



Australian Government
Attorney-General's Department

Submission to the Senate Legal and Constitutional Affairs Committee

Crimes Legislation Amendment Bill (No.2) 2011

The *Crimes Legislation Amendment Bill (No.2) 2011* (the Bill) was introduced into Parliament on 23 March 2011.

Schedule 1 of the Bill will amend the *Customs Administration Act 1985* and *Law Enforcement Integrity Commissioner Act 2006* to include the Australian Customs and Border Protection Service within the jurisdiction of the Australian Commission for Law Enforcement Integrity.

Schedule 2 of the Bill will amend the *Australian Federal Police Act 1979* and *Proceeds of Crime Act 2002* (the POCA) to allow the Commissioner of the Australian Federal Police (AFP) to conduct litigation on proceeds of crime matters on behalf of the Criminal Assets Confiscation Taskforce and allow the Commonwealth Director of Public Prosecutions (DPP) and the Commissioner of the AFP to transfer matters already commenced between themselves. Schedule 2 also contains a number of other proceeds of crime related amendments and consequential amendments to other Acts.

This submission focuses on the amendments contained in Schedule 2 of the Bill, which will enable the Commissioner of the AFP to commence and carry on litigation under the POCA.

Background

Existing institutional arrangements for confiscating criminal assets have been successful. With the exception of the 2008-2009 financial year, the level of confiscation recoveries has increased every year since the introduction of non-conviction based confiscation provisions in the POCA. However, recent developments in the areas of proceeds of crime and organised crime, including the introduction of unexplained wealth proceedings, present an opportunity to revisit these arrangements to increase their effectiveness into the future.

In August 2009, the Parliamentary Joint Committee on the Australian Crime Commission recommended that the Australian Government examine an integrated model of asset recovery in which investigation and prosecution would be undertaken within one agency.

During the 2010 election, the Government announced that it would establish a new Criminal Assets Confiscation Taskforce, led by and housed in the AFP, to enhance the identification of potential criminal asset confiscation matters and strengthen their pursuit.

The Taskforce commenced operation in January 2011 and is designed to take a more proactive, intelligence-led approach to the identification of potential criminal asset confiscation matters by bringing together intelligence, operations, legal and other specialist resources. The AFP, Australian Taxation Office and the Australian Crime Commission are participating agencies in the Taskforce.¹ The Taskforce will continue to work in partnership

¹ The DPP is also a participating agency under the current Taskforce arrangements and has responsibility for the independent litigation of proceeds of crime investigations undertaken by the Taskforce. However, it is

with other relevant Commonwealth agencies in order to identify and investigate appropriate asset confiscation matters.

The amendments in Schedule 2 of the Bill are required to enhance and streamline the operation of the Criminal Assets Confiscation Taskforce. Subject to the passage of these amendments, it is envisaged that the AFP will take responsibility for litigating all proceeds of crime matters relevant to the proceeds investigations undertaken by the Taskforce, and all non-conviction based proceeds of crime matters. While it is likely that the Taskforce will take responsibility for the majority of proceeds of crime matters, it is expected that the DPP will continue with a limited number of matters that are closely connected with criminal prosecutions.

As stated in the Explanatory Memorandum to the Bill, the division of responsibilities between the two authorities will be subject to administrative arrangements outlined in a Memorandum of Understanding. We understand that a working group has been established between the AFP and CDPP in planning for the permanent Taskforce arrangements under the proposed legislation. The issues to be considered, in consultation with the Attorney-General's Department, include funding arrangements, the delineation of responsibilities on matters, and the transfer of current matters.

A number of domestic and international jurisdictions, including the United Kingdom, Victoria and New South Wales, provide for authorities other than prosecutorial agencies to undertake proceeds of crime litigation.

Role of the AFP as envisaged by the Bill

The amendments in the Bill will enable the AFP Commissioner to exercise all of the powers, duties and functions currently vested in the DPP under the POCA, including the power to apply for an order to restrain property, an ancillary order, a confiscation order or an examination order. The Commissioner will also be able to appear and give evidence at the hearings for applications under the POCA. This will be achieved by substituting references to the DPP with 'proceeds of crime authority'. A proceeds of crime authority is defined as either the DPP or the Commissioner of the AFP.

The current safeguards contained within the POCA will apply equally to the AFP and the DPP. For example:

- a court will be able to refuse to make a restraining order if a proceeds of crime authority refuses or fails to give an undertaking on behalf of the Commonwealth with respect to the payment of damages and/or costs (section 21)
- a court will be able to award costs against a proceeds of crime authority (section 323), and
- the proceeds of crime authority with responsibility for the proceedings will be required to give notice to relevant parties in accordance with the POCA (see for example sections 26, 61, 92A, 136, 163 and 179N).

envisaged that the DPP will not be a permanent part of the Taskforce once the Bill is passed and the AFP will employ lawyers to litigate on behalf of the Taskforce.

Under proposed section 315B, where matters are transferred between the AFP and DPP, the authority that takes over a matter will be bound by any prior undertakings with respect to damages or costs that had been given by the authority previously responsible for the proceedings. The new authority will also be liable for any damages or costs awarded by any court from the date of the transfer.

In addition, the power to make a restraining order, ancillary order, examination order or a confiscation order will continue ultimately to be vested in a court.

Accountability for the exercise of powers under the POCA

We note that the Law Council of Australia has raised concerns about the potential for non-lawyers to exercise the powers conveyed on the AFP Commissioner by this Bill, including concerns about the potential misuse of powers.

The commencement and conduct of proceeds of crime matters will be undertaken by suitably qualified and experienced lawyers within the Taskforce. These lawyers will:

- hold independent practising certificates, which require them to abide by the professional conduct and practice rules under relevant State or Territory legislation
- have a professional and ethical duty as officers of the court, and
- be subject to the *AFP Legal Charter of Independence and Ethical Responsibilities*, which requires AFP lawyers to:
 - maintain integrity, objectivity, confidentiality, and independence in giving legal advice
 - be free from direction or influence from any person outside of AFP Legal in relation to the content and substance of advice, and
 - avoid conflicts of interest.

Further, under Item 1 of Schedule 2 of the Bill, the Commissioner will only be able to delegate his or her powers to senior executive AFP employees, which will ensure that relevant decisions are only made by staff with the appropriate level of seniority and expertise.

The AFP has advised that a Manager of Litigation, as the delegate of the Commissioner, will be appointed to oversight decisions about the litigation of proceeds of crime matters. This position will ensure an objective assessment about the appropriateness of proceeding with a matter.

We have been advised by the AFP that the Manager of Litigation will operate independently of the operational arm of the Taskforce which undertakes proceeds investigations, and other areas of the AFP undertaking criminal investigations.

Decisions to commence proceeds of crime matters will also be subject to the scrutiny of the Ombudsman, the Australian Commission for Law Enforcement Integrity, and the courts. The AFP, including the Taskforce, will also be accountable to Parliament through the Parliamentary Joint Committee on Law Enforcement and through the Senate Estimates process.