminologists investigating organised crime through network analysis have found a prevalence of less integrated criminal group structures with fuzzy boundaries, inherent flexibility and often an opportunistic and temporary nature. Indeed in cyber-space such networks may never meet face-to-face. In these structures, brokers and facilitators often sit outside the network's core (where it has one) and play critical roles not only in enhancing criminal activity but also in structuring the network itself.[84]

2.66 Professor Broadhurst and Ms Ayling suggested that the Bill would more effectively achieve this aim if it adopted the language of 'criminal networks' so that it would more clearly grant courts the flexibility to recognise structures that may not amount to 'organisations'. They argued that:

> [The] continuing use of the language of organisations suggests a focus on criminal groups with clear boundaries, defined memberships and exclusively criminal objectives, despite the fact that these forms of organising now seem to be the exception rather than the rule.[85]

2.67 On the other hand, some submitters suggested that the definition of 'criminal organisation' is too broad. For example, while Dr Schloenhardt was generally supportive of the criminal organisation offences in proposed sections 390.4, 390.5 and 390.6, he argued that the definition of 'criminal organisation' implicit in these provisions does not require the group to have any formal structure nor that it exist for any period of time.[86] Similarly, Dr Ben Saul of the Sydney Centre for International Law pointed out that the United Nations Convention against Transnational Organised Crime (TOCC) defines an 'organized criminal group' as a:

> Structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.[87]

2.68 Dr Saul noted that:

> In contrast, the Bill applies to associations of only two or more people, which need not be 'structured' ...nor exist 'for a period of time'.[88]

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84 *Submission 6*, p. 3.

85 *Submission 6*, p. 3.

86 *Submission 1*, pp 14-15.

87 *Submission 5*, p. 1; Article 2, TOCC, [2004] ATS 12.

88 *Submission 5*, p. 2.

2.69 To address this issue, the NSW Attorney-General suggested that 'a group of persons that forms randomly for the immediate commission of a single offence' should be specifically excluded from the definition of 'criminal organisation'.[89]

2.70 Dr Saul raised more specific concerns that the offence of providing material support or resources to a criminal organisation is too vague and ill-defined to enable a person to know the scope of their criminal liability.[90] He compared proposed section 390.4 with United States offences of providing material support or resources to a terrorist organisation which were found to be unconstitutionally vague by a United States superior court.[91] The United States offences defined the term 'material support or resources'.[92] Despite this, Dr Saul noted that

> ...the failure to define what actual conduct was within the scope of the concept of providing material support or resources rendered the offence too vague and uncertain for the purposes of criminal liability, since individuals are unable to prospectively know the scope of their liabilities.[93]

2.71 By contrast, he noted:

> No such specificity or particularity is found in the proposed Australian Bill, which contains no further definition whatsoever of the key concepts of providing material support or resources. ...
>
> The inclusion of the word 'material' to qualify 'support or resources' does not cure the essential indeterminacy of the offence. The vagueness is aggravated by the element of the offence that a mere 'risk' of aiding the organisation suffices to establish liability (as opposed to, for instance, a 'substantial' risk). The offence may ultimately capture relatively harmless and unintended conduct which is too remote from the commission of serious criminal harm to warrant special extended liability.[94]

2.72 The Law Council also raised concerns about the proposed offence of supporting a criminal organisation under proposed section 390.4. Firstly, the Law Council noted that this offence does not require that the accused knew or intended that his or her provision of support or resources would aid, or was likely to aid, the recipient organisation in committing an offence. The accused need only be reckless about this result. The Law Council submitted that:

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89 *Submission 13*, p. 1.

90 *Submission 5*, p. 3.

91 *Submission 5*, p. 2. The case is the decision of the United States Court of Appeals for the Ninth Circuit Court in *Humanitarian Law Project v Reno* [2000] USCA9 114 at http://www.worldlii.org/us/cases/federal/USCA9/2000/114.html (accessed 20 October 2009).

92 'Material support or resources' was defined as 'currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials': *Humanitarian Law Project v Reno* [2000] USCA9 114.

93 *Submission 5*, p. 3.

94 *Submission 5*, p. 3.

> As currently drafted, under the proposed section a person may be subject to sanction because he or she provides support to an organisation in circumstances where there is a risk that the support may aid the organisation to commit an offence. ...[T]his extends the reach of the section too far.[95]

2.73 The Law Council suggested amending this offence so that it provides that the support must be *intended* to aid the organisation to commit an offence.[96]

2.74 Secondly, the Law Council pointed out that a person guilty of the offence of supporting a criminal organisation 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. The Law Council suggested that the offence under proposed section 390.4 should be limited to supporting the commission of *serious* offences.[97]

Government response

2.75 The Attorney-General's Department rejected the argument that the proposed criminal organisation offences could capture a group that formed randomly for the commission of a single offence:

> The term 'organisation' requires there to be a form of organisation, so it would never encompass, for example, a group that randomly formed to commit an offence and then disbanded. Also, our view is that 'organisation' is not a term of art—it is an ordinary term that a court would be able to interpret—and that it is not too broad. The nature of the term 'organisation' requires that there be some sense of structure and a group coming together for a purpose, rather than people who might happen one evening to run into each other on the street or a mob attack, for example. It would not cover that.[98]

2.76 The department also submitted that limiting the offence of supporting a criminal organisation to circumstances where the accused intended that the support would aid the organisation to commit an offence would significantly restrict the application of the offence:

> 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.[99]

2.77 In response to concerns that the maximum penalty for the offence of supporting a criminal organisation may exceed the penalty for the offence the support might have aided, the department submitted that:

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95 *Submission 12,* pp 11-12.

96 *Submission 12,* p. 12.

97 *Submission 12,* p. 12.

98 Ms Sarah Chidgey, *Committee Hansard,* 29 October 2009, p. 9.

99 *Answers to questions on notice,* 9 November 2009, p. 8.

> ...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.[100]

Increased penalties for bribery offences

2.78 The joint submission from Make Poverty History and Micah Challenge strongly supported the increased penalties for bribery offences which would be introduced by Schedule 8 of the Bill.[101] The submission noted that corruption in developing countries has a diverse range of negative consequences such as:

- undermining progress in reducing child mortality and fighting diseases;
- allowing exploitative work conditions; and
- permitting poorly constructed buildings that collapse with deadly consequences.[102]

2.79 These organisations argued that corruption in the developing world is sustained by bribes paid by western countries and that:

> ...bribery fosters a culture of impunity and repeat corruption, undermines the functioning of public institutions and fuels a [public] perception that governments and bureaucracies are up for sale to the highest bidder.[103]

2.80 The Police Associations also supported the increased penalties for bribery offences but argued that this would not be sufficient to deter people from engaging in bribery, especially organised crime groups which corrupt public officials to assist their criminal activities. As a result, the Police Associations argued that an unjust enrichment offence in relation to Commonwealth public officials should be introduced.[104]

Drug importation

2.81 Finally, the NSW Department of Premier and Cabinet submitted that the proposed amendments to the definition of 'import' may narrow the definition rather than broaden it. This was on the basis that the definition includes 'bring the substance into Australia *and* deal with the substance in connection with its importation.' The department argued that 'and' should be replaced with 'or' to ensure the intention of broadening the definition is achieved.[105]

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100 *Answers to questions on notice*, 9 November 2009, p. 9.

101 *Submission 2*, p. 1. See also Professor Broadhurst and Ms Ayling, *Submission 6*, p. 2.

102 *Submission 2*, pp 2-4.

103 *Submission 2*, pp 3-4.

104 *Submission 3*, pp 6-7.

105 *Submission 14*, pp 1-2.

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

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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]

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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]

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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

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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

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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

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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 Quaedvlieg 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.

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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]

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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.

CHAPTER 4

AUSTRALIAN CRIME COMMISSION

Provisions in the Bill

4.1 The Explanatory Memorandum notes that:

> The ACC, established under the ACC Act, is a statutory body that works collaboratively with Commonwealth, State and Territory agencies, to counter serious and organised crime in Australia. Using intelligence and investigative strategies, the ACC endeavours to better position Australia to meet and respond to the threats posed by serious and organised crime groups.[1]

4.2 Schedule 7 of the Bill would amend the ACC Act with the aim of improving the operation and accountability of the ACC by:

(a) clarifying procedural powers for issuing summons and notices to produce;

(b) increasing the ACC's powers to deal with uncooperative witnesses;

(c) adding the Commissioner of Taxation to the ACC Board; and

(d) requiring an independent review of the ACC every five years.[2]

4.3 Many of the changes proposed by the Bill respond to recommendations made by the Parliamentary Joint Committee on the Australian Crime Commission (the PJC) in the report on its inquiry into the *Australian Crime Commission Amendment Act 2007*.[3]

Issuing summons and notices to produce

4.4 Under Division 2 of Part II of the ACC Act, ACC examiners have coercive information gathering powers, similar to those of a Royal Commission, which may be used to obtain information in relation to a special ACC operation or investigation.[4] In particular, examiners have the power:

- to summons a person to appear before an examiner and require the person to answer questions and to produce documents or other things (section 28); and

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1 Explanatory Memorandum, p. 165. The ACC has provided a useful overview of its structure and functions: *Submission 7*, pp1-2.

2 Explanatory Memorandum, pp 3 and 165. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the ACC Act.

3 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, at http://www.aph.gov.au/Senate/committee/acc_ctte/acc_amend_act07/report/report.pdf (accessed 13 October 2009), September 2008, recommendations 1 to 8. See also ACC, *Submission 7*, p. 9.

4 Section 7C allows the ACC Board to determine that an intelligence operation or an investigation is a special operation or special investigation.

