NSWCCL
New South Wales Council for Civil Liberties

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20 January 2016

Ms Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Commonwealth of Australia
By email: legcon.sen@aph.gov.au

Dear Ms Dunstone,

Inquiry into the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

1. The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia. CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. CCL is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

2. CCL thanks the Senate Committee for the opportunity to make this submission.

3. This submission is limited to comments about Schedule 1 of the bill, and any references to items should be interpreted as referring to items in that schedule.

Schedule 1: *Proceeds of Crime Act 2002 (Cth)*

4. Schedule 1 of the bill proposes amendments to the *Proceeds of