Chapter 2

Key issues and committee views

2.1 Submissions to the inquiry discussed Schedules 1, 2, 4 and 5 of the bill. This chapter sets out the issues raised and views offered by submitters in respect of those schedules, and the committee's views in response to each.

Schedule 1: proceeds of crime

Human rights issues and questions of constitutionality

The 'interests of justice' and the right to a fair trial

2.2 Several submitters expressed concern that the proposed amendments to section 319 may interfere with the right of potential defendants in criminal proceedings to a fair trial, by limiting courts' discretion to stay non-conviction based forfeiture proceedings.[1] The Australian Human Rights Commission (AHRC) advised that the right to a fair trial was guaranteed under international and Australian law,[2] and the Law Council of Australia (LCA) noted that section 80 of the Constitution, as interpreted by the courts, also 'provides some limited protection to the right to a fair trial'.[3]

2.3 The AHRC and the NSW Council for Civil Liberties (CCL) regarded the drafting of section 319 as ambiguous, and potentially internally contradictory.[4] The AHRC stated that while subsection 319(1) provided that a court may stay proceedings if it considered that it was 'in the interests of justice to do so', subsection 319(2) set out grounds on which the court may not stay proceedings, and the bill did not indicate which provision took precedence.[5]

2.4 The AHRC described the concern, shared by other submitters: that requiring a person to provide in a forfeiture case details of the specific potential prejudice posed by the proceedings to the related criminal case, may in itself cause prejudice, where the person would have to incriminate themselves or reveal information about their defence.[6]

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1 Australian Human Rights Commission, *Submission* 2, pp 4-5; Law Council of Australia, *Submission* 3, pp 6-9; Families and Friends for Drug Law Reform, *Submission* 8, pp 4-6; The Victorian Bar and Criminal Bar Association, *Submission* 10, pp 4-5; NSW Council for Civil Liberties, *Submission* 11, pp 1-4.

2 The AHRC advised that the right to a fair trial is guaranteed by Article 14 of the International Covenant on Civil and Political Rights (ICCPR), and is a fundamental element of Australia's criminal justice system: Australian Human Rights Commissions, *Submission* 2, p. 4.

3 Law Council of Australia, *Submission* 3, pp 6-7.

4 Australian Human Rights Commissions, *Submission* 2, p. 7; NSW Council for Civil Liberties, *Submission* 11, p. 2.

5 Australian Human Rights Commission, *Submission* 2, p. 7.

6 Australian Human Rights Commission, *Submission* 2, p. 8.

2.5 LCA believed that:

> The result of the proposed amendments may be that [PoC Act] cases would proceed uncontested. Clients may be advised not to contest the civil proceedings on the basis that it may jeopardize their criminal trial. Individuals could therefore be in a position where they will have to relinquish their property rights so as not to put at risk a finding of guilt in the criminal proceedings.[7]

2.6 The Victorian Bar and Criminal Bar Association (CBA) described the proposed restriction of the courts' inherent power to stay proceedings where there was a risk of prejudice to impending criminal proceedings, as 'a grave infringement of the rights of an accused to a fair criminal trial', expressing the view that 'the public interest in determining proceeds of crime proceedings expeditiously should not displace long-held fundamental principles underpinning the adversarial system and the right to a fair trial'.[8]

2.7 Families and Friends for Drug Law Reform (FFDLR) expressed strong opposition to the existence of a non-conviction based forfeiture scheme at all, arguing that the confiscation of property where no court had established that a crime had been committed was a breach of the fundamental civil liberties enshrined in Australia's legal system.[9]

2.8 The AHRC proposed that concerns about the impact of the provisions on the right to a fair trial may be overcome by adding a caveat to subsection 319(2) to clarify that subsection 319(1), the interests of justice, took precedence. The proposed addition would have subsection 319(2) read:

> Unless it would be in the interests of justice to do so, the court must not stay the POCA proceedings on any of the following grounds:…[10]

2.9 The AHRC also believed that some of the grounds which a court would be required to ignore under the new section 319 would be 'highly likely to result in prejudice to an accused person and increase the risk that their trial would not be fair'. The AHRC regarded subsections 319(3) and (4) as the most serious in this regard, in requiring a court to overlook the fact that the case or subject matter of the forfeiture proceedings was the same as, or substantially similar to, the matter or circumstances of the criminal proceedings. The AHRC recommended that these subsections be deleted.[11]

2.10 The Attorney-General's Department (AGD) responded that 'the amendments do not require the court to "ignore" factors which may raise risks of prejudice to an

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7 Law Council of Australia, *Submission* 3, p. 9.

