CRIME COMMISSION LEGISLATION AMENDMENT BILL 2014

Bill introduced on motion by Mr Stuart Ayres, read a first time and printed.

Second Reading

Mr STUART AYRES (Penrith—Minister for Police and Emergency Services, Minister for Sport and Recreation, and Minister Assisting the Premier on Western Sydney) [5.36 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crime Commission Legislation Amendment Bill 2014. The Crime Commission's powers to conduct compulsory examinations are an essential tool in combating serious and organised crime. A series of cases in the High Court concerning hearings held by the Australian Crime Commission and the NSW Crime Commission have thrown into doubt the use of compulsory examination powers. This has led to uncertainty among investigators about how investigations may now be undertaken, and consequent disruption to major criminal investigations. There is also uncertainty among prosecutors as to the use of compulsory examination material in legal proceedings.

In the case of *X7 v Australian Crime Commission* in 2013, the High Court held that the Australian Crime Commission could not hold compulsory examinations of persons if they had already been charged with offences and those offences were the subject of the examination because this would prejudice the person's right to a fair trial. In *Lee v The Queen*, a 2014 case, the High Court held in similar circumstances that the publication of a transcript of a NSW Crime Commission hearing to a member of the Office of the Director of Public Prosecutions who was involved in the prosecution of the commission's witness was prejudicial to the person's fair trial. The High Court's comments in Lee suggested that "'persons involved in the prosecution" might in other circumstances include police and other investigators. This throws into doubt current practices that allow police officers to attend examinations and/or access hearing transcripts and, in doing so, undermines the utility of the NSW Crime Commission.

The High Court has recognised in both the X7 and Lee judgements that it is within the power of the Legislature to create laws that depart from the fundamental principles of our system of justice. Both judgements held that for legislation to overcome fundamental principles, its intention must be "expressed clearly or in words of necessary intendment." However, legislation risks being constitutionally invalid if it attempts to overcome fundamental principles by fettering the impartiality or discretion of the court. This bill proposes amending the Crime Commission Act 2012—the Act—to incorporate those clear "words of necessary intendment" and restore confidence in the lawful and appropriate exercise of the commission's functions. The amendments aim to protect the use of the commission's compulsory examination powers and the admissibility of evidence obtained in or derived from these commission hearings and to protect criminal prosecutions from challenge solely on the basis that a person has been questioned by the commission.
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Situations where the commission compulsorily examines a person charged with an offence are infrequent, but when they arise they often involve homicide investigations or persons who are part of an organised criminal group—but not the principal—and it is necessary to establish the identity of other offenders and the circumstances surrounding the offence. There is thus a significant public interest in the New South Wales Crime Commission retaining full use of its powers of compulsory examination post-charge. The bill also contains amendments to the Crime Commission Act 2012 concerning the powers of the commission in relation to the joint task forces and other minor amendments.

No legislation is immune from challenge and these amendments cannot guarantee that all criminal prosecutions where the Crime Commission has been involved will be immune from challenge. However, legislative amendments are required as soon as possible to address the ongoing uncertainty among investigators and subsequent reluctance to use the commission's powers. I note that the outcome of cases currently before the courts and the approach adopted by other jurisdictions in future may necessitate further legislative amendments in this area. Where an accused person is to be questioned by the Crime Commission after they have been charged with an offence in relation to the subject matter of that charge, the amendments set out in schedules 1 and 3 to the bill propose four key changes.

First, the leave of the Supreme Court is required before compulsory examination can take place. The court can grant leave if it is satisfied that any prejudicial effect to the accused's trial is outweighed by the public interest in using the commission's powers to fully investigate the matters that are the subject of the relevant reference to the Crime Commission. This also requires the commission to give notice to the person that leave has been granted, prior to questioning. Secondly, the evidence given will be subject to both use and derivative use of immunity. However, it may still be admissible in relation to an offence against the Act or for lying to the commission and may be admissible against other persons. Thirdly, the evidence given must be quarantined from any person who is a member of an investigative agency—including, for example, the police—who is involved in the investigation of the accused in relation to the offence. This is achieved by constraints on who may attend the hearing and on subsequent disclosure of the evidence given at the hearing.

