



New South Wales

Crime Commission Legislation Amendment Bill 2014

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Crime Commission Act 2012 (the Principal Act)* so as:

- (a) to address issues raised in decisions of the High Court in connection with the compulsory examination of persons about an offence for which they have been charged, and
- (b) to provide for the referral for investigation, and oversight, by the New South Wales Crime Commission Management Committee (the *Management Committee*) of the New South Wales Crime Commission (the *Commission*) of matters arising from work done in co-operation with a person or authority of the Commonwealth, the State or another State or Territory (including a task force or a member of a task force) (an *external person or authority*), and
- (c) to make other amendments relating to the procedures of the Commission, including in relation to search warrants, hearings and annual reports, and
- (d) to provide for savings and transitional matters consequent on the enactment of the proposed Act.

The Bill also amends the *Crimes (Appeal and Review) Act 2001* to limit appeals arising from compulsory examination of a person or the giving of evidence, or the production of a document or thing, under the Principal Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Crime Commission Act 2012 No 66—provisions relating to compulsory examinations

The High Court in various cases raised issues in connection with the compulsory examination by the Commission of persons about offences for which they have already been charged or are later charged. The principal cases in the High Court are *X7 v Australian Crime Commission & Anor* (2013) 248 CLR 92 and *Do Young (aka Jason) Lee v The Queen* [2014] HCA 20. In *X7 v Australian Crime Commission & Anor* (2013) 248 CLR 92, the High Court considered the accusatorial nature of criminal trials and determined that any fundamental change in that system, such as the compulsory examination, prior to and outside the trial process, of a person charged with an offence about matters relevant to that charge, should be expressly effected by legislation. In *Do Young (aka Jason) Lee v The Queen* [2014] HCA 20, the High Court ordered the retrial of offences in a case where transcripts of evidence given by a defendant during a compulsory examination in a hearing before the Commission were given to the prosecution to aid in its preparation for trial. The decision in that case was based on the principle that proof by the prosecution, unaided by the accused, is fundamental to the criminal justice system.

The amendments made by the Schedule address issues raised in both cases relating to persons charged with an offence where that offence has not been finally dealt with or determined (a *current charge*).

Limitations on presence of other persons at compulsory examinations

Schedule 1 [2] makes it clear that a person is taken to be present at a hearing even though the person is not physically present if, while the hearing is occurring, the person can view and hear (or understand) it from a concealed position or remotely by closed circuit television or similar means or can hear (or understand) it by electronic or other means.

Schedule 1 [4] requires the Commission to give prior notice to a witness of a proposed direction that another person may be present while the witness is giving evidence at a hearing and to give the witness an opportunity to comment on the proposed direction. An adverse comment by the witness will not result in the other person not being entitled to be present.

Schedule 1 [5] prevents the Commission from giving a direction that another person may be present if the hearing involves a person who is the subject of a current charge for an offence unless the Commission is of the opinion that the presence of the other person is reasonably necessary to exercise its functions. The amendment also prohibits the Commission from giving a direction that a person who is a member of an investigative agency involved in investigating a person who has been charged with an offence may be present while the person is being questioned about the subject matter of the offence. Schedule 1 [3] makes a consequential amendment.

Evidence of accused persons

Schedule 1 [6] prohibits a person who is the subject of a current charge from being compulsorily examined by, or from being required to produce a document or thing to, the Commission except in accordance with the leave of the Supreme Court. Leave may only be granted if the Court is satisfied that any prejudicial effect likely to arise to the person's trial is outweighed by the public interest in having the matter referred to the Commission fully investigated. Evidence that is obtained from the person after leave is granted cannot be used against the person in any civil, criminal or disciplinary proceeding (other than for an offence against the Principal Act or an offence relating to falsity of evidence) but is not inadmissible as against other persons. Notice that leave has been granted is to be given to the person by the Commission. The general functions and procedures of the Supreme Court relating to ex parte proceedings will apply in respect of ex parte applications for leave.

Schedule 1 [7] provides for evidence (*derivative evidence*) that is obtained as a result of original evidence obtained by the questioning of a witness at a hearing of the Commission or the production of a document or thing to the Commission to be admissible in a civil or criminal proceeding, despite specified grounds on which it might otherwise be inadmissible. However, this does not extend to making any derivative evidence admissible against a person questioned in relation to the subject matter of the offence for which the person was charged unless the derivative evidence could have been obtained (or its significance understood) without the testimony of the person.

Schedule 1 [8] enables a person subject to a current charge in respect of whom leave to be examined has been given by the Supreme Court to apply to the Attorney General for assistance in respect of an application for a review of the decision.

Disclosure of evidence

Schedule 1 [9] and [10] require the Commission to make evidence given before the Commission available to a court if the court certifies that it may be in the interests of justice that the evidence be made available to the prosecutor even though the Commission has directed that the evidence must not be published so as not to prejudice the fair trial of a person who has been charged with an offence. The court may, after examining the evidence, make the evidence available to the prosecutor if the court is satisfied that the interests of justice require it to do so.

Schedule 1 [11] makes it clear that the provisions relating to publication of evidence are subject to the new restrictions on disclosure of evidence inserted by the proposed Act.

