

EXPLANATORY MEMORANDUM
THE ROYAL COMMISSIONS (POWERS) AMENDMENT BILL 2005

Background

The final report of the Kennedy Police Royal Commission recommended, amongst other things, that the *Royal Commissions Act 1968* ("the RC Act") and the *Surveillance Devices Act 1998* ("the SD Act") be amended.

The Royal Commissions (Powers) Amendment Bill contains provisions to:

- make the powers in Part 3 of the *Royal Commission (Police) Act 2002*, which relate to arrest, available to all Royal Commissions. The Bill gives Royal Commissions the power to arrest and conditionally release persons who will not attend to give evidence before the Commission (Part 2 of the Bill);
- make the powers in Part 8 of the *Royal Commission (Police) Act 2002*, which relate to the use of electronic surveillance devices available to a Royal Commission if the Governor has declared that those powers are to be available to that Royal Commission (Part 3 of the Bill); and
- improve the procedures for dealing with contempt in the face of a Royal Commission and clearly provides the types of offences which will constitute contempt of a Royal Commission (Part 2 of the Bill).

Part 1 - Preliminary

Clause 1 sets out the correct citation of the Bill once it has been proclaimed.

Clause 2 deals with commencement of the Bill (which is upon proclamation).

Part 2 - Amendments to the Royal Commissions Act 1968

Clause 3 states the purpose of this Part of the Bill - to amend the *Royal Commissions Act 1968* ("the RC Act").

Clause 4 amends section 4 of the RC Act to:

- italicise the year of the Act referred to; and
- insert a definition of Officer of the Commission.

Clause 5 inserts two new sections into the RC Act:

- Section 8A gives a Commission the power to obtain information from public authorities or officers (as defined in section 3 of the *Corruption and Crime Commission Act 2003*) without summoning a witness.
- Section 8B gives a Commission the power to obtain documents and other things, by requiring a person to attend the Commission, but not requiring the person to give evidence.

Clause 6 amends section 9 of the RC Act (Power to summons witnesses and documents) by broadening the definition of things a person can be required to produce to include "any books, documents, writings or things" in the person's custody or control.

Clause 7 deletes section 12 of the RC Act (Affirmation in lieu of oath) as the legislation relating to oaths and affirmations currently before Parliament makes it redundant. The effect of the deletion is that a person can chose to take either an oath or an affirmation before the Commission.

Clause 8 repeals sections 13 and 14 of the RC Act and inserts instead sections 12A to 15E.

The following sections set out the ways that a person can be in contempt of a Commission:

- 12A, failing, without reasonable excuse, to comply with a notice served on a person under s8A to produce a statement of information;
- 13, failing to attend or produce documents to the Commission as required by a notice under s8B;
- 14, failing to be sworn or to give evidence when summoned;
- 15, hindering the execution of a search warrant issued under s18; and
- 15A, other contempts such as threatening or insulting a Commission or officer of a Commission, interrupting the proceedings of a Commission, creating or continuing a disturbance in or near a Commission inquiry, or anything else that would be contempt of court if the Commission were a Judge acting judicially. This section also gives the Commission the power to exclude from the place where the inquiry is being conducted a person who is in contempt of the Commission.

Sections 15B - 15 E provide the general procedures relating to contempt of a Commission:

- s15B provides the following mechanism for punishment of contempt:
 - (1) A person alleged to be in contempt of a Commission is defined as the "defendant".
 - (2) When a Commission is alleged to have taken place, the Commission may present to the Supreme Court a certificate setting out the details of the act or omission that the Commission considers constitutes the alleged contempt.
 - (3) Unless the defendant has been required to show cause why he or she should not be dealt with under s15B, or apprehended under a warrant under s15C(4), the Commission is required to give the defendant a written statement setting out the details of the alleged contempt.
 - (4) A certificate issued pursuant to this section is prima facie evidence of the matters certified in it.
 - (5) The Supreme Court has jurisdiction as if the alleged contempt were a contempt of that Court.
 - (6) A Commissioner cannot be compelled to attend before the Supreme Court to give evidence in proceedings for an alleged contempt of a Commission.

- (7) A record or transcript of proceedings of a Commission is admissible in evidence in proceedings for an alleged contempt of the Commission.
 - (8) A person is not liable to be punished for contempt for a failure to produce documents, books, writings or things that the person can prove were not relevant to the inquiry.
 - (9) If a Commission ends before a certificate has been presented, the alleged contempt may be dealt with on the motion of the Attorney General as if the person concerned were in contempt of the Supreme Court and the Supreme Court has jurisdiction accordingly.
- s15C sets out the general provisions regarding contempt and provides that the Chairman may issue a summons to be served on a defendant requiring the defendant to attend the Commission at a time and place named in the summons to show cause why he or she should not be dealt with under s15B for contempt of the Commission. If the defendant fails to attend, the Commission can issue a warrant for the defendant's apprehension. If a contempt is committed in the face or hearing of the Commission, the defendant may be taken into custody in a prison or elsewhere and called on to show cause why he or she should not be dealt with under section 15B for contempt. The Commission may revoke the warrant at any time before the defendant is brought before the Supreme Court. When the defendant is brought before the Supreme Court, the Court may direct that the defendant be kept in such custody as the Court may determine or direct that the defendant be released.
 - s15D provides that a person detained under s15C may be released by order of the Commission on condition that the defendant appear before the Supreme Court. Such release can be subject to certain conditions and can be amended, revoked or varied. A defendant who fails to comply with such a condition is guilty of an offence punishable by imprisonment for 2 years and a fine of \$24,000.
 - s15E provides that an act or omission may be punished as a contempt of a Commission even though it could be punished as an offence (and vice versa). However, if an act or omission constitutes both an offence and a contempt of a Commission the defendant is not liable to be punished twice.

