Statutory Review Report

Crime Commission Act 2012

December 2020

Published by

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Contents

Executive summary

1.1 This is a report on the statutory review (**the Review**) of the *Crime Commission Act 2012* (**the Act**). The Review concludes that the policy objectives of the Act remain valid and makes 9 recommendations to amend legislation to enhance the operation and effectiveness of the NSW Crime Commission (**the Commission**).

1.2 Neither the Review nor the stakeholder submissions concluded that major amendments to the Act were required. There was no suggestion to alter the current oversight arrangements whereby the Management Committee, which has a retired judge as independent Chairperson, must issue an investigation reference to permit the use of the Commission's special powers. The continued trust by Parliament and the public in the Commission holding such powers depends on there being no reduction in oversight and accountability.

1.3 There is no doubt that the Commission, like all law enforcement agencies, must adapt to deal with the criminal use of rapidly changing technology, and there are improvements to be made to its powers and functions. The need for its long-standing coercive powers, which make it analogous to a standing Royal Commission, has not abated.

1.4 The Commission works largely 'behind the scenes' in law enforcement, alongside counterparts including the NSW Police Force (**NSWPF**) and partner law enforcement agencies: the Australian Police Force (**AFP**), Australian Border Force (**ABF**) and the Australian Criminal Intelligence Commission (**ACIC**).

1.5 *Criminal Assets Recovery Act 1990* (**CARA**) is intrinsically linked to the Commission and its work, as one of the key roles of the Commission is to exercise functions under CARA. As there is no statutory review provision in CARA, it is appropriate that the Review consider how CARA might be improved to support the functions of the Commission. Accordingly, the Review makes some recommendations for amendments to CARA. These relate to enabling confiscation proceedings where profit has been derived from cybercrime, enabling the Commission to undertake administrative forfeiture for seized assets under CARA, and amending CARA to clarify the principles a court may consider when granting an application for a stay of proceedings.

1.6 The Review was conducted on behalf of the Minister for Police by the NSW Department of Communities and Justice (**the Department**), in accordance with s. 88 of the Act. The section requires the Minister to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

1.7 The Review is to be undertaken as soon as possible after the period of five years from the commencement of the Act (being 5 October 2012), and a report is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

1.8 The Department issued a Discussion Paper to key stakeholders in July 2018, which posed questions for consideration as part of the Statutory Review. A further Supplementary Consultation Paper was circulated to targeted stakeholders in June 2019 on additional issues arising during the Review. The Review considers and comments on the issues raised in these papers and stakeholder submissions.

1.9 Appendix B outlines stakeholders consulted and provides the list of submissions.

2. Recommendations

2.1 **Recommendation 1:**

The object of the *Crime Commission Act 2012* be amended so that the Act's object is to "prevent, disrupt and reduce the incidence of organised and other serious crime".

2.2 **Recommendation 2:**

The *Crime Commission Act 2012* be amended to expressly provide that the NSW Crime Commission's functions include applying for an order under the *Crimes (Serious Crimes Prevention Orders) Act 2016*.

2.3 **Recommendation 3:**

The contempt provisions in the *Crime Commission Act 2012* be strengthened by allowing the NSW Crime Commission to refer alleged contempt of the Commission to the Supreme Court.

2.4 **Recommendation 4:**

The *Crime Commission Act 2012* be amended to provide that proceedings for breaches to secrecy provisions under section 80 can commence up to three years after the alleged offence was committed.

2.5 **Recommendation 5:**

The *Crime Commission Act 2012* be amended to make it abundantly clear that any disclosure or communication of information to which section 80 of the Act applies by any means is an offence under section 80(2), including disclosure or communication of information to a court, subject to the existing exceptions in the Act.

2.6 **Recommendation 6:**

The *Crime Commission Act 2012* be amended to make it clear that officers of other agencies involved with NSW Crime Commission operations and investigations who are not members of section 58 Task forces, who are given access to confidential information are covered by section 80.

2.7 **Recommendation 7:**

The *Criminal Assets Recovery Act 1990* be amended to include the offences under sections 308C, 308D and 308E of the *Crimes Act 1900* within the meaning of "serious criminal offence" under section 6(2).

2.8 **Recommendation 8:**

An administrative forfeiture scheme should be developed under the *Criminal Assets Recovery Act 1990* in consultation with stakeholders, with recommendations provided to the Government about an appropriate forfeiture regime.

2.9 **Recommendation 9:**

The *Criminal Assets Recovery Act 1990* be amended to align the stay provision in section 63 with section 319 of the *Proceeds of Crime Act 2002* (Cth), including giving courts options to hear matters in closed court and to prevent disclosure of information obtained in CARA proceedings to prosecuting authorities.

3. Overview of the Crime Commission Act 2012

3.1 The Act received assent on 24 September 2012. The Act re-enacts the *New South Wales Crime Commission Act 1985* and implements certain recommendations of the Special Commission of Inquiry into the NSW Crime Commission (known as the Patten Review).

3.2 The Patten Review, handed down on 30 November 2011, examined the structure, procedures, accountability and oversight of the Commission.

3.3 Mr Patten found that overall the Commission was performing its duties effectively and lawfully, and that it should continue to do so. However, the Commission had been operating for more than 20 years without review and, as a result of his review, Mr Patten made 57 recommendations to improve the structure, oversight, accountability, and powers and procedures of the Commission.

3.4 The 2012 Act implemented most of the recommendations of the Patten Review, provided for greater oversight of the Commission, and modernised the legislation.

3.5 The object of the Act is to reduce the incidence of organised and other serious crime. This is achieved through the Commission exercising its functions under the Act including through the investigation of such crime (generally in partnership with other law enforcement agencies) and through the confiscation of criminal assets.

3.6 The Act is arranged into Parts:

- Part 1 (s.1-6) includes the object of the Act and relevant definitions.
- Part 2 (s.7-48) confers the constitution, functions and powers of the Commission, hearings procedure and special protections.
- Part 3 (s.49-59) establishes the membership, functions and procedures for the Management Committee.
- Part 4 (s.60-69) is repealed.
- Part 5 (s.70-71) confers the functions of the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission constituted under the *Ombudsman Act 1974.*
- Part 6 (s.72-78) provides arrangements for staff of the Commission.
- Part 7 (s.78A-88) makes provision for miscellaneous issues including vetting of staff, disclosure and secrecy provisions.
- Schedule 1 provides for the Commissioner and Assistant Commissioners.
- Schedule 2 provides for the members and procedure of the Management Committee.
- Schedule 3 is repealed.
- Schedule 4 makes savings, transitional and other provisions.
- Schedule 5 is repealed.

4. Related legislation

4.1 The Act is part of a broader framework of legislation and initiatives designed to disrupt, prevent, investigate and respond to serious and organised crime.

Criminal Assets Recovery Act 1990

4.2 The *Criminal Assets Recovery Act 1990* (**CARA**) is intrinsically linked to the Commission and its work, as one of the Commission's key roles is to exercise functions under CARA.

4.3 The principal objects of CARA are set out in section 3:

- to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities,
- to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired,
- to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person,
- to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and
- to enable law enforcement authorities to effectively identify and recover property.

4.4 Several issues related to CARA's impact on the Crime Commission functions were identified as part of the Review and are discussed at Part 9 of this report.

Other legislation

Crimes (Serious Crime Prevention Orders) Act 2016

4.5 One of the issues explored as part of this Review is whether the *Crime Commission Act 2012* provides sufficient clarity for the Commission to exercise powers under the *Crimes (Serious Crime Prevention Orders) Act 2016*.

This issue is considered at section 6.26 of this report.

Law Enforcement (Controlled Operations) Act 1997

4.6 The Commission is an eligible applicant under the above Act to apply for authority to conduct a controlled operation. No issues have been raised as part of this Review with the Commission's use of this legislation.

Law Enforcement (Powers and Responsibilities) Act 2002

4.7 The Commission is an eligible applicant under the above Act to apply for covert search warrants. No issues have been raised as part of this Review with the Commission's use of this legislation.

Law Enforcement and National Security (Assumed Identities) Act 2010

4.8 The Commission is an eligible applicant under the above Act to apply to acquire and use an assumed identity for law enforcement purposes. No issues have been raised as part of this Review with the Commission's use of this legislation.

Surveillance Devices Act 2007

4.9 The Commission is an eligible applicant under the above Act to apply to use a surveillance device and for warrants. No issues have been raised as part of this Review with the Commission's use of this legislation.

Telecommunications (Interception and Access) (New South Wales) Act 1987 and Telecommunications (Interception and Access) Act 1979 (Cth)

4.10 The Commission is an eligible applicant to apply for telecommunication interception (TI) warrants.

4.11 The Commonwealth recently amended its Act, via the *Unexplained Wealth Legislation Amendment Act 2018,* to permit the derived use of TI evidence in criminal asset confiscation proceedings by jurisdictions participating in the national cooperative scheme on unexplained wealth. Previously TI warrants and evidence derived from them was available only for the investigation of serious criminal offences.

4.12 Issues regarding TI material were explored as part of this Review and are discussed at section 8.57.

5. Part 1 of the Act - Preliminary

Section 3 – Object of the Act

5.1 The long title of the Act is "an Act to re-enact the *New South Wales Crime Commission Act 1985* to implement certain recommendations of the Special Commission of Inquiry into the New South Wales Crime Commission; and for other purposes".

