



14 July 2011

Ms Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Ms Dennett

CRIMES LEGISLATION AMENDMENT BILL (NO. 2) 2011

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the above Bill.

The Law Council's submission is concerned with Schedule 2 of the Bill and specifically those amendments which are designed to enable the Commissioner of the Australian Federal Police (AFP) to commence and conduct proceedings under the *Proceeds of Crime Act 2002* (POC Act).

Currently under the POC Act, the Commonwealth Director of Public Prosecutions (CDPP) has exclusive responsibility for commencing and conducting litigation under the Act. The Bill seeks to amend the POC Act so that all the powers currently exercised by the CDPP can also be exercised by the Commissioner of the AFP. These powers include the power to apply to the Court for final orders under the Act, such as forfeiture orders, pecuniary penalty orders and unexplained wealth orders, as well as the power to apply for interlocutory restraining orders, preliminary unexplained wealth orders and compulsory examination orders.

In the Explanatory Memorandum accompanying the Bill, it is envisaged that, in practice, the CDPP will continue to take primary responsibility for proceeds of crime applications which are ancillary to a criminal prosecution, while the AFP will take primary responsibility for non-conviction based proceeds of crime matters, that is, proceedings which are not commenced in connection with any criminal prosecution.

These amendments have not been the subject of prior public consultation and are opposed by the Law Council.

The value of CDPP involvement in POC matters

There are a range of serious orders which may be made under the POC Act which can have a very real, immediate and adverse impact on people's rights and livelihood.

While the court retains responsibility under the Act for making any orders which result in the restraint or forfeiture of property or the imposition of a pecuniary penalty, in exercising this role the court is very much dependent on the party bringing the application, at present the CDPP, to ensure the following:

- That applications made under the Act, whether ultimately successful or otherwise, are at the very least well founded, not frivolous nor brought for an improper or collateral purpose;
- That applications are only heard *ex parte* in circumstances where it is absolutely necessary;
- That before relevant orders are made, the Commonwealth has given an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order; and
- That before relevant orders are made, reasonable steps have been taken to notify all possible parties with an interest in the property.

For that reason, although it is acknowledged that civil confiscation proceedings are not strictly speaking a prosecutorial function, the involvement of the CDPP in the process offers a valuable safeguard against the misuse or overuse of the powers available under the Act.

First, the involvement of the CDPP guarantees that an authority which is independent of the investigating agency makes an objective assessment about the appropriateness of proceeding with any application, in view of the objectives of the legislation, the available and admissible evidence and the likely prospects of success.

Secondly, it guarantees that the person who commences and conducts the proceedings is an officer of the Court and the Crown, with all the duties that entails, and thus has a personal obligation to ensure that the Court's powers and processes are not abused.

Coordinated approach to POC matters does not require transfer of powers to AFP

The Law Council supports arrangements, such as the establishment of the Criminal Assets Confiscation Taskforce, which are designed to achieve greater focus, communication and cooperation between the many agencies which have a role to play in identifying and securing the proceeds of crime. However, the Law Council does not accept that the establishment of such a Taskforce necessarily requires the transfer of responsibilities from the CDPP to the AFP, particularly when the CDPP is already theoretically a part of the Taskforce. It is not clear why a "multi-agency approach to combating organised crime" requires the centralisation of functions in the AFP, even if the AFP is responsible for coordinating and housing the Taskforce.

The details of the apparent inefficiencies in the current arrangements under the POC Act are not explored in the Second Reading Speech or the Explanatory Memorandum.

However, in the absence of such information, the Law Council submits the following:

- It is possible that problems relating to coordination and cooperation have arisen in the past because there are disparities in the budgetary allocations between participating agencies in the Taskforce, like the AFP and the CDPP. Such disparities may contribute to bottlenecks and delays. If this is the case, the Law Council submits that the matter should be addressed as a funding issue, rather than by removing functions from the appropriate agency, in this case the CDPP, and allocating them to another, simply because it may be better resourced.
- Provided that agencies are working together cooperatively and openly, it is not necessarily problematic that there may be differences of opinion on proceeds of crime matters between the CDPP and AFP from time to time. This would demonstrate that the CDPP is rigorously reviewing the material submitted by the AFP before commencing court proceedings. That is the role the Law Council would hope and expect an independent CDPP to play.

A note of caution about the tentative recommendations of the PJC

The Law Council is aware that, in the context of its 2008/9 review of legislative arrangements to outlaw serious and organised crime groups, the Parliamentary Joint Committee on the Australian Crime Commission (the PJC),¹ gave some consideration to whether it may be beneficial to vest a single Commonwealth agency with primary responsibility for both investigating and commencing proceeds of crime matters.

In its final Report the PJC concluded:

The best model for investigating and prosecuting criminal assets confiscation matters and other confiscation matters was not the primary focus of this inquiry. However, the Committee did hear substantial evidence and received numerous recommendations as to how the Commonwealth's approach to these issues could be strengthened, thereby improving the success of criminal assets confiscation laws in Australia.