8 The Victorian Bar and Criminal Bar Association, *Submission* 10, p. 5.

9 Families and Friends for Drug Law Reform, *Submission* 8, p. 3.

10 Australian Human Rights Commission, *Submission* 2, p. 8 (emphasis added).

11 Australian Human Rights Commission, *Submission* 2, pp 8-9.

accused person', but require that the matters in subsections 319(2) not be the sole ground/s upon which a stay is granted.[12]

2.11 AGD stated that there were often instances where criminal proceedings and non-conviction forfeiture proceedings were on foot at the same time. These covered a wide range of circumstances and potential relationships between the parties involved. AGD's view was that:

> it is appropriate that any respondent making an application for a stay of their POC proceedings should be required to demonstrate a specific risk of prejudice to the criminal trial if the civil POC matter proceeded, not just the overlap in the subject matter of the two proceedings.[13]

2.12 AGD explained that if this were not the case:

> A stay of the determination of forfeiture proceedings until related criminal trial(s) are complete may delay the proceeds of crime matter for several years. Such a delay would have a substantial impact on the effective operation of the POC Act - for example, it may compromise the availability of evidence and reduce the efficiency of POC litigation (including restraining orders). There are also flow-on effects, including vast increases in the costs and complexity of the management of restrained assets, and significant delays in forfeiture and realisation of assets into the Confiscated Assets Account ('CAA'), preventing the investment of CAA funds into crime prevention and community safety initiatives.
>
> The amendments have been developed in consultation with key stakeholders, particularly the AFP. Development of the amendments involved careful consideration of how best to ensure the effective operation of the regime while recognising its role in the criminal justice system, legitimate interests and human rights.[14]

2.13 AGD did not support the amendment proposed by the AHRC to subsection 319(2), confirming that the additional words proposed 'would appear to make proposed subsection 319(2) subordinate to subsection 319(1), which would negate the effect of proposed subsections 319(2)-(5)'.[15]

2.14 Submitters acknowledged that the bill sought to introduce two safeguards against potential prejudice where a stay of forfeiture proceedings was refused, providing that a court may make an order prohibiting the disclosure of information, or hear the forfeiture proceedings in closed court. The AHRC and others regarded these as insufficient, however, to mitigate the potential prejudice created by section 319.[16]

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12 Attorney-General's Department, *Submission* 12, p. 6.

13 Attorney-General's Department, *Submission* 12, p. 3.

14 Attorney-General's Department, *Submission* 12, p. 4.

15 Attorney-General's Department, *Submission* 12, p. 6.

16 Australian Human Rights Commission, *Submission* 2, p. 9.

2.15 In relation to potential non-disclosure orders, CCL set out a range of circumstances in which it believed these would not prevent prejudice to a criminal trial, including where the very existence of evidence discovered during forfeiture proceedings might affect a criminal defence, and where the investigating authority in respect of both the forfeiture and the criminal proceedings was the AFP.[17]

2.16 The AHRC and CCL argued that allowing for closed court hearings was potentially inappropriate given that international human rights law and the public interest required that closed courts should be the exception rather than the rule. Both believed that the proposed provisions made it likely that forfeiture proceedings would become closed proceedings as 'a matter of course'.[18]

2.17 FFDLR stated that closed court hearings were restrictive of the rights of the media and public to know about proceedings, and only offered 'flimsy' privacy protections for those involved.[19] CBA and CCL were of the view that, as with disclosure orders, closed court hearings would not effectively safeguard against prejudice when the AFP was a party to both sets of proceedings.[20]

2.18 LCA acknowledged that the *Federal Court of Australia Act 1976* allowed that court to close proceedings to the public 'if it is considered in the interests of justice'.[21] However, LCA observed that the High Court's 2015 decision in relation to the PoC Act forfeiture scheme rejected the argument that a confidentiality order or closed court would sufficiently avoid the risk of prejudice, which 'may suggest the inadequacy of the purported safeguards in the Bill'.[22]

