



Australian Government
Attorney-General's Department
Criminal Justice Division

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Senator Trish Crossin
Chair
Senate Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Senator Crossin

Questions on notice to the Attorney-General's Department regarding the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009

This letter addresses questions on notice to the Attorney-General's Department about the Crimes Legislation (Serious and Organised Crime) Bill 2009 (the Bill). The questions on notice include those emailed to the Department by the Committee Secretariat on 26 August 2009, and questions that arose during the Committee's public hearings into the Bill on 28 August 2009.

Questions on notice emailed to the Attorney-General's Department on 26 August 2009

Proceeds of Crime Act 2002 (POCA)

The definition of "wealth" in proposed subsection 179G does not allow property to be double counted. A broad definition of wealth is required so that a person accounts for the entirety of his or her wealth over time and not just property he or she currently owns or controls.

The Commonwealth's unexplained wealth provisions are modelled on the Western Australian and the Northern Territory unexplained wealth provisions (section 13 of the *Criminal Property Confiscation Act 2000* (WA) and section 69 of the *Criminal Property Forfeiture Act* (NT)), which operate in exactly the same way. That is, a broad definition of what constitutes a person's wealth coupled with a common sense approach that the proceeds of property disposed of cannot be counted in addition to further property purchased with those proceeds. There has not been any suggestion that the WA or NT provisions "double count" property in practice.

To take the example at the first bullet point under question one of the Committee's questions, while both houses will form part of the person's total wealth, the person will be able to demonstrate that the proceeds of the sale of the first house were used to purchase the second house.

The best way to illustrate the point is if the second item of property a person has from the proceeds of the sale of a house is cash. In these circumstances, the second item of property (the cash) is the proceeds of the first item of property, but the two items (house/proceeds and cash) would not be counted as two separate amounts in determining a person's total wealth because it can be demonstrated that the second item of property (cash) is the same as the first item (the house). The same is true of any other item of property.

Property that is subject to an encumbrance will be discounted by the value of the encumbrance without the need for an express provision in the Bill to this effect. This is because it cannot be said that a person whose house is valued at \$200,000, but which is subject to a \$50,000 mortgage, is either fully owned or under the effective control of the person.

Legally, the \$50,000 portion of the house is owned by the holder of the mortgage, who has a legal interest in the house. The remainder of the house, \$150,000, is owned and under the effective control of the person and this is the portion that will be counted in a person's total wealth amount for the purposes of the unexplained wealth provisions.

If property is purchased with consideration that is partly the proceeds of crime, it has not been lawfully acquired and will form part of the amount that a person must pay to the Commonwealth under subsection 179E(2).

For example, a person who purchases a house worth \$200,000 with \$100,000 of proceeds and \$100,000 of legitimate consideration and the house appreciates to \$300,000 (assuming the property is not subject to an encumbrance); the person is entitled to retain the legitimate \$100,000 consideration, but will have to pay \$200,000 to the Commonwealth which comprises the \$100,000 proceeds consideration as well as the \$100,000 appreciation of the house.

The definition of 'lawfully acquired wealth' has the effect described at page 20 of the Explanatory Memorandum because property that is derived from one of the offences specified at subparagraphs 179E(2)(b)(i)-(iii) cannot have been lawfully acquired if it was derived from one of those sources.

Controlled operations

The restrictions listed at proposed subsection 15GQ(2) are intended to apply where an authorising officer proposes to vary the authority at his or her own initiative. It is intended that no variation may extend the period of effect of a formal authority in such a way that the period of effect of the authority would exceed 3 months.

We are considering amendments to the provisions to clarify this.

Witness identity protection

We are considering amendments to address the issues identified by the Committee.

Senator Barnett and Senator Brandis asked for the dates of legal advice provided by the Solicitor-General and the Australian Government Solicitor about the unexplained wealth provisions in the Bill, and for those advices, to be provided. If the Government declines to produce the advices, Senators Barnett and Brandis requested the reasons for non-production.