- to issue a notice that requires a person to produce a document or thing to a specified person (section 29).[5]

4.5 Subsections 28(1A) and 29(1A) require an examiner, when issuing a summons or notice to be satisfied that it is reasonable in all the circumstances to do so and to record in writing the reasons for the issue of the summons or notice.[6] At present under these provisions, the examiner may record his or her reasons before, at the same time or as soon as practicable after the issue of the summons or the notice. The Bill would amend subsections 28(1A) and 29(1A) so that an examiner is required to record these reasons at or before the time the summons or notice was issued.[7]

4.6 Subsections 28(8) and 29(5) currently provide that a failure by an examiner to comply with various requirements for issuing a summons or notice does not invalidate the summons or notice. In particular, these provisions prevent a summons or notice being invalidated where the examiner fails to:

- record reasons for issuing the summons or notice;
- in the case of a summons, attach the relevant ACC Board determination establishing the special operation or investigation to which the summons relates; or
- to issue a non-disclosure notation under section 29A.[8]

4.7 The Bill would amend subsections 28(8) and 29(5) so that a failure to comply with the requirements to record reasons will invalidate the summons or notice. In addition, a failure to attach the relevant ACC Board determination to a summons will invalidate the summons.[9]

4.8 The Bill would also amend subsections 29B(2) and (4) to ensure that, where a notation under section 29A prohibits disclosures about a summons or notice, this will not prevent disclosures:

- to the Ombudsman for the purposes of making a complaint under the *Ombudsman Act 1976;* or

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5 Explanatory Memorandum, p. 168.

6 Explanatory Memorandum, pp 168-169.

7 Items 9, 10, 12 and 13 of Schedule 7; Explanatory Memorandum, pp 170 and 171. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 2, pp 11-16; ACC, *Submission 7*, p. 9.

8 Explanatory Memorandum, pp 170 and 171. In some circumstances, section 29A requires an examiner to include a notation in a summons or notice prohibiting disclosure of information about the summons or notice (for example, where it is reasonable to expect that a disclosure would prejudice the safety or reputation of a person).

9 Items 11 and 14, of Schedule 7; Explanatory Memorandum, pp 170-171. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 3, pp 21-22; ACC, *Submission 7*, p. 9.

- to the Australian Commission for Law Enforcement Integrity (ACLEI) for the purpose of referring to the Integrity Commissioner an allegation or information that raises a corruption issue.[10]

Powers to deal with uncooperative witnesses

4.9 The ACC Act contains a number of criminal offences aimed at ensuring that a person issued with a notice or summons complies with that notice or summons. These offences are punishable by up to five years imprisonment or a fine not exceeding 200 penalty units and relate to:

- failing to attend an examination;
- failing to take an oath or affirmation;
- failing to produce a document;
- failing to answer questions;
- giving false or misleading evidence; and
- obstructing or hindering an examiner or the ACC.[11]

4.10 However, the Explanatory Memorandum argues that that are difficulties in relation to these offences achieving the aim of ensuring witnesses comply with notices and summons:

> There are two issues with the offences as they currently operate. Firstly, there is no immediate threat of detention. At present, if a person is summonsed to appear as a witness and attends the examination but refuses to cooperate, the matter is referred to the [Commonwealth Director of Public Prosecutions] and the prosecution proceeds by way of summons. As a result, there is no immediate detention or threat of immediate detention to the person. ...
>
> Secondly, the effectiveness of these offences is often compromised by the delay in the commencement of court proceedings. It can often take a long time before a matter is brought before a court and even longer before the court is able to deal with the matter. 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 (and therefore any penalty) 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

10 Items 15 and 17 of Schedule 7; Explanatory Memorandum, pp 171-174. See also PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 4, p. 26; ACC, *Submission 7*, p. 6.

11 Subsection 29(3A), subsection 30(6), subsection 33(2) and subsection 35(2); Explanatory Memorandum, p. 174. A 'penalty unit' is currently $110.

> delaying when information is provided, a witness is able to effectively delay and frustrate the operation of an ACC investigation.[12]

4.11 The Bill proposes to insert new provisions in the ACC Act which would allow the ACC to refer a witness, who is not cooperating with an examination, to a court to be dealt with as if the person was in contempt of that court.[13] Similar powers were proposed for the National Crime Authority by the National Crime Authority Legislation Amendment Bill 2000 but were rejected by the Senate.[14]

4.12 Proposed section 34A would provide that a person is 'in contempt of the ACC' if he or she:

> (a) refuses or fails:
>
> (i) to take an oath or affirmation;
>
> (ii) to answer a question; or
>
> (iii) to produce a document or thing;
>
> (b) provides false or misleading information to an examiner;
>
> (c) obstructs or hinders an examiner in the performance of his or her functions;
>
> (d) disrupts an examination; or
>
> (e) threatens a person present at an examination.[15]

4.13 In addition, proposed subsection 34A(b) would provide that a legal practitioner is in contempt of the ACC if the practitioner:

- refuses to answer a question or produce a document on the basis of legal professional privilege; and
- also refuses to reveal the name and the address of the person to whom the privilege applies.[16]

4.14 The Explanatory Memorandum notes that the elements of proposed section 34A mirror the offences under the ACC Act related to not cooperating with an ACC examination.[17]

4.15 Where an examiner considers that a person is in contempt of the ACC, proposed subsection 34B(1) would allow the examiner to apply to a court for the

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12 Explanatory Memorandum, pp 174-175. See also ACC, *Submission 7*, pp 3-4; Mr John Lawler, Chief Executive Officer, ACC, *Committee Hansard*, 29 October 2009, pp 1 and 4; *Answers to questions on notice*, 9 November 2009, p. 16.

13 Item 18 of Schedule 7; Explanatory Memorandum, p. 174.

14 *Senate Hansard*, 8 August 2001, pp 25833-25856. See also ACC, *Submission 7*, p. 3.

15 Explanatory Memorandum, p. 176.

16 Explanatory Memorandum, p. 176.

17 Explanatory Memorandum, p. 177. Note that the offence of threatening a person at an examination would be inserted in the ACC Act by Item 19 of Schedule 7 which amends section 35: Explanatory Memorandum, pp 179-180; ACC, *Submission 7*, p. 10.

person to be dealt with in relation to the contempt.[18] The examiner would have to inform the person that he or she proposes to make such an application.[19]

4.16 The application would have to be accompanied by a certificate setting out the grounds for the application and the evidence supporting it.[20] Proposed subsection 34C(3) would provide that this certificate is prima facie evidence of the matters it sets out.[21] The person accused of the contempt would have to be given a copy of the certificate either before or at the same time as the application is made.[22]

4.17 Proposed subsection 34B(5) would allow the court, after considering the certificate and any evidence in support of the ACC or the person, to determine that a person was in contempt of the ACC. Where the court did so, it would be able to deal with the person as if he or she were in contempt of that court.[23]

4.18 Proposed subsection 34D(1) would empower an examiner, who proposes to make a contempt application to a court, to direct an AFP officer or a state or territory police officer to detain a person for the purposes of bringing him or her before the court for contempt proceedings.[24] Where an examiner does so, proposed subsection 34D(2) would require firstly that the ACC to make the contempt application as soon as practicable and secondly that the person be brought before the court as soon as practicable.[25]

4.19 The Bill would amend section 35A to ensure that, where a contempt application is made to a court in relation to a person's conduct and the person is dealt with by the court in relation to that conduct, the person cannot be prosecuted for an offence in relation to the same conduct. Conversely, if a person has been prosecuted for an offence in relation to conduct, a contempt application will not be able to be made in relation to the same conduct.[26]

4.20 The ACC submission noted that state agencies with similar powers to the ACC to investigate serious and organised crime or official corruption have the option of citing a witness for contempt before the state Supreme Court:

> This power is rarely used but its availability appears to have a salutary effect on witnesses. It raises the prospect of immediate custody and

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18 Explanatory Memorandum, p. 177. The application must be either to the Federal Court, or to the Supreme Court of the state or territory in which the examination is being conducted.

19 Proposed subsection 34B(2); Explanatory Memorandum, p. 177.

20 Proposed subsection 34B(3); Explanatory Memorandum, p. 177.

21 Explanatory Memorandum, p. 178.

22 Proposed subsection 34B(4); Explanatory Memorandum, p. 177.

23 Explanatory Memorandum, p. 177.

24 See the definition of 'constable' which would be inserted in subsection 4(1) by Item 1 of Schedule 7 and the existing definition of 'State' in subsection 4(1); Explanatory Memorandum, p. 178.

25 Explanatory Memorandum, p. 178. The reference to the ACC in this provision appears to be a drafting error since it is the examiner, not the ACC, who is empowered to make the contempt application under proposed subsection 34B(1).

26 Items 20 and 21 of Schedule 7; Explanatory Memorandum, p. 180.

> detention for an initially indeterminate period, even if the alleged [contemnor] is able to obtain bail pending a full hearing of the contempt allegations. This is a strong motivation for an initially recalcitrant witness to reconsider their position and purge their contempt by complying with the original requirement.[27]

4.21 The independent review of the ACC Act conducted by Mr Mark Trowell QC in 2007 (the Trowell report) recommended that contempt provisions be introduced into the ACC Act.[28] The PJC has also supported such provisions noting that:

> In view of the ACC's function to combat serious and organised crime, the PJC considers that the ACC examiners should be given assistance to enable them to overcome the difficulties presented by persons who deliberately obstruct the ACC examination process with a view to frustrating special ACC operations and investigations.
>
> The committee is persuaded that a limited statutory definition of contempt and a statutory power of referral would be appropriate.[29]

ACC Board

4.22 Item 7 of Schedule 7 would amend subsection 7B(2) of the ACC Act to include the Commissioner of Taxation on the board of the ACC. The Explanatory Memorandum outlines the rationale for the change:

> The current membership of the Board provides for a diverse range of issues and views to be considered in setting the ACC's priorities. The benefits of adding the Commissioner of Taxation as a Board member is that it will further enhance the ACC Board's expertise and, in light of significant taxation related activity identified in ACC investigations and intelligence operations, increase the ACC's capability to counter the impact of serious and organised crime.[30]

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27 *Submission 7*, p. 3. See also Explanatory Memorandum, pp 176 and 178. For examples of similar powers under state legislation see section 49 of the *Major Crime (Investigative Powers) Act (Vic)* and section 163 of the *Corruption and Crime Commission Act 2003 (WA)*.

