



Australian
Human Rights
Commission

Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth)

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

5 June 2015

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth) (Bill) introduced by the Australian Government.

2 Summary

2. The Commission welcomes the opportunity to make a submission about this Bill.
3. The Bill engages principles that are fundamental to our criminal law system: the privilege against self-incrimination and the right to a fair trial.
4. A key aspect of the Bill involves granting power to the Australian Crime Commission (ACC) and the Integrity Commissioner to conduct compulsory examinations of people who have been charged with a criminal offence and to ask them questions that relate to the subject matter of the charge. In these examinations, a person may not refuse to answer a question on the ground that the answer may tend to incriminate them.
5. The Government submits that it is necessary for the ACC to conduct post-charge examinations because:¹
 - a. examining a person before they are charged 'may alert the person to law enforcement interest and allow them to dispose of incriminating material' and to notify associates;
 - b. waiting until all charges against a person have been resolved before examining him or her may mean that the value of information about current criminal activities, operations and practices of others may be lost.
6. The Government accepts that these powers cannot be exercised for the purpose of bolstering a prosecution case against the person being examined. Rather, it says that such action is necessary in order to understand, disrupt and prevent serious and organised crime by others.²
7. It is a policy question for the Parliament to determine as to whether these reasons are sufficient to justify the extraordinary step of authorising secret and compulsory examinations of accused persons about the subject matter of their pending charge. There may also be questions about whether such a step is constitutional. The Commission does not make submissions about either of these matters.
8. The Commission submits that if such a step is taken, then it is necessary to provide stronger safeguards than those that currently appear in the Bill to ensure that material provided by a person being examined, and other material derived from this material, is not provided, directly or indirectly, to those responsible for prosecuting the case against the person.

9. Use of this material would then be limited to assisting investigations against third parties.
10. As the High Court has recently unanimously confirmed, it is a departure in a fundamental respect from the essential aspects of a criminal trial for the prosecution to be armed with evidence from an accused person obtained under compulsion concerning the subject matter of the charges.
11. The Commission also makes submissions about the circumstances in which those conducting examinations should be required to make directions that examination material not be published.
12. Given the limited time in which to make submissions, the Commission has limited its submissions to what it considers to be the most important aspects of the Bill.
13. Further, for simplicity, the Commission limits its comments in this submission to the amendments proposed to the *Australian Crime Commission Act 2002* (Cth) (ACC Act). The comments apply equally to the equivalent amendments proposed to the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act). Again, for simplicity, the submission also focusses on the investigation and prosecution of criminal offences, but the comments apply equally to the investigation and prosecution of confiscation matters under relevant proceeds of crime legislation.

3 Recommendations

14. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

The Commission recommends that the Bill be amended (in particular proposed s 25C of the ACC Act) to remove the ability of a person to provide post-charge examination material, directly or indirectly, to a prosecutor of the examinee.

Recommendation 2

The Commission recommends that the Bill be amended (in particular proposed s 25D of the ACC Act) to remove the ability of a person to provide derivative material obtained from post-charge examination material, directly or indirectly, to a prosecutor of the examinee.

Recommendation 3

The Commission recommends that the Bill be amended (in particular proposed s 25H of the ACC Act) to remove the ability of a person to provide post-confiscation application examination material or derivative material obtained from post-confiscation application examination material, directly or indirectly, to a proceeds of crime authority.

Recommendation 4

The Commission recommends that proposed section 25A(9A) of the ACC Act be amended to read:

An examiner must give a direction under subsection (9) about examination material if the failure to do so might:

- (a) prejudice a person's safety; or
- (b) prejudice the fair trial of an examinee who has been, or may be, charged with an offence.

Recommendation 5

The Commission recommends that equivalent amendments be made to the Bill in respect of the LEIC Act.

4 General principles

4.1 Privilege against self-incrimination

15. The privilege against self-incrimination has a long history in the common law. As the Australian Law Reform Commission (ALRC) has noted in its current review of encroachments by Commonwealth laws on traditional rights and freedoms, the privilege can be traced back to the 12th and 13th centuries.³
16. The ALRC refers to comments by William Blackstone in his *Commentaries on the Laws of England* (1765-1769) that a defendant's 'fault was not to be wrung out of himself, but rather to be discovered by other means and other men'.⁴
17. In its current form in Australia, the right to claim the privilege against self-incrimination in criminal law and against self-exposure to penalties in civil and administrative law is a 'basic and substantive common law right'⁵ and entitles a natural person (but not a corporation)⁶ to refuse to answer any question or produce any document if it would tend to incriminate them.⁷
18. The privilege is also reflected in human rights treaties signed by Australia. Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR)⁸ provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ...

