
Discussion Paper

Review of the Crime Commission Act 2012

July 2018



Justice



Call for submissions

Section 88 of the *Crime Commission Act 2012* (**the Act**) 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.

The Act is administered by the Minister for Police.

A current version of the Act is available at:

<https://www.legislation.nsw.gov.au/#/view/act/2012/66/full>

This Discussion Paper includes specific questions for consideration; however, stakeholders are invited to comment on any other issues relevant to the administration of the Act.

Any submissions or correspondence relating to this review should be sent to:

Crime Commission Review
Office for Police
GPO Box 5434
SYDNEY NSW 2001

The questions raised in this paper are intended to stimulate discussion and are not indicative of a proposed course of action. They do not reflect the formal views of the NSW Government.

Submissions may also be lodged via email at: crimecommission@justice.nsw.gov.au

The deadline for submissions is 20 August 2018.

1. OVERVIEW OF THE *CRIME COMMISSION ACT 2012* ('THE ACT')

The Act was introduced in 2012 to re-enact the *New South Wales Crime Commission Act 1985* and to implement certain recommendations stemming from the *Special Commission of Inquiry into the New South Wales Crime Commission* by Mr David Patten ('the Patten Review'). The Patten review examined the structure, procedures, accountability and oversight of the Crime Commission. The report was handed down on 30 November 2011.

Mr Patten found that overall the New South Wales Crime Commission was performing its duties effectively and lawfully; however, the Crime Commission had been operating for more than 20 years without review. Mr Patten made 57 recommendations to improve the Commission's structure, oversight, accountability, powers and procedures.

The 2012 Act re-enacted the 1987 Act, implemented the recommendations of the Patten review, updated the legislation, and provided for a greater level of oversight.

2. Related legislation and initiatives to support the Crime Commission

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

2.1. *Criminal Assets Recovery Act 1990*

The Crime Commission utilises the *Criminal Assets Recovery Act 1990* (CARA) to initiate court proceedings which result, for example, in the forfeiture of an interest in property of a person suspected of having engaged in a serious crime related activity or serious crime related activities.

2.2. *Crimes (Serious Crime Prevention Orders) Act 2016*

The Crime Commission is an eligible applicant under the *Crimes (Serious Crime Prevention Orders) Act 2016* (SCPO Act).

Under the SCPO Act the Crime Commission may apply to a court for a serious crime prevention order against a specified adult. The court may grant the request if satisfied that the person:

- The person had been convicted of a serious criminal offence or had been involved in serious crime related activity for which the person had not been convicted of a serious criminal offence; and
- That there were reasonable grounds to believe that the making of the order would protect the public by preventing, restricting or disrupting involvement by the person in serious crime related activities.

2.3. *Law Enforcement (Controlled Operations) Act 1997*

The Crime Commission is an eligible applicant under this Act and may apply for authority to conduct a controlled operation.

2.4. *Law Enforcement (Powers and Responsibilities) Act 2002*

The Crime Commission is an eligible applicant under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) to apply for covert search warrants.

2.5. *Law Enforcement and National Security (Assumed Identities) Act 2010*

A law enforcement officer of the Crime Commission may apply to acquire or use an assumed identity.

2.6. *Surveillance Devices Act 2007 (SDA)*

The Crime Commission is an eligible applicant under this Act and may apply to use a surveillance device and for warrants.

2.7. *Telecommunications (Interception and Access) Act 1979 (Cth) and Telecommunications (Interception and Access) Act 1987 (NSW)*

The Crime Commission is an eligible applicant to apply for telecommunication interception warrants.

2.8. Taskforces

The Crime Commission operates on a collaborative model via joint task forces and information sharing arrangements with the NSW Police Force (NSWPF) and other law enforcement agencies. These investigate organised drug crime activity (and related money laundering), terrorism offences, and unsolved homicides.

The NSWPF, however, investigates a much wider range of organised and serious crime (including high-level fraud, organised child abuse, cybercrime, loan sharking and firearms trafficking) that could also benefit from the specialist skills and powers of the Crime Commission.