28 Mark Trowell QC, *Independent Review of the Provisions of the Australian Crime Commission Act 2002—Report to the Inter-Governmental Committee*, March 2007, recommendations 2 to 7, pp 4, 5-6 and 42-71; Explanatory Memorandum, p. 175.

29 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, p. 49. See also recommendation 6 and PJC, *Examination of the Australian Crime Commission Annual Report 2007-08*, at: http://www.aph.gov.au/Senate/committee/acc_ctte/annual/2008/report/report.pdf (accessed on 14 October 2009), recommendation 1, pp 13-14; Explanatory Memorandum, pp 175-176.

30 Explanatory Memorandum, p. 168. See also ACC, *Submission 7*, p. 4.

4.23 The Explanatory Memorandum notes that the PJC has recommended that the Commissioner of Taxation be included on the board of the ACC on several occasions.[31]

Accountability and review

4.24 Finally, the Bill would insert a new section 61A to provide for regular, five-yearly reviews of the operation of the ACC Act. The first review would be of the period five years from the commencement of Schedule 7. A review would not have to be conducted in a particular five year period if a parliamentary committee commences a review of the ACC Act in that period.[32] Commenting on this amendment, the ACC acknowledged that:

> ...it is endowed with extraordinary powers to interfere with the rights of individuals in order to combat a major social evil, in the form of serious and organised crime, and that it is vitally important that these coercive powers are not abused. Accordingly, it accepts that from time to time its performance should be subject to review, to ensure that it is continuing to use the coercive powers, and to perform its functions more generally, in a responsible way, balancing its objectives in robustly addressing the threat of serious and organised crime with sensitivity to the genuine requirements of human rights in a democratic society.[33]

4.25 This amendment responds a recommendation of the PJC but the PJC recommended the first review should occur no later than January 2011.[34]

4.26 In addition, the PJC recommended 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.[35] However the Bill does not implement these recommendations.

Issues raised in submissions

4.27 The Western Australian Attorney-General expressed some concerns in relation to the amendments to the ACC Act which would treat a contempt of the ACC as if it were a contempt of court. In particular, the Attorney-General noted that proposed subsection 34A(b) appears to prevail over legal professional privilege.[36]

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31 Explanatory Memorandum, p. 167. See for example PJC, *Review of the Australian Crime Commission Act 2002*, at http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/acc_act02/report/index.htm (accessed 14 October 2009), November 2005, recommendation 6, pp 54 and 56.

32 Item 22 of Schedule 7; Explanatory Memorandum, pp 180-181.

33 *Submission 7*, p. 10.

34 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendation 8, p. 58.

35 PJC, *Inquiry into the Australian Crime Commission Amendment Act 2007*, recommendations 9 and 10, pp 58-59.

36 *Submission 4*, pp 1-2.

4.28 In addition, the Attorney-General pointed out that, under proposed subsection 34D(1), a legal practitioner could be placed in detention, before they are convicted of contempt, for refusing to produce a document to which legal professional privilege would otherwise apply. The Attorney-General argued that, unless there are compelling examples to support the need for such a power, this provision should be amended to provide for contempt applications to be dealt with expeditiously by the courts rather than immediate detention at the behest of the examiner.[37]

4.29 The Law Council similarly argued that:

> ...ACC examiners, who are not judicial officers, should not be given the power to authorise a person's detention, for whatever purpose or period.[38]

4.30 Furthermore, the Law Council expressed concern:

> ...that the power to order a person's detention pending referral to the court is not directed at securing their attendance, but rather is intended to operate in a punitive way and thus provide a very immediate incentive for cooperation.[39]

4.31 The Law Council opposed the enactment of proposed subsection 34D but suggested that, at least, proposed subsection 34D(1) should be amended to specifically provide that an examiner may only direct that a person be detained where he or she believes, on reasonable grounds, that it is necessary to detain the person in order to secure that person's attendance before the court.[40]

4.32 In the context of its inquiry into the *Royal Commission Act 1902*, the Australian Law Reform Commission (ALRC) has examined some of the difficulties involved in applying the concept of contempt to non-judicial bodies.[41] ALRC also outlined alternative approaches to contempt provisions similar to those contemplated by the Bill. One example is section 70 of the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) which allows the Australian Securities and Investments Commission (ASIC) to apply to the Federal Court for an order for enforcement of its orders. A refusal to comply with the court order will then amount to a contempt of court.[42] ASIC frequently considers the use of this power because 'it generally aims to secure compliance rather than impose punishment.'[43] ALRC noted that:

> The procedure of applying to a court to enforce an order for compliance differs, in a subtle but important way, from the procedure used in some

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37 *Submission 4*, p. 2.

38 *Submission 12*, p. 20.

39 *Submission 12*, p. 20.

40 *Submission 12*, p. 21.

41 Australian Law Reform Commission, *Royal Commissions and Official Inquiries*, Discussion Paper 75, at: http://www.alrc.gov.au/inquiries/current/royal-commissions/DP75/index.html (accessed 15 October 2009), August 2009, pp 429-431.

42 ALRC, pp 433-435.

43 ALRC, p. 433.

> state and territory legislation of applying to a court to punish conduct as a contempt of court. The approach of applying for enforcement avoids using the concept of contempt in the context of Royal Commissions and other public inquiries. Rather, the scope of the conduct that may be referred to the court is limited to a failure to comply with notices or directions of the tribunal or inquiry.[44]

4.33 Similarly, the Law Council submitted that this procedure of applying to a court to enforce an order for compliance is preferable to the procedure proposed in the Bill because:

> ...rather than requiring the court to treat contempt of the ACC as contempt of the court, it first requires the court to make a decision whether or not to enforce the relevant order of the ACC.
>
> If the Court decides to enforce that order and the person to whom it is directed still refuses to comply, then this refusal to comply will, in fact, be contempt of the court and may be treated as such. ...[T]he law of contempt was developed to protect the administration of justice. Therefore, it should only be employed to safeguard and reinforce the authority of the court, and not executive bodies exercising executive powers – such as the ACC.[45]

4.34 On the other hand, the Police Associations supported the proposed amendments to the ACC Act that relate to dealing with witnesses who refuse to cooperate with ACC examiners.[46]

Government response

4.35 In explaining the need for the contempt provisions, Mr John Lawler, Chief Executive Officer of the ACC, noted that the ACC was experiencing a growing problem with uncooperative witnesses:

> We are seeing a very deliberate, orchestrated and coordinated campaign by serious and organised crime networks who are lawfully summons before ACC coercive hearings. We are seeing them failing to attend hearings in contravention of the lawful process that has been served upon them, when they arrive at a hearing failing to enter the witness box or to take an oath, failing to answer questions or indeed, when they do answer questions, providing false or misleading evidence to the Australian Crime Commission examiner. ...
>
> In 2007-08 eight persons were charged with such offences and 14 persons were charged in 2008-09, which was a 60 per cent increase. In the five months of the 2009-10 financial year a total of 12 people have already been identified and are in the process of being charged or briefs of evidence are

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44 ALRC, p. 435. See also Law Council, *Submission 12*, pp 17-18.

45 *Submission 12*, p. 18.

46 *Submission 3*, p. 6. See also Professor Broadhurst and Ms Ayling, *Submission 6*, pp 1 and 2.

> being prepared for the Director of Public Prosecutions, with six in the last week.[47]

4.36 Mr Michael Outram, Executive Director of the ACC, explained how a coordinated campaign of non-cooperation by witnesses can frustrate ACC investigations:

> Under the current process, we cannot usually revert to an arrest scenario because we generally cannot satisfy the arrest provisions. We actually have to go through a summonsing process, and that can take some time. We then have to go through the court process... We did an analysis in 2006, ...at that time... the average time being taken was over 20 months to resolve these cases. But, of course, our investigations are very dynamic; it is a very quick moving environment, and when lines of inquiry become 'hot' we want to respond to that. So what this does is undermine the outcome of the investigation or the special intelligence operation and it means that opportunities are lost. Certainly two years down the track the forensic purpose has all but gone and the opportunity has gone.[48]

4.37 In response to a question from the committee regarding why an examiner should have the power to detain a witness before he or she has even made a contempt application to the court, Mr Outram stated:

> In a practical sense, if somebody attends an examination and refuses at that point to cooperate, either by refusing to take the oath or by refusing to answer questions, then our purpose is to avoid delay and to get that person to the point where they comply as soon as possible. ...If the examiner does not refer it to the court immediately and the person is not taken into custody by a police officer at the same time or almost immediately, it defeats the purpose, which is to get them in front of the other court as soon as possible.[49]

4.38 The Attorney-General's Department rejected the position of the Western Australian Attorney-General that proposed subsection 34A(b) overrides legal professional privilege:

> ...that provision does not override legal professional privilege, but it requires a lawyer, when claiming legal professional privilege in relation to answers or documents, to provide the name and address of the individual to whom the legal professional privilege relates—the lawyer's client—so that the ACC can make inquiries of the client about whether they also wish to claim legal professional privilege or waive it in that instance. It is only in

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47 *Committee Hansard*, 29 October 2009, p. 3. See also *Answers to questions on notice*, 9 November 2009, p. 14.

48 *Committee Hansard*, 29 October 2009, pp 7-8. See also Mr Lawler, *Committee Hansard*, 29 October 2009, pp 4 and 8; *Answers to questions on notice*, 9 November 2009, p. 15.

49 *Committee Hansard*, 29 October 2009, p. 14.

relation to a failure to provide a name or address that that lawyer can then be subject to offences.[50]

4.39 In addition, an officer from the Attorney-General's Department advised that the department did consider an approach similar to section 70 of the ASIC Act but instead adopted the proposed contempt provisions in the Bill because they are consistent with the recommendations of the Trowell report and the PJC.[51]

50 Ms Sarah Chidgey, *Committee Hansard*, 29 October 2009, p. 8. See also Mr Outram, ACC, *Committee Hansard*, 29 October 2009, p. 9.