 - (g) Not to be compelled to testify against himself or to confess guilt.
19. A number of rationales for the privilege against self-incrimination have been put forward.
20. A key rationale is that the privilege reduces the potential for abuses of power, particularly between an individual accused and the state. There are a range of investigatory situations in which there is 'a risk of considerable physical and

psychological pressure being applied to suspects to co-operate by making incriminating statements or handing over evidence such as documents'.⁹ As was noted by McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd*, the privilege:

probably arose as a response to what was perceived as an abuse or potential abuse of power by the Crown in the examination of suspects or witnesses. Once the Crown is able to compel the answering of a question, it is a short step to accepting that the Crown is entitled to use such means as are necessary to get the answer. Those means need not necessarily involve physical coercion. Confessions can be obtained by inhumane means without the necessity to resort to the rack or other forms of physical torture. By insisting that a person could not be compelled to incriminate him or herself, the common law thus sought to ensure that the Crown would not use its power to oppress an accused person or witness and compel that person to provide evidence against him or herself.¹⁰

21. A related rationale is that if a confession is not voluntary it may be unreliable and should not form the basis of a conviction.¹¹

22. More broadly, the privilege can be seen as being derived from the nature of the accusatorial system of criminal justice. In particular, this system is based on the principles that an accused person is presumed innocent until proven guilty, and that the onus is on the prosecution to prove guilt beyond a reasonable doubt. As was said by Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd*:

The privilege against self-incrimination confers an immunity which is deeply embedded in the law. In the end, it is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself.¹²

23. Typically, where the privilege against self-incrimination is abrogated, the legislation limits the use that can be made of evidence that is obtained through compulsion. As the High Court said in *X7 v Australian Crime Commission*:¹³

In balancing public interest considerations and the interests of the individual, legislation abrogating the privilege will often contain, as in the case of the [*Australian Crime Commission Act 2002 (Cth)*], "compensatory protection to the witness", by providing that, subject to limited exceptions, compelled answers shall not be admissible in civil or criminal proceedings.

24. The *Guide to Framing Commonwealth Offences* published by the Attorney-General's Department provides that:

If the privilege against self-incrimination is to be overridden, it is usual to include a 'use' immunity or a 'use and derivative use' immunity provision, which provides some degree of protection for the rights of individuals.¹⁴

25. The Guide describes each of these immunities in the following way:

- 'use' immunity – self-incriminatory information or documents provided by a person cannot be used in subsequent proceedings against that person, but can be used to investigate unlawful conduct by that person and by third parties, and

- ‘derivative use’ immunity – self-incriminatory information or documents provided by a person cannot be used to investigate unlawful conduct by that person but can be used to investigate third parties.¹⁵

4.2 Equality of arms

26. More generally, article 14 of the ICCPR provides a right for those charged with criminal offences to a fair and public hearing by a competent, independent and impartial tribunal established by law.
27. One, if not the most,¹⁶ important aspect of a fair trial is the principle of ‘equality of arms’ between the prosecutor and defendant.¹⁷ This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.¹⁸
28. As noted in the Explanatory Memorandum, where an examination hearing under the ACC Act occurs after the examinee has been charged with an offence, answers that he or she gives about the subject matter of the offence may affect his or her fair trial and the equality of arms principle. This is particularly the case if the examination material were to be provided to the prosecutors of the examinee.¹⁹
29. In addition to infringing the privilege against self-incrimination, a compulsory examination may limit a defendant’s choices in how to defend the charges at trial.²⁰

4.3 Abrogating fundamental common law rights

30. Like other fundamental common law rights, the common law privilege against self-incrimination can be abrogated by statute. To be effective, the statute must abrogate the principle by clear words or necessary implication. This is referred to as the ‘principle of legality’. That is, the courts will presume that Parliament does not intend to interfere with fundamental rights unless it expresses itself with ‘irresistible clearness’.²¹
31. Here, the Government is clear that it intends to interfere with the privilege against self-incrimination. The Explanatory Memorandum begins by expressly providing that the proposed amendments are based on the principle of legality.²²
32. There are two questions that this Committee should consider when a Bill proposes to depart from fundamental common law principles.
33. The first question is whether the departure is permitted by the Constitution. One aspect of this issue was raised in the leading judgment in *X7 v Australian Crime Commission* in the following way:

Can the legislature provide for the secret and compulsory examination of an accused person about the subject matter of the pending charge? That question would call for consideration not only of Ch III of the Constitution, but also, and more particularly, of s 80 of the Constitution and what is meant by

‘trial on indictment’ and the requirement that trial on indictment of any offence against any law of the Commonwealth shall be ‘by jury’.²³

(emphasis in original)

34. The Commission does not seek to make any submissions about whether or not the proposed amendments are constitutionally valid. Clearly the drafter has recognised the risk that some provisions may be found to be invalid, which is why so many of the proposed sections have ‘severability clauses’. See, for example, proposed sections 24A(3), 25A(6), 25B(4), 25C(3), 25D(2), 25E(5), 25F(5), 25H(5) and 28(9) of the ACC Act. These severability clauses suggest that the key risks to invalidity are provisions which authorise:
- a. the post-charge compulsory examination of a person about the subject matter of that charge;
 - b. the post-charge use or disclosure of material obtained as a result of a compulsory examination; and
 - c. in particular, the disclosure of post-charge material to prosecutors (and proceeds of crime authorities).
35. The second question for the Committee to consider is whether the degree of infringement of fundamental common law principles is necessary to achieve the stated aim of the legislation and is a reasonable and proportionate response to that aim. The Commission submits that aspects of the amendments proposed in this Bill go beyond what is necessary to achieve the stated purpose.

5 Functions of the Australian Crime Commission

5.1 Power to conduct examinations

36. The ACC has the functions, among others, of undertaking intelligence operations and investigating matters relating to federally relevant criminal activity.²⁴
37. The Board of the ACC²⁵ may determine that an intelligence operation is a ‘special operation’. Before doing so, it must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers under the ACC Act have been effective.²⁶
38. The Board of the ACC may also determine that an investigation into federally relevant criminal activity is a ‘special investigation’. Before doing so, it must consider whether ordinary police methods of investigation into the matters are likely to be effective.²⁷
39. The ACC may conduct examinations for the purposes of a special operation or a special investigation.²⁸ An examiner may summon a person to appear and give evidence at an examination.²⁹ A person who is served with a summons must attend the examination, and may not refuse or fail to answer a question

asked by the examiner or refuse or fail to produce a document required by the summons.³⁰

40. However, if the person, before answering the question or producing the document, claims that the answer or document might tend to incriminate them, then the answer or document is not admissible in evidence against the person in criminal proceedings or proceedings for the imposition of a penalty (other than confiscation proceedings under the *Proceeds of Crime Act*, or proceedings about giving false evidence).³¹
41. An examiner may make a non-publication direction in relation to evidence given at an examination. The examiner must make a non-publication direction if the failure to do so 'might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence'.³²
42. Subject to any non-publication order made by an examiner, where the ACC obtains admissible evidence of a criminal offence in the course of an operation or investigation, it must give this evidence to:
 - a. the Attorney-General of the Commonwealth or a relevant State;
 - b. the relevant police force; or
 - c. the person or authority responsible for prosecuting the offence.³³

5.2 Limits on the power to conduct examinations

43. The Government says that the powers of the ACC to conduct examinations have been affected by three decisions of the High Court of Australia and one decision of the Supreme Court of New South Wales. The Bill seeks, in part, to overcome limitations in the ACC Act (and equivalent legislation) identified by the courts in these cases.
 - (a) *X7*
44. In *X7 v Australian Crime Commission*,³⁴ a majority of the High Court held that the ACC Act did not permit the compulsory examination of a person after they had been charged with an offence about the subject matter of the offence.
45. As a matter of practice, since *X7* the ACC has decided to cease examining persons who have been charged with an offence where there is a possibility that any questioning could touch upon matters related to the charges.³⁵
 - (b) *Seller*
46. In *R v Seller and McCarthy*,³⁶ the respondents were examined by the ACC prior to being charged with offences related to misleading the Commissioner of Taxation. The ACC later disseminated transcripts of those examinations to prosecuting authorities. The Supreme Court of New South Wales found that the dissemination was in breach of non-publication direction under s 25A(9) of

the ACC Act, or was done in circumstances where a non-publication direction should have been made.