5.2 The object of the Act is to reduce the incidence of organised and other serious crime.

5.3 In the second reading speech, Mr Greg Smith, the then Attorney General and Minister for Justice, stated:

> "It has always been envisaged that the Crime Commission's focus should be on serious and organised crime. Drug trafficking was the principal activity of organised crime; however organised crime is now becoming increasingly diverse. The 2011 Organised Crime Threat Assessment undertaken by the European Police Office [Europol] noted that, *Organised crime is changing and becoming increasingly diverse in its methods, group structures, and impact on society…criminal groups are increasingly multi-commodity and poly-criminal in their activities, gathering diverse portfolios of criminal business interests, improving their resilience at a time of economic austerity and strengthening their capability to identify and exploit new illicit markets*. The Australian criminal environment reflects these international experiences and the objects of the Act should allow for a flexible and responsive Crime Commission…These reforms will ensure that there is stringent accountability and oversight of the Crime Commission whilst enabling the Crime Commission to complete its work in an ethical, effective and efficient manner."

5.4 The possibility of amending the object of the Act to explicitly include the prevention and disruption of serious and organised crime was raised in the Discussion Paper.

Discussion Paper Question:

5.5 ***Is the object of the Act sufficiently clear that "reducing the incidence of organised and other serious crime" includes prevention and disruption?***

Submissions

5.6 Stakeholders were generally comfortable with the current wording of the objects of the Act. The Commission submission noted the current wording is broad enough to cover prevention and disruption of organised crime, but was open to a clarifying amendment of the kind suggested in the Discussion Paper. The Office of the Director of Public Prosecutions (**ODPP**) submitted that amending the objects to specifically refer to the prevention and disruption of organised and other serious crime would be more transparent and in keeping with the Commission's powers under CARA. The NSWPF agreed that the object of the Act could be amended to make it clear that reducing the incidence of organised and other serious crime specifically includes a reference to 'prevention' and 'disruption'.

Conclusion

5.7 The words "reduce the incidence of organised and other serious crime" appear to be broad enough to encompass the prevention and disruption of such crime. A specific reference to prevention and disruption could be inserted but is not essential, as the Commission is not currently constrained in carrying out its function. However, making amendment for absolute clarity does not carry high risk and may increase transparency about the objects of the Commission. We consider that an amendment should be made for abundant clarity.

Recommendation 1:

The object of the *Crime Commission Act 2012* be amended to provide that the Act's object is to "prevent, disrupt and reduce the incidence of organised and other serious crime".

Section 4 – interpretation

5.8 The Discussion Paper canvassed whether the definitions or functions in the Act require amendment to capture criminal use of technology such as the 'dark web', blockchain technologies or hacking software which is used to facilitate or commit serious and organised crimes.

5.9 We ultimately conclude that no terminology updates are required to enable the Commission to investigate crime committed by way of new technology, however, further discussion about the functions of the Commission and the use of technology such as the 'dark web', blockchain technologies or hacking software is found later in this report at section 6.9 'Functions of the Commission'.

6. Part 2 of the Act – NSW Crime Commission

Division 1 – Constitution of Commission (and Schedule 1)

6.1 Schedule 1 clause 1(1) of the Act provides that a person is not eligible to be appointed as Commissioner or to act in that office unless the person has special legal qualifications. Section 4(2) of the Act provides that a person who has special legal qualifications is:

(a) qualified to be appointed as (but who is not) a Judge of the Supreme Court of the State or of any other State or Territory, a Judge of the Federal Court of Australia or a Justice of the High Court of Australia, or

(b) a former Judge or Justice of any court referred to in paragraph (a)

6.2 The Discussion Paper canvassed whether a person appointed as Commissioner should be required to have special legal qualifications.

6.3 The Commissioner needs to be well versed in law enforcement, is responsible for the management and administration of the Commission as a whole and must manage, coordinate and control its operations and investigations. The Commissioner must develop and maintain partnerships with other agencies, ensure its functions are used effectively and oversight the review of internal structures and develop business activities.

6.4 The Discussion Paper observed that the exercise of the Commission's coercive powers is just one of the disciplines involved in its functioning. Other key aspects of the Commission's work include intelligence analysis and forensic accounting. The Discussion Paper queried whether it was necessary for a senior lawyer to be appointed to oversee all these other disciplines.

6.5 The Discussion Paper acknowledged that the Commission's legal functions should be exercised by persons with special legal qualifications. It suggested that if one or two Assistant or Special Commissioners with special legal qualifications were appointed to work alongside the Commissioner, they could assist him or her to undertake the Commission's functions while maintaining the integrity of the exercise of its coercive powers. As a further safeguard, the Act could provide that those persons would not be subject to the direction of the Commissioner when exercising the Commission's coercive powers.

Discussion Paper Questions:

6.6 ***How could the Commission be structured to allow for a Commissioner with a greater variety of skills, experience, and the ability to manage a diverse agency dealing with technologically advanced criminals?***

6.7 ***What are the risks and advantages of removing the 'special legal qualifications' requirement from the Commissioner's role?***

6.8 ***If the requirement for special legal qualifications was removed from the Commissioner's role, how would the exercise of coercive powers by the Assistant or Special Commissioners be safeguarded from improper direction or influence?***

6.9 ***In such circumstances, is there another term for the Assistant Commissioners (for example, Special Commissioners) that better reflects this role?***

Submissions

6.10 Overall, the view amongst stakeholders was that the discharge of the Commission's functions depends on its special, coercive legal powers, and these powers should be appropriately supervised by a Commissioner with special legal qualifications. The confidence of the community in the use of coercive powers rests with the current model, which is less likely to have legal challenge where the exercise of those powers is supervised by a Commissioner who has special legal qualifications.

6.11 The Law Enforcement Conduct Commission (**LECC**) argued in its submission that any change in the Commissioner's qualification could lead to operational difficulties from the separation of functions between the Commissioner and an Assistant or Special Commissioner canvassed in the paper. LECC submitted that: "[g]iven the relationship between any investigation and the potential for the use of compulsory powers, it is difficult to see how this division of functions could effectively operate, since it must necessarily be the case that not only whether coercive powers should be exercised but also what is sought and what is the course of an interrogation must be decided by the Assistant or Special Commissioner".

6.12 NSWPF also suggested that if the view was taken that the Commissioner does not require special legal qualifications, an Assistant Commissioner with the requisite legal skills could be delegated to run an increased number of hearings.

6.13 Some stakeholders addressed other key skills the Commissioner should, in their view, be required to possess. ODPP and the NSW Bar Association favour an additional requirement for a background in criminal law and management experience.

Conclusion

6.14 Removing the requirement for the Commissioner to possess special legal qualifications presents unacceptable risks to the reputation and operational effectiveness of the Commission.

6.15 Some of the powers of the Commission are extraordinary. For example, a witness summoned to attend or appear before the Commission at a hearing is not entitled to rely on the privilege against self-incrimination or legal professional privilege as an excuse for not answering questions or producing documents. The Commission can hold such hearings in secret. Public acceptance of the Commission's extraordinary powers could be significantly undermined if they were no longer overseen by a person with special legal qualifications.

6.16 Legislative amendment is not necessary to attract and appoint persons to the role of Commissioner with an understanding of criminal law and machinery of government processes and demonstrated senior level management experience and skills. This can be done through an updated Commissioner role description and recruitment processes.

6.17 In light of the conclusion that the current qualification for the role of Commissioner should remain unchanged, there is no need to consider the Discussion Paper's question concerning the title of Assistant Commissioner.

Division 2 – Functions of the Commission

Cyber references

6.18 Section 10 of the Act provides for the Commission to investigate matters referred to it by the Commission's Management Committee that relate to a relevant criminal activity, a serious crime concern, and the criminal activities of criminal groups. These matters cover 'traditional' crimes like armed robbery and extend to crimes committed by using modern technology. The Discussion Paper discussed whether the Act provided a sufficient statutory basis for the Commission to investigate crimes committed with new technology such, as the 'dark web', blockchain technologies and hacking software.

6.19 The Discussion Paper observed there is a growing need for the Commission to focus on the crimes committed using these technologies, with the caveat that it should be directed towards uncovering serious criminal activity and not mere intelligence gathering or research exercises. The Paper gave the example of a drug importation investigation uncovering a 'dark web' facility used by a drug syndicate to obtain false customs documentation. The facility could also be used by other parties to facilitate further serious offences such as firearms trafficking, people smuggling, child exploitation and terrorism.

6.20 The Commission must be able to follow the 'cyber trail', not just the traditional physical 'money trail' associated with profit-based crime. In light of this, the Discussion Paper sought comment on whether any amendments were needed to ensure that this occurs.

Discussion Paper Question:

6.21 ***Do the definitions in the Act require amendment to capture criminal use of blockchain technology and 'cybercrime', that is, digitally-enabled crime and crime committed against, and via, information technology systems (where such crimes are already relevant offences under the Act)?***

6.22 ***Do the functions in the Act require amending in order for the Management Committee to be able to approve references to investigate the use of technology such as the 'dark web', blockchain technologies or hacking software, which is used to facilitate or commit serious and organised crimes?***

Submissions

6.23 Stakeholder submissions were overwhelmingly supportive of retaining the current provisions of the Act, as the existing definitions in the Act are considered broad enough to capture blockchain technology and cybercrime or technology related crime.

6.24 The Commission advised that a reference had already been approved authorising the investigation of relevant criminal activity that was or is facilitated by encrypted communication technology. The Commission advised the legislation is adequate and there is no specific need to amend the Act to address a specific type of methodology. The Commission also noted in its submission that the skills of staff to access encrypted data need to be developed, and that this is an issue of training, not legislation.

Conclusion

6.25 We agree with the unanimous view expressed in the submissions that there is no need to amend the Act to authorise references to investigate crime committed by way of new technology.