51 Ms Chidgey, *Committee Hansard*, 29 October 2009, p. 14.

CHAPTER 5
PROCEEDS OF CRIME

Background

5.1 In 2006, Mr Tom Sherman AO conducted the independent review of the 2002 POC Act required by section 327 of that Act (the Sherman report). The Sherman report recommended several changes to the POC Act aimed at strengthening the federal regime for seizing the proceeds and instruments of crime.[1] Some of the proposed amendments in Schedule 1 of the Bill arise out of recommendations of the Sherman report, whilst other amendments would implement proposals made by law enforcement agencies.[2]

5.2 The committee's report on the provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 provides an overview of the existing provisions of the POC Act as well as other reviews and inquiries that are relevant to the Act.[3]

Provisions in the Bill

5.3 Schedule 1 of the Bill would make amendments to the POC Act relating to:

(a) the exclusion of property from restraining or forfeiture orders, and compensation for legitimately obtained interests in property;

(b) pecuniary penalty orders;

(c) examination orders;

(d) other information gathering powers;

(e) ancillary orders; and

(f) various definitions in the Act.[4]

Exclusion or recovery of property and compensation

5.4 In certain circumstances, the POC Act provides for:

- the exclusion of property from restraining orders (section 29);
- the exclusion of property from forfeiture (sections 73 and 94);
- the recovery of forfeited property or its equivalent value (section 102); and

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1 Mr Tom Sherman AO, *Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*, July 2006, at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth) (accessed 29 September 2009).

2 Explanatory Memorandum, p. 6.

3 *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]*, September 2009, pp 3-6. See also DPP, *Submission 8*, pp 1-3.

4 Explanatory Memorandum, pp 6-7.

- compensation for the proportion of forfeited property that was legitimately obtained (section 77).

Exclusion or recovery of property

5.5 The provisions in Part 1 of Schedule 1 would correct various anomalies in the provisions relating to the exclusion of property from restraining or forfeiture orders and the recovery of forfeited property.[5] Perhaps the most serious anomaly relates to the test that applies to the exclusion of property from a forfeiture order. The Explanatory Memorandum explains that:

> Currently, paragraph 73(1)(d) specifies the test which allows a third party to apply for exclusion of property from a forfeiture order under sections 47 and 49. Paragraph 73(1)(c) specifies the test that applies to a suspect. At present, the provisions are more onerous for a third party than for a suspect, as a third party must show that they were not involved in the commission of any of the offences to which the application relates. The same requirement does not apply to a suspect.[6]

5.6 The amendments would ensure that the tests for exclusion of property from forfeiture orders are not harder for third parties to satisfy than for suspects by providing, essentially, that property will be excluded where it is not the proceeds of unlawful activity or an instrument of a relevant offence.[7] The amendments would also ensure that:

- third parties with an interest in property have access to the same mechanisms to exclude property from forfeiture as suspects;[8] and
- the test for recovery of forfeited property under section 102 is consistent with the test for exclusion of property from automatic forfeiture under section 94.[9]

5.7 The POC Act currently refers to the Commonwealth Director of Public Prosecutions (DPP) being given an opportunity to conduct an 'examination of the applicant' prior to a court hearing an application to exclude property from a restraining or forfeiture order.[10] However, there are cases where the DPP may need to examine not only the applicant but also a third party (for example where the applicant is holding property on behalf of that third party). The Bill would therefore amend these provisions to read 'examinations in relation to the application'.[11] Similar

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5 Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the POC Act.

6 Explanatory Memorandum, p. 12.

7 Item 22 of Schedule 1, Explanatory Memorandum, p. 12.

8 Items 51, 52 and 54 of Schedule 1, Explanatory Memorandum, pp 19-20.

9 Items 58, 60 and 62 of Schedule 1, Explanatory Memorandum, pp 22-23.

10 Subsection 32(b) and section 76.

11 Items 18 and 28 of Schedule 1; Explanatory Memorandum, pp 11 and 14; Mr Tom Sherman AO, recommendation D6, p. D8. Item 56 of Schedule 1 makes a similar amendment to section 94 which does not currently provide that an application under that section, to exclude property from forfeiture, must not be heard until the DPP has had a reasonable opportunity to conduct an examination.

amendments would ensure that the DPP has an opportunity to conduct examinations of all relevant parties before it is required to provide notice of the grounds on which it proposes to contest an application to exclude property from a restraining or forfeiture order.[12]

Compensation for legitimately obtained property

5.8 Schedule 1 of the Bill would also amend the provisions of the POC Act dealing with compensation for legitimately obtained interests in property to address some anomalies and inconsistencies. For example, section 77 currently provides that compensation is available if, when the property first became proceeds of an offence, a proportion of the property was not acquired using the proceeds of any offence. The Explanatory Memorandum notes that:

> This limits a court's consideration to a particular moment in time, which could frustrate the purpose of the Act. For example, if a $500,000 house was purchased with a deposit of $50,000 derived from crime and a legitimate loan of $450,000, only 10% of the value was obtained with illegitimate funds when the property first became the proceeds of crime. If mortgage payments are subsequently made entirely with proceeds of crime, a court might be prevented from considering the later use of illegitimate funds because they are not relevant to when the house first became proceeds. This could result in compensation being paid where it should not be paid.[13]

5.9 The Bill would amend subsection 77(1) to provide that before making a compensation order, a court must be satisfied that the portion of the applicant's interest that is to be compensated was not derived or realised, directly or indirectly, from the commission of any offence, and is not an instrument of any offence.[14] Subsection 77(1) does not currently exclude compensation for legitimately obtained property on the basis that the property is an instrument of an offence.[15] The Attorney-General's Department advised that this change is necessary to ensure that it is not possible for a person to receive compensation for property that has been validly forfeited.[16]

5.10 Another inconsistency in the provisions dealing with compensation for legitimately obtained interests in property is that compensation is available if property has been forfeited to the Commonwealth under a forfeiture order but not if it has been

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12 Items 17, 27 and 55 of Schedule 1; Explanatory Memorandum, pp 10-11, 13 and 20; Mr Tom Sherman AO, recommendation D5, p. D7. See also Items 33, 34 and 63 of Schedule 1 which would provide that the DPP need not give notice of the reasons it proposes to contest a compensation, recovery or buy back order, and a court must not hear an application for a compensation, recovery or buy back order, until the DPP has had a reasonable opportunity to conduct examinations in relation to the application: Explanatory Memorandum, pp 16 and 24.

13 Explanatory Memorandum, p. 14.

14 Item 30 of Schedule 1; Explanatory Memorandum, p. 14.

15 Proposed section 94A would also exclude compensation if the applicant's interest in the property is the instrument of any offence.

16 *Answers to questions on notice*, 9 November 2009, p. 17.

automatically forfeited under section 92 of the POC Act. Item 57 of Schedule 1 would insert a new section 94A in the POC Act to ensure that where property that was automatically forfeited was acquired with both the proceeds of an offence and legitimately obtained funds, the owner of the forfeited property is compensated for the legitimately obtained proportion of the property.[17]

Pecuniary penalty orders

5.11 Sections 115 to 150 of the POC Act relate to pecuniary penalty orders which are orders that require payment to the Commonwealth of amounts based on benefits derived from crime.

5.12 Part 2 of Schedule 1 would clarify the provisions governing the calculation of pecuniary penalty orders. At present, these provisions direct the court to consider a person's property that is covered by a restraining order, but make no reference to property of another person that is under the person's effective control. The Explanatory Memorandum notes that this omission can result in a court not taking into consideration the full range of criminal benefits a person has gained. The amendments would address this by inserting references to property 'suspected of being subject to the effective control of the person' in subparagraph 121(4)(a)(i) and paragraph 124(1)(c).[18]

5.13 The Bill would also empower a court to hear an application for a pecuniary penalty order, outside of the time limits set by section 134 if it is in the interests of justice to do so.[19] The Explanatory Memorandum argues that this provision is necessary in circumstances where the DPP seeks the forfeiture of property in the mistaken belief that the entire property was obtained with the proceeds of crime and therefore does not also seek a pecuniary penalty order in relation to the person's criminal activities.[20] The Explanatory Memorandum provides the following example:

> ...assume a person defrauds the Commonwealth of $1 million, and owns a house worth $1 million. Following an investigation, it appears that the house was purchased using the proceeds of the fraud, so the house is restrained and then forfeited. Subsequently, another person demonstrates that they contributed $250,000 in legitimate funds to purchase the house, and is therefore entitled to be compensated for this amount. The person who committed the offence has therefore only forfeited 75% of the value of the offence. If the [DPP] was aware of this at the time of restraint, a pecuniary penalty order would have been issued for the $250,000. However, if the [DPP] became aware after forfeiture, it is prevented by section 134 from obtaining a pecuniary penalty order.[21]

5.14 The Bill would amend the POC Act to allow a court to vary a pecuniary penalty order where the order was made on the basis of a number of convictions and

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17 Explanatory Memorandum, p. 21.

18 Items 68 and 72 of Schedule 1; Explanatory Memorandum, pp 25 and 26.

19 Item 78 of Schedule 1; Explanatory Memorandum, pp 27-28.

20 Explanatory Memorandum, p. 28.

21 Explanatory Memorandum, p. 28.

one conviction was subsequently quashed.[22] The Explanatory Memorandum notes that at present, under section 146 of the POC Act, there is provision for the DPP to seek confirmation of the pecuniary penalty order, relating to a person's conviction of a serious offence, by proving to the civil standard that the quashed offence occurred. However, if this cannot be proved then the entire pecuniary penalty order is discharged even if it relates to several other offences which have not been quashed.[23]

5.15 Furthermore, if the pecuniary penalty order relates only to indictable offences there is no provision for the DPP to seek confirmation of the order and the order will lapse even if it relates to several other indictable offences which have not been quashed. The amendments would provide that if a conviction is quashed, a pecuniary penalty order is discharged unless the DPP applies to the court within 14 days to have the order confirmed or varied and insert proposed section 149A to set out the procedure for varying a pecuniary penalty order.[24]

Examination orders

5.16 Sections 180 to 201 of the POC Act permit courts to make orders allowing the examination of any person who has an interest in property which is the subject of a restraining order. The Bill would permit courts to make an examination order, in certain circumstances, where a restraining order is not in place.[25] In particular, the Bill would permit examination orders where:

- an application is made to have property excluded from forfeiture (proposed section 180A);
- an application is made for compensation for the proportion of property that was legitimately obtained, after the property has been forfeited (proposed section 180B);
- an application is made to recover an interest in forfeited property (proposed section 180C);
- a confiscation order has been made but not satisfied (proposed section 180D);[26] or
- a restraining order is revoked under section 44, which allows a court to revoke a restraining order where a person provides satisfactory security or a satisfactory undertaking in lieu of the restraining order (proposed section 180E).[27]

5.17 Proposed sections 180A to 180E would permit not only examination of persons who have or claim an interest in the relevant property (or in the case of

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22 Items 82-87 and 91-93 of Schedule 1; Explanatory Memorandum, pp 29 and 30; Mr Tom Sherman AO, recommendation D21, p. D27.