The Department obtained legal advice in relation to the unexplained wealth provisions contained in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 from the Australian Government Solicitor on 14 April and 6 May 2009 and from the Solicitor-General on 12 June 2009.

The advices are subject to legal professional privilege and the Attorney-General has advised that, in accordance with long-standing practice, he wishes to claim public interest immunity from disclosure on this basis.

Senator Brandis asked the Department to confirm the types of information to which proposed section 266A of the Bill applies.

Disclosure of information in accordance with the table at subsection 266A(2) of the Bill may only occur where the information to be disclosed was obtained in one of the ways specified in subsection 266A(1).

Subsection 266A(1) provides that information obtained as a direct result of a person being given a sworn statement under an order made under paragraph 39(1)(d), or as a direct result of the exercise of a power or the performance of a function under Part 3-1 (examinations), 3-2 (production orders), 3-3 (notices to financial institutions), 3-4 (monitoring orders), 3-5 (search and seizure) or Division 2 of Part 4-1 (obtaining information about controlled property), or as a result of a disclosure or a series of disclosures under subsection 266A(1), may be disclosed.

Information presented to a court during the course of the hearing of an application under proposed sections 179B and 179E will not be able to be disclosed under proposed section 266A.

A use immunity applies to protect information provided by a person in an examination and cannot be used against the person in civil or criminal proceedings, except in the limited circumstances described in subsection 266A(3). Those circumstances are based on an existing use immunity in section 198 of the *Proceeds of Crime Act 2002* (POCA).

The disclosure of information under section 266A has not been confined to the disclosure of information about serious offences, as suggested by the Office of the Privacy Commissioner and the Law Council of Australia, for several reasons. Firstly, “serious offence” has a very particular and narrow meaning under section 338 of the POCA. A “serious offence” is an indictable offence punishable by imprisonment for 3 or more years and involving specified categories of unlawful conduct.

Disclosure of information about offences that do not meet the definition of “serious offence” under POCA may still be very relevant to combating crime and, when combined with other similar pieces of information, could lead to the detection of serious offences.

Senator Hutchins requested a more substantial response to his question about whether there is a difference in what evidence the Director of Public Prosecutions will need to show to obtain a section 20A restraining order, as opposed to a section 18 restraining order.

There is not a substantial disparity in the level of evidence the DPP must provide to a court to obtain a section 20A (unexplained wealth) or section 18 (people suspected of committing serious offences) restraining order. For section 18 restraining orders, it must be demonstrated that there are reasonable grounds to suspect that a person has committed a serious offence. For section 20A restraining orders, it must be demonstrated that there are reasonable grounds to suspect that a person has unexplained wealth.

However, there are some important differences. Under section 20A restraining orders, there is no need to demonstrate a suspected connection between the person and a specific offence. Section 20A restraining orders are more flexible than section 18 restraining orders in that it is open to the DPP to demonstrate that there are reasonable grounds to suspect either that a person committed one of the specified offences at subparagraph 20A(1)(g)(i), or that the whole or any part of the person's wealth was derived from one of the specified offences at subparagraph 20A(1)(g)(ii). Thus the unexplained wealth restraining orders need not necessarily be based on a connection between a person and one of the specified offences.

The restraining order provisions do not reverse the onus of proof for unexplained wealth restraining orders because they act as a threshold for other provisions in POCA, such as examination orders. There may also be concerns about requiring a person to explain their wealth at the restraining order stage before the DPP has supplied evidence of reasonable grounds for its suspicions.

Senator Barnett asked the Department to take on notice the Constitutional question about section 51 (xxix) of the Constitution, the external affairs power. In particular, to advise the Committee on the conventions, treaties and any other agreements on which the Government relied to frame or create the Bill. Senator Barnett also asked the Department to link the specific provisions of the conventions, treaties and agreements back to this Bill.