Serious Crime Prevention Orders

6.26 The *Crimes (Serious Crime Prevention Orders) Act 2016* (**SCPO Act**) authorises the Commission to apply for serious crime prevention orders.

6.27 A serious crime prevention order (**SCPO**) may be made against a specified person if the court is satisfied that the person has been convicted of a serious criminal offence, or involved in serious crime related activity for which the person has not been convicted of a serious criminal offence, and there are reasonable grounds to believe the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

6.28 Part 2 of Division 2 of the Act sets out the principal functions of the Commission under the Act and a number of other Acts. It does not include applying for serious crime prevention orders as one of the Commission's principal functions.

6.29 The Discussion Paper asked whether applying for SCPOs should be expressly included as a function of the Commission.

Discussion Paper Question:

6.30 ***Out of an abundance of caution, is there any rationale for not making it explicit that the functions of the Crime Commission include the prevention and/or disruption of serious and organised crime, or seeking a Serious Crime Prevention Order to prevent and/or disrupt serious and organised crime?***

Submissions

6.31 The Commission submitted that there is uncertainty whether making an SCPO application clearly falls within its functions set out at sections 10 and 11 of the Act, particularly if the application was not connected with an investigation but made "with a view to merely disrupting or inhibiting criminal activity". Section 14 could conceivably cover SCPO applications, as it provides the Commission with the "power to do all things necessary to be done in connection with, or reasonably incidental to the exercise of its functions". However there remains some risk of challenge of this interpretation.

6.32 Other stakeholders did not express strong views against amendment to clarify this power.

Conclusion

6.33 The proposed amendment at Recommendation 1 would make it clear that preventing and disrupting organised and other serious crime is an object of the Act.

6.34 The inclusion of a provision in Division 2 of Part 2 of the Act would also clarify that applying for SCPOs is a principal function of the Commission. For abundance of clarity, we consider that the Act should be amended to expressly provide that applying for orders under the SCPO Act is a function of the Commission.

Recommendation 2:

The *Crime Commission Act 2012* be amended to expressly provide that the NSW Crime Commission's functions include applying for an order under the *Crimes (Serious Crimes Prevention Orders) Act 2016.*

Division 7 – attendance before the Commission

6.35 The Discussion Paper stated that there appeared to be an anomaly in the Act which fails to protect Commission witnesses who may be subject to court orders that prevent them from complying with a Commission summons.

6.36 In particular these situations include where:

- bail conditions restrict a witness's movements or impose a curfew, and
- the witness is subject to a community based sentence requiring they be elsewhere at the same time.

6.37 The Discussion Paper suggested that in order to comply with the Commission's summons, the only option for these witnesses may be to attend a public courtroom to seek a variation to their original court order. The safety of witnesses may then be compromised.

Discussion Paper Question:

6.38 ***What should be done to manage persons summoned by the Commission who are prevented from attending due to other court orders?***

Submissions

6.39 There was general support among the submissions for a legislative amendment to address this issue; but there is also recognition of the complexity and practical difficulties that are involved. The Commission recommended in their 2018 submission to the Review that the Act be amended to include a provision for the Supreme Court to "grant leave ex parte and 'in camera' for a witness to comply with a summons irrespective of any specified bail condition(s) and/or post-conviction order(s) and/or sentence(s) imposed upon that person". Noting that any amendment would have to protect the interest of a surety (guarantor) in the witness's compliance with bail conditions, the Commission suggested that the Act could be amended by following the provisions of the current s 35A, which applies to charged persons.

6.40 ODPP pointed out the difficulties in formulating a mechanism for court orders to be suspended given the variable obligations and conditions that may be an impediment to complying with the summons. It is concerned about the onus being on the individual to raise the problem with the Commission in the first instance. NSWPF suggested that a Management Committee process could be applied with a legislative machinery section to address the issue as an 'exemption to any breach' for an offender subject to orders. Others were supportive of consideration of this matter.

Conclusion

6.41 The *Bail Act 2013* (**Bail Act**) gives police and courts wide discretion to deal with bail compliance issues. Section 77 of the Bail Act gives police officers wide discretion to respond to situations that may constitute a breach of bail, including taking no action. In deciding whether to take action, and what action to take, police officers must consider the following:

(a) the relative seriousness or triviality of the failure or threatened failure,
(b) whether the person has a reasonable excuse for the failure or threatened failure,
(c) the personal attributes and circumstances of the person, to the extent known to the police officer, and
(d) whether an alternative course of action to arrest is appropriate in the circumstances.

6.42 Section 78 of the Bail Act permits a bail authority that is satisfied that an accused person has failed or is about to fail to comply with a bail acknowledgment or a bail condition to release the person on the person's original bail, or vary the bail decision. Section 79 of the Bail Act also provides a reasonable excuse defence to the offence of fail to appear in court in breach of a bail acknowledgement.

6.43 Section 48(4) of the Act is relevant to the exercise of this discretion. It provides that no criminal or civil liability (apart from the Act) attaches to a person for compliance, or purported compliance in good faith, with any requirement made under the Act. This applies to witnesses who comply with summonses issued under s 45 of the Act.

6.44 The intent of s 48(4) is that a person who complies with a requirement to appear before the Commission should not suffer adverse legal consequences. The concept of criminal liability is often used in the sense that a person is liable to be convicted and sentenced for an offence. There may be an argument as to whether immunity from criminal liability extends to person alleged to have failed to comply with bail conditions. However, given that a person who complies with a Commission summons cannot be convicted of the offence of fail to appear under s 70 of the Bail Act, it would be odd if the legislation contemplates that bail should be revoked for breach of a condition arising from the same circumstances.

6.45 We are not aware of any instances where a person who has complied with a Commission summons has been arrested by police and had bail revoked for breach of bail. It is unlikely that the police and the courts would seek to penalise a person subject to bail who complies in good faith with a Commission summons. Equally, it is unlikely that the Commission would be inflexible about moving hearing dates to accommodate a witness's obligations to comply with bail.

6.46 Similar considerations apply with respect to community based sentences. The *Crimes (Administration of Sentences) Act 1999* (**CAS Act**) gives Corrective Services NSW (**CSNSW**), courts and the State Parole Authority (**SPA**) discretion in responding to situations that may constitute a breach of a community based sentence, including taking no action. The CAS Act also gives CSNSW staff authority to suspend an offender's compliance with non-association and place restriction conditions on community based sentences.

6.47 As is the case with bail, the community based sentence legislative frameworks provide significant flexibility to manage situations where a Commission summons is issued to a person subject to a community based sentence. It is unlikely that courts, SPA and CSNSW would seek to penalise a person subject to a community based sentence who complies in good faith with a Commission summons. Equally, it is unlikely that the Commission would be inflexible about moving hearing dates to accommodate a witness's obligations to comply with a community based sentence.

6.48 In some circumstances, public awareness of a witness's attendance at the Commission under a summons may present a risk to the safety of the witness and other persons. Section 45(1)(d) of the Act authorises the Commission to prevent publication of the fact that a witness has given or may be about to give evidence at the hearing, or to require that fact to be published only in such manner, and to such persons, as the Commission specifies. This provision gives the Commission discretion to make arrangements for secret hearings and to make arrangements to notify police, courts, SPA or CSNSW that the witness is required to appear before the Commission.

6.49 We are confident that all relevant agencies take a practical, co-operative and flexible approach to managing the attendance at the Commission of witnesses subject to bail or community based sentences. Accordingly, we do not consider it necessary to amend the Act to provide for potential conflicts between a witness's obligations to comply with a summons and conditions of bail or a community based sentence.

Section 47 – Contempt of the Commission

6.50 The Discussion Paper observed that the contempt of the Commission offence in s 47 of the Act is arguably an inadequate regime to deal with contempt by a person summonsed to attend Commission hearings and by a witness giving evidence before the Commission.

6.51 A prosecution under s 47 of the Act may take months to come before a court. It may eventually result in a reluctant witness giving evidence, but it does not have an immediate salutary effect on the witness or on other witnesses called to the same hearing.

6.52 Legislation for comparable agencies, such as the Independent Commission Against Corruption (**ICAC**) and LECC, authorises the referral of witnesses to the Supreme Court. This is a quick and effective measure to deal with contemnors.

Discussion Paper Question:

6.53 ***Consistent with comparable bodies, should new provisions be inserted into the Act to allow the Commission to refer alleged contempt to the Supreme Court, in addition to the current mechanism of prosecuting an offence?***

Submissions

6.54 Most stakeholders were supportive of an amendment to adopt a contempt procedure consistent with comparable bodies. Stakeholders suggested the regimes of both ICAC and the LECC as options, noting that the Chief Justice of the Supreme Court should be consulted before any amendment can be made. NSWPF was the only dissenting view, submitting that it does not support any proposal for the Commission to undertake their own prosecution for contempt matters, as the current process is considered adequate.

Conclusion

6.55 We agree the Commission should have the same capacity as ICAC and LECC to deal swiftly with contempt by referring contemnors to the Supreme Court. The capacity to deal swiftly with contempt will motivate the contemnor and other witnesses to comply with the Commission's directions.

6.56 Establishing a regime to refer contempt to the Supreme Court, similar to the ICAC and LECC regimes, would not constitute a prosecution for the offence of contempt of the Commission under s 47 of the Act. That offence would remain within the Local Court's jurisdiction and be prosecuted by police prosecutors. We recommend an amendment to the Act to enable the Commission to refer contempt to the Supreme Court.

Recommendation 3:

The contempt provisions in the *Crime Commission Act 2012* be strengthened by allowing the NSW Crime Commission to refer alleged contempt to the Supreme Court.