23 Explanatory Memorandum, p. 29.

24 Explanatory Memorandum, pp 29 and 30.

25 Explanatory Memorandum, p. 32. See also DPP, *Submission 8*, p. 3.

26 'Confiscation order' is defined in section 338 of the POC Act and means a forfeiture order, a pecuniary penalty order or a literary proceeds order.

27 Item 103 of Schedule 1; Explanatory Memorandum, pp 32-35. See also Mr Tom Sherman AO, recommendation D22(b), pp D29-D31.

proposed section 180D the person against whom the confiscation order was made) but also spouses or de facto partners of those persons. In addition, the Explanatory Memorandum notes that these provisions would allow the examination of lawyers, accountants, bankers and other advisers of the person and his or her spouse or de facto partner.[28]

5.18 Part 3 of Schedule 1 of the Bill would also:

- confirm that the DPP may apply for an examination order ex parte;[29]
- insert a definition of 'affairs' to clarify the range of questions which may be asked at an examination;[30]
- introduce a new offence of providing false or misleading answers or documents in connection with an examination;[31] and
- increase penalties for existing offences relating to examinations.[32]

Other information gathering powers

5.19 In addition to the power to conduct examinations, the POC Act provides for various other information gathering powers including:

- production orders which are orders made by a magistrate requiring the production of property tracking documents (sections 202 to 212);
- notices to financial institutions requiring the provision of information or documents relating to accounts and transactions (sections 213 to 218); and
- monitoring orders which are orders made by a judge requiring a financial institution to monitor and provide information relating to transactions through an account (sections 219 to 224).

5.20 Part 4 of Schedule 1 of the Bill would amend the provisions relating to production orders by:

- broadening the definition of 'property tracking document' in subsection 202(5) to allow production orders to be used in relation to property where the identity of the person who committed the relevant offences is unknown;[33]

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28 Explanatory Memorandum, pp 33-35; *Answers to questions on notice*, 9 November 2009, pp 18-19.

29 Item 109 of Schedule 1; Explanatory Memorandum, pp 36-37. See also Mr Tom Sherman AO, recommendation D22(d), pp D30-D31.

30 Items 118 of Schedule 1; Explanatory Memorandum, p. 39. Under sections 180 and 181 and proposed sections 180A to 180E, examination orders permit questioning 'about the affairs' of the person being examined.

31 Items 116 of Schedule 1; Explanatory Memorandum, p. 38. See also Mr Tom Sherman AO, recommendation D25, p. D33.

32 Items 114 and 115 of Schedule 1; Explanatory Memorandum, pp 37-38. See also Mr Tom Sherman AO, recommendation D24, p. D32.

33 See for example Item 120 of Schedule 1; Explanatory Memorandum, pp 39-40; Mr Tom Sherman AO, recommendation D26(a), pp D33-35.

- requiring production orders to specify the form and manner in which documents are to be produced to allow for the electronic receipt of documents;[34] and
- clarifying the power of a magistrate to order that documents be produced within a shorter period than the usual minimum of 14 days from the order including setting a minimum period of at least three days from the order in these urgent cases.[35]

5.21 In relation to the power to issue notices to financial institutions, the Bill would make three significant changes. Firstly, the list of authorised officers who may issue such notices would be expanded to include the Commissioner of Taxation, the Chief Executive Officer of the Australian Customs and Border Protection Service (Customs) and the Chairperson of ASIC.[36] Secondly, where an authorised officer considers it appropriate, he or she would be able to specify a period for providing the documents or information of less than the current minimum of 14 days though the period would have to be at least three days from the giving of the notice.[37] Thirdly, authorised officers would have the power to obtain information about stored value cards and transactions made using those cards.[38]

5.22 The power of a judge to issue a monitoring order would also be expanded to enable orders to be made that require financial institutions to provide information about transactions made using a stored value card issued by the financial institution.[39]

5.23 Finally, the existing definition of 'account' in section 338 of the POC Act would be expanded to include credit card accounts, loan accounts and closed accounts.[40] The effect of this change would be to broaden information gathering powers under the POC Act, particularly, the powers to issue notices to financial institutions and to obtain monitoring orders.[41]

Ancillary orders

5.24 Section 39 of the POC Act allows a court to make ancillary orders where a restraining order has been made. Amongst other things, such orders can require the owner of property to give a sworn statement about his or her property, or to take actions necessary to bring the restrained property within the jurisdiction. Part 5 of Schedule 1 of the Bill would clarify the way in which orders ancillary to restraining orders are to be made and operate.[42] For example, the Bill would:

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34 Item 125 of Schedule 1; Explanatory Memorandum, p. 40; Mr Tom Sherman AO, recommendation D26(b), pp D33-35.

35 Item 126 of Schedule 1; Explanatory Memorandum, p. 41.

36 Item 133 of Schedule 1; Explanatory Memorandum, pp. 42.

37 Items 136 and 137 of Schedule 1; Explanatory Memorandum, p. 43.

38 Item 132 of Schedule 1; Explanatory Memorandum, p. 42. Item 148 of Schedule 1 would insert a definition of 'stored value card' in section 338 of the POC Act.

39 Item 141 of Schedule 1; Explanatory Memorandum, p. 44.

40 Item 147 of Schedule 1; Explanatory Memorandum, p. 45.

41 Explanatory Memorandum, p. 45.

42 Explanatory Memorandum, p. 7.

- empower the court to make orders directing a person whom the court reasonably suspects has information relevant to identifying, locating or quantifying the property (such as a mortgage broker or a real estate agent) to give a sworn statement in relation to the property;[43]
- expand the power to make orders requiring the owner of restrained property to do anything necessary to bring the property within the jurisdiction so that it also applies to persons who have effective control of the property;[44]
- allow ancillary orders to be made ex parte;[45]
- clarify that the privilege against self-incrimination does not apply in relation to providing a sworn statement about particulars of, or dealings with, property.[46]

5.25 The Explanatory Memorandum notes that the abrogation of the privilege against self-incrimination is in response to a New South Wales Supreme Court decision which held that the privilege was impliedly removed by paragraph 39(1)(d).[47] The provision is therefore designed to clarify the existing position, but it would also provide a direct use immunity so that the sworn statement cannot be used in civil or criminal proceedings against the person except in specified circumstances.[48]

Changes to definitions in the POC Act

5.26 Part 7 of Schedule 1 would amend several of the definitions used in the POC Act. The Bill would expand the definition of 'serious offence' in section 338 of the POC Act so that it would cover two or more related fraud offences which, in aggregate, cause a benefit or loss of more than $10,000.[49] The Explanatory Memorandum notes that the existing definition of 'serious offence', as it relates to fraud-type offences, refers to an indictable offence that causes a benefit or loss of at least $10,000 and is punishable by three or more years imprisonment. This definition does not capture a person committing a series of related frauds which, in aggregate, cause a benefit or loss of more than $10,000.[50]

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43 Item 152 of Schedule 1; Explanatory Memorandum, p. 46.

44 Item 153 of Schedule 1; Explanatory Memorandum, p. 47; Mr Tom Sherman AO, recommendation D7(c), pp D10 and D12.

45 Item 154 of Schedule 1; Explanatory Memorandum, p. 47; Mr Tom Sherman AO, recommendation D7(d), pp D11-12. Item 154 would also insert a new section 39B which will enable a person to apply for an ancillary order to be revoked where the order was made ex parte.

46 Item 156 of Schedule 1; Explanatory Memorandum, pp 48-49; Mr Tom Sherman AO, recommendation D7, pp D10 and D12.

47 *DPP v Xu* [2005] NSWSC 191 at para 36; Explanatory Memorandum, p. 48.

48 Explanatory Memorandum, pp 7 and 48.

49 Item 179 of Schedule 1; Explanatory Memorandum, p. 55; Mr Tom Sherman AO, recommendation D36, pp D48-D49.

50 Explanatory Memorandum, p. 55. See also DPP, *Submission 8*, p. 4.

5.27 The Bill would also expand the definition of 'unlawful activity' in section 338 to include state and territory summary offences.[51] The Explanatory Memorandum notes that:

> Currently, the definition of "unlawful activity" applies to any offences against Commonwealth law or the laws of a foreign country, but applies only to indictable offences under State and Territory law (excluding State/Territory summary offences). This limit did not exist in the *Proceeds of Crime Act 1987* and the Sherman Report recommended the definition be amended to encompass these offences...[52]

5.28 The term 'unlawful activity' is used in several provisions of the POC Act. One significant example is that property can only be excluded from a restraining order or from forfeiture where it is not the proceeds of unlawful activity.[53]

5.29 Finally, the Bill would clarify the definitions of 'evidential material', 'foreign indictable offence' and 'tainted property' set out in sections 337A and 338. These amendments would allow search warrants to be issued under section 225 of the Act in relation to property that is proceeds of a foreign indictable offence.[54]

Issues raised in submissions

5.30 Many of the proposed amendments to the POC Act are technical in nature but some submissions expressed support for the amendments or raised concerns about particular amendments. For example, the Police Associations strongly supported the proposed amendments.[55] While the AFP expressed specific support for the amendments that would:

- allow search warrants to be obtained under section 225 in relation to property that is proceeds of a foreign indictable offence;
- expand the definition of 'account'; and
- extend the information gathering powers under the POC Act to stored value cards.[56]

5.31 The DPP also supported the POC Act amendments overall but made one suggestion in relation to the amendments in Part 1 of Schedule 1. The DPP suggested 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.[57]

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51 Item 182 of Schedule 1; Mr Tom Sherman AO, recommendations D38, pp D49-D50.