Schedule 1 [12] prohibits the Commission from allowing evidence as to the subject matter of an offence that is given by a person the subject of a current charge for the offence who objected to providing the evidence to be disclosed to a member of an investigative agency or a prosecutor involved in investigating or prosecuting the offence. The Commission may direct that evidence be disclosed to a member of an investigative agency for use in investigation or prosecution of offences under the Principal Act relating to false evidence by the witness, an offence other than the offence concerned or offences by another person, if the Commission considers it desirable in the interests of justice to do so and the witness was informed of the power to make such a direction. Evidence may also be disclosed to the Director of Public Prosecutions for the purposes of a request by the Director of Public Prosecutions to the Attorney General to grant indemnity from prosecution or of giving advice about undertakings relating to the use of evidence, both in relation to persons who give evidence when subject to a current charge and persons who are charged after giving evidence.

Schedule 1 [12] also sets out matters that a court must consider when considering an application for a stay of proceedings arising from the compulsory examination of a person before the Commission or a disclosure of evidence or a record of evidence given before the Commission. It further provides that the fact that the Commission examined the person about the subject matter of an offence (whether or not the person was the subject of a current charge for the offence), or that a transcript or record of the proceedings was given to an investigative agency or a prosecutor whether before or after the person was charged with the offence, is not capable of giving rise to a presumption that there is a fundamental defect in criminal proceedings. Other matters are also excluded from being sufficient grounds for a stay, including the fact that evidence has been derived from the holding of a hearing or from the dissemination of a record of a hearing.

Other amendments

Schedule 1 [1] inserts definitions.

Schedule 1 [2] defines when a person is the subject of a current charge.

Schedule 1 [13] inserts savings and transitional provisions consequent on the enactment of the proposed Act, including a provision that applies the new provisions relating to stays of proceedings to both proceedings, and applications for stays, pending before the commencement of the provisions.

Schedule 2 Amendment of Crime Commission Act 2012 No 66—provisions relating to working with interstate and Commonwealth persons or authorities and other matters

Referrals relating to work in co-operation with external persons or authorities, including joint task forces

Schedule 2 [6] confers on the Management Committee the function of referring (by written notice) to the Commission for investigation matters (*joint task matters*) relating to the subject of co-operation with an external person or authority. **Schedule 2 [7]** makes a consequential amendment.

Schedule 2 [8] sets out the matters about which the Management Committee must be satisfied before it can refer a joint task matter to the Commission for investigation.

Schedule 2 [9] enables the Management Committee to impose limitations on the investigation by the Commission of joint task matters.

Schedule 2 [10] sets out the matters that must be contained in a notice by the Management Committee referring a joint task matter to the Commission for investigation. **Schedule 2 [5]** makes a consequential amendment.

Schedule 2 [11] enables the Commission to request the Management Committee to refer a joint task matter to the Commission for investigation.

Schedule 2 [12] makes it clear that the parliamentary Joint Committee that monitors and reports on the exercise by the Management Committee of its functions is not authorised to reconsider a decision by the Management Committee to refer a joint task matter to the Commission for investigation.

Miscellaneous amendments

Schedule 2 [1] enables the Commission, in accordance with any guidelines of the Management Committee, to disseminate intelligence and information to bodies of other countries if the Commission thinks it appropriate to do so.

Schedule 2 [2] revises the grounds on which an executive officer of the Commission may apply for a search warrant. The new grounds will be that the Commission has reasonable grounds to suspect that there is or will be within one month in or on premises things connected with an investigation or that may be used in relevant proceedings and that the Commission has reasonable grounds to believe that, if a summons for production were issued, the things might be concealed, lost, mutilated or destroyed.

Schedule 2 [3] extends the procedure for Supreme Court review that currently applies to a decision by the Commission that a person is not entitled to refuse to produce information or answer a question under a summons issued by an executive officer to a decision to that effect made by the Commission where a person claims to be entitled not to take an oath or affirmation or to answer questions or to produce a document or thing at a hearing of the Commission. The person may apply for a review within 5 days after being notified of the decision.

Schedule 2 [4] prohibits a prosecution from being commenced in respect of a failure to take an oath or affirmation or to answer questions or to produce a document or thing at a hearing of the Commission, if the person has claimed to be entitled not to do so, until after the period for applying for a Supreme Court review or, if an application is made, until after it is determined or otherwise disposed of.

Schedule 2 [13] enables the Commission to waive the requirement for a consultant, or members of a class of consultants, engaged by the Commission to provide a statement of financial information.

Schedule 2 [14] and [15] replace the mandatory requirement for the Commission to include all recommendations that it has for legislative changes in its annual report with a discretion to include any such recommendations in its annual report.

**Schedule 3 Amendment of Crimes (Appeal and Review) Act
2001 No 120—provisions relating to compulsory
examinations before the Crime Commission**

Schedule 3 [1] prohibits the Supreme Court from directing that an inquiry be held into the conviction or sentence of a person, or that a matter be referred to the Court of Criminal Appeal to be dealt with as an appeal, if the grounds for the direction or appeal arise only from the fact that the person was questioned at a hearing of the Commission or required to produce a document or thing to the Commission or that evidence was obtained directly or as a result of that questioning or the production of the document or thing.

Schedule 3 [2] applies that prohibition to applications to the Supreme Court for a direction or referral that were pending before the commencement of the amendment made by **Schedule 3 [1]** and to any application to, or action on its own motion by, the Supreme Court relating to a proposed direction or referral on or after that commencement. The amendment also extends the application of the amendments to evidence obtained, or documents or things produced, under the *New South Wales Crime Commission Act 1985*.