7. Part 3 of the Act – NSW Crime Commission Management Committee (and Schedule 2)

Delegates to Management Committee meetings

7.1 The Discussion Paper noted that the work of the Commission continues to be enhanced by the role performed by the Management Committee. The Management Committee is comprised of:

- Independent Chair
- NSWCC Commissioner
- Chair of the Board of the ACIC (currently the AFP Commissioner)
- NSWPF Commissioner
- Secretary, Department of Justice.

7.2 The Discussion Paper suggested that the Management Committee could assist the Commission by "providing a stronger focus on setting investigative priorities" and suggested the following possibilities:

1. The inclusion of the Assistant or Special Commissioner as a member, as head of the legal branch responsible for the use of coercive powers. This would ensure that when the Management Committee is considering a referral both 'arms' (i.e. investigative and legal function) of the Commission are involved. [Note, this suggestion presupposed a change in the requirement for the Commissioner to have special legal qualifications, which is not recommended.]

2. A Deputy Commissioner of Police to attend a meeting when the Commissioner of Police is not able to attend. A Deputy Commissioner of Police has the required knowledge and skill to assist the Management Committee.

3. Provision for a member to nominate a senior officer in their department to attend in the occasional absence (such as sudden illness) of the member, to ensure a quorum may be constituted.

Discussion Question

7.3 ***Should the Act provide for the ability of Management Committee members to delegate attendance in certain circumstances and provide for the attendance of the Assistant or Special Commissioners?***

Submissions

7.4 The Commission's submission noted the Act provides that a member, or Chairperson, may appoint a person to attend a meeting of the Management Committee in place of the member. However, there is no express provision in the Act for the Chairperson or member to delegate their functions. In addition, the provision for a member to nominate a substitute to attend on their behalf may be intended only to cater for occasional absences not for long term or frequent absences.

7.5 Stakeholders were generally supportive of amendment of the Act to provide for the ability of Management Committee members to delegate their functions in certain circumstances and for the attendance of Assistant or Special Commissioners. The NSW Bar Association opposes provision for a member of the Management Committee to nominate a senior officer in their department to attend. LECC made the argument that the Act already provides for relevant delegations under s 4 or s 15.

Conclusion

7.6 Some of the proposals canvassed in the Discussion Paper about the Management Committee flow from the discussion about removing the need for the Commissioner of the Crime Commission to have special legal qualifications. Given we made no recommendation to proceed with any amendment, we did not consider this issue further.

7.7 Other issues raised in the Discussion Paper concerned the provision for a member to nominate a senior officer in their department to attend in the occasional absence (such as sudden illness) of the member, to ensure a quorum may be constituted. Further discussion about this proposed amendment is outlined below.

Should delegations be permitted?

7.8 Schedule 2 clause 7 of the Act provides that a member, or the Chairperson, may appoint a person to attend a meeting of the Management Committee in place of the member and a person so appointed is, when attending a meeting of the Committee in the place of a member, taken to be a member. Although there is no provision in the Act for the Chairperson or member to delegate members' functions, this provision makes it clear that a person appointed to attend on behalf of a member is *taken to be* a member.

7.9 In addition, NSW members of the Committee (apart from the Chairperson) have authority to delegate their statutory functions or nominate other persons to attend meetings of the Committee on their behalf. The Commissioner of the Crime Commission is authorised by s 15(2) of the Act to delegate to an Assistant Commissioner or member of staff of the Commission any of his or her functions. The Commissioner of Police is authorised by s 31 of the *Police Act 1990* to delegate to another member of the NSWPF any of the functions conferred or imposed on him or her by or under the *Police Act* or any other Act. Section 50(1)(e) of the Act provides for the Secretary of the Department of Communities and Justice to be represented at the Management Committee by a senior executive of the Department, nominated by the Secretary.

7.10 The Chair of the Board of the Australian Crime Commission (now known as the Australian Criminal Intelligence Commission) is a member of the Management Committee. Section 7B(3) of the *Australian Crime Commission Act 2002* (Cth) provides that the Commissioner of the AFP is the Chair of the Board. The Chair has no power to delegate his or her functions as Chair and s 69C of the *Australian Federal Police Act 1979* provides only for the delegation of the functions of the Commissioner of the AFP under that Act.

7.11 Further clarification was sought from the Commission in September 2019 about the need for an amendment. The Commission advised there is currently no need to amend the Act to allow a member to permanently delegate his or her attendance. The Management Committee is functioning effectively, with generally strong attendance by members or a senior member of the member's agency, when the need arises.

7.12 It is acknowledged that long term non-attendance of Management Committee meetings by members of the Committee is not desirable. However, the latest advice from the Commission is that the Committee is not experiencing such problems. NSW members of the Committee (apart from the Chairperson) already have the power to nominate other persons to attend on their behalf and exercise their functions. With respect to the Commissioner of the AFP in his or her capacity as Chair of the Australian Criminal Intelligence Commission, it is our view that if the AFP and the Board of the Australian Criminal Intelligence Commission consider it necessary for the Chair of the Board to be able to delegate his or her functions, it would be more appropriate for Commonwealth legislation to provide for such matters.

7.13 For the reasons outlined above we do not recommend an amendment to specifically provide for a member to delegate the member's attendance at Management Committee meetings and the member's functions as a member of the Committee.

Should Assistant Commissioner/s be members of the Management Committee?

7.14 Given the Review recommends the Crime Commissioner's qualifications are to remain unaltered and that s 15(2) and schedule 2 clause 7 of the Act are appropriate to provide for absences whether occasional or frequent, the Review does not support the Assistant Commissioner (Legal) becoming a member of the Management Committee.

7.15 Our view is that there is a risk that giving the Commission two members on the Management Committee could appear unbalanced and less arms-length in its decision-making and oversight than is currently the case.

7.16 We note that schedule 2 clause 9(3) of the Act already provides that an Assistant Commissioner may attend Management Committee meetings with the consent of the appointed and other members of the Committee and participate in the discussion of matters arising at the meeting.

8. Part 7 of the Act – Miscellaneous

Section 78A – vetting of Commission staff

8.1 Section 78A provides for vetting of prospective Commission staff to ensure all officers have the highest level of integrity. However, such checks are not repeated during the span of the person's employment at the Commission. There is risk that over time officers who are susceptible to indiscretions or who are disillusioned may compromise the Commission's information holdings.

8.2 The Discussion Paper noted a 2015 report by the Victorian Independent Broad-Based Anti-Corruption Commission that supported 'revalidation' of employees' clearances: "… as organised crime groups appear more likely to target existing employees rather than to infiltrate agencies by putting forward a member or associate for recruitment."

Discussion Question:

8.3 ***Should the Act permit continuous vetting of currently engaged staff? Should such vetting be generally implemented or only in specific instances where issues have been raised about an employee?***

Submissions

8.4 Stakeholder views on this question were supportive of the Commission having the power to undertake continuous vetting of staff, but many noted that revalidation of security access is an ongoing requirement of almost all law enforcement agencies when managing restrictive intelligence, and one already permitted under the Act.

8.5 The Commission's submission acknowledged that ongoing vetting checks are necessary to maintain accurate assessment of its personnel risks. The submission indicated that the Commission does not currently undertake continuous vetting. It distinguished between three types of ongoing vetting (targeted, random and continuous), all three of which it stated were appropriate strategies to ensure the integrity of the Commission.

Conclusion

8.6 Section 74(6) of the Act provides that the regulations may make provision for or with respect to the appointment, conditions of employment, discipline, code of conduct and termination of employment of staff of the Commission (except in so far as provision is made for those matters under the *Government Sector Employment Act 2013*).

8.7 This regulation making power appears to provide sufficient power to prescribe a requirement for Commission staff, as a condition of their employment, to consent to ongoing vetting, including consenting to the Commission obtaining information about their suitability for continued employment. We note that clause 8 of the Government Sector Employment (General) Rules 2014 already provides that Public Service employees who are subject to a condition of employment to have a security clearance must continue to maintain that clearance.

8.8 We also note that under the Crime Commission Regulation 2012, the Commission already has strong powers to compel, without cause, an employee to furnish a wide range of personal particulars, as well as fingerprints, and to provide consent to undertake enquiries. These requirements are prescribed under the regulation making power in s 77, concerning the disclosure of Commission officers' pecuniary interests.

8.9 In light of these provisions, our view is that the Act provides sufficient power to the Commission to continue or expand on current vetting of its staff.

Section 80 – Secrecy provisions

Timeframe for commencing proceedings for breaches of secrecy provisions

8.10 The limitation period for commencing proceedings for offences against the Act is currently set at six months. This is the general limitation period for summary offences at s179 of the *Criminal Procedure Act 1986*.

8.11 The Commission's submission suggested consideration could be given to this limitation being extended to three years for breaches against the Act's secrecy provisions.

8.12 For most offences, such as a witness refusing to answer a question before the Commission, the six-month limitation period is appropriate. However, the situation is different, with regard to offences against the secrecy provisions in s 80 of the Act. Those working for the Commission or attached to it in task forces are privy to a great deal of sensitive information, improper release of which could damage investigations, breach the privacy of individuals, or even worse, endanger the safety of witnesses and undercover operatives. The fact of unlawful release may not be known for some time after the offence has been committed.

8.13 Proceedings for offences against the secrecy provisions at s 180 of the *Law Enforcement Conduct Commission Act 2016* (**LECC Act**), as well as some other offences under that Act, can be commenced up to three years after the offence is committed. The secrecy provisions of the LECC Act are similar in intent to the terms of the Act and given the risks involved with secrecy breaches, stakeholders were asked whether it is more appropriate that proceedings for secrecy offences may be commenced within three years of the alleged offence.