52 Explanatory Memorandum, p. 56.

53 See for example sections 29, 73 and 94.

54 Items 172, 173, 177 and 180 of Schedule 1; Explanatory Memorandum, pp 53-56; Mr Tom Sherman AO, recommendations D33, D37 and D39, pp D45-D46 and D49-D50.

55 *Submission 3*, p. 3.

56 *Submission 10*, pp 2-4. See also Mr Roman Quaedvlieg, Acting Deputy Commissioner, *Committee Hansard*, 29 October 2009, p. 3.

57 *Submission 8*, p. 3. See also *Answers to questions on notice*, 9 November 2009, p. 18.

5.32 Liberty Victoria raised several issues about the proposed amendments to the POC Act. For example, Liberty Victoria queried the rationale for extending the power to issue notices to financial institutions, requiring the provision of information or documents, to the Australian Taxation Office (ATO), Customs and ASIC and noted that this represents a significant increase in access to personal information without a warrant.[58]

5.33 Sections 211 and 218 of the POC Act create offences where a person fails to comply with a production order or a notice to produce. Liberty Victoria argued that the Bill should amend these sections to provide a general defence where a person has made all reasonable efforts to comply with the production order or the notice to produce.[59]

5.34 The NSW Attorney-General expressed concern about the potential breadth of the amendment to expand the definition of 'unlawful activity' to include state and territory summary offences. The Attorney-General noted that there are 'a broad range of summary offences, many of which involve a very low degree of criminality.'[60]

5.35 Finally, Professor Broadhurst and Ms Ayling noted that proceeds of crime laws are becoming more complex and suggested that:

> ...there may be the need to provide further specialisation within the judiciary, indeed the task may be best handled by a specialist court.[61]

58 *Submission 11*, p. 2.

59 *Submission 11*, p. 2. Item 127 of Schedule 1 would introduce a more limited defence in relation to the offence under section 211. This defence would apply where a person fails to comply with a production order only because he or she did not produce the documents within the time specified in the order: Explanatory Memorandum, p. 41.

60 *Submission 13*, p. 1. See also Liberty Victoria, *Submission 11*, p. 2.

61 *Submission 6*, p. 2.

CHAPTER 6
WITNESS PROTECTION

Provisions in the Bill

6.1 Schedule 3 of the Bill would amend the *Witness Protection Act 1994* (WP Act). The Explanatory Memorandum notes that:

> The *Witness Protection Act 1994* provides a statutory basis for the NWPP. The NWPP provides protection and assistance to people who are assessed as being in danger because they have given, or have agreed to give, evidence or a statement on behalf of the Crown in criminal or certain other proceedings, or because of their relationship to such persons. For example, if a person gives evidence in a serious or high profile criminal trial, that person's security, and that of their family, may be at risk as a result.[1]

6.2 The Commissioner of the AFP maintains the NWPP and decides whether to include a witness in the NWPP and what assistance is necessary to protect a witness included in the NWPP. This assistance can include providing the witness with a new identity or relocating the witness.[2]

6.3 The key amendments in Schedule 3 of the Bill would:

(a) extend the availability of protection under the NWPP to former participants and related persons; and

(b) extend the scope of non-disclosure offences.[3]

6.4 At present, the WP Act only distinguishes between a person's 'former identity and his or her 'new identity'.[4] Schedule 3 of the Bill would also update the concept of identity under the WP Act to take into account that a participant in the NWPP may be provided with more than one identity in addition to his or her original identity (for example where the person is relocated under a new identity but is recognised and must be provided with a further new identity).[5]

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1 Explanatory Memorandum, p. 93. Unless otherwise specified, references to provisions or proposed provisions in this chapter are references to provisions or proposed provisions of the WP Act.

2 Sections 4, 8 and 13; Explanatory Memorandum, p. 93.

3 Explanatory Memorandum, p. 93.

4 Explanatory Memorandum, p. 94.

5 Explanatory Memorandum, pp 94, 96 and 97. See particularly Items 2, 3 and 7 of Schedule 3 which would insert new definitions of 'current NWPP identity', 'former NWPP identity' and 'original identity' in section 3.

6.5 Finally, Schedule 3 would make various amendments to close potential gaps that exist in the WP Act in relation to protection of state and territory witnesses included in the NWPP, and their obligations under the NWPP.[6]

Availability of protection to former participants and related persons

6.6 The Bill would insert new subsection 13(5) in the WP Act to allow the AFP Commissioner to provide protection and assistance:

- to former participants in the NWPP, where it is necessary and reasonable for their protection, without formally re-including them in the NWPP; and
- to someone whose relationship with a former participant is such that the Commissioner is satisfied that it is appropriate to provide that assistance.[7]

6.7 The Explanatory Memorandum outlines why this amendment is required:

> The operation of the current definitions in the [WP]Act relevant to section 13 precludes assistance from being provided to persons who have left the NWPP.
>
> There can be circumstances, however, where a witness requires further protection or assistance after leaving the NWPP. For example, a former participant may need to be relocated if he or she is recognised by someone who was aware of his or her original identity. Under the current provisions of the [WP] Act, once participants have left the NWPP, they are unable to obtain assistance without undergoing a formal assessment to rejoin the NWPP. This delay could endanger former participants.[8]

6.8 In addition, this amendment would also allow assistance to be provided to relatives, friends or other associates of the former participant including people the former participant has met since leaving the program.[9] The Explanatory Memorandum gives the example that, if a former participant decides to marry, his or her spouse may at some stage require protection and assistance as a result of the relationship with the former participant.[10]

Non-disclosure offences

6.9 Existing subsection 22(1) of the WP Act makes it an offence to disclose:

- information about the identity or location of a person who is or has been a Commonwealth participant in the NWPP; or
- information that compromises the security of such a person.

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6 Explanatory Memorandum, pp 94 and 98-99. See particularly Items 10, 11 and 13 of Schedule 3 which would insert: new definitions of 'State participant' and 'Territory participant' in section 3 of the WP Act; and a new section 3AB to define a 'State offence that has a federal aspect'.

7 Item 22 of Schedule 3; Explanatory Memorandum, pp 95 and 102.

8 Explanatory Memorandum, p. 102.

9 Explanatory Memorandum, p. 95.

10 Explanatory Memorandum, p. 102.

6.10 The Explanatory Memorandum notes that:

> This offence does not distinguish between instances where the person disclosing the information is reckless as to whether there is a risk that the disclosure will compromise the security of an individual and those not involving this aspect of potential harm.[11]

6.11 In addition, subsection 22(2) makes it an offence for a person who is or has been a Commonwealth participant, or a person who has undergone assessment for inclusion in the NWPP as such a participant, to disclose certain information about the NWPP (such as information about how the NWPP operates).

6.12 Both the offences created by section 22 apply only in relation to Commonwealth participants in the NWPP.[12]

6.13 Item 52 of Schedule 3 would repeal the existing offences at section 22 and replace them with three separate sets of offences, which will apply to disclosure of information about:

- Commonwealth or Territory participants, and people undergoing assessment for inclusion in the NWPP as such participants (proposed section 22);
- State participants, and people undergoing assessment for inclusion in the NWPP as such participants (proposed section 22A); and
- the NWPP (proposed section 22B).[13]

6.14 The main changes introduced by these provisions would be:

(a) to provide for a higher maximum penalty for offences where there is a risk that the disclosure will compromise the security of an individual involved in the NWPP;[14]

(b) to extend the offences so that they apply to disclosures relating to, or made by:

(i) State and Territory participants; and

(ii) people undergoing assessment for inclusion in the NWPP.[15]

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11 Explanatory Memorandum, p. 95.

12 Explanatory Memorandum, p. 95.

13 Explanatory Memorandum, pp 95 and 108.

14 The penalty for these offences would be a maximum of 10 years imprisonment: proposed subsections 22(3) and (4) and 22A(3) and (4). Offences not involving this element would have a maximum penalty of two years imprisonment: proposed subsections 22(1) and (2), and 22A(1) and (2).

15 Explanatory Memorandum, pp 95-96, 109 and 117. Proposed subsections 22(2) and (4), and 22A(2) and (4) would create offences relating to disclosures regarding people undergoing assessment for inclusion in the NWPP. Proposed subsection 22B(1) would extend the scope of the existing offence under subsection 22(2) to include disclosures by State and Territory participants and people undergoing assessment for inclusion in the NWPP.

6.15 In addition, the Bill would extend the scope of the existing offence under subsection 22(2) with respect to disclosures of information about how the NWPP operates or officers involved in the NWPP. At present, this offence is limited to people who are or were Commonwealth participants in the NWPP or have undergone assessment for inclusion as a Commonwealth participant.[16] Proposed subsection 22B(2) would make it an offence for a person who does not have a connection to the NWPP to disclose such information where there is a risk that the disclosure will:

- adversely affect the integrity of the NWPP; or
- compromise the security of an officer who is, or has been, involved in the NWPP.