The unexplained wealth provisions in the Bill rely on all heads of power under section 51 of the Constitution. There is no single head of power, such as the external affairs power, that supports all of the unexplained wealth provisions. This is because the link in 20A(1)(g), 20A(3)(c), 179E(1)(b) and 179E(2)(b) to an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, is a link to all of those offences that in turn rely on different heads of Constitutional power for their validity. The definition of State offence with a federal aspect relies on the full range of Commonwealth heads of powers.

It is not possible to provide the Committee with an exhaustive list of all conventions, treaties and any other agreements which are relied on to support the Bill, nor to link every treaty, convention or other agreement relied on, to specific provisions of the Bill. There are thousands of offences across Commonwealth legislation and reviewing all of these for their reliance on international agreements would take very considerable resources and time.

By way of example, the drug offences in Chapter 9 of the *Criminal Code 1995* (an offence against a law of the Commonwealth), are supported by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Section 72.15 of the Criminal Code makes it an offence to possess, manufacture, traffic in and import/export plastic explosives which do not have a chemical detection marker. This offence is supported by the Convention on the Marking of Plastic

Explosives for the Purpose of Detection. The money-laundering offences in Division 400 of the Criminal Code are, in part, supported by the Council of Europe Convention on Money-Laundering. Offences in Commonwealth environmental legislation are supported by a number of international environmental agreements and aviation and maritime offences by international aviation and maritime agreements.

Senator Barnett asked what consultation the Department had and which stakeholders and people were consulted about this bill.

Model laws

The controlled operations, assumed identities and witness identity protection provisions in the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 implement model laws developed following the 2002 Leaders Summit on Multi-jurisdictional Crime by the Joint Working Group (JWG) of the Standing Committee of Attorneys-General (SCAG) and the then Australasian Police Ministers Council.

A discussion paper developed by the JWG, was released for public consultation in February 2003. The Discussion Paper aimed to provide the public with an opportunity to comment on the model laws by providing commentary on the proposed laws as well as an overview of the existing law in each jurisdiction. The JWG received 19 written submissions in response to the Discussion Paper from bodies such as State and Territory Police forces, Law Societies and academics. A full list is at Attachment A.

The Final Joint Working Group Report, Cross-border Investigative Powers for Law Enforcement, containing model controlled operations, assumed identities and witness identity protection laws, was released in November 2003, and the model laws were endorsed by SCAG in 2004. The model laws contained in the final report addressed issues that arose during the consultation process.

Proceeds of Crime Act 2002 amendments

In July 2006, Mr Tom Sherman presented his independent review of the operation of the *Proceeds of Crime Act 2002* (POCA). The Department considered Mr Sherman's recommendations and developed a comprehensive policy document about possible amendments to POCA.

Beginning in early 2008, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, the Australian Crime Commission, the Australian Taxation Office, the Australian Securities and Investments Commission, Customs and the Insolvency and Trustee Service Australia were consulted on proposed amendments to POCA, including through a policy document circulated on 6 June 2008.

On 11 February 2009, Ms Elizabeth Kelly, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department wrote to several organisations, inviting them to comment on the Department's draft policy to amend POCA. Those organisations included: the Australian Bankers' Association, the Privacy Commissioner, the Law Council of Australia, National Legal Aid, Civil Liberties Australia and the Association of Building Societies.

Responses were received from the Law Council of Australia, Civil Liberties Australia, the Office of the Privacy Commissioner, National Legal Aid and the Australian Bankers' Association.

Senator Barnett asked for specific information about drafting of the unexplained wealth provisions in the Bill. In particular, he asked when work on the POCA amendments commenced, when drafting was completed and when did consultation occur?

Work on the POCA amendments commenced after Mr Sherman's review in 2006. Drafts of policy documents and earlier versions of drafting instructions were circulated to relevant stakeholders for comment during 2008. Drafting commenced in mid April 2008 and was completed in mid June 2009.