Discussion Question:

8.14 ***Should section 80 of the Act be amended to provide that proceedings for breaches of the Crime Commission Act 2012 be commenced within three years of the alleged offending?***

Submissions

8.15 Stakeholders generally did not oppose the proposal. The Law Society of NSW submitted concerns about this proposal without further information, requesting detail about the average duration of the Commission's enquiries. It notes that allowing the commencement of proceedings to be extended to within three years of the alleged offending would remove the incentive to urgently investigate such serious matters. It also suggests that the two-year limitation under s 179(3)(b) of the *Criminal Procedure Act 1986* would maintain a level of consistency if the time period is to be extended.

Conclusion

8.16 The circumstances of unlawful disclosure of information may not become apparent until more than six months after the information has been disclosed. Proceedings for offences against the secrecy provisions in the LECC Act, as well as other provisions under that Act, can be commenced within three years after the offence is committed. This is considered proportionate to the high risk involved in the disclosure of sensitive information. There is no reason why a similar provision could not be adopted in the Act

8.17 For the reasons outlined above, we support extending the limitation period for commencing prosecutions for offences under s 80 of the Act to three years.

Recommendation 4:

The *Crime Commission Act 2012* be amended to provide that proceedings for breaches to secrecy provisions under section 80 can commence up to three years after the alleged offence was committed.

Divulging or unauthorised communication of information

8.18 The Act has strong provisions in s 80 preventing a person from unauthorised disclosure of information acquired while they were exercising functions under the Act.

8.19 However, the Commission has raised concerns about the current phrasing of s 80(2)(b) – "divulge or communicate to ***any person*** any information" [emphasis added]. The Commission expressed concerns about court judgments that exclude courts from the meaning of "person" when interpreting provisions like s 80(2) of the Act.

8.20 In *Osborne v R* [2014] NSWCCA 17, the Court of Criminal Appeal held in respect of the secrecy provision in s 135A(1) of the *National Health Act 1953* (Cth) that the words "divulge or communicate to any person" did not extend to a court. It relied, in part, on a line of authority going back to *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 where Dixon CJ held that the meaning of "person" in the secrecy provision in s 16(2) of the *Income Tax and Social Services Contribution Act 1936* (Cth) did not extend to courts.

8.21 The Commission is concerned that this interpretation of "person" exempts disclosure of information to a court from s 80(2), which the Commission is otherwise entitled not to disclose in response to a subpoena or other compulsory legal process. A person, including current and former officers of the Commission, could lawfully reveal operationally sensitive methodology in legal proceedings, compromise the effective performance of the Commission's functions and/or expose the Commission to spurious claims without the Commission's consent.

8.22 The Commission also expressed concerns that if a court is not a person for the purposes of s 80(2), then disclosures of information not made to an individual, such as by uploading or otherwise divulging information to a website might also fall outside the scope of the provision. The Commission proposed removing the words "to any person" from s 80(2)(b) to resolve both of these issues so that any disclosure regardless of whether it is to a person, a court, or otherwise is prohibited.

8.23 The Commission submitted it was not concerned with 'whistle blowers' who wish to draw attention to misconduct within the Commission. The Commission submitted that whistle blower rights to disclose information in certain circumstances are protected by the *Public Interest Disclosures Act 1994* and the *Law Enforcement Conduct Commission Act 2016*. The risk the Commission sought to address was current or former staff of the Commission maliciously or mischievously disclosing confidential information during a court proceeding and not being in breach of s 80(2).

Discussion Question:

8.24 ***Should section 80 of the Act be amended to remove the words "to any person" with respect to unauthorised disclosure of information?***

Submissions

8.25 Stakeholders generally did not oppose the Commission's proposal. However, the Bar Association opposed the proposal on the ground that, in some circumstances, a voluntary disclosure of confidential information to a court is appropriate and in the public interest. With respect to disclosure to websites, the Bar Association suggested inserting the words "or publish" after "to any person".

8.26 The Law Society of NSW recommended further consideration of potential ramifications across other legislation. It pointed to the case of *DPP v Best* [2016] NSWSC 261 in support of the view that disclosure using a website is intended to be a disclosure to a person by an intermediary. The AFP notes that even if s 80 is amended, the real person or persons behind an online electronic entity may not be identifiable themselves.

8.27 The Supreme Court was also asked its views about amending the Act to prevent voluntary disclosure of information covered by s 80 to a Court. The Supreme Court did not support such an amendment.

Conclusion

Disclosure to courts

8.28 The implications of the Commission's proposal are significant. It may impede courts in the administration of justice by preventing persons from voluntarily giving evidence in court that would help a court ascertain the truth. The evidence given could exculpate a defendant in a criminal trial or reveal significant wrongdoing that may be critical to the final verdict or orders made by the court.

8.29 However, s 80 already impedes courts from performing their functions by enabling the Commission, its officers and the Management Committee to refuse to comply with court orders to give evidence or produce documents. The Commission's power to withhold such information also applies to other bodies with similar powers such as Royal Commissions and Special Commissions of Inquiry.

8.30 There are good reasons for this exemption. The Commission holds very sensitive information which, if disclosed, could endanger the safety of a Commission witness, source of information or member of staff, and compromise the effective performance of the Commission's law enforcement functions and the functions of its partner agencies in NSW and in other jurisdictions. Parliament has determined that courts should not be able to compel production of or the giving of evidence of information obtained under the Act and has prohibited Commission staff and other persons from divulging or communicating such information, except in the limited circumstances set out in sub-section (4).

8.31 Given the clear intent of the policy behind s 80 to empower the Commission to resist court orders to compel it to disclose information and documents and to prevent current and former officers from disclosing information obtained in the course of their duties, it would be incongruous for the Act to give current and former officers of the Commission a discretion to voluntarily give evidence about very sensitive matters in legal proceedings without the consent of the Commission and the Management Committee or where otherwise permitted by the Act. We agree with the Commission that in light of the judicial trend to interpret provisions like s 80(2) as not applying to courts, the Act should expressly prevent a person from divulging or communicating information to a court.

8.32 We consider that the Commission's proposal to simply remove the words "to any person" may not necessarily have the intended effect. Courts may understandably look closely at provisions like s 80(2) and interpret them in a way that enables them to obtain evidence and discharge their functions, where the language of a provision can bear such an interpretation. To avoid such an outcome, we recommend that the Act be amended to make

it abundantly clear that any disclosure or communication of information to which s 80 applies by any means, including disclosure or communication of information to a court, is an offence under s 80(2).

8.33 This recommendation would not prevent a person from disclosing information voluntarily to a court in all circumstances, because s 80(4) provides for a number of exceptions to the offence in s 80(2). We also note that s 128 of the *Evidence Act 1995* enables a court to give a certificate to a person who objects to giving evidence on the ground that doing so may tend to prove he or she has committed an offence. The certificate means that the person may willingly or be required to give evidence to a court where it is in the interests of justice. The certificate prevents the evidence given in the proceedings being used against the person in other proceedings. This proposal would not absolutely rule out a current or former officer of the Commission giving evidence to a court.

Disclosure to websites

8.34 We consider the likelihood of a court finding that disclosing information to a website is not a disclosure to a person under s 80(2) to be remote. The Oxford English Dictionary defines "website" as "a collection of related and linked web pages hosted under a single domain name, typically produced by a single person, organization, etc.; the notional location on the World Wide Web at which such a collection of web pages can be accessed". In our view, providing information to a website is an act of disclosure to the controller of the website, similar to leaving an envelope of documents in a mailbox to be collected by the controller of the mail box. We consider it more likely that such disclosure would be considered a disclosure or communication to the person who controls the website, with the website being a tool used to enable the disclosure or communication to take place.

8.35 We have, however, for abundance of caution, included the words "by any means" in our recommendation in order to reinforce the intent of the legislation to prevent any unauthorised disclosure of information, regardless of to whom and how it is done. If this recommendation is implemented, it will be a matter for the Parliamentary Counsel to draft the language of the amendment to reflect the intent of the legislation.

Recommendation 5:

The *Crime Commission Act 2012* be amended to make it abundantly clear that any disclosure or communication of information to which section 80 of the Act applies by any means is an offence under section 80(2), including disclosure or communication of information to a court, subject to the existing exceptions in the Act**.**

Extension of secrecy provisions to staff of other agencies involved in joint investigations with the Crime Commission who are not part of a formal task force

8.36 Officers from other investigative agencies may work with the Commission either in formal task force arrangements under s 58 of the Act, or arrangements outside of s 58. The second group includes, for example, many police officers involved in joint investigations into homicides.

The Commission's submission draws attention to the inconsistent way in which the secrecy provisions in s 80 of the Act apply to its staff and members of task forces under s 58, but not to other persons working closely with the Commission. Commission staff and members of s 58 task forces are obliged to keep secret any material they acquire in the course of their duties. The secrecy provision currently applies to others working closely with the Commission *only if* they are expressly advised that information they receive from Commission personnel is to be treated as confidential.

8.37 This does not appear to reflect the reality that investigators from other agencies who are working with the Commission will have access to confidential information, over which secrecy constraints should apply. Information can be obtained directly from a computer or other source and not from a Commission staff member. The Commission's submission also argues it is inappropriate that the secrecy provisions only apply when these officers are expressly informed that the material is confidential.

8.38 The requirement that other officers be expressly informed of the confidential nature of material they are provided or given access to might be cumbersome or redundant in most cases. However, if officers working with the Commission without the formality of a s 58 task force could potentially commit a criminal offence arising from the way they deal with Commission material, they should be put on notice – at least in general terms if not item by item – of the effect of the secrecy provisions in the Act.