6.16 The Explanatory Memorandum states that:

> This amendment recognises that there could be instances of people not directly involved in the NWPP nevertheless finding out information about the NWPP that, if disclosed, could adversely affect the integrity of the NWPP and endanger participants and others involved in the NWPP through their work.[17]

6.17 Proposed sections 22, 22A and 22B would all provide that a disclosure of information is not an offence if the disclosure has been:

- authorised by the AFP Commissioner;
- made for the purpose of making a complaint or providing information to the Ombudsman;
- made to ACLEI for the purpose of referring to the Integrity Commissioner an allegation or information that raises a corruption issue; or
- made for the purpose of giving information that raises an AFP conduct or practices issue, or investigating or resolving such an issue.[18]

Issues raised in submissions

6.18 The Police Associations supported the proposed amendments to the WP Act and noted that:

> [Australian Federal Police Association] members working within the AFP Witness Protection programme perform an important and dangerous role on behalf of national and international law enforcement agencies. These amendments strengthen protections for those AFP employees and are welcomed by our membership.[19]

6.19 The AFP stated that the proposed amendments would 'increase the efficiency of the NWPP, improve the overall operations of NWPP and ensure the integrity of

16 Explanatory Memorandum, p. 118.

17 Explanatory Memorandum, p. 118.

18 Proposed subsections 22(5), 22A(5) and 22B(3); Explanatory Memorandum, pp 111, 116 and 118-119.

19 *Submission 3*, p. 3.

NWPP.'[20] Mr Quaedvlieg of the AFP told the committee that an internal review of the NWPP revealed that many of the provisions that enabled the AFP to provide protection to witnesses were dated:

> ...for example, ...the construct of what we today call 'identity' is a lot more fluid than what it was when the provisions were originally struck for the protection of witnesses. The amendments look to give us some increased flexibility and contemporaneity around the way witnesses are actually managed, to enable us to safeguard them against threat or risk.[21]

6.20 Similarly, Professor Broadhurst and Ms Ayling submitted that the amendments will enhance the WP Act and, in particular, that the increased penalties for disclosure offences will assist in increasing confidence in the NWPP.[22]

6.21 Liberty Victoria opposed the insertion of proposed section 22C which would provide that that the non-disclosure offences at proposed sections 22, 22A and 22B apply to the disclosure of information to a court, tribunal, a Royal Commission or any other commission of inquiry. Liberty Victoria argued that:

> ...preventing disclosure to superior courts and Royal Commissions runs counter to the principle of the rule of law and more broadly government accountability. Liberty is confident that such forums are capable of keeping such information secret. It is of great concern to Liberty that the executive arm of government would have the final say when it comes to such a serious and important protective regime.[23]

6.22 Liberty Victoria also submitted that, given the possibility for accidental or unknowing disclosure, the disclosure offences under proposed sections 22, 22A and 22B should require knowing or reckless disclosure of information.[24] However, the Explanatory Memorandum states that the offences require that the disclosure be intentional.[25]

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20 *Submission 10*, p. 11. See also Mr Quaedvlieg, AFP, *Committee Hansard*, 29 October 2009, p. 3.

21 *Committee Hansard*, 29 October 2009, p. 4.

22 *Submission 6*, p. 2.

23 *Submission 11*, p. 3.

24 *Submission 11*, p. 3.

25 Explanatory Memorandum, pp 109-118. This is not clear on the face of the provisions but section 5.6 of the Criminal Code applies automatic fault elements to offences that do not specify fault elements. In the case of physical elements that consist of conduct (such as disclosing information), the fault element is intention.

CHAPTER 7

COMMITTEE VIEW

7.1 The committee recognises that this Bill makes a large number of changes which either correct anomalies or drafting errors, or are technical in nature. However, evidence to the committee raised substantive issues about the provisions of the Bill:

- creating organised crime offences;
- expanding search and information gathering powers under the Crimes Act;
- enhancing the powers of the ACC to deal with uncooperative witnesses; and
- amending the POC Act.

Organised crime offences

7.2 The committee supports the intention of the proposed organised crime offences in the Bill to provide a mechanism through which law enforcement agencies can specifically target people who are involved in serious and organised criminal activity. Nevertheless, the committee considers that the association offences and the offence of providing support to a criminal organisation require some changes to ensure they do not operate more broadly than is necessary to achieve this purpose.

Association offences

7.3 The committee has particular reservations about offences which criminalise who a person associates with rather than specific conduct. The committee therefore welcomes the fact that the association offences proposed by the Bill require not only an association but also that the association facilitates criminal conduct or proposed conduct. Despite this, submissions to the inquiry raised legitimate concerns about the breadth of these offences.

7.4 The example of an association offence provided by the Explanatory Memorandum refers to meetings between the accused and a person proposing to illegally import drugs through an airport, for the *purpose* of the accused providing advice on how airport security could be circumvented as part of the operation.[1] In other words, the example is one in which there would almost certainly be an *intention* to facilitate criminal activity. The committee agrees that this is precisely the type of behaviour which ought to be captured by the proposed association offences. However, the association offences as currently drafted require only recklessness not an intention to assist the criminal conduct. By contrast, the offences of associating with a terrorist organisation, under section 102.8 of the Criminal Code, require not only that the association provides support to the organisation but also that the accused intended that the support would assist the organisation to expand or to continue to exist.[2]

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1 Explanatory Memorandum, p. 135.

2 These offences are punishable by imprisonment for three years as are the offences under proposed section 390.3 of the Criminal Code.

7.5 The committee can imagine many individuals who knowingly associate with people engaged in a criminal lifestyle, whose actions may facilitate the commission of offences, even though they have no intent to do so and may indeed hope to dissuade those people from further criminal activity. For example, a legitimate employer may technically fall foul of the association offences by paying wages to a person he or she knows has been involved in criminal activities with a drug trafficking gang, if there is a substantial risk those wages may be used to assist the commission of further offences. It is difficult to see how an individual could ever renounce a criminal lifestyle if the law exposed his or her employers to the risk of criminal prosecution for taking a chance that the person genuinely wished to reform.

7.6 The Acting Deputy Commissioner of the AFP suggested to the committee that, while there may be an infinite number of scenarios which would arguably be captured by the association offences, the aim of the provisions is to target the core of serious organised criminality not the margins.[3] It might also be argued that the DPP will not pursue prosecutions when a person is only tenuously connected to organised crime but good legislation does not rely on the appropriate exercise of discretion by government officials: it is justified in its own terms. In short, the committee considers that the association offences in proposed section 390.3 of the Criminal Code are drafted so broadly that they could capture a range of conduct which ought not to be criminal.

7.7 Moreover, the defences in proposed subsection 390.3(6) of the Criminal Code are drafted too narrowly to remedy this. For example, it is difficult to see why an association which is only for the purpose of providing legal advice in relation to a property conveyance should render a legal practitioner criminally liable if the property acquired facilitates the commission of an offence and the practitioner is reckless about this possibility. People who are involved in organised crime are still entitled to legal advice and representation and the committee cannot accept that practitioners should only be protected in relation to specific types of advice and representation. Even if this is not accepted, the Law Council rightly points out that a legal practitioner will not be able to make out the defences 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.

7.8 A further example is that the defence for associations that take place in the course of practising a religion applies only if the association occurs in a place used for public religious worship. Yet there are likely to be many circumstances in which religious practitioners associate with people involved in organised criminal activity, in private settings, in the course of practising their religion.

7.9 It seems that assistance provided by counsellors and medical practitioners would be protected by the defence for associations that are for the purpose of providing humanitarian aid. However, this defence does not appear to be broad enough to protect a person who provides accommodation, employment or education,

3 *Committee Hansard*, 29 October 2009, p. 15.

to someone involved in organised criminal activity, in circumstances that do not warrant criminal sanction.

7.10 Rather than seeking to identify every potential association which ought to be excluded from these offences, the committee agrees with the submission of Professor Broadhurst and Ms Ayling that there should be a general defence of reasonableness which confers a discretion on the court to consider whether an association that facilitated criminal conduct or proposed conduct was justified in the circumstances.

Recommendation 1

7.11 The committee recommends that proposed section 390.3 of the Criminal Code be amended by limiting its application to circumstances where the accused intended that the association would facilitate the criminal conduct or proposed criminal conduct.

Recommendation 2

7.12 The committee recommends that the defences in proposed subsection 390.3(6) of the Criminal Code be amended by:

- **replacing the existing defences for legal practitioners with a more general defence that the association was only for the purpose of providing legal advice or representation; and**
- **adding a general defence where the association was reasonable in the circumstances.**

Criminal organisation offences

7.13 The committee is also concerned about the breadth of the proposed offence of supporting a criminal organisation. The committee notes the requirement that the support be 'material'. This will ensure that trivial resources or support are not captured by proposed section 390.4 of the Criminal Code but it does not address other issues raised in evidence before the committee. Once again this offence does not require that the accused knew or intended that the provision of support would aid the criminal organisation to commit an offence: it requires only recklessness in relation to this element. In addition, there need only be a *risk* that that the support would aid the criminal activity. The combination of these factors means the offence would capture people in circumstances where the person is aware of a substantial risk that there is a risk that the provision of support will aid criminal activity. This layering of risk upon risk makes the offence too broad. The committee recommends the offence should instead apply in circumstances where the accused intends that the provision of the resources or support will aid the organisation to engage in criminal activity.

7.14 Furthermore, it seems incongruous that a person guilty of the offence of supporting a criminal organisation 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. The committee considers that the offence should be punishable by a term of imprisonment equivalent to the penalty for the offence the support could have aided.

Recommendation 3

7.15 The committee recommends that proposed paragraph 390.4(1)(b) of the Criminal Code be amended to provide that 'the person intended the provision of the support or resources would aid the organisation to engage in conduct constituting an offence against any law.'

Recommendation 4

7.16 The committee recommends that the maximum penalty for an offence under proposed section 390.4 of the Criminal Code should be the maximum penalty for the offence the accused intended to support.

Search and information gathering powers

7.17 While the committee is generally supportive of the proposed amendments to the Crimes Act, it considers that some minor changes should be made to these provisions. Firstly, the committee is concerned about the impact the proposed changes to subsections 3K(3A) and 3K(3B) of the Crimes Act would have where equipment used by a business is moved for examination. The Bill would increase the initial time period that equipment may be moved to another place for examination from 72 hours to 14 days. While it is clear that the current time limit of 72 hours creates significant operational difficulties for the AFP, this must be balanced against the consequences for the owner of removing equipment for an extended period of time. The committee considers that increasing the initial period to seven days, with provision for an issuing officer to approve extensions of up to seven days, would strike an appropriate balance between these competing concerns.