47. A key witness for the prosecution, Mr Quincy Tang, was present at the compulsory examinations. His role was to provide financial analysis for the ACC in its investigation. Mr Tang had access to the transcripts of the examinations and to documents produced during the examinations. The trial judge found that knowledge of this material 'contributed in a significant although indirect way to his evidence, and the conclusions which he expresses'.³⁷
 48. On appeal, the Court held that the requirement to make non-publication directions under s 25A(9) extended to the disclosure of both direct and indirect incriminating material to prosecuting authorities. That is, a direction under s 25A(9) will be required to be made in relation to derivative use of examination material where the failure to do so might prejudice the fair trial of a person who has been, or may be, charged with an offence.
- (c) *Lee No. 1*
49. In *Lee v NSW Crime Commission*,³⁸ a majority of the High Court considered the scope of s 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW) which permitted the compulsory examination before the Supreme Court of New South Wales of a person concerning the person's affairs, including the nature and location of any property in which the person has an interest.
 50. The Court held that the section permitted the examination of a person after they had been charged with an offence about the subject matter of the offence. In doing so, the Court distinguished X7.
- (d) *Lee No. 2*
51. In *Lee v The Queen*,³⁹ the appellants had been examined by the New South Wales Crime Commission using compulsory powers substantially the same as those of the ACC. At the time of the examinations, one of the appellants had already been charged with a firearms offence and a charge relating to drug offences was imminent. Both appellants were charged with further offences after their examinations.
 52. The New South Wales Crime Commission was required to make a direction prohibiting the publication of evidence given before it if that publication may prejudice the fair trial of a person charged with an offence. In breach of this requirement, the transcripts of both appellants' examinations were made available to the DPP before their trial. The request for the transcripts was made by a DPP solicitor to the police officer who had laid the charges and who had been seconded to the Commission. In particular, the DPP solicitor sought any information about the defences that the appellants may raise to the charges.
 53. The High Court unanimously held that the disclosure of material to the DPP 'was for a patently improper purpose, namely the ascertainment of the

appellant's defences'.⁴⁰ The effect of this conduct was to affect the criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused.⁴¹ As a result, it amounted to a miscarriage of justice.

5.3 Balance between investigation function and the rights of accused persons

54. The Government's Statement of Compatibility with Human Rights reveals what appear to be the two competing principles that are at stake.
55. From the perspective of the ACC, it wants to be able to:
- a. examine people even after they have been charged with an offence;
 - b. ask them questions about any matter relevant to an ACC operation or investigation, even if this also relates to the offence that the person has been charged with; and
 - c. provide the information obtained to authorities charged with investigating serious criminal conduct.
56. From the perspective of potential witnesses, they will have an interest in:
- a. answers and documents that they are required to give to an examiner which may incriminate them or which may disclose defences that they may rely on at trial not being provided, directly or indirectly, to the authority responsible for prosecuting them; and
 - b. answers and documents that they are required to give to an examiner which may incriminate them not being used in evidence against them in a criminal trial.
57. The Government notes that the ACC will conduct examinations not only to investigate a particular individuals, but also in order to understand, disrupt and prevent serious and organised crime.⁴² Special powers are given to the ACC to use in situations where normal policing powers have been ineffective. Allowing the ACC to continue to examine a person even after they have been charged with an offence may assist the ACC to protect the community from serious and organised crime.
58. In *X7*, French CJ and Crennan J (in the minority) described the way in which the ACC Act sought to balance these competing principles:

The ACC Act reflects a legislative judgment that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented the continuing investigation of the group's activities by way of examination of that member by the ACC.

To summarise, the public interest in the continuing investigation of serious and organised crime is elevated over the private interest in claiming the privilege against self-incrimination. However, whilst a person examined under the ACC Act is compelled to give an answer, or produce a document or thing,

which might otherwise be withheld because of the privilege against self-incrimination, the interest in that person being tried openly and fairly is protected both by the prohibition on direct use of answers given, or documents or things produced, and by the provisions safeguarding the fair trial of that person.⁴³

59. The amendments proposed in the Bill do not currently provide an appropriate balance between these competing principles. However, the Commission considers that a better balance is achievable. In particular, it may be possible to allow for a broadening of the investigatory powers of the ACC to examine those charged with offences, in order to obtain evidence to be used in investigating the conduct of third parties, while providing better protection against self-incrimination for the person who is the subject of the examination.
60. If the ACC is to be given the power to conduct post-charge examinations, including about the subject matter of the charge, then there need to be greater protections to ensure that this material is not made available to the authority responsible for prosecuting the person.