8.39 Any amendment to the Act in this regard may necessitate the Commission putting in place a mechanism to put investigators from other agencies on notice that they are bound by the secrecy provisions of the Act.

Discussion Question:

8.40 ***Should section 80 of the Act be extended to officers of other investigative agencies who have been involved in NSWCC investigations other than by way of a s.58 task force?***

Submissions

8.41 Stakeholders did not oppose the proposal to extend secrecy provisions to officers who are not part of formal tasks forces if appropriate safeguards are implemented. NSWPF suggested the use of a caveat or similar mechanism on any Commission information held on a computer system and accessed by police involved in joint investigation.

8.42 NSWPF is concerned that if secrecy provisions are extended too broadly they could apply to peripheral officers who may have limited indirect involvement in a joint investigation or access to Commission material for investigative purpose. ACIC requested that it be kept informed of changes to secrecy provisions, as it maintains an interest in understanding how any hypothetical changes might affect ACIC staff, particularly NSWPF secondees and AFP special members. The AFP recommends that if this proposal is implemented, the Commission should clearly advise other agency investigators that they are on notice that the s 80 secrecy provisions apply.

Conclusion

8.43 As indicated above, the current provision does not appear to reflect the reality that officers from other agencies who are working with the Commission outside of a s 58 task force will have access to confidential information, over which secrecy constraints should apply.

8.44 The requirement that they be expressly informed of the confidential nature of material that they are provided or to which they are given access might be cumbersome or redundant in most cases. However, if officers working with the Commission without the formality of a s. 58 task force could potentially commit a criminal offence arising from the way they deal with Commission material, they should be put on notice - at least in general terms if not item by item - of the effect of the secrecy provisions in the Act.

8.45 An amendment to the Act in this regard would need to be supported by the Commission introducing a mechanism to put on notice investigators from other agencies that they are bound by the secrecy provisions of the Act. This would require agreement from the NSWPF and the AFP to the terms of the amendment and new notice arrangements. Any amendment of this nature should also ensure that appropriate safeguards are implemented.

Recommendation 6:

The *Crime Commission Act 2012* be amended to make it clear that officers of other agencies involved with NSW Crime Commission operations and investigations who are not members of section 58 Task forces who are given access to confidential information are covered by section 80.

Section 80A – Disclosure of information and giving of evidence to the NSW Ombudsman

8.46 Section 80A was inserted into the Act by the *Ombudsman Amendment Act 2012* to enable the Ombudsman's office to complete its inquiry (Operation Prospect) into complaints and allegations about the conduct of officers of the NSWPF, the Crime Commission and the Police Integrity Commission.

8.47 Sub-section (1) authorises the Commission to furnish information and give evidence before the Ombudsman. Sub-section (2) provides that the Commissioner and officers of the Commission can be compelled to give evidence or produce documents before the Ombudsman where a matter has been referred to him or her by the Inspector of the Law Enforcement Conduct Commission for investigation.

8.48 As Operation Prospect has now concluded, comments were sought on whether s 80A is fit for purpose, or whether any or all of the section should be amended or removed.

Discussion Question:

8.49 ***Section 80A was inserted into the Act to deal with a particular event, Operation Prospect. Given Operation Prospect has now concluded, should any or all of section 80A be amended or removed?***

Submissions

8.50 There were mixed responses to this issue from stakeholders. The Commission submitted that given the exceptions to secrecy provisions under s 80A were inserted to reflect a particular context of a point in time, there is no requirement to maintain such a section in the Act. This was supported by NSWPF, however, the Ombudsman opposes such amendment.

8.51 In its submission, the Ombudsman elaborated further on the provision, noting that s 80A does not relate to the Ombudsman's jurisdiction, but rather provides exception to the Commission secrecy obligations so that the Commission can voluntarily provide information to the Ombudsman, and so that the Ombudsman can compel the production of information from the Commission in certain circumstances. The Ombudsman argued that exceptions provided for in s 80A should be retained in some form.

8.52 The Ombudsman notes that although there have been no cases to date other than Operation Prospect where the exception has been required, the provision is nevertheless potentially relevant for future investigations. LECC also opposes removing the provision as it may have useful application to other scenarios which could arise in future.

8.53 The AFP suggested that this is a policy question for the Commission, but noted that issues of disclosure can be resolved by early and constant communication between relevant agencies who have a duty to disclose. Disclosure can be managed by ensuring a 'two-stage' process is maintained. This involves, firstly, disclosure to the ODPP of the existence of potential disclosure material, and then negotiation between parties as to the extent to

which disclosure is made. The disclosure can be in full or in part depending on the protective measures available such as legal professional privilege.

Conclusion

8.54 Although Operation Prospect has ended, there are compelling arguments to retain the provision put forward by the NSW Ombudsman. The obligation on the Commission in s 80A is to give evidence or produce documents to the Ombudsman only applies where the Ombudsman is investigating a matter about LECC or officers of LECC that is referred to the Ombudsman by the Inspector of LECC. Section 124(1)(e) of the LECC Act limits the Inspector's power to refer matters to the Ombudsman for these matters only.

8.55 The second reading speech to the Bill which introduced s 80A noted that one of the reasons for the Ombudsman to conduct the Operation Prospect inquiry was the capacity of the Ombudsman's office to carry out an inquiry of that scale. It is possible in future that the Inspector of LECC may need to refer an inquiry into LECC to the Ombudsman because of capacity constraints. Removing the provision could hinder the ability of the Ombudsman to conduct such an investigation. In this respect, the objections of both the Ombudsman and LECC to removing s 80A are significant.

8.56 Given the concerns of the Ombudsman and LECC and that there is no strong rationale for change, no amendment to s 80A is recommended.

Sharing telecommunications interception material within a task force

8.57 The Discussion Paper canvassed a suggestion by the Commission to streamline the recording and retention requirements of the *Telecommunications (Interception and Access) Act 1987* (NSW) (**TIA Act NSW**) when the Commission provides information to the NSWPF "in connection with an accepted reference"[1].

8.58 The Commission is permitted to share "lawfully obtained material" with the NSWPF when both agencies are involved in joint operations, but is required by s 5 of the TIA Act NSW to record the particulars of each communication of this material. The recording and reporting on each communication is onerous and takes valuable time away from investigations.

8.59 The Discussion Paper canvassed an amendment to the Act to capture the Commission's information sharing in investigative partnerships for the purposes of the TIA Act NSW, enabling information to be shared quickly with all investigators. The recording would still occur but for a 'group' of information, rather than every occasion.

Discussion Question:

8.60 ***In order to address the onerous obligations described above, is an amendment to the Crime Commission Act a more sensible approach than an amendment to the TIA Act?***

Submissions

8.61 The Commission initially raised the issue of record keeping compliance with the TIA Act NSW. However, supplementary advice from the Commission suggested legislative amendment was not necessary. This is because NSWPF officers working with the Commission in task forces are considered "staff of the Commission" under s 74 of the Act.

8.62 Other stakeholders had mixed responses. ODPP concluded that amendment of the Act would be a reasonable response to this situation, the NSW Bar Association considers amendment to the Act is not more sensible than amendment to the TIA Act. LECC has concerns about constitutional risks. NSWPF found the proposal unclear and notes that any amendment to the TIA Act should apply to all agencies.

Conclusion

8.63 In light of the Commission's supplementary advice that officers of other agencies who work in a task force are considered to be Commission staff, we consider that no amendment to the Act is required.

[1] This is taken to mean in connection with a task force established by the Management Committee under s.58 of the *Crime Commission Act 2012*.

9. Criminal Assets Recovery Act 1990

Meaning of serious crime related activity

Additional offences to deal with evolving crime

9.1 The foundation for action under CARA to confiscate criminal assets is a person's involvement in 'serious crime related activity'. Section 6 of CARA defines 'serious crime related activity' to include a range of specific and serious criminal offences, many (but not all) to do with prohibited drugs. There is also a 'catch-all' provision in s 6(2)(d), which picks up:

> *'an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide'.*

9.2 Criminal activity has evolved in recent years to encompass the use of the internet and modern technology to engage in serious crime. Some of the offences in s 6(2)(d) of the Act could involve the use of digital technology, or even amount to 'cybercrime'; but there are still gaps with regard to computer offences that are not committed in furtherance of fraud, money laundering, or one of the other offences specified, such as hacking websites and databases to obtain confidential information.

9.3 The Discussion Paper suggested that confiscation proceedings under CARA should be available where profit has been derived from cybercrime, and proposed amending the definition of 'serious criminal offence' within 'serious crime related activity' in s 6 of CARA to include the following computer offences in the *Crimes Act 1900*:

- Section 308C (unauthorised access, modification or impairment with intent to commit serious indictable offence);
- Section 308D (unauthorised modification of data with intent to cause impairment); and
- Section 308E (unauthorised impairment of electronic communication).

9.4 The Discussion Paper also suggested CARA be amended if necessary, to ensure that assets in the form of blockchain technology such as Bitcoin are captured under CARA.

Discussion Question:

9.5 ***Are there other offences that should apply under CARA to enable the Commission to adapt to evolving crime types?***

Submissions

9.6 Stakeholders were generally supportive of some kind of amendment to enable the Commission to adapt to evolving crime types. The Commission supports the suggestions for the three additional *Crimes Act* computer offences, but made no further suggestions. The NSW Bar Association had concerns about the inclusion of s 308C as this provision picks up an intention to commit any serious indictable offence as opposed to confining the serious indictable offences to those at s 6(2) of CARA, however no other stakeholders held this view. LECC is of the view that CARA litigation should be conducted by the NSWPF.

9.7 On the issue of whether CARA should be amended to ensure that assets in the form of blockchain technology such as Bitcoin are captured, stakeholders either did not consider it necessary or did not comment.