2.19 AGD advised the committee that in practice, since 2012, non-conviction based forfeiture was undertaken by the AFP, while criminal cases and conviction-based forfeiture cases were handled only by the Commonwealth Director of Public Prosecutions (CDPP). This 'clear role delineation' was set out in a Memorandum of Understanding between the AFP and CDPP.[23] AGD noted that information could not be exchanged between authorities where a court had made a non-disclosure order to that effect.[24]

2.20 In relation to closed court hearings, AGD emphasised that these would remain at the discretion of the court as one of a range of options available to protect the

17 NSW Council for Civil Liberties, *Submission* 11, pp 3-4.

18 Australian Human Rights Commission, *Submission* 2, p. 9; NSW Council for Civil Liberties, *Submission* 11, pp 4-5.

19 Families and Friends for Drug Law Reform, *Submission* 8, p. 4.

20 The Victorian Bar and Criminal Bar Association, *Submission* 10, p. 5; NSW Council for Civil Liberties, *Submission* 11, p. 5.

21 Law Council of Australia, *Submission* 3, p. 6.

22 Law Council of Australia, *Submission* 3, p. 7.

23 Attorney-General's Department, *Submission* 12, pp 2-3.

24 Attorney-General's Department, *Submission* 12, p. 5.

interests of the parties, and stated that 'the AFP does not anticipate that a proceeds of crime authority would often, if ever, apply for a court to be closed'.[25]

2.21 AGD further offered the view in relation to the safeguards in the bill, that 'in circumstances where a court considers that the combination of these protections will not sufficiently preserve the respondent's right to a fair trial, a stay of the POC proceedings can and should be granted'.[26]

Restraint, exclusion and forfeiture: order of proceedings

2.22 LCA, CBA and CCL also opposed the proposed amendment to section 315A, which would require an application for exclusion from a restraining order to be resolved prior to the court hearing an application for forfeiture. LCA believed this provision was 'similarly likely to be a disproportionate infringement on the right to a fair hearing'.[27]

2.23 CCL pointed out that under the legislation:

> …if no exclusion order is sought from the restraining order, the Commissioner of Police does not have to present any evidence in order for the property to be forfeited…
>
> The result is that if a possessor of an asset wishes to challenge a forfeiture order, he or she must, in practical terms, first seek an exclusion order, excluding the property from a restraining order.
>
> If item 3 of Schedule 1 is accepted, the possessor of property suspected to be tainted will have to present a case for exclusion of the property before he or she has heard the case for it being tainted.[28]

2.24 CBA further observed that the threshold for securing a restraint order (reasonable grounds to suspect that the property is the proceeds of crime) was lower than that for forfeiture (satisfaction of the court that the property is the proceeds of crime). CBA said that:

> By hearing the applicant authority's forfeiture application first…the Court can determine on the basis of admissible evidence whether it is satisfied that the property in question is the proceeds of crime or an instrument of crime. If it is so satisfied, then the Court can determine if the respondent's interests should be excluded from both the restraining order and the forfeiture order. If the Court is not so satisfied, then it is appropriate that the restraining order be discharged.[29]

2.25 CBA added that the proposed amendment would complicate the legislative regime, by potentially requiring the court to hear two separate exclusion

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25 Attorney-General's Department, *Submission* 12, p. 6.

26 Attorney-General's Department, *Submission* 12, p. 5.

27 Law Council of Australia, *Submission* 3, p. 8.

28 NSW Council for Civil Liberties, *Submission* 11, pp 5-6 (internal references omitted).

29 The Victorian Bar and Criminal Bar Association, *Submission* 10, p. 4.

applications—first against restraint, then against forfeiture—rather than dealing with the matter conclusively in one step.[30]

2.26 AGD emphasised the distinction between restraining orders as an interim step and the final nature of forfeiture orders, saying that 'if an application for a final forfeiture order must be heard before an exclusion application in respect of a restraining order, this creates an anomalous situation and undermines the provisions allowing exclusion of property from a restraining order'.[31]

The separation of powers and role of the courts

2.27 The AHRC and LCA also submitted that the constitutional validity of the proposed amendments to section 319 may be open to question, on the basis of the doctrine of the separation of powers.