6 Significance of charging a person with an offence

61. The point at which a person is charged with a criminal offence marks a significant change in the criminal process from the investigation of a criminal offence to its prosecution. The laying of a charge marks the first step in engaging the exclusively judicial task of adjudicating and punishing criminal guilt.⁴⁴
62. The conduct of an inquiry, particularly a compulsory examination, in parallel to a person's criminal prosecution would ordinarily constitute a contempt of court because the inquiry presents a real risk to the administration of justice.⁴⁵
63. For example, in *Hammond v Commonwealth*, the High Court restrained a Royal Commissioner from compelling an accused person to answer questions which would tend to incriminate him in relation to an alleged conspiracy. Chief Justice Gibbs (with whom Mason and Murphy JJ agreed) said:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with.⁴⁶

64. His Honour went on to say that questioning the plaintiff in such circumstances 'would, generally speaking, amount to a contempt of court'.

7 Post-charge examinations

65. Any proposal to allow post-charge examinations to be conducted should be scrutinised very carefully. As the majority of the High Court held in X7:

Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the

process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.

Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case.⁴⁷

(emphasis in original)

66. The majority said that a procedure which permits post-charge examinations about the subject matter of a pending charge ‘fundamentally alters the process of criminal justice’.⁴⁸
67. It appears that part of the reason why a person could be prejudiced, even if the answers could not be used at the trial, is that the accused’s lawyer would not be able to test the prosecution’s case in a manner that is inconsistent with the accused person’s instructions.⁴⁹ This may be affected by what an accused person is required to say in an examination.
68. The result is that the accused person could no longer decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution’s case as revealed by the prosecution brief and the evidence led at trial.⁵⁰

8 Provision of material to prosecutors

8.1 Key principles

69. If post-charge examinations are to be permitted, despite the concerns raised by a majority of the High Court in X7, then it is essential that material arising from such an examination is not provided, directly or indirectly, to the person responsible for prosecuting the person being examined.

70. Last year in *Lee No. 2*, a unanimous High Court said:

Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in X7. ...

The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof. ...

It is a breach of the principle of the common law and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges.⁵¹

71. As described earlier, that case concerned a failure to comply with non-publication directions that were (and should have been) made under s 13(9) of the *New South Wales Crime Commission Act 1985* (NSW).

72. The key error to occur in *Lee No. 2* was described by the High Court in this way:

The purpose of s 13(9) of the NSWCC Act was to protect the fair trial of a person who might be charged with offences. ... The protective purpose of s 13(9) would usually require that the Commission quarantine evidence given by a person to be charged from persons involved in the prosecution of those charges. It would require the Commission to make a direction having that effect and to maintain the prohibition in the face of requests for access to the evidence. That purpose was not met in the present case, with the consequence that the appellants' trial differed in a fundamental respect from that which our system of criminal justice seeks to provide.⁵²

73. The High Court emphasised that a fair trial of the accused also required that there be no indirect publication of material to the prosecution, for example, by provision of material to investigators without a direction being made prohibiting them from providing the material to the prosecution.⁵³

8.2 Post-charge examination material

74. Proposed amendments to s 24A of the ACC Act would allow for post-charge examinations. Proposed new s 25A(6A) of the ACC Act would allow for examinations to deal with the subject matter of any charge, or imminent charge, against the witness. Subject to any question about constitutional validity, these amendments would overcome the High Court's decision in *X7*.

75. Proposed new s 25C of the ACC Act would allow a person or body lawfully to disclose examination material (including post-charge examination material) to prosecutors of the examinee. This raises the issues considered in *Lee No. 2*.

76. The additional safeguard proposed in the Bill is that in some circumstances disclosure would require a court order. In relation to a post-charge disclosure of either pre-charge examination material or post-charge examination material, it would be necessary for an application to be made to a court under new s 25E(1) of the ACC Act.

77. The Commission considers that the Bill is overly permissive in providing mechanisms for the disclosure of post-charge examination material to prosecutors. Particularly in the light of the High Court's decision in *Lee No. 2*, it is not clear when such disclosure could ever be appropriate.