Conclusion

9.8 We consider there is merit in amending s 6 of CARA to include the three computer offences under the *Crimes Act 1900* suggested in the Discussion Paper, to make it clear that confiscation proceedings may be taken under CARA where profit has been derived from cybercrime.

9.9 The NSW Bar Association's concerns regarding s 308C can be addressed by confining the proposed provision so that only instances where the serious indictable offence intended by the unauthorised computer access would itself be already encompassed within s 6(2).

9.10 With respect to whether CARA should be amended to ensure that assets in the form of blockchain technology such as Bitcoin are captured, given the lack of positive stakeholder support for an amendment and the potential for unintended consequences on the meaning of personal property in other legislation, no recommendation is made.

Recommendation 7:

The *Criminal Assets Recovery Act 1990* be amended to include the offences under sections 308C, 308D and 308E of the *Crimes Act 1900* within the meaning of "serious criminal offence" under section 6(2).

Commonwealth offences committed outside NSW

9.11 As indicated above, s 6(2) of CARA lists a number of NSW offences that are "serious crime related activity" (e.g. drug trafficking, money laundering, sexual servitude, firearms manufacture). Through s 6(2)(i), CARA intends that comparable offences committed in other jurisdictions (including overseas) are serious crime related activities in NSW – thus enabling the Commission to commence asset confiscation proceedings.

9.12 The Discussion Paper noted that the wording in s 6(2)(i) does not clearly capture offences that have no NSW equivalent (e.g. excise fraud related to illegal tobacco importation – "Commonwealth only offences"), but which are otherwise serious crime related activities. The Discussion Paper suggests that re-wording of this section would clarify this and support the cross-jurisdictional work of the Commission.

Discussion Question:

9.13 ***Should section 6(2)(i) of CARA be redrafted so that it better captures offences committed outside NSW that could be characterised as serious crime related activity even if there is no exactly comparable NSW offence?***

Submissions

9.14 ODPP, the Commission and NSWPF supported an amendment to capture offences outside NSW that have no NSW equivalent offence. The Commission notes that s 6(2)(i) attempts to include, to a limited extent, Commonwealth offences in the definition of serious crime related activity, but is poorly worded and unclear. It proposes an amendment of s 6(2)(i) that separates Commonwealth offences from those committed in other places (including outside Australia). In respect of Commonwealth offences, it suggests adding the words, "… even if there is no equivalent State [NSW] offence".

9.15 The NSW Bar Association did not consider it necessary to make such an amendment. Commonwealth concerns regarding this issue are outlined further in the below conclusion summary.

Conclusion

9.16 There were mixed views as to the merit of the proposal. The Commission's proposed formulation aims to avoid the risk that offences committed in overseas jurisdictions with draconian legal systems might - because they 'sound like' comparable NSW offences - be classified as serious criminal activity and fall within the ambit of CARA. This is not to suggest that the Commission would in fact instigate proceedings on the basis of such offences.

9.17 The Commonwealth Government has recently taken significant steps to improve its own proceeds of crime confiscation regime – including the establishment of a National Co-operative Scheme on Unexplained Wealth, of which NSW is a founding member. The National Unexplained Wealth Scheme presupposes that more than one jurisdiction can have coverage of the same criminal assets and includes notification mechanisms, to avoid conflicting proceedings being instituted.

9.18 Consultation was undertaken with the Commonwealth Department of Home Affairs, the AFP, the Commonwealth Director of Public Prosecutions, the Australian Taxation Office and the Commonwealth Attorney-General's Department, for officer-level views on the proposal put forward by the Commission. The AFP advised that it was not immediately clear what the rationale is for requesting the change. All agencies had significant concerns, summarised below.

9.19 Commonwealth agencies submitted that the proposal may:

- Give rise to operational inconsistencies between NSW and the Criminal Assets Confiscation Taskforce without the dual criminality test under s 6(2)(i) of CARA,
- Create a strange situation where NSW restraining and confiscation orders apply more broadly extraterritorially than they do in NSW,
- Extend powers inappropriately to NSW to litigate asset confiscation matters,
- Require considerable additional resources to create a suitable de-conflicting scheme, in the event of duplication under the proposal,
- Potentially confuse international counterparts as to the appropriate authority under CARA,
- Potentially reduce the Commonwealth's negotiating power in deferred prosecution agreements, if the Commission cannot guarantee it would not pursue the company separately under its proceeds of crime laws,
- Reduce the Commonwealth's control on representations put before courts on the proper construction of these offences,
- Reduce revenue to the Commonwealth,
- The Commission action could come into conflict with future proposed proceeds of crime action by the Commonwealth DPP,
- Result in CARA proceedings preceding Commonwealth prosecution, which could then jeopardise prosecution of the defendant or related offenders as well as create the undesirable situation of the Commission litigating Commonwealth offences and putting interpretations of Commonwealth legislative provisions before NSW superior courts,
- Create a potential for 'tip off' of parties the target of Commonwealth investigations, and
- Create inconsistencies with the Australian Constitution in relation to relevant Commonwealth legislation.

9.20 Given the concerns raised by various Commonwealth stakeholders, and without a strong rationale for change, it is not recommended CARA be amended to expand or clarify the Commission's power to institute proceedings under CARA for Commonwealth-only offences.

Administrative Forfeiture

9.21 In the course of exercising its law enforcement functions, the Commission regularly seizes large sums of cash and items of value (e.g. jewellery) where no one claims ownership. This is because connection with the items could implicate them in criminal offences. An example given is where a large volume of cash is found in an abandoned property that was formerly used for illicit drug activity.

9.22 The suggested solution to these types of scenarios is to introduce into CARA provisions which provide for forfeiture of seized property where no party claims an interest in it. Such a scheme is already operating in the Commonwealth under the *Customs Act 1901*.

9.23 Administrative forfeiture avoids unnecessary and wasteful court proceedings that are uncontested. Administrative forfeiture is not available in respect of real property.

Discussion Question:

9.24 ***If CARA is amended to enable the Commission to undertake Administrative Forfeiture for seized assets that are suspected of being serious crime derived property and no party has claimed ownership, what protections should be prescribed to ensure the true owner can claim their assets?***

Submissions

9.25 Most stakeholders supported or raised no objections to administrative forfeiture provisions being introduced into CARA, but expressed no view on a method of administrative forfeiture that should be adopted. The NSW Bar Association was the only stakeholder that did not support the proposal, as it considers that the well-developed process of civil forfeiture and safeguards under CARA is appropriate in its current form.

9.26 The Commission has proposed a system of notification (adapted from that set out in the *Customs Act 1901* (Cth)) whereby there would be a notice period of 30 days served on all non-parties who may have a claim. For example, the lawful owner of stolen goods could recover them before forfeiture occurs. It is suggested that the Commission undertake further development of the system of notification to put in place a range of mechanisms to proactively seek to identify a legitimate owner prior to confiscation occurring.

9.27 If no claim is made, administrative forfeiture can be effected. If a claim is made, the Commission could either accede to the claim or progress the matter under CARA in the usual manner.

9.28 A further protection the Commission recommends is for CARA to provide that even after forfeiture has occurred, it would be possible for parties to appeal and recover the funds or goods. Such an appellant would need to establish proof of ownership, lawful acquisition (broadly defined to mean property that is not 'tainted' – see below) and reasons for not making a claim within the specified time.

Conclusion

9.29 We agree that introducing administrative forfeiture provisions into CARA would avoid the artificial and wasteful use of court processes for *in rem* proceedings with no other party responding to the Commission's application.

9.30 However, apart from the Crime Commission, there was little stakeholder engagement about the kind of administrative forfeiture scheme that should be implemented. There are a range of alternative administrative forfeiture schemes that could be considered as a basis for a scheme for the Commission, such as the scheme used by the Australian Border Force

under the *Customs Act 1901* (Cth) and the scheme for the NSW Police Force in the *Law Enforcement (Powers and Responsibilities) Act 2002*.

9.31 We note that the Customs Act scheme focuses on property that is seized because it is not able to be lawfully brought into Australia. Property seized by the Commission in the exercise of its functions may not have a connection with any unlawful activity and the owner of the property may not have been involved in criminal activity.

9.32 We consider there should be further policy development and active engagement with stakeholders on this issue before making recommendations about the specific regime to be introduced. We propose to consult further with stakeholders to develop an administrative forfeiture regime for the Commission and provide recommendations to Government.

Recommendation 8:

An administrative forfeiture scheme should be developed under the *Criminal Assets Recovery Act 1990* in consultation with stakeholders, with recommendations provided to the Government about an appropriate forfeiture regime.

Stay of proceedings

9.33 Section 63 of CARA provides that the fact that criminal proceedings are underway is not a ground for the Supreme Court to stay civil proceedings under CARA. Its purpose is to enable confiscation proceedings under CARA to proceed without being delayed by concurrent criminal proceedings related to the CARA proceedings. The wording of s 63 is identical to the wording of s 319 of the Commonwealth *Proceeds of Crime Act 2002* (**POCA**) prior to amendments made to s 319 in 2016.

9.34 The Crime Commission submitted that amendments should be made to CARA to reflect the revised provisions in POCA.

Amendments to POCA

9.35 In February 2015, the High Court ruled that although the mere institution of criminal proceedings against a defendant that relate to concurrent POCA forfeiture proceedings against that defendant is not a ground on which the forfeiture proceedings should be stayed, s 319 of POCA did not prevent the staying of forfeiture proceedings where they may prejudice the conduct of the defence in the criminal proceedings; *Commissioner of the Australian Federal Police & Ors v Zhao & Anor* [2015] HCA 5.