2.9. Joint Counter Terrorism Team (JCCT)

The Crime Commission provides existing effective and formidable support to the JCTT with onsite analytical, technical and linguistic services, operational support and access to the Commission's coercive powers.

This support is becoming more and more essential as threat levels across the world continue to rise.

2.10. Joint Organised Crime Group

The Joint Organised Crime Group (JOCG) is a multiagency task force involving the Commission, the NSWPF, the Australian Federal Police, Australian Border Force and the Australian Criminal Intelligence Commission (ACIC). The Crime Commission has been on this task force since its inception (as the Joint Asian Crime Group) in 1997.

The main focus of the JOCG is on organised crime groups involved in drug importation and distribution, and interstate drug trafficking.

The Commission provides the JOCG with onsite analytical, financial, technical and linguistic services and operational support as well as access to the Commission's coercive powers if required.

2.11. Fintel Alliance

Led by AUSTRAC, the Fintel Alliance is a public-private partnership between 19 agencies (including law enforcement, financial and intelligence institutions) to investigate terrorism financing and money laundering.

As with other task forces the Commission provides the Alliance with criminal and financial analytical services and operational support as well as access to the statutory powers.

3. DISCUSSION

3.1. Part 1 – Preliminary

The long title of the 2012 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”.

The object of the Act is to “reduce the incidence of organised and other serious crime”. In the second reading speech, Mr Greg Smith SC, the then Attorney General and Minister for Justice, reinforced:

“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.”

Although the current object of the Act is very broad, it may be argued that the object of the Act should be amended to make it clear that reducing the incidence of organised and other serious crime specifically includes references to ‘prevention’ and ‘disruption’. This may, for example, more clearly encompass the Crime Commission’s function in relation to Serious Crime Prevention Orders.

For consideration:

Is the object of the Act sufficiently clear that “reducing the incidence of organised and other serious crime” includes prevention and disruption?

Section 4 – Interpretation

The principal functions allow the Commission to exercise a function or participate in investigations relating to a ‘relevant criminal activity’, ‘serious crime concern’ or ‘criminal activities of criminal groups’.

In many cases, this would include investigating traditional criminal offences that are facilitated by technology (eg drug syndicates communicating electronically); however, it is not clear that the Commission has a statutory basis for investigating crimes committed with new technology such as the 'dark web', blockchain technologies, or hacking software.

To highlight the focus of the Commission on the crimes committed using these technologies, the Act could be amended to make it clear that the Management Committee could approve references to investigate the use of such technologies to facilitate or commit serious and organised crimes.

Such an amendment would not merely enable intelligence gathering or research exercises, but would be directed towards uncovering and participating in investigations into serious criminal activity.

For example, a drug importation investigation may have uncovered a 'dark web' facility that the syndicate used to obtain false customs documentation. It could also be used by other parties to facilitate other serious offences such as firearms trafficking, people smuggling, child exploitation and radicalisation/terrorism.

For consideration:

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)?

3.2. Part 2 – NSW Crime Commission

Commissioner and Assistant Commissioners

Both section 8 and section 9 of the Act are appropriate for the appointment of a Commissioner and Assistant Commissioners.

However, these sections need to be read with Schedule 1, which contains additional provisions relating to the roles.

Clause 1 of Schedule 1 of the Act states 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 of the Act states that a reference to a person who has special legal qualifications is a reference to a person who 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).

There is a strong argument that this requirement is not necessary for the Commissioner's role if a Commissioner is working alongside at least one or two Assistant or Special Commissioners who do have special legal qualifications. These Assistant or Special Commissioners would assist the Commissioner to make arrangements for the Commission to undertake its functions, while maintaining integrity in the exercise of their coercive powers. If the Act were amended to remove the requirement for the Commissioner to have special legal qualifications, a further amendment would be needed to ensure the Assistant or Special Commissioners are not subject to the direction of the Commissioner in relation to the exercise of their coercive powers.