78. The Explanatory Memorandum suggests that it may be appropriate for prosecutors to be provided with post-charge examination material 'where the examination material is exculpatory or where the examinee wishes the prosecutor to take matters in the examination into account in making a decision about whether to prosecute'. These suggestions are unconvincing for at least two reasons.

79. First, if an accused so wished, they would be able to separately provide exculpatory material that they had provided to an examiner directly to either investigators or the prosecutor. No additional legislative mechanism is necessary to achieve this.
80. Secondly, as the High Court demonstrated in *Lee No. 2*, there may be prejudice to the accused in providing the prosecutor with material which on its face appears to be exculpatory. In that case, one of the appellants produced certain documents under compulsion to the NSW Crime Commission at an examination. The Court said:

On their face, the documents might have provided an innocent explanation as to the sources of the monies which the prosecution sought to link to the drugs. The documents were used by the Commission to take statements from persons who were signatories to them as to their authenticity. The documents were then attached to the statements and made available to the police.⁵⁴

81. In that case, the court did not ultimately make findings about whether this involved a miscarriage of justice because it was sufficient to focus on the publication of the transcripts of evidence before the Commission to the prosecution. However, the example shows that provision to the prosecution of post-charge 'exculpatory' evidence obtained under compulsion has the potential to prejudice the trial of an accused both by disclosing defences that may be raised and by allowing the prosecution to direct further investigations to be conducted in advance of the trial to modify the prosecution case in light of those anticipated defences.

Recommendation 1

82. The Commission recommends that the Bill be amended (in particular proposed s 25C of the ACC Act) to remove the ability of a person to provide post-charge examination material, directly or indirectly, to a prosecutor of the examinee.

8.3 Post-charge derivative material

83. Proposed new s 25D of the ACC Act would allow a person or body to lawfully disclose derivative material (including derivative material obtained from post-charge examination material) to prosecutors of the examinee.
84. In *Seller*, the Supreme Court of New South Wales held that not all derivative use of examination material will prejudice the fair trial of a person being examined. Chief Justice Bathurst said:

Thus, answers which would tend to indicate the availability of admissible evidence could properly be used for this purpose. For example, in cases such as the present this may include the location of bank accounts. Further, it does not seem to me that the use by the prosecution of documents produced during the course of an examination which supported the Crown case, usually would compromise a fair trial. However, the question of whether derivative use of such material could have that effect will always depend on the material in question and the circumstances of its use. ...

The position is different in my opinion if the provision of the material in question discloses defences or explanations of transactions by the accused which he or she may raise at trial, and possibly evidence or information which would tend to show that documents or transactions apparently regular on their face in fact tend to support the proposed charges.⁵⁵

85. Importantly, the court in *Seller* was considering a case involving pre-charge examinations. The court recognised that there could be a risk to a fair trial in derivative use of pre-charge examination material as well as post-charge examination material.⁵⁶
86. In each case, whether or not a fair trial is prejudiced will depend on ‘the nature of the material to be disseminated, the function of the person or body to whom the material is to be disseminated and in some cases the timing of the dissemination’.⁵⁷
87. The Commission submits that the risk to a fair trial is highest where derivative use is proposed to be made of post-charge examination material and where it is proposed that such material is to be made available to the prosecutor of the person being examined. Such a conclusion would be consistent with the High Court’s reasons in *X7*, heard contemporaneously with *Seller*, as to why the ACC Act does not (currently) permit the compulsory examination of a person after they had been charged with an offence about the subject matter of the offence.
88. The Government acknowledges that there is a significant difference between pre-charge and post-charge examination material. The Explanatory Memorandum says:

It is appropriate that material derived from the pre-charge examination of a person should be able to be provided to a prosecutor without additional restrictions. The ACC Act overrides the privilege against self-incrimination in an examination, but provides that examination material over which the examinee has claimed the privilege will be inadmissible in most criminal proceedings against him or her (amongst other things). While it is appropriate to ensure that there are strict limits on the disclosure of examination material to a prosecutor of the examinee, material derived from the pre-charge examination of an examinee stands in a different category.⁵⁸
89. Again, the only example given in the Explanatory Memorandum of where it may be appropriate for post-charge examination material to be provided to a prosecutor is ‘where the derivative material is exculpatory’.⁵⁹ For the reasons given in the section above, this is an unconvincing rationale for creating a mechanism for such disclosure.
90. The Commission recommends that the Bill be amended (in particular proposed s 25D) to remove the ability of a person to provide derivative material obtained from post-charge examination material, directly or indirectly, to a prosecutor of that person. This would leave the question of dissemination of pre-charge examination material to be determined according to the principles in s 25A(9). It would also allow derivative use of examination material in the investigation of third parties and thus allow the ACC to fulfil its

broader functions of understanding, disrupting and preventing serious and organised crime.