9.36 The circumstances of the criminal proceedings and the stayed POCA proceedings in *Zhao* centred around charges against the second respondent for the Commonwealth offence of dealing with money and property that are proceeds of crime. The second respondent claimed his criminal defence would be affected if he defended the POCA proceedings, because he would have to depose of his property and financial interests and in effect wave his right to self-incrimination. The Victorian Court of Appeal accepted these arguments and stayed the POCA proceedings against him pending determination of the criminal charges. POCA proceedings against the first respondent were also stayed to prevent a multiplicity of cases arising from the same circumstances.

9.37 The High Court rejected an argument that the second respondent should state the specific matters of prejudice affecting him, as this would reveal information about his criminal defence. The Court also rejected arguments that protective orders could be made to address the issue and the case heard in closed court. Protective orders could not circumvent the AFP's power under s 266A of POCA to disclose evidence obtained by compulsion to the prosecution. Closing a court to enable the AFP to progress POCA

proceedings and receive the second respondent's evidence was not a proper reason to depart from the principle of open justice.

9.38 Following the *Zhao* decision, the Commonwealth introduced a number of amendments to POCA. Section 319 was amended to provide that a court may stay POCA proceedings that are not criminal proceedings if the court considers that it is in the interests of justice to do so. Section 319 also clarifies the grounds on which POCA proceedings must not be stayed:

(a) where criminal proceedings have been, are proposed to be or may be instituted or commenced against the person subject to the POCA proceedings;

(b) where criminal proceedings have been, are proposed to be or may be instituted or commenced against another person in respect of matters relating to the subject matter of the POCA proceedings;

(c) where a person may consider it necessary to give evidence, or call evidence from another person in POCA proceedings and the evidence is or may be relevant (to whatever extent) to a matter that is, or may be, at issue in criminal proceedings that have been, are proposed to be or may be instituted or commenced against the person or any other person;

(d) where POCA proceedings in relation to another person have been, are to be or may be stayed.

9.39 In considering whether a stay of POCA proceedings is in the interests of justice, s 319 requires the court to have regard to:

(a) the need for the POCA proceedings, and any criminal proceedings against a person subject to the POCA proceedings to proceed as expeditiously as possible;

(b) the cost and inconvenience to the Commonwealth of retaining property to which the POCA proceeding relates and being unable to expeditiously realise its proceeds;

(c) the risk of a proceeds of crime authority suffering any prejudice (whether general or specific) in relation to the conduct of the POCA proceedings if the proceedings were stayed;

(d) whether any prejudice that a person (other than a proceeds of crime authority) would suffer if the POCA proceedings were not stayed may be addressed by the court by means other than a stay of the proceedings;

(e) any orders (other than a stay of the POCA proceedings) that the court could make to address any prejudice that a person (other than a proceeds of crime authority) would suffer if the proceedings were not stayed.

9.40 The rationale for the amendments was that stays that delay POCA proceedings until a criminal trial is complete have flow on effects on the availability of evidence, impede the operation of POCA and frustrate its objects. A stay should only be used if it is the only means of addressing the prejudice to a criminal trial. The Commonwealth explanatory memorandum to the amendments stated they were designed to ensure that the individual circumstances of POCA proceedings are considered, including the nature of the overlap between POCA and criminal proceedings, and to prevent the risk that a person need only claim a risk of prejudice without showing the nature of that risk.

9.41 The Commonwealth inserted s 319A into POCA to enable proceedings to be held in closed court to prevent interference with the administration of criminal justice. It also amended s 266A of POCA to prevent the disclosure of information obtained through compulsory processes under POCA where contrary to a non-disclosure order of a court. These

provisions were designed to give the court alternative options to limit the potential prejudice to criminal proceedings without having to stay the POCA proceedings.

9.42 As the Commission's proposal to amend s 63 of CARA to reflect the amendments made to s 319 of POCA would be significant, the views of stakeholders were sought.

Discussion Question:

9.43 ***Should section 63 of the Criminal Assets Recovery Act 1990 be amended to reflect amendments made to section 319 of the Proceeds of Crime Act 2002 (Cth) following the High Court decision in the matter of Zhao?***

Submissions

9.44 There were mixed responses to this proposal. The AFP supported the proposed amendment to s 63 and NSWPF and LECC did not oppose it. The Law Society of NSW opposed the proposal arguing that s 319 of POCA is too prescriptive and grounds for staying proceedings should be developed through common law. The NSW Bar Association also opposed the proposed amendment on similar grounds to that of the Law Society. The Bar Association submitted that whether the interests of justice require a stay of proceedings will depend upon the circumstances of the particular case at hand. That is a matter best left to the discretion of the court, which should not be unduly constrained by amendments of the kind effected by s 319 of POCA. No other stakeholders held these views.

Conclusion

9.45 Our view is that s 63 of CARA should be amended to reflect the new provisions in s 319 POCA. When the CARA legislation was introduced in 1990, the then Premier's second reading speech stated that "the legislation will not allow civil proceedings to be delayed pending completion of the criminal proceedings, but it does provide for the making of suppression orders or non-publication orders by the Supreme Court. In this way confiscation proceedings can go ahead independently of action in the criminal courts". While the decision in Zhao understandably sought to tackle prejudice to the defendant in that case, it has implications for s 63 and its underlying intention to enable CARA proceedings to proceed even though criminal proceedings are on foot. We consider that courts should be able to stay proceedings where there is no other option to adequately address prejudice to a defendant, but that other options should be explored first before taking that step.

9.46 The explanatory memoranda to the Bill which amended s 319 of POCA explained that the intent of the amendments was to prevent a person using a generalised risk of prejudice as a basis for seeking a stay. A successful stay application would enable a person to delay the determination of POCA proceedings until the criminal trial is complete, which would have flow on effects on the availability of evidence, impede the operation of the non-conviction based POCA scheme and frustrate the objects of POCA.

9.47 The amendments to s 319 were designed to ensure that the court will consider the individual circumstances of the proceedings, including the nature of the overlap between the civil POCA proceedings and the criminal proceedings, and the specific nature of the risk of prejudice being claimed. A person should not obtain a stay based only on a claim of a risk of prejudice without providing evidence explaining the nature of that risk. The matters to which a court must have regard in considering whether to grant a stay are not closed and do not prevent the court from considering other issues in deciding whether a stay is in the interests of justice.

9.48 The new s 319 grounds on which POCA proceedings must not be stayed do not prevent a court from taking account prejudice to an accused person arising from proceedings under

POCA and do not remove the court's discretion to stay where such prejudice cannot be adequately addressed.

9.49 In addition, the restriction on disclosure of information inserted into s 266A of POCA and the option of hearing proceedings in closed court under s 319A of POCA are additional protections that can be included in CARA to enable the court to mitigate the risk of prejudice arising from CARA proceedings.

9.50 We consider that aligning s 63 of CARA with s 319 of POCA including giving courts options such as closed court hearing and the power to prohibit information sharing, will support the intent of s 63 to enable CARA proceedings to proceed while criminal proceedings are on foot, while retaining a power for courts to stay proceedings where there is a demonstrated prejudice to the defendant and no other measures would adequately address that prejudice. It would give courts guidance on when to stay CARA proceedings and harmonise the law in NSW and the Commonwealth, thus allowing courts to develop case law on applications for stays that can assist in both jurisdictions.

9.51 We note that courts have begun applying the new s 319 to applications to stay POCA proceedings. For example, in *Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101* the NSW Criminal Court of Appeal upheld a decision by the Primary Judge not to stay proceedings under the new s 319 because the defendant had not demonstrated the loss of legitimate forensic choice, the information protection mechanisms put in place under the new provisions were adequate, and the Primary Judge had properly considered the prejudice to both parties of making or refusing a stay.

Recommendation 9:

The *Criminal Assets Recovery Act 1990* be amended to align the stay provision in section 63 with section 319 of the *Proceeds of Crime Act 2002* (Cth), including giving courts options to hear matters in closed court and to prevent disclosure of information obtained in CARA proceedings to prosecuting authorities.

10. Appendix A: Glossary

ABF:	Australian Border Force
ACIC:	Australian Criminal Intelligence Commission (formerly Australian Crime Commission)
AFP:	Australian Federal Police
BA:	NSW Bar Association
CARA:	*Criminal Assets Recovery Act 1990* (NSW)
COPOCA	*Confiscation of the Proceeds of Crime Act 1989*
LECC:	Law Enforcement Conduct Commission
NSWCC:	NSW Crime Commission
NSWPF:	NSW Police Force
ODPP:	Office of the Director of Public Prosecutions (NSW)
PH:	Peter Hastings QC (former Crime Commissioner)
POCA:	*Proceeds of Crime Act 2002* (Cth)
SCPOs:	Serious Crime Prevention Orders
TI:	Telecommunications interception
TIA Act NSW:	*Telecommunications (Interception and Access) Act 1987* (NSW)

11. Appendix B: Consultation

Responses to Discussion Paper: July 2018	
Name	**Organisation**
NSW Police Force	Law Enforcement
NSW Crime Commission	Law Enforcement
Law Enforcement Conduct Commission	Oversight Agency
Office of the Director of Public Prosecutions (NSW)	Prosecutions
NSW Bar Association	Legal practitioners
Peter Hastings	Former Commissioner, NSW Crime Commission

Responses to Supplementary Consultation Paper: June 2019	
Name	**Organisation**
NSW Police Force	Law Enforcement
Law Enforcement Conduct Commission	Oversight Agency
NSW Bar Association	Legal practitioners
Law Society of NSW	Legal Practitioners
Australian Federal Police	Law Enforcement