



## **Australian Government**

Australian Government response to the recommendations of  
the Senate Legal and Constitutional Affairs References  
Committee in its report:

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

[FEBRUARY 2015]

**AUSTRALIAN GOVERNMENT RESPONSE TO THE RECOMMENDATIONS OF THE  
SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE IN ITS  
REPORT *CURRENT INVESTIGATIVE PROCESSES AND POWERS OF THE  
AUSTRALIAN FEDERAL POLICE IN RELATION TO NON-CRIMINAL MATTERS***

---

## **Introduction**

The Australian Government welcomes the recommendations of the Senate Legal and Constitutional Affairs References Committee (the Committee) in its report *Current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters* (the report).

The Committee received eight submissions. The Australian Federal Police (AFP) prepared a written submission dated March 2014 and a supplementary submission dated April 2014 for the Committee. The Attorney-General's Department (AGD) did not prepare a written submission, but endorsed both the AFP's submission and the supplementary submission. The AFP and the Commonwealth Director of Public Prosecutions (CDPP) appeared before the Committee at a public hearing held on 7 April 2014. On 5 May 2014, the Committee provided two written questions on notice to AGD concerning issues raised by the Rule of Law Institute of Australia in relation to the use of search warrants and production notices during investigations under the *Proceeds of Crime Act 2002* (Cth) (POC Act). On 9 May 2014 AGD responded to these questions on notice.

The Committee's report was published on 15 May 2014. The report makes nine recommendations relating to investigations in support of civil action under the POC Act.

In responding to the recommendations, the Government has taken advice from the following Commonwealth Government departments and agencies with responsibility for and expertise in matters relating to investigations in support of civil actions under the POC Act:

- the Attorney-General's Department
- the Australian Federal Police, and
- the Commonwealth Director of Public Prosecutions.

**Recommendation 4:**

The Commonwealth Government investigates options for distinguishing literary proceeds matters from other matters under the POC Act with particular consideration given to:

- retaining literary proceeds matters within the POC Act, and amending the POC Act to distinguish clearly between literary proceeds matters and other proceeds of crime matters; or
- removing literary proceeds matters from the POC Act altogether and creating standalone legislation to deal with literary proceeds matters.

**Not agreed.**

The Government does not consider that distinguishing more clearly in legislation between literary proceeds matters and other matters under the POC Act would significantly assist law enforcement officers or a magistrate to fulfil their functions in relation to an investigation of a literary proceeds matter or further the policy aims of the POC Act. More effective support to literary proceeds investigations could be afforded by providing clear guidance to law enforcement officers and to magistrates regarding the protocols associated with investigations of literary proceeds matters. This will be achieved through implementation of recommendations 1–3 of the Committee’s report.

In considering this recommendation, the Government has taken into account that creating a separate regime for literary proceeds orders—whether within the POC Act or in standalone legislation—would add to the complexity of legislation. Keeping literary proceeds orders with other kinds of orders within the POC Act aligns with the Government’s commitment to legislative clarity.

Literary proceeds actions, like the majority of actions in the POC Act, are civil, rather than criminal in nature and the information-gathering mechanisms contained in these provisions are common across a range of civil proceedings. The name of the Act reflects the policy intent of the laws to ensure that criminals do not profit from their crimes, and does not imply criminality on the part of the companies that are party to investigations under the Act. The Government does not agree with the view expressed by the Committee that the name of the POC Act may give rise to the impression that any company investigated under its provisions must be involved in criminal activity.

**Recommendation 5:**

The Commonwealth Government develops and introduces amendments to the POC Act in order to ensure that, wherever possible during investigations under the Act, information is sought via a production order before a search warrant is granted.

**Not agreed.**

The Government considers that in order for the AFP to conduct effective investigations under the POC Act, it is important that the AFP retains flexibility in the choice of investigatory tools it may employ. The full suite of information gathering and investigatory powers

**Recommendation 7:**

The Commonwealth Government develops and introduces legally enforceable protocols governing the procurement of information or records from media organisations during investigations by the AFP.

In developing these protocols, the Commonwealth Government should consult with relevant stakeholders and have regard to relevant examples from other jurisdictions, including the United States' Government's *Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media*.

**Not agreed.**

The Government considers that implementing this recommendation would introduce further impediments to investigations of proceeds of crime matters and would frustrate the ability of the AFP to lawfully acquire information during investigations of proceeds of crime matters.

Any person or organisation that is party to a police investigation is required to comply with relevant laws. The Government does not support creating specific arrangements for media organisations, as distinct from other organisations or individuals, during investigations of criminal matters. In order to effectively investigate suspected criminal behaviour, it is important that the AFP should have timely access to all relevant information, irrespective of the nature of the organisation that is in control or possession of that information. The introduction of enforceable protocols during investigations by the AFP may also generate uncertainty concerning the interaction of such protocols with existing obligations under the POC Act.

**Recommendation 8:**

The AFP and relevant media and publishing stakeholders develop guidelines to be observed during the execution of search warrants on the premises of media organisations in circumstances where a claim of journalists' privilege is made.

**Agreed in principle.**

Journalists' privilege is currently recognised in section 126H of the *Evidence Act 1995* (Cth), which provides protection for confidential journalists' sources during court proceedings, and ensures that journalists and their employers cannot be compelled to identify a confidential informant in court.

In considering this recommendation, the Government has noted that the privilege enjoyed by journalists is not the same as legal professional privilege. Whereas legal professional privilege applies during investigations of criminal matters, journalists' privilege does not apply during criminal investigations. Journalists' privilege in Australia is a product of evidence law, and is relevant to the admissibility of evidence in court proceedings only.

The AFP will work with relevant stakeholders to develop a search warrant execution protocol. The protocol would apply only in circumstances where a journalist has agreed with