It is appropriate that the exercise of coercive powers such as notices and hearings is done by those who have 'special legal qualifications'; however, work undertaken by lawyers represents just one of the disciplines involved in the proper functioning of the Crime Commission. Less than 10% of the Commission's work force is employed in the 'legal branch'. As head of a truly multi-disciplinary agency, the Commissioner should have qualifications and experience reflecting the broadness of his or her functions. It is not obvious that the head of one discipline in the Commission (a senior lawyer) needs to be in charge of all the other disciplines (for example, intelligence analysts, forensic accountants, technical specialists and monitors).

In view of the Commission's range of functions and need to evolve to keep pace with emerging crime types, the Commissioner needs to have skills and experience in areas such as:

- Managing and coordinating operations and investigations;
- Developing and maintaining partnerships, especially with the agencies involved in cyber security and cybercrime;
- Ensuring the Commission's statutory functions are used effectively;
- Reviewing the Commission's internal structures and implementing organisational change to adapt the work of the Commission to emerging criminal enterprise; and
- Being familiar with technology enabled crime and the complex technological environment exploited by terrorists, child sex offenders, cyber criminals and organised crime syndicates to communicate, commit and enable crimes.

Under the current legislative structure, the workload of the Commissioner is absorbed in the legal proceedings, notices to produce and coercive powers; which may leave less time to focus on non-legal matters. The highly specialised legal functions could, therefore, be devolved to Assistant or Special Commissioner/s with appropriate legal qualifications and experience to enable the Commissioner to focus on managing the Commission more broadly.

In his 2011 report, Mr Patten, while ultimately recommending a different model, recognised that the Commissioner needed administrative skills of a high order and that there was some merit in considering the separation of the office of Commissioner from those conducting the compulsory questioning of witnesses. Seven years later, in light of a changing criminal environment and the need for a strong investigative and preventative focus, there is a greater need for a Commissioner at the top of the organisation to have high-level investigative, administrative and strategic management experience.

For consideration:

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?

For consideration:

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

For consideration:

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

Functions of the Commission

Emerging Technology

The principal functions allow the Commission to exercise a function or participate in investigations relating to a 'relevant criminal activity', 'serious crime concern' or 'criminal activities of criminal groups'.

In many cases, this would include investigating traditional criminal offences that are facilitated by technology (eg drug syndicates communicating electronically). The Crime Commission must be able to follow the 'cyber trail' not just the traditional physical 'money trail' associated with profit-based crime.

There is a growing need for the Crime Commission to focus on crimes committed using emerging technologies. However, as previously highlighted, it may not be clear that the Commission has a statutory basis for investigating crimes committed with new technology such as the 'dark web', blockchain technologies or hacking software.

Such an amendment would not merely enable intelligence gathering or research exercises, but would be directed towards uncovering and participating in investigations into serious criminal activity.

Serious Crime Prevention Orders

The current Act does not expressly provide that 'reducing the incidence' of serious and organised crime includes a preventative or disruptive component; so it may be beneficial to amend the Crime Commission Act so the Commission's status as an 'eligible applicant' under the SCPO Act can be more clearly recognised.

For consideration:

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?

For consideration:

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?

Division 7 – attendance before the Commission

It appears that the current Act does not adequately deal with a situation in which Commission witnesses may be prevented from attending the Commission due to court orders restricting their movements, for example:

- Bail conditions restrict their movements or impose a curfew;
- They are subject to Home Detention Orders;
- They are subject to Community Service Orders (or soon to be Community Corrections Orders) requiring they be elsewhere at the same time.

The safety of witnesses may be compromised if the only option for these witnesses is to attend a public courtroom to seek a variation to their original court order in order to comply with the Commission's summons.

For consideration:

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

Section 47 – Contempt of the Commission

Other than section 47, there are no further provisions with respect to the definition of contempt or any action to be taken to bring the contemnor before the Commission.

It could be argued that the current provisions of section 47 create an inadequate regime for dealing with contempt by a person who has been served with a witness summons to attend for Commission hearings, and witnesses giving evidence before the Commission.