2.28 The AHRC believed that if subsection 319(2) could be read as a predetermination by the executive of what is or is not in the interests of justice, this may amount to a usurpation of Commonwealth judicial power, contrary to Chapter III of the Constitution.[32]

2.29 LCA agreed, stating that 'the proposed categories of what does not qualify as being in the interests of justice warranting a potential stay of proceedings is very broad', and that 'there seems to be little or no basis left for when [PoC Act] proceedings could be stayed'.[33] On that basis, LCA assessed that the bill may therefore be beyond the government's legislative power, because it was inimical to the exclusive powers of the judiciary, and the inherent powers of the courts to prevent their processes being employed in a manner which gave rise to unfairness.[34]

2.30 LCA advised that regulating judicial processes was constitutionally admissible—an alteration of procedural rules would not constitute an invalid direction to exercise judicial power in a manner inconsistent with the essential characteristics of a court, or with the nature of judicial power. LCA assessed that:

> It is unclear, however, as to whether the High Court's inherent power to order a stay of proceedings should be distinguished from other procedural matters such as the rules of evidence.[35]

2.31 LCA recommended that the constitutional validity of the proposed amendments (in terms of both Section 80 and the separation of powers doctrine) may be more assured if subsection 319(2) were recast so as not to seek to direct a court, but instead present 'various factors for a court to consider and weigh' in its discretion, in

30 The Victorian Bar and Criminal Bar Association, *Submission* 10, pp 3-4.

31 Explanatory Memorandum, p. 27.

32 Australian Human Rights Commission, *Submission* 2, p. 7.

33 Law Council of Australia, *Submission* 3, p. 5.

34 Law Council of Australia, *Submission* 3, pp 5-6.

35 Law Council of Australia, *Submission* 3, p. 6.

deciding whether or not to grant a stay of proceedings.[36] As with the AHRC's proposed amendment to section 319(2) above, AGD rejected this proposal, stating that it would undermine the desired effect of the amendments.[37]

Efficacy of the civil forfeiture scheme

2.32 FFDLR argued that strengthening the non-conviction forfeiture scheme as proposed in Schedule 1 would not be effective. Comparing figures from the Australian Crime Commission on the direct costs to the economy of serious and organised crime in 2013-14 ($21.29 billion), against the receipt of confiscated assets by the Financial Management Authority in 2014 ($83.6 million), FFDLR stated that 'any expectation that the proposed amendments will significantly reduce the probability of serious and organised crime in Australia and reduce the amount of that crime seems based on a groundless hope rather than a realistic appreciation and strategic analysis'.[38]

2.33 Commenting specifically on drug-related crime, FFDLR elaborated its view that law enforcement measures such as confiscation had the effect of stimulating rather than hindering the illicit drug trade, and argued that strengthening the proceeds of crime forfeiture scheme would only be justified if there was sufficient 'compelling evidence' that it would materially reduce the availability of illicit drugs in Australia, and thereby have a positive impact sufficient to outweigh its imposition on civil liberties.[39]

2.34 Conversely, the Police Federation of Australia, the Justice and International Mission of the Uniting Church Synod of Victoria and Tasmania (JIM), and the Victorian Director of Public Prosecutions were supportive of the proposed amendments, which they saw as strengthening action against crime through the non-conviction based asset forfeiture scheme under the PoC Act.[40]

2.35 JIM emphasised the impact of corruption and financial crime on poverty in developing countries, including where proceeds of crime were transferred into Australia, and believed that 'it is vital that concurrent civil and criminal proceedings be possible'.[41]

2.36 JIM argued that the UN Office for Drugs and Crime (UNODC) and the World Bank had taken the position that 'properly constructed legislation for the restraint and confiscation of unexplained wealth is consistent with human rights standards', and that

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36 Law Council of Australia, *Submission* 3, p. 9.

37 Attorney-General's Department, *Submission* 12, pp 5-6.

38 Families and Friends for Drug Law Reform, *Submission* 8, p. 7.

39 Families and Friends for Drug Law Reform, *Submission* 8, pp 15-16.

40 Police Federation of Australia, *Submission* 4; Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5; Director of Public Prosecutions, State of Victoria, *Submission* 6.

