

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S DEPARTMENT

**Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters**

Written Questions on Notice

1. In its written submission and verbal evidence to the committee's inquiry, the Rule of Law Institute of Australia proposed an amendment to the *Proceeds of Crime Act 2002* (POC Act) which would limit the circumstances in which a magistrate can grant a search warrant under section 225 of the POC Act in relation to evidentiary material. The Law Council of Australia also supported further consideration of this proposed amendment.

- What are the Department's views on the amendment proposed by the Rule of Law Institute?
- Are there any flow-on amendments that would be necessary if this proposed amendment were to be introduced?

The answer to the honourable senator's question is as follows:

The Rule of Law Institute Australia (RoLIA) has proposed the introduction of further requirements that would need to be satisfied prior to a magistrate issuing a search warrant pursuant to section 225 of the *Proceeds of Crime Act 2002* (the POC Act), namely that;

- the document cannot be identified or described with sufficient particularity for the purposes of obtaining a production order, or
- a production order requiring the document has been given but not complied with, or
- there are reasonable grounds to suspect that a production order would not be complied with, or
- the investigation for the purposes of which the warrant is being sought might be seriously prejudiced by seeking a production order if an authorised officer does not gain immediate access to the document without notice to any person.

Under the POC Act, production orders and search warrants are separate tools that differ significantly in scope and effect, with the categories of document and material that can be obtained under a search warrant being greater than the material that can be obtained under a production order. Production orders can only be used to obtain property-tracking documents that are in the possession or under the control of a body corporate, or used or intended to be used in the carrying on of a business. Production orders are generally used to obtain documents from third party bodies (such as financial institutions) that otherwise may be unable to pass the information on, for example, due to confidentiality restrictions. Search warrants are broader in scope and can be issued in relation to any type of premises in order to obtain 'tainted property' or 'evidential material'. Both types of provisions contain appropriate safeguards and redress mechanisms.

Ensuring both mechanisms are available allows law enforcement to choose the most appropriate and effective means of obtaining the required information or locating criminal assets in the particular circumstances, taking into account such factors as the likelihood of assets being moved quickly out of reach of law enforcement, the type of evidential material/document/tainted property being sought, and the level of cooperation expected from the person (including body corporates) involved.

The Department considers that the decision about whether to seek to obtain information using a search warrant or a production order, or both, is one best made by law enforcement based on operational experience and case-specific information. Therefore, the Department does not consider the approach suggested by the RoLIA, which would significantly impede the AFP's ability to utilise search warrants in appropriate circumstances to investigate the range of proceeds of crime matters under the POC Act, to be appropriate.

**Are there any flow-on amendments that would be necessary if this proposed amendment were to be introduced?**

Yes.

The amendments proposed by the RoLIA, which are based on the provisions of the *Proceeds of Crime Act 1987* (POC Act 1987), are not suited to the current proceeds of crime regime introduced in 2002 and as amended since that time.

While the investigative powers in the POC Act 1987 were aimed at supporting forfeiture of assets in connection with a criminal conviction, the modern regime was adapted to support a wide range of conviction and non-conviction based confiscation orders, including unexplained wealth orders, pecuniary penalty orders, automatic forfeiture orders and literary proceeds orders. The evolution of the POC Act reflects an increasing emphasis by successive governments on enabling law enforcement to target serious and organised crime by 'following the money' and depriving criminals of the profits gained from their offending and exploiting their criminal notoriety. The modern POC Act is also adapted to suit changing technologies, which have increased the speed at which large amounts of information can be hidden. As noted above, it is appropriate that law enforcement have the necessary flexibility to determine which investigative tools are most appropriate to seek information relevant to each of these orders, in the circumstances of each particular case.

The impact of the amendments proposed by RoLIA would need to be assessed across the entire proceeds of crime regime to ensure they were adapted to support investigations into the full range of orders available under the current POC Act. It would also be important to ensure that any requirement to satisfy the RoLIA's proposed requirements before seeking a search warrant did not delay investigations or 'tip off' offenders, particularly in circumstances where this may result in an offender dissipating or concealing assets before the search warrant was issued.