Division 9 of the *Law Enforcement Conduct Commission Act 2016* (LECC Act) contains the statutory regime for identifying, pursuing and, if appropriate punishing a witness, for contempt of that Commission.

The Crime Commission is not similarly equipped by statute to pursue contempt proceedings relating to a person who has been served with a witness summons. Arguably, witnesses before the Commission are more impervious to compliance than police representatives and civilians called before the LECC; or its predecessor the Police Integrity Commission.

Referral to the Supreme Court provides the Independent Commission Against Corruption, the LECC, and Royal Commissions with a quick and effective measure to deal with contempt that involves refusing to give evidence, with the contemnor immediately detained until they co-operate. The existence of the power supports the authority of these Commissions.

A prosecution, which may take months to come before a court, and results in that witness eventually giving their evidence, does not have the same immediate salutary effect on other witnesses called to the same inquiry.

For consideration:

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?

New provision

The Commission has identified a need to streamline the recording and retention requirements of the *Telecommunications (Interception and Access) Act 1987* (NSW) (the TIA Act) when the Commission provides information to the NSW Police Force in connection with an accepted reference.

The Commission is currently permitted to share “lawfully obtained material” with the NSWPF when both agencies are involved in joint operations, but is required by the TIA Act to record the particulars of each communication of this material.

The chief officer of an eligible authority is required to record particulars of each use made by the authority of lawfully obtained information; particulars of each communication of lawfully obtained information by an officer of the authority to a person or body other than such an officer; and particulars of each occasion when, to the knowledge of an officer of the authority, lawfully obtained information was given in evidence in a relevant proceeding in relation to the authority. This information is to be recorded in writing on a computer as soon as practicable after the happening of the events.

The Commission regularly partners with other enforcement agencies and sharing this type of information is integral to their joint work, but recording and reporting on each communication is onerous and adds little value to the intent of the TIA Act – merely taking valuable investigative time away from the work of the agencies.

There is merit in considering an amendment to the Act to capture the Commission's information sharing in investigative partnerships for the purposes of the TIA Act and therefore enable information to be shared quickly with all investigators. The recording would still occur but for a 'group' of information rather than every occasion.

Amending the *Crime Commission Act 2012* is a more bespoke solution than a blanket amendment to the TIA Act that could operate too broadly.

For consideration:

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?

3.3 Part 3 – NSW Crime Commission Management Committee

Section 50 – Members of the Management Committee

The work of the Crime Commission continues to be enhanced by the Management Committee. The oversight and management of references should remain. The Chair should remain independent. Membership should remain as currently provided:

- Independent Chair;
- Commissioner;
- Chair of the Board of the Australian Criminal Intelligence Commission (ACIC), currently the Australian Federal Police Commissioner. The Act refers to the 'Australian Crime Commission'; however, the Australian Crime Commission was merged with CrimTrac and is now called the Australian Criminal Intelligence Commission. Section 50 will be updated accordingly;
- Commissioner of the NSWPF; and
- Secretary, Department of Justice

However, the Management Committee can further augment the functions of the Commission by providing a stronger focus on setting investigative priorities by including:

- The Assistant or Special Commissioner as a member, as head of the legal branch responsible for the use of coercive powers. A part time Assistant or Special Commissioner should be able to attend in the absence of the Assistant or Special Commissioner. This change in membership would occur if the qualifications and roles of Commissioner and Assistant or Special Commissioner were reformed as suggested above.
- A Deputy Commissioner of Police to attend when the Commissioner of Police is not able to attend a meeting. A Deputy Commissioner of Police has the required knowledge and skill to assist the Management Committee.
- 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.

For consideration:

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?

3.4 Part 7 – Miscellaneous

Section 78A - Vetting of prospective staff

Section 78A makes provision for vetting of staff to ensure all officers have the right expertise and highest level of integrity. During the vetting stage, checks of an applicant's social media profile(s) are completed. This can reveal details regarding an applicant's personal life which indicate a propensity for inappropriate disclosures and/or links to criminal networks.