Finally, the prosecution can in most cases only access the evidence if a further court order is made that it is in the public interest to release it to them. Operationally, this will require the investigating agency to establish a separate "clean team" of investigators. This clean team will not have access to the Crime Commission evidence and will not be involved in the broader Crime Commission investigation. They will be responsible for the ongoing prosecution of the accused. "Chinese walls" will have to be put in place to ensure the clean team is not tainted by access to the evidence of the accused given to the commission about the subject matter of the offence. I now turn to the disclosure of compelled evidence dealt with in this bill. The commission's functions include the provision of evidence to the Director of Public Prosecutions [DPP] and other agencies, reinvestigation of police inquiries referred to the commission by the management committee, and to work together with law enforcement agencies of the Commonwealth, New South Wales and other States and Territories.

Part of the assistance the commission provides, and the evidence it gathers, involves the conduct of compulsory hearings and dissemination of evidence and information obtained therein. To ensure the commission can continue to fully discharge its functions, it must be able to disclose records of commission hearings where a witness is not the subject of a current charge, and in limited specified circumstances where the witness is the subject of a current charge. Similarly, police and investigative agencies must be able to make use of evidence obtained as a result of that disclosure to gather further evidence. The Act already provides for records of a commission hearing to be made available to the person who was examined or their legal practitioner. The bill provides that the court will also be able to order disclosure of a record of a commission hearing to a prosecutor.

The bill prohibits the disclosure of compelled evidence given by an accused person about the subject of the charge to a member of an investigative agency or prosecutor who is involved in the investigation or prosecution of the offence concerned. Notwithstanding this prohibition, the commission may order disclosure to an investigative agency or to a prosecutor, where the commission considers disclosure is desirable in the interests of justice and the commission restricts use of the evidence so that it is only used to investigate or prosecute an offence against the Act or for lying to the commission, an offence other than the offence with which the accused had been charged prior to being examined, or a person other than the accused.

Whenever the commission makes an order to disclose a record of a hearing, it may also make orders restricting the use or further disclosure of the evidence or record. The bill also addresses applications to stay proceedings. New section 45C is intended to reduce the likelihood of a successful application for a stay of proceedings being made as a result of the commission's compulsory examination or disclosure of compulsorily obtained material to, for example, the police or DPP. It applies whether or not the witness was the subject of a current charge. This provision sets out matters that the court must consider when considering a stay application. It requires the court to assess whether these matters have led or are likely to lead to unfair consequences for a person's trial. The matters listed include, for example, the questions asked and answers given during the hearing, whether the person was charged before the hearing, and the extent to which a prosecutor has had access to compulsorily obtained material.

The provision also sets out matters that are not capable of giving rise to a presumption of the kind of fundamental defect in criminal proceedings that would be a ground on which a court may stay criminal proceedings. These matters include, for example, the mere fact that a transcript was provided to an investigative agency or to a prosecutor, or the mere fact that evidence was derived as a result of the dissemination of a transcript. I now turn to the issue of appeals against past convictions. The bill creates an exception to part 7 of the Crimes (Appeal and Review) Act 2001, which confers a statutory right to have a conviction and/or sentence reviewed in certain circumstances. The proposed amendments provide that the Supreme Court is not to consider an application under part 7 for a review of a conviction or sentence that is based solely on consequences said to have flowed from the fact that an applicant was compulsorily examined by the Crime Commission, or evidence obtained from, or as a result of, that compulsory examination. I now turn to schedule 2, which includes matters that do not arise from the X7 and Lee cases.