41 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, p. 2.

civil forfeiture schemes were in place in a number of other jurisdictions including Ireland, the United Kingdom, United States and Italy.[42] JIM submitted that:

> The World Bank and UNODC have pointed out that because assets can be moved within minutes and at the click of a button, investigations need to act in a time-sensitive manner. Any delay in executing a freezing request after the suspect has been arrested or tipped off can be fatal to the recovery of assets.[43]

2.37 AGD described the objectives of the PoC Act, including preventing crime by diminishing the capacity of offenders to finance further criminal activity, deterring criminals by reducing the profitability of their actions, and compensating society for the harm caused by criminal activity. AGD said that the non-conviction based forfeiture scheme was 'one of a range of tools developed to meet these objects'.[44] AGD added that:

> Non-conviction based forfeiture is a vital tool in the fight against serious and organised crime, countering the techniques that senior members of organised crime syndicates use to insulate themselves from criminal prosecution, and disrupting and dismantling serious and organised crime groups.[45]

Committee view

2.38 The committee takes seriously the concerns raised in submissions regarding the fundamental rights and constitutional principles that may be impacted by the proposed amendments. At the same time, the committee is cognisant of the importance of an effective proceeds of crime regime in combating serious crimes and those who profit from crime, as emphasised by AGD and supported by a number of other submitters.

2.39 The committee acknowledges the department's advice that these amendments were developed in consultation with key stakeholders, and with a view to striking the appropriate balance between effectively combating crime, and respecting the fundamental rights and principles underlying Australia's criminal justice system. The committee notes that the amended legislation will if necessary be tested in the courts, who will be well placed to determine the questions of constitutionality and fundamental rights that have been raised in this inquiry.

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42 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, p. 4.

43 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, p. 5.

44 Attorney-General's Department, *Submission* 12, p. 2.

45 Attorney-General's Department, *Submission* 12, p. 3.

Schedule 2: false accounting

2.40 Varying perspectives were offered in submissions in relation to Schedule 2. LCA, and law firm Johnson Winter & Slattery (JWS) were concerned that the provisions went much further than required to meet Australia's obligations under the OECD Convention, and were likely to result in 'significant unintended consequences' for businesses dealing with accounting documents.[46]

2.41 On the other hand the Australian Securities and Investments Commission (ASIC) indicated its support for the passage of Schedule 2,[47] and JIM argued that the offences could be made even stronger.[48]

Application beyond foreign bribery

2.42 LCA and JWS observed that a key element of the OECD Convention's foreign bribery offence provision, an intention of influencing a foreign public official, was not included in the proposed new offences, and as such, they were not limited to foreign bribery situations. These submitters argued that the absence of a nexus with foreign bribery, and the breadth of the offences as drafted, meant that the offences would potentially impose criminal liability in a very wide range of situations, which it believed were unintended and unreasonable.[49] JWS recommended that the provisions be amended to expressly limit their application to conduct relating to foreign corrupt practices.[50]

2.43 ASIC advised, on the other hand, that the amendments in Schedule 2 were of particular significance to its work, and particularly welcomed that the new offences would have a broader field of application than foreign bribery. ASIC said they would assist more generally in addressing corporate crime offences of false accounting, which 'can and do cause significant harm to Australian financial consumers and compromise the integrity of our markets'.[51]

2.44 JIM suggested making the offences even broader, to apply where the action or omission was intended to (or reckless about the potential to) facilitate, conceal or disguise the contravention of any law of the Commonwealth,[52] although AGD did not regard this as necessary under the current construction of the bill.[53]

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46 Law Council of Australia, *Submission* 3, pp 10-11; Johnson Winter & Slattery Lawyers, *Submission* 7, pp 1-2.

47 Australian Securities and Investments Commission, *Submission* 1.

48 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, pp 5-9.

49 Law Council of Australia, *Submission* 3, pp 10-11; Johnson Winter & Slattery Lawyers, *Submission* 7, p. 2.

50 Johnson Winter & Slattery Lawyers, *Submission* 7, p. 2.

51 Australian Securities and Investments Commission, *Submission* 1, pp 1-2.

52 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, pp 8-9.