Clause 9 amends s16 of the RC Act, which deals with the arrest of a witness failing to appear. Section 16(1) currently gives the Commission the power to issue a warrant for the apprehension of a person who has been served with a summons pursuant to section 9 who fails to attend as required by the summons or fails to remain until excused.

Clause 9 repeals s16(2) of the RC Act and inserts instead 4 new subsections which give the Chairman of a Commission a new power to issue a warrant to apprehend a person whose evidence is required for the Commission's inquiry. Such a warrant can only be issued if the Chairman is satisfied that it is probable that the person will not attend or is about to or is making preparation to leave the State. A warrant may be issued without a prior summons to the relevant person and it may be issued after a summons even though the time specified in the summons has not yet passed. A warrant issued under this section authorises the apprehension of the person and the person being promptly brought before the Commission and detained in custody in a prison or elsewhere until released by order of the Commission.

Clause 10 repeals section 17 (Appeal against apprehension) of the RC Act and replaces it with sections 16A and 17.

Section 16A gives the Commission the power to release a person detained under s16. The release of a person under that subsection may be made subject to condition to ensure the further attendance of the person before the Commission, for example, the provision of sureties by the person. The Commission may by order amend, revoke or add to any such conditions and a person who fails to comply with any condition is guilty of an offence punishable by imprisonment for 2 years and a fine of \$24,000.

Section 17 gives a person who has not been released by the Commission under s15D or 16A a right to apply to the Supreme Court for a review of the decision not to release the person. It also gives a person who has been released subject to certain conditions a right to review by the Supreme Court of those conditions. The Supreme Court may do either or both affirm or set aside the Commission's decision or make any order that the Commission may make in relation to the detention or release of the person.

Clause 11 repeals ss18(7) to (10) of the RC Act because they are covered by the new contempt provisions and procedures.

Clause 12 repeals s19B of the RC Act (Restriction of publication of documents etc.) and inserts a new, broader, section 19B which defines "publishes" and "visual recording" and creates several contempt offences:

- (2) making a sound recording of proceedings of the Commission unless the recording is made either for the purpose of fair report or with leave of the Commission. NB: it is contempt of a person to make a sound recording of proceedings of the Commission for a fair report if the Commission has directed that a sound recording of the proceedings is not to be made (19B(3));
- (4) photographing or making visual recording of proceedings of a Commission without the leave of the Commission;
- (5) publishing, without leave of a Commission:
 - a sound recording of proceedings of the Commission;
 - a photograph or visual recording of proceedings of the Commission;
 - a written record or transcript of proceedings of the Commission, or of evidence given before the Commission, which the Commission has directed not be published; or
 - any documents, books, writings produced to or obtained by the Commission which the Commission has directed not to be published;
- It also provides in 19B(6) that if the Commission has ended, the Governor may give the leave required in s19B(5); and
- (7) If a contravention of subsection (5) occurs after the Commission has ended, the contravention may be dealt with on the motion of the Attorney General as if the person concerned were in contempt of the Supreme Court and the Supreme Court has jurisdiction accordingly.

Note: The restriction in 19B(5) also contains an implied power for the Commission to direct that a written record or transcript of proceedings of the Commission, or of evidence given before the Commission, or of any documents, books or writings produce to or obtained by the Commission, may not be published.

Clause 13 amends section 32 of the RC Act (Proceedings for defamation not to lie) by replacing the words "Crown in right of the" so that the remaining references are to the State, and Ministers of the State.

Clause 14 amends sections 24 to 30 of the RC Act, which are various similar offences. This clause makes all of the offences "crimes" rather than "misdemeanours" and unifies the punishment so that all the offences are punishable by imprisonment for 5 years or a summary conviction penalty of imprisonment for 2 years and a fine of \$24,000.

Part 3 - Amendments to the Surveillance Devices Act 1998

Clause 15 provides that the amendments in this Part are to the *Surveillance Devices Act 1998* ("the SD Act").

Clause 16 amends s3 of the SD Act (Interpretation) by inserting new definitions of "designated Commission", "officer of a designated Commission" and "misconduct" and by amending the current definitions of "authorised person", "emergency authorisation", and "law enforcement officer" to include an officer of a designated Commission.

NB: "designated commission" means a Royal Commission under the *Royal Commissions Act 1968* to which, by the terms of appointment or in an instrument made by the Governor, this Act is expressly declared to apply.