Schedule 2 to the bill contains miscellaneous amendments to the Act, including amendments to

provide clarity regarding the NSW Crime Commission's powers to work in cooperation with external persons or bodies, including joint task forces. The 2012 remake of the Crime Commission Act formally recognised that it is a function of the commission to work in cooperation with joint task forces, including with agencies from the Commonwealth and other States and Territories. However, the way the legislation is constructed did not provide clarity regarding the Crime Commission's powers when it is working cooperatively in a task force or similar arrangement with interstate agencies. Joint task forces involving the Commonwealth and other jurisdictions are essential to investigate the most serious crime and criminal groups. Organised crime gangs do not stop their activities at State borders. It is essential that the NSW Crime Commission be able to use its formal powers—notably at compulsory hearings—when working on joint investigations.

The bill establishes a new type of referral, specific to the commission's function relating to joint operations whereby the management committee of the commission can refer for investigation matters relating to these operations. These are referred to as joint task matters in the bill. The existing safeguards and thresholds for referring a matter for investigation will apply to joint task matter referrals. Notably, the investigation will have to relate to a relevant criminal activity, serious crime concern or criminal activities of a criminal group that is the conduct that can form the basis of an existing referral. Alternatively, if the investigation involves cross-border or Commonwealth matters, there will have to be some nexus to New South Wales in the conduct being investigated and the matters must be of comparable seriousness to matters that can ordinarily be referred for investigation.
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So, for example, the activities of New South Wales residents who are believed to be planning offences under Commonwealth counterterrorism laws could be the subject of such a referral. The management committee will only be able to make a joint task matter referral if it is satisfied that the commission's powers are necessary to fully investigate the matter, that it is in the public interest to do so, and that the matters are sufficiently serious or prevalent to warrant the investigation. I advise the House that this amendment is supported by both the NSW police commissioner and the Australian Federal Police commissioner, who is also Chair of the Board of the Australian Crime Commission.

Both are members of the Management Committee of the New South Wales Crime Commission. I also point out a number of miscellaneous amendments in the bill. The 2012 remake of the Act altered the wording of the provision allowing the Crime Commission to disseminate information and intelligence to other bodies making it unclear whether such information can be disseminated to bodies in other countries. Schedule 2 [1] will make clear that the commission can make such overseas disseminations if the management committee's guidelines approve it. This is consistent with the practice under the previous NSW Crime Commission Act. The 2012 Act also made an amendment to the provisions that apply when the commission is seeking a search warrant.

Under the previous provisions an application for a warrant could only be made where the commission reasonably suspected that there was a relevant thing on the premises, and had a reasonable belief that if a summons were issued for the thing it might be concealed, lost, mutilated or destroyed. The amendments reduced this to a one-stage reasonable belief test that did not

incorporate the second limb relating to the issue of a summons. These amendments were intended to simplify matters, but in practice they have proven to be less useful than the earlier two-tier formulation. The Crime Commission considers that the two-tier test is more appropriate and supports reinstating that test. The bill therefore restores the two-tier formulation.

Section 33 of the Act provides for a right of review to the Supreme Court where a person claims they are entitled to resist production and questioning obligations under sections 28 and 30 of the Act. As presently drafted, the provision does not extend this right of review to hearings under section 24 of the Act. The amendments will ensure that a Supreme Court review can be sought if a person refuses to be sworn in or refuses to answer questions or produce documents at such a hearing. This will ensure that the review safeguard applies more broadly to people who are the subject of the commission's questioning regime. New section 35 (2) in the bill will ensure that the existing safeguards regarding commencing a prosecution where a person has sought a review to the Supreme Court are extended to the broader review category.

As part of the Patten report implementation, the 2012 Act introduced strict obligations on commission staff concerning disclosure of their financial circumstances. This is an important integrity measure and it is not intended to remove it. However, an unintended effect is that contractors and consultants engaged by the commission, even when briefly employed and/or engaged in non-sensitive work, are subject to the stringent financial disclosure requirements. Schedule 2 [13] confers discretion on the commissioner to waive the financial disclosure requirement for some consultants or class of consultants. Whether such a waiver is granted will obviously depend on the nature of the work being engaged in. If the work is related to the law enforcement functions of the commission then it is expected that the requirements would generally not be waived. The Act currently requires the commission to include recommendations for legislative change in its annual report. The bill sensibly makes this a permissive provision rather than a mandatory requirement. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.