53 Attorney-General's Department, *Submission* 12, p. 10.

2.45 AGD confirmed that the offences had been drafted deliberately without an explicit link between the false accounting and foreign bribery. The department considered that confining the offences to a foreign bribery context would make them difficult to prosecute, and unnecessarily limit their effectiveness. The department believed that:

> It is appropriate that the offences should be implemented to the extent of the Commonwealth's Constitutional authority. The broad application of the proposed offences will assist to combat the conduct of false accounting in a range of criminal contexts. The offences will target not only bribes to foreign public officials, but all manner of duplicitous payments.[54]

Intention and recklessness

2.46 LCA's view was that, given the broad application of the offences and the substantial penalties proposed, they 'should require as a minimum an intention on behalf of the defendant that a person receive or give a benefit, or incur a loss'.[55] JWS agreed, submitting that the threshold for recklessness under the Criminal Code is not high and is not well understood, and conduct 'that is not much more than carelessness could be criminalised by the new provisions'.[56]

2.47 On the other hand, ASIC supported the introduction of both intention- and recklessness-based forms of the offence, particularly 'in light of the likelihood that fault will often need to be inferred from the available circumstantial evidence'. ASIC believed that:

> In cases where the evidence does not support prosecution of an intention-based offence it will be important that an alternative means is available to deal with those who have nevertheless engaged in the proscribed conduct with an awareness of the substantial risk that their dealing with an accounting document would, for instance, facilitate an illegitimate payment.[57]

2.48 JIM observed that prosecutions under the recklessness offence were likely to occur more frequently than under the intent offence, because of the difficulty of proving intent. JIM suggested that the bill 'could be further refined to improve its effectiveness and reduce the evidential and enforcement burden', although it did not specify how this might be done.[58]

2.49 JIM further advocated that the proposed new offences should be amended to go a step beyond their present application to accounting documents that a person is under a legal duty to make or alter. JIM recommended, in line with United States

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54 Attorney-General's Department, *Submission* 12, p. 8.

55 Law Council of Australia, *Submission* 3, p. 11.

56 Johnson Winter & Slattery Lawyers, *Submission* 7, p. 2.

57 Australian Securities and Investments Commission, *Submission* 1, p. 2.

58 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, p. 9.

legislation, that the bill create an express obligation on persons to maintain proper accounting records for the purposes of demonstrating compliance with the foreign bribery provisions of the Criminal Code.[59]

2.50 AGD advised that it 'considers that the fault elements in the proposed offences strike an appropriate balance between enforceability of the offences and fairness'.[60] The department did not agree that recklessness was a low threshold, noting that it required that defendants were aware of a substantial risk that their conduct would result in the described outcomes. AGD added that a similar structure of 'tiered' liability was used for the money laundering offences in Division 400 of the Criminal Code.[61]

2.51 While agreeing with JIM's view that the proposed offences should harmonise with existing Australian laws, AGD advised that extending the offences beyond accounting documents a person was under a legal duty to make would not be consistent with Australian common law, under which criminal liability does not attach to an omission unless the person is under a legal obligation to perform the act.[62]

2.52 AGD also expressed its view that heavy penalties were appropriate in these circumstances to reflect 'the gravity of white-collar crime', noting ASIC's support for this. AGD further advised that the proposed penalties were consistent with comparable offences in other jurisdictions.[63]

Committee view

2.53 The committee joins submitters from both within and outside government in welcoming these proposed new offences, which will not only support Australia's compliance with its international obligations, but go further in helping combat a range of financial crimes. The committee regards the breadth of the proposed offences, and the potentially serious penalties for those who commit them, as appropriate in the circumstances.

59 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, pp 8-9.

60 Attorney-General's Department, *Submission* 12, p. 7.

61 Attorney-General's Department, *Submission* 12, p. 8.

62 Attorney-General's Department, *Submission* 12, p. 10.

63 Attorney-General's Department, *Submission* 12, p. 9.

Schedules 4 and 5: disclosure of AUSTRAC and AusCheck information

2.54 Submitters again offered mixed views on Schedules 4 and 5, with two concerns raised by LCA, while others indicated their support for the proposed amendments.