Senator Barnett asked for examples of other Commonwealth and State and Territory legislation that use the phrases "reasonable grounds to suspect" and "reasonable grounds to believe."

The tests of "reasonable grounds to *believe*" and "reasonable grounds to *suspect*" are used throughout Commonwealth legislation. The tests enable people exercising powers to distinguish between the level of satisfaction required to perform that particular function.

Crimes Act 1914

Subsections 3E(1) and 3E(2) allow an issuing officer to issue a search warrant if there are reasonable grounds to *suspect* that there is, or there will be within the next 72 hours, any evidential material at the premises.

Of the powers that an officer can use when executing a search warrant under Division 2, Part IAA of the Crimes Act, some rely on reasonable grounds to *suspect* and others on reasonable grounds to *believe*. There are similar search warrant provisions in the *Mutual Assistance in Criminal Matters Act 1987*, the *Australian Crime Commission Act 2002* and the *Law Enforcement Integrity Commissioner Act 2006*.

Under section 3W of the Crimes Act, a person can only be arrested without a warrant if a constable has reasonable grounds to *believe* that the person has committed or is committing an offence. Division 4 of Part IAA of the Crimes Act also sets out the other powers a constable can use when it comes to arrest and related matters and uses both reasonable grounds to *believe* and reasonable grounds to *suspect* as thresholds.

Part ID of the Crimes Act deals with forensic procedures and uses both a reasonable grounds to *believe* and reasonable grounds to *suspect* test depending on the power to be exercised. For example, section 23WO sets out the matters to be considered by a senior constable before ordering a forensic procedure. One relevant consideration is that there are reasonable grounds to *believe* that the suspect committed a relevant offence.

Similarly, section 23WF of the Crimes Act sets out the requirements for obtaining a suspect's informed consent to undergo a forensic procedure. As part of that process, a constable need not allow a suspect who is in custody to communicate with a legal practitioner in private if the constable *suspects* on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Criminal Code 1995

Part 5.3 of the Criminal Code also uses these tests in the terrorism provisions. For example, under paragraph 104.2(2)(b), a senior AFP member may only seek the Attorney-General's written consent

to request an interim control order in relation to a person if the member considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act, or if they suspect on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

A further example is section 105.43 of the Criminal Code which governs when fingerprints, recordings, samples of handwriting or photographs may be taken from a person who is being detained under a preventative detention. A police officer may only do so if they *believe* on reasonable grounds that it is necessary to do so for the purpose of confirming the person's identity as the person specified in the order.

Proceeds of Crime Act 2002

POCA uses the test of "reasonable grounds to suspect" in several provisions. These include the restraining order provisions (sections 17, 18, 19 and 20), excluding property from restraining orders (section 29) and making production orders (section 202). The test of "reasonable grounds to believe" is used in the test to determine whether things should be moved to another place for examination or processing (section 244).

Criminal Property Forfeiture Act (NT)

The *Criminal Property Forfeiture Act (NT)* uses the test, "reasonable grounds for suspecting," in several provisions. These include: s 13 information volunteered by financial institutions, s 22 production orders, s 29 monitoring and suspension orders, s 33 power to detain persons, s 34 search warrants, s 36 additional powers, s 39 seizure of crime used or crime derived property, s 43 restraining order in relation to specified property, s 66 innocent party and s 140 evidence that property is crime used or crime derived property.

Criminal Property Confiscation Act 2000 (WA)

The *Criminal Property Confiscation Act 2000 (WA)* uses the test, "reasonable grounds for suspecting," in several provisions. These include: s 33 seizure of crime used or crime derived property, s 34 issue of freezing notices, s 40 cancellation of freezing orders, s 48 duration of freezing orders for registrable real property, s 53 financial institutions may volunteer information, s 58 making orders for examination, s 63 making production orders, s 68 making monitoring orders and suspension orders, s 73 power to detain and search persons for property or documents, s 74 search warrants, s 106 grounds for finding property is crime-used or crime-derived and s 153 innocent party.