7.18 Secondly, the committee acknowledges the issues raised by the Law Council in relation to the proposed amendments to section 3L of the Crimes Act which would make it easier for officers executing a warrant to operate electronic equipment at the warrant premises and to copy data accessible from the equipment. The Bill proposes to remove the additional test for searches of electronic equipment at warrant premises on the basis that, just as a warrant authorises searches of filing cabinets on the warrant premises, it should be sufficient to authorise searches of electronic equipment.[4] However, to compare searching a filing cabinet with searching a computer is fallacious because subsection 3L(1) permits not only a search of the computer itself but of data accessible from it. This could include data stored on servers at multiple locations. As such, these searches are potentially much more intrusive and wide ranging than a physical search of the warrant premises. The committee considers that an additional threshold test should have to be satisfied before such searches are permitted. That test should clearly be less onerous than the test for seizing material which is reasonable grounds to believe a thing constitutes evidential material.[5] As a result, the committee believes that the appropriate test is that there are reasonable grounds to suspect that data accessible from the equipment constitutes evidential material.

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4 Explanatory Memorandum, p. 84.

5 Paragraph 3F(1)(d) of the Crimes Act; Explanatory Memorandum, p. 84.

7.19 The committee is not persuaded that the proposed test under subsection 3L(1A) for copying data of, reasonable grounds to suspect that the data constitutes evidential material, is significantly broader than the existing test of, reasonable grounds to believe that the data *might* constitute evidential material. Furthermore, it will often be preferable from an occupier's perspective for data to be copied and searched off site rather than a search having to be carried out on the warrant premises. As a result, the committee does not oppose this change.

Recommendation 5

7.20 The committee recommends that subsections 3K(3A) and 3K(3B) of the Crimes Act should provide for equipment to be moved for examination for an initial period of no longer than seven days.

Recommendation 6

7.21 The committee recommends that subsection 3L(1) of the Crimes Act should require that, before operating electronic equipment at warrant premises to access data, an officer executing the warrant must have reasonable grounds to suspect that the data constitutes evidential material.

Australian Crime Commission Act 2002 amendments

7.22 The committee welcomes the proposed amendments related to the procedures ACC examiners must follow when issuing a summons or notice to produce and providing for five yearly reviews of the ACC.

7.23 The committee acknowledges the concerns raised by submitters in relation to the proposed amendments which would strengthen the powers of the ACC to deal with uncooperative witnesses. However the committee received compelling evidence from the ACC about the difficulties the ACC confronts when dealing with uncooperative witnesses and the potential for this behaviour to frustrate ACC investigations and operations. The committee accepts that the ACC is facing a concerted campaign of non-cooperation by some organised crime groups. The committee is also mindful that the power to summon witnesses for examination is limited to special investigations and operations which are subject to specific approval by the ACC Board and that these amendments are consistent with recommendations of both the Trowell report and the PJC. The committee considers that the changes proposed by the Bill are necessary to ensure that the ACC is able to effectively exercise the powers Parliament has invested it with in order to tackle serious organised crime.

Proceeds of Crimes Act 2002 amendments

7.24 The committee notes the concerns raised by the NSW Attorney-General and Liberty Victoria regarding the broadening of the definition of 'unlawful activity' under the POC Act. One effect of this amendment would be to narrow the tests for exclusion of property from restraint or forfeiture so that property which is the proceeds of state or territory summary offences would not be excluded. The committee considers that the amendment is justified given that it returns to the position under the *Proceeds of Crime Act 1987* and would treat the proceeds of state

and territory summary offences in the same way as the proceeds of Commonwealth summary offences.

Conclusion

7.25 The committee wishes to specifically acknowledge that the work of law enforcement officers and prosecutors in tackling serious and organised crime is difficult and dangerous. While the committee is entirely supportive of efforts to strengthen the legislative regime targeting those who direct and profit from organised crime, the provisions in the Bill should not go further than is required to achieve this end nor should they unnecessarily intrude on the rights of individuals. The committee has sought through its recommendations to limit the scope of some provisions in the Bill which are unnecessarily broad without compromising the fundamental purpose of those provisions.

7.26 Overall the committee considers that the Bill in combination with the amendments proposed by the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 represents a significant enhancement of the Commonwealth's ability to target organised criminal activity. In addition, both bills will rationalise and improve many aspects of Commonwealth legislation governing investigative powers and the confiscation of proceeds of crime.

Recommendation 7

7.27 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Patricia Crossin

Chair

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal Senators support the aim of the Bill to enhance the capacity of the Commonwealth to prevent, investigate and prosecute organised criminal activity. We also endorse the view of the committee that some provisions in the Bill go further than necessary to achieve this purpose and, in doing so, unnecessarily intrude on the rights of individuals. Liberal Senators support the recommendations in the committee's report which seek to remedy this but query whether those recommendations go far enough. We consider that some additional changes to the Bill proposed by the Law Council are worthy of consideration. In particular, the Law Council proposed:

(a) defining the term 'facilitate', which is used in the proposed association offences, to ensure it does not capture activities that are only of peripheral relevance to the commission of an offence;[1]

(b) making the test under subsection 3L(1A) of the Crimes Act, for when data accessible from electronic equipment located at search premises may be copied, 'reasonable grounds to *believe* that the data constitutes evidential material';[2]

(c) limiting the power of an ACC examiner to detain an uncooperative witness to circumstances where the examiner believes, on reasonable grounds, that it is necessary to detain the person in order to secure that person's attendance before the court;[3] and

(d) deleting proposed subsection 34C(3) of the ACC Act which would provide that a certificate issued by an ACC examiner in relation to an alleged contempt is prima facie evidence of the matters it sets out.[4]

1.2 In relation to the organised crime offences proposed by the Bill, the Law Council pointed out that:

> In recent years, in the name of tackling serious and organised crime, law enforcement agencies have been provided with significantly enhanced investigative powers and new offences and civil proceedings have been created to allow law enforcement agencies to target the money trail.
>
> It is of concern that despite the reported success of these measures, there is a suggestion that there is still a need for further fundamental law reform, to alter the very principles of criminal responsibility.

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1 *Submission 12*, p. 9. Under proposed subparagraphs 390.3(1)(c) and 390.3(2)(d) of the Criminal Code, to constitute an offence, the associations must 'facilitate' the other person engaging in crime.

2 *Submission 12*, p. 22-23.

3 *Submission 12*, p. 21.

4 *Submission 12*, pp 18-19.

> If every time law enforcement agencies feel impotent in the face of a particular type of offending, we amend not just the content of our laws but the manner in which we apportion criminal responsibility and adjudicate guilt, then the integrity of our criminal justice system will quickly be compromised.[5]

1.3 This caution applies equally to the provisions of the Bill proposing expanded search and information gathering powers and new powers for the ACC to deal with uncooperative witnesses. It is not sufficient justification for a continual expansion in the powers available to law enforcement agencies and the reach of criminal offences to point simply to the difficulties allegedly faced in pursuing particular groups of offenders. The task of law enforcement officers and prosecutors may well be challenging, but to address this by diluting basic criminal justice principles, and over-simplifying the arrest, prosecution and imprisonment of people[6] would jeopardise the most fundamental individual rights.

1.4 Liberal Senators consider that changes proposed by the Bill and the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 ought to be viewed as being at the outer limit of the powers the Parliament will countenance for law enforcement agencies. Furthermore, we intend to monitor closely through the Estimates process whether these powers are being exercised appropriately and whether practice bears out arguments that they are necessary to tackle organised crime.

1.5 Finally, this Bill was referred to the committee for inquiry in mid-September during a period in which the committee has been conducting several other legislation inquiries. The capacity of the committee to properly scrutinise legislation is hampered by the imposition of short deadlines when multiple inquiries are referred. As Professor Roderic Broadhurst and Ms Julie Ayling noted in their submission, the imposition of short timeframes for inquiries also impedes individuals and organisations providing the committee with their views on the proposed legislation.[7] There is only one schedule in the Bill which contains urgent amendments. It is unclear to Liberal Senators why these amendments could not have been dealt with separately to enable more thorough consideration of a Bill which introduces major new offences and powers.

Senator Guy Barnett **Senator Mary Jo Fisher**

Deputy Chair

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5 *Submission 12*, p. 7.

6 *Submission 12*, p. 21.

7 *Submission 6*, p. 7.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Andreas Schloenhardt
2	Make Poverty History and Micah Challenge
3	Australian Federal Police Association
4	Attorney-General; Minister for Corrective Services (WA)
5	Sydney Centre for International Law, Faculty of Law, University of Sydney
6	Professor Roderic Broadhurst and Ms Julie Ayling
7	Australian Crime Commission
8	Commonwealth Director of Public Prosecutions
9	Dwyer Lawyers
10	Australian Federal Police
11	Liberty Victoria
12	Law Council of Australia
13	NSW Attorney-General
14	NSW Government Department of Premier and Cabinet

ADDITIONAL INFORMATION RECEIVED

1	Answers to Questions on Notice - Provided by the Attorney-General's Department on Tuesday 10 November 2009
2	Correspondence regarding Answers to Questions on Notice, provided by the Australian Crime Commission Monday 16 November 2009
3	Correction to Answer to Question on Notice, provided by the Australian Crime Commission Monday 16 November 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Thursday, 29 October 2009

BAILEY, Ms Jane, Executive Director, People and Business Services
Australian Crime Commission

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch
Attorney-General's Department

KILEY, Mr Andrew, Acting Senior Legal Officer, Criminal Law and Law Enforcement Branch
Attorney-General's Department

LAWLER, Mr John, Chief Executive Officer
Australian Crime Commission

OUTRAM, Mr Michael, Executive Director
Australian Crime Commission

QUAEDVLIEG, Mr Roman, Acting Deputy Commissioner, Operations
Australian Federal Police

SWINBOURNE, Ms Emma, Acting Senior Legal Officer, Criminal Law and Law Enforcement Branch
Attorney-General's Department

WHOWELL, Mr Peter, Manager, Policy and Planning
Australian Federal Police