In the Committee's view, Australia may benefit from an assets recovery agency like the [Irish Criminal Assets Bureau], for example by vesting the capacity to bring proceeds of crime and unexplained wealth matters in the ACC, or by the establishment of permanent multi-agency taskforces with a lead role in investigating and prosecuting criminal assets recovery matters, or from a combination of these approaches.

The committee recommends that this issue be given further consideration by the Commonwealth government.

The committee recommends that the Commonwealth government examine a more integrated model of asset recovery in which investigation and prosecution are undertaken within one agency, such as the ACC.²

In reaching this conclusion, the PJC was influenced by evidence of the success of similar arrangements in New South Wales, the United Kingdom and Ireland, where the NSW

¹ This Committee has since been subsumed into the new Parliamentary Joint Committee on Law Enforcement.

² Parliamentary Joint Committee on the Australian Crime Commission, Final Report on Legislative arrangements to outlaw serious and organised crime groups (17 August 2009) at 5.131 to 5.134

Crime Commission, Serious and Organised Crime Authority (SOICA) and Criminal Assets Bureau (CAB) respectively have responsibility for both investigating proceeds of crime matters and instigating confiscation proceedings.³

However, developments since that Report were issued cast doubt on the wisdom of evaluating the success of confiscation regimes in other jurisdictions simply by reference to dollar amounts recovered. Recent experience in New South Wales indicates that apparent success in confiscating criminal assets may, in fact, mask serious problems in practice and procedure. In that regard, it is noted that the NSW Crime Commission and its practices and procedures in the conduct of actions under the *Criminal Assets Recovery Act 1990* (NSW) are now the subject of a Police Integrity Commission inquiry.⁴

It is acknowledged that there are relevant differences in the NSW and Commonwealth proceeds of crime regimes, including in relation to cost recovery. Nonetheless, the Law Council submits that the problems which appear to have arisen in New South Wales are, at least in part, the result of a lack of separation between those responsible for investigating and enforcing proceeds of crime legislation.

It may be that if the PJC were conducting its inquiry today, the New South Wales criminal assets confiscation model would not be commended in the same way, as one that the Commonwealth should adopt.

Further, in relation to the tentative findings of the PJC, it is also important to note that the models relied upon from overseas, the SOCA in the United Kingdom and the CAB in Ireland, are not ad hoc taskforces. They are both statutory bodies established by the *Serious Organised Crime and Police Act 2005* and *Criminal Assets Bureau Act, 1996*, respectively. Both agencies have clear, legislatively defined roles and responsibilities and staffing and reporting obligations. The amendments proposed in the current Bill do not meaningfully emulate these overseas arrangements. On the contrary, they simply 'bolt-on' additional powers to an existing agency, that is, the AFP.

Submission in the alternative

As noted above, and for the reasons outlined, the Law Council does not support the amendments proposed in Schedule 2 of the Bill. However, in the event that the Committee is not persuaded by the Law Council's reservations to oppose the conferral of additional powers on the AFP, the Law Council submits in the alternative that, at the very least, the following amendments to the Bill should be considered.

- The Bill should be amended to vest the relevant powers in an alternative statutory authority (other than the Commissioner of the AFP) but still within the AFP. The AFP Act already provides for statutory officers to hold the position of Deputy Commissioner. A discrete office of "Confiscations Commissioner" or similar could be created within the AFP, with a proviso that the office holder must be an admitted legal practitioner at the senior executive level. The powers of the "Confiscations Commissioner" to delegate his or her powers could, in turn, also be similarly restricted.

³ Parliamentary Joint Committee on the Australian Crime Commission, Final Report on Legislative arrangements to outlaw serious and organised crime groups (17 August 2009) at 5.115 to 5.130

⁴ See <http://www.theaustralian.com.au/national-affairs/state-politics/nsw-crime-commission-loses-bid-to-silence-pic-investigation/story-e6frgczx-1226067500334>

- Failing that, it is noted that the amendments proposed in the Bill currently provide for the insertion of proposed sub-section 69C(3) into the *Australian Federal Police Act 1979*. This new sub-section will enable the AFP Commissioner to delegate his new powers under the POCA as a "proceeds of crime authority" to any senior executive AFP employee. This includes delegating the power to police officers with no legal qualifications. It is submitted that, as a minimum safeguard, the Bill should be amended so that the Commissioner's powers as a proceeds of crime authority may only be delegable to a senior executive AFP employee who is admitted as a legal practitioner. Although the Commissioner of the AFP is not necessarily a lawyer, it is reasonably to be expected that on a day to day basis the power will be exercised by his delegates, who would be legal practitioners.

I hope that these comments are of assistance to the Committee in its deliberations on the Bill.

Yours sincerely,

Bill Grant
Secretary-General