Clause 16 also inserts several new subsections so that the SD Act operates as if certain references:

- to a suspected criminal offence included a reference to suspected misconduct,
- to an offence included a reference to an act of misconduct; and
- to a suspected offence included a reference to suspected misconduct.

The effect of clause 16 is that many of the powers in the SD Act will be applicable to certain Royal Commissions. These powers will enable certain Royal Commissions to have access to the powers in the SD Act in relation to behaviour that would constitute misconduct or suspected misconduct as defined in the *Corruption and Crime Commission Act 2003*. For example, an officer of a Royal Commission may be an "authorised person" under the *Surveillance Devices Act 1998* and obtain approval to use surveillance devices.

Clause 17 amends s9 of the SD Act (Prohibition of publication or communication of private conversations or activities) so that a designated Commission is exempt from the general prohibition of publication or communication of a private conversation in s9(1).

Clause 18 amends s11 of the SD Act (Presumption as to evidence obtained under warrant or emergency authorisation) so that where an officer of a designated Commission gives evidence of a private conversation or a private activity that is alleged to have been obtained as a direct or indirect result of the use of a listening device or an optical surveillance device under a warrant or an emergency authorisation, it shall be presumed in the proceedings, unless the contrary is proved,

that the warrant or emergency authorisation was made in good faith and the evidence was properly obtained in accordance with the warrant or emergency authorisation.

Clause 19 amends s15 (Applications for warrants) so that:

- a person authorised by a designated Commission may make an application for a warrant; and
- an application for a warrant by an officer of a designated Commission is required:
 - to attach an authorisation of the designated Commission or a person delegated by the designated Commission for the action proposed; and
 - to include an affidavit of an officer of a designated Commission deposing to the facts required by the court to enable the court to deal with the application in accordance with section 13 (Warrants for use etc. of surveillance devices) or 14 (Warrants for maintenance and retrieval of certain tracking devices).

Clause 20 amends s16 of the SD Act (Radio/Telephone applications for warrants) so that a person who is entitled to apply for a warrant under the SD Act may cause an application to be transmitted to the court under this section on his or her behalf by a member of the police force of the State, an officer of the Corruption and Crime Commission, an officer of a designated Commission or a member of the staff of the National Crime Authority.

Clause 21 amends s17 of the SD Act (Warrants issued following radio/telephone applications) so that where a court issues a listening device warrant, an optical surveillance device warrant or a tracking device warrant following a radio or telephone application, the court must cause a written record to be made of the name of the officer of a designated Commission who transmitted the application to the court (as well as the details of the application and the date and time the warrant is granted).

Clause 22 amends s20 of the SD Act (Emergency Use of Surveillance Devices) so that an officer of a designated Commission may have emergency use of surveillance devices if an authorised person authorises the officer of a designated Commission to take such action in accordance with an emergency authorisation issued under section 21.

Clause 23 amends s31 of the SD Act (Order allowing publication or communication in the public interest) so that upon an application for an order allowing publication or communication of a private conversation in the public interest, a Judge may make an order that a report or record of a private conversation, or a record of a private activity, be delivered to a designated Commission.

Clause 24 amends section 37(2)(b) of the SD Act (Report of finding surveillance device) so that section 37(1) will no longer apply to an officer of the Corruption and Crime Commission. (The need for this amendment was overlooked when the SD Act was amended by the *Corruption and Crime Commission Act 2003*.)

Clause 25 amends section 40(1) of the SD Act (Forfeiture):

- so that the section refers to the State rather than the Crown; and
- so that where an order of forfeiture is made under this section any officer of a designated Commission may seize the item forfeited for the purpose of giving

effect to the order and for that purpose may enter any premises, by force if necessary.

Clause 26 amends section 41 (Dealing with records obtained by surveillance devices) so that:

- a designated Commission must keep every record or report obtained by use of a surveillance device under a warrant or emergency authorisation issued to an officer of a designated Commission in a secure place, being a place that is not accessible to persons who are not entitled to deal with the record or report;
- where a record or report referred to above was obtained by use of a surveillance device under a warrant issued under section 15(2) on behalf of another law enforcement office, the designated Commission, as the case requires, may only destroy that record or report after consultation with the police force, body, department, authority, or agency of which that law enforcement officer is a member, officer or employee;
- a designated Commission must keep such records concerning the records and reports obtained by the use of surveillance devices under warrants and emergency authorisations as are necessary to enable documents and information to be identified and obligations under the Act to provide reports to be complied with.

Clause 27 inserts section 43A into the SD Act and provides that a Royal Commission which has access to these powers may furnish to the Attorney General a report containing information relating to warrants and other matters relating to the use of surveillance devices. If a Royal Commission does furnish such a report to the Attorney General, then the Attorney General is required to lay that report before each House of Parliament as soon as is practicable.

Clause 28 amends section 44 (Regulations) of the SD Act to give the Governor power to make regulations prescribing all matters that are necessary or convenient to be prescribed for achieving the objects and giving effect to the purposes of the Act and in particular, with respect to the provision of information reasonably required to enable a designated Commission to furnish a report under section 43A.