Schedule 4: regulation-making power

2.55 LCA expressed similar concerns to the Scrutiny of Bills Committee regarding the 'very general regulation-making power' in Schedule 4 for proscribing additional international organisations with which AUSTRAC information may be shared in future. LCA recommended that such a power should be subjected to a six-month 'sunset clause', which:

> would provide law enforcement agencies and the public with assurance that the Parliament will consider the effectiveness of the power and any necessary oversight measures within a definite timeframe. It would also provide those stakeholders with the opportunity to comment further on the necessity and proportionality of the power.[64]

2.56 JIM stated its support in general terms for Schedule 4, observing that '[e]ffective information sharing is essential to curbing money laundering and financing of terrorism'.[65]

2.57 AGD stated that:

> The department consulted extensively with the relevant affected stakeholders, including the Australian Transaction Reports and Analysis Centre (AUSTRAC), the AFP, and the Australian Crime Commission (ACC), on the necessity and proportionality of the regulation-making power. It is our considered view that the proposed measure is both reasonable and necessary in order to ensure that newly constituted international bodies, in particular those with multijurisdictional law enforcement coordination and cooperation functions similar in nature to INTERPOL and Europol, are able to be listed in future as expediently as possible. Enabling timely and effective cooperation in the investigation of transnational crime will both assist in fulfilling our international obligations to combat money laundering and the financing of terrorism and beneficially affect Australia's relations with foreign countries and international organisations. We further note that as regulations are a disallowable instrument, the prescription of any additional body will be subject to Parliamentary scrutiny.[66]

Possible retrospectivity in schedules 4 and 5

2.58 LCA raised a further concern in relation to the potential retrospective operation of both Schedules 4 and 5 of the bill, in that they would permit the use and

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64 Law Council of Australia, *Submission* 3, p. 11.

65 Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, *Submission* 5, p. 9.

66 Attorney-General's Department, *Submission* 12, p. 12.

disclosure of personal information collected prior to the passage of the bill. On this matter LCA recommended that, where reasonable or possible, the public be informed about the scope of such possible uses and disclosures.[67]

2.59 AGD did not agree with LCA's concern that the provisions may have retrospective effect, stating that the proposed amendment 'does not seek to retrospectively alter legal rights or obligations; it simply seeks to provide legislative certainty regarding the scope of existing powers under the AML/CTF Act'.[68] AGD advised that AUSTRAC already provided information about access to and disclosure of information on its website.[69]

2.60 In a submission to the committee the Department of Immigration and Border Protection (DIBP) added its endorsement of the 'legislative certainty and clarity' for information sharing by AUSTRAC and AusCheck with other agencies which would be achieved by Schedules 4 and 5. DIBP emphasised the importance of inter-agency information sharing for the work of the Australian Border Force (ABF), including in light of its counter-terrorism role and the detection of an increase in attempts to take undeclared currency out of Australia.[70]

Committee view

2.61 The committee notes the concerns raised by LCA in relation to the operation of these provisions, but welcomes the clarifications provided by AGD in that regard, and emphasises, as the department has done, that the regulatory powers granted by the bill remain subject to parliamentary oversight. The committee regards information sharing as crucial to effective action against crime, particularly where anti-terrorism and other national security concerns are at stake. As such, the committee endorses the enhanced information-sharing proposed in Schedules 4 and 5, while encouraging AUSTRAC and AGD/AusCheck to ensure that adequate and robust safeguards are in place to protect personal privacy and to appropriately govern and oversee the careful and lawful sharing of information.

67 Law Council of Australia, *Submission* 3, pp 11-12.

68 Attorney-General's Department, *Submission* 12, p. 12.

69 Attorney-General's Department, *Submission* 12, p. 12.

70 Department of Immigration and Border Protection, *Submission* 9, p. 2.

Conclusion

2.62 This bill seeks to combat a number of serious and complex criminal activities within Commonwealth jurisdiction including organised crime, bribery and duplicitous financial conduct, trade in illicit drugs, money laundering and the financing of terrorism.

2.63 The committee appreciates the concern shown by submitters to ensure that the bill achieves its objectives in balanced, appropriate and effective ways.

2.64 Ultimately, the issues before the committee in relation to this bill relate to questions of balance: between effectively combating crime and the protection of human rights and constitutional principles; between closing unfair loopholes exploited by criminals and providing sufficient precision to ensure that offences are appropriate to their context; between information sharing and the protection of privacy.

2.65 With the assistance of the information and clarifications provided by the Attorney-General's Department and others on these questions, the committee is satisfied that the bill strikes the appropriate balances within each of its legislative schemes, bearing in mind the important matters of criminal justice and national security at stake.

2.66 As such, the committee believes that the bill should proceed.

Recommendation 1

2.67 The committee recommends that the bill be passed.

Senator the Hon Ian Macdonald
Chair