There is an ongoing risk that officers who are susceptible to indiscretions or who are disillusioned may compromise the Commission's information holdings over time. Those applicants who pass the vetting stage but are later deemed a higher risk should be monitored on a regular basis in specific instances where issues have been raised about them.

The ongoing monitoring of staff following engagement by the Commission is essential in order to minimise the risk of sensitive information being sourced and/or distributed. A disclosure could jeopardise the integrity of the Commission and the safety of its staff.

The Independent Broad-based Anti-corruption Commission in Victoria published an intelligence report in 2015 titled *Organised crime group cultivation of Victorian public sector employees*. The report states the following:

Although pre-employment screening is important, it will not identify all individuals who present a security risk. Vulnerabilities such as personality factors, lifestyle changes or workplace behaviours are not always observable at recruitment or may arise following recruitment.

Revalidation of employees' clearances at regular or random intervals during their employment ensures that public bodies can respond to changes in employees' risk factors...Revalidation is particularly important as organised crime groups appear more likely to target existing employees rather than to infiltrate agencies by putting forward a member and associate for recruitment.

A system of revalidation also acknowledges that employees' access and influence within a public body will generally increase the longer they have been employed, increasing their potential value to organised crime groups. Long-term employees may also develop risk factors such as disenchantment with their employer or a desire for revenge. Robust and ongoing security screening assists in identifying and reducing these vulnerabilities.

As suggested, the continuous vetting of employees is an important method by which the Commission could mitigate against these risks.

For consideration:

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?

3.5 – Criminal Assets Recovery Act 1990 (NSW)

The *Criminal Assets Recovery Act 1990* (NSW) (CARA) is intrinsically linked to the Crime Commission and its work. A review of the *Crime Commission Act 2012* (NSW) should rightly consider how CARA may be improved to support the functions of the Commission and keep pace with the dynamic criminal environment.

Definition of serious criminal offence

Confiscation proceedings should also be available where profit has been derived from cybercrime, or where cybercriminals are living beyond their lawful means (unexplained wealth).

Therefore, there is merit in amending the CARA definition of ‘serious criminal offence’ within ‘serious crime related activity’ to include certain provisions in the *Crimes Act 1900* (NSW) so these may be captured under the Commission’s purview:

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

CARA should also be amended, if necessary, to ensure that assets in the form of blockchain technology such as Bitcoin are captured.

For consideration:

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

Administrative Forfeiture

The Commission has identified a gap in the effective recovery of the proceeds of crime.

It regularly seizes large sums of cash and items of value (eg. jewellery) but the true owners will not come forward or actively deny ownership because the items could implicate them in criminal offences.

There is no clear, streamlined process for these assets to be forfeited to the Crown; and the current provisions in CARA cannot be relied upon because there is no “person” against whom confiscation proceedings can be taken.

Administrative forfeiture may be an appropriate solution to this problem. Administrative forfeiture provides for forfeiture of seized property (particularly cash) where no party claims a legal interest. Administrative forfeiture is available under the *Customs Act 1901* (Cth).

The main advantage of administrative forfeiture is that it overcomes court delays in civil forfeiture proceedings and saves judicial and agency resources wasted in processing and determining forfeiture proceedings that ultimately are not going to be contested.

Where someone does assert an interest, the existing provisions of CARA have to be relied on to seek a confiscation order (in the Supreme Court) and provide the owner an opportunity to contest forfeiture.

For consideration:

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?

Offences committed outside NSW

Under CARA, property derived from “serious crime related activity” may be forfeited to the Crown.

Section 6(2) lists a number of NSW offences that are “serious crime related activity” (eg. drug trafficking, money laundering, sexual servitude, firearms manufacture). This section intends that comparable offences committed in other jurisdictions (including overseas) are serious crime related activities in NSW – thus enabling asset confiscation proceedings to be undertaken in NSW for offences committed elsewhere.

The current wording does not unambiguously capture offences that have no NSW equivalent (eg. excise fraud related to illegal tobacco importation), but which are otherwise serious crime related activities.

This section could be redrafted to clarify this issue and support the cross-jurisdictional and international work of the Commission.

For consideration:

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?