Senator Barnett asked the Department to advise the Committee on the net benefit of the unexplained wealth provisions, were they to be passed.

As indicated by the Australian Federal Police (AFP) and the Australian Crime Commission (ACC) in their oral evidence to the Committee on Friday 28 August 2009, it is not possible to provide a specific estimate of the net benefit of the unexplained wealth provisions in the Bill were they to be passed.

The AFP suggested in its evidence that passage of the unexplained wealth provisions in the Bill would enable many cases to be brought under those provisions that cannot be brought under the existing confiscation mechanisms in POCA.

Further information about issues raised in hearings and submissions

Recognition of State and Territory cross-border investigative powers

The Commonwealth will recognise State and Territory cross-border investigative powers that implement the model laws. Recognition of non-model laws will be determined on a case by case basis. Non-model laws will only be recognised as corresponding laws if the Government is satisfied that they include adequate safeguards and accountability measures. Further, corresponding laws will be prescribed in regulations, so could be disallowed by Parliament.

Controlled Operations Reports

The Commonwealth Ombudsman indicated that the proposed new controlled operations provisions do not include a requirement for the principal law enforcement officer to submit a report to the chief officer on an operation within two months of the conclusion of the operation. Nor do they include provisions to require records to be kept and reported on concerning handling and possession of narcotic goods.

The model controlled operations legislation contains a provision requiring principal law enforcement officers' reports. The requirement for a report by principal law enforcement officers would largely duplicate information recording and reporting requirements that will be set out under other provisions. The only information that would not already be available under other provisions is details of the outcome of each operation. We are considering an amendment that would require such information to be provided in the chief officers' 6 monthly reports to the Minister and Ombudsman under proposed section 15HM.

While there is no such requirement under the model provisions, the current Crimes Act provisions require records to be kept and reported on concerning handling and possession of narcotic goods. We are considering an amendment to include this requirement.

Unexplained wealth provisions

Senator Brandis asked the Australian Federal Police Association and the Police Federation of Australia, the Commonwealth Director of Public Prosecutions, the Australian Federal Police and the Australian Crime Commission about whether, before making an application under proposed section 179B of the Bill, the DPP should be required to demonstrate why it had not been able to pursue alternative measures such as prosecution.

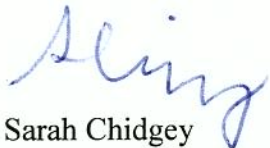
The Attorney-General's Department submits that it would not be appropriate to include a criterion under subsection 179B(1) that would require the DPP to explain to a court whether consideration had been given to bringing a criminal prosecution and, if a decision was made not to bring a prosecution, the grounds for that decision.

The bringing of a criminal prosecution is a distinct and separate question from proceedings under POCA. POCA proceedings are civil in nature and there is no connection between the decision to commence POCA proceedings and the decision whether to prosecute.

Further, if the DPP were required to provide reasons for the decision not to proceed with a criminal prosecution, this would presumably require the DPP to disclose all the available evidence it held in relation to the person. This could compromise ongoing investigations.

The action officer for this matter is Louise Cairns who can be contacted on (02) 6141 2853.

Yours sincerely



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Submissions received in response to the Joint Working Group Discussion Paper:

1. Victoria Police
2. Information Commissioner Northern Territory
3. Simon Bronitt, The Australian National University
4. Criminal Bar Association (Victoria)
5. Victorian Bar
6. Queensland Government
7. New South Wales Police
8. Public Interest Monitor (Queensland)
9. Parliamentary Crime and Misconduct Committee (Queensland)
10. Privacy Victoria
11. New South Wales Council for Civil Liberties
12. International Commission of Jurists-Australian Section
13. Western Australia Police Service
14. Police Integrity Commission (New South Wales)
15. Law Council of Australia
16. Privacy New South Wales
17. Benjamin May
18. Ryan Crowley
19. The Law Society of New South Wales