Recommendation 2

91. The Commission recommends that the Bill be amended (in particular proposed s 25D of the ACC Act) to remove the ability of a person to provide derivative material obtained from post-charge examination material, directly or indirectly, to a prosecutor of the examinee.

8.4 Post-confiscation application material

92. For the same reasons, the Commission recommends equivalent changes to the ability of a person to provide post-confiscation application material to a proceeds of crime authority.

Recommendation 3

93. The Commission recommends that the Bill be amended (in particular proposed s 25H of the ACC Act) to remove the ability of a person to provide post-confiscation application examination material or derivative material obtained from post-confiscation application examination material, directly or indirectly, to a proceeds of crime authority.

9 Threshold for mandatory non-publication orders

94. Section 25A(9) of the ACC Act currently provides a discretion to an examiner to make a non-publication order about the evidence given in an examination and the contents of any document or thing produced during an examination. Such a non-publication order must be made:

if failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

(emphasis added)

95. The word 'might' in this subsection qualifies both limbs of the phrase, namely each of 'the safety or reputation of a person' and 'the fair trial of a person'. The word 'might' in those circumstances means a real risk as distinct from one that is remote or fanciful.⁶⁰
96. The Bill proposes to reduce the scope of circumstances where a non-publication order must be made in a number of ways. The Commission is concerned about two of these in particular.
97. First, instead of requiring a non-publication order if failure to do so 'might' prejudice the fair trial of a person, new s 25A(9A) of the Bill proposes that a non-publication order would only be required if failure to do so 'would reasonably be expected to' prejudice the examinee's fair trial.

98. The change to this threshold is significant. Particular emphasis was given to the word 'might' by the Supreme Court of New South Wales in *Seller*⁶¹ and by the minority High Court Justices in *X7*⁶² in assessing whether the level of protection provided by the ACC Act against self-incrimination was appropriate.
99. Secondly, the obligation to make a non-publication order would only apply if the examinee had already been charged with an offence related to the subject matter of the examination, or if such a charge was imminent. That is, if there was no imminent charge but there was a real prospect of a future charge, there would be no requirement on an examiner to make a direction.
100. Based on the way in which the Crown interpreted these obligations in *Seller*, this change could have very significant consequences for examinees who have not yet been charged. In *Seller*:

The Crown submitted that different directions may be called for in the case of a person charged as distinct from those in relation to a person who might be charged. It submitted that in the former case it may be necessary ... to direct that incriminating material not be distributed outside the ACC. However, in the case of a person not charged, the risk of a trial being unfair would generally be avoided by a direction prohibiting publication to the press or the public at large.⁶³

101. The Explanatory Memorandum asserts that 'the only time at which ... prejudice could occur is where the examinee has either been charged with an offence or where such a charge is imminent'.⁶⁴ As a result, it suggests that it is unnecessary to require a non-publication direction if charges are not already imminent. The Commission disagrees with this analysis. As Bathurst CJ noted in *Seller* '[t]he risk to a fair trial as envisaged by s 25A(9) and (11) is the same irrespective of when charges are brought. In the case of pre-charge dissemination the risk will only materialise when charges are brought'.⁶⁵ Therefore, a non-publication direction remains appropriate where there is a real prospect of future charges.

Recommendation 4

102. The Commission recommends that proposed section 25A(9A) be amended to read:

An examiner must give a direction under subsection (9) about examination material if the failure to do so might:

- (a) prejudice a person's safety; or
- (b) prejudice the fair trial of an examinee who has been, or may be, charged with an offence.

- 1 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 12.
- 2 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 10.
- 3 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Issues Paper 46, 10 December 2014, p 74. At http://www.alrc.gov.au/sites/default/files/pdfs/publications/ip46_wholedoc_2.pdf (viewed 10 April 2015).
- 4 *Ibid*, citing William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol IV, 293.
- 5 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 137 [104] (Hayne and Bell JJ), citing *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340.
- 6 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
- 7 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [159] (Kiefel J); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.
- 8 ICCPR, opened for signature 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976, except Article 41, which came into force generally on 28 March 1979; entered into force for Australia on 13 November 1980, except Article 41, which came into force for Australia on 28 January 1993).
- 9 Dennis, I 'Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination' (1995) 54 Cambridge Law Journal 342 at 376, referred to in Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report 59 (December 2004), at [3.14].
- 10 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 544 (McHugh J).
- 11 Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Report 59 (December 2004), at [3.20]-[3.24].
- 12 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 532 (Deane, Dawson and Gaudron JJ). Their honours were in the minority in this case as to the key question of whether the privilege extended to corporations, but not on this point.
- 13 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 112 [28] (French CJ and Crennan J).
- 14 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, at [9.5.4].
- 15 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, at [9.5.4].
- 16 See M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, 2nd ed 2005, p 321.
- 17 United Nations Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007), para 8.
- 18 United Nations Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007), para 13, referring to United Nations Human Rights Committee, *Dudko v Australia*, Communication No. 1347/2005, UN Doc CCPR/C/90/D/1347/2005 (29 August 2007), para 7.4.
- 19 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 9.
- 20 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 9.
- 21 *Potter v Minahan* (1908) 7 CLR 277 at 304.
- 22 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 2.
- 23 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 133 [92] (Hayne and Bell JJ), see also at 153 [160] (Kiefel J), cf at 125 [63]-[65] (French CJ and Crennan J).
- 24 ACC Act, s 7A(b) and (c).
- 25 The Board of the ACC consists of the Commissioner of the Australian Federal Police, the Secretary of the Attorney-General's Department, the CEO of Customs, the Chair of the Australian Securities and Investments Commission, the Director-General of Security, the Commissioner (or head) of the police force in each State and Territory, the CEO of the ACC and the Commissioner of Taxation: ACC Act, s 7B.
- 26 ACC Act, s 7C(2).
- 27 ACC Act, s 7C(3).
- 28 ACC Act, s 24A.
- 29 ACC Act, s 28.

- 30 ACC Act, s 30(1) and (2).
31 ACC Act, s 30(4) and (5).
32 ACC Act, s 25A(9).
33 ACC Act, s 12.
34 *X7 v Australian Crime Commission* (2013) 248 CLR 92 (**X7**).
35 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 29.
36 *R v Seller* (2013) 273 FLR 155 (**Seller**).
37 *Seller* at 167 [34].
38 *Lee v NSW Crime Commission* (2013) 251 CLR 196 (**Lee No. 1**).
39 *Lee v The Queen* (2014) 88 ALJR 656 (**Lee No. 2**).
40 *Lee No. 2* at 663 [39].
41 *Lee No. 2* at 666 [51].
42 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), p 10.
43 *X7* at 112 [29]-[30] (French CJ and Crennan J).
44 *X7* at 138 [110] (Hayne and Bell JJ, with whom Kiefel J agreed).
45 *X7* at 153 [161] (Kiefel J), referring to *Clough v Leahy* (1904) 2 CLR 139, *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, *Hammond v Commonwealth* (1982) 152 CLR 188.
46 *Hammond v Commonwealth* (1982) 152 CLR 188 at 198.
47 *X7* at 127 [70]-[71] (Hayne and Bell JJ, with whom Kiefel J agreed).
48 *X7* at 131 [85] (Hayne and Bell JJ, with whom Kiefel J agreed).
49 *X7* at 136 [101] (Hayne and Bell JJ, with whom Kiefel J agreed).
50 *X7* at 142 [124] (Hayne and Bell JJ, with whom Kiefel J agreed).
51 *Lee No. 2* at 662 [32]-[33], and 664-665 [46] internal references omitted.
52 *Lee No. 2* at 662-663 [34].
53 *Lee No. 2* at 663 [36].
54 *Lee No. 2* at 663 [37].
55 *Seller* at 183 [102] and [104] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
56 *Seller* at 184 [105] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
57 *Seller* at 184 [106] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
58 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), pp 50-51.
59 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), pp 52.
60 *Seller* at 181 [91] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
61 *Seller* at 184 [106] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
62 *X7* at 110 [26] and 123 [55] (French CJ and Crennan J).
63 *Seller* at 172 [43] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).
64 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), pp 45.
65 *Seller* at 184 [105] (Bathurst CJ, with whom McClellan CJ at CL and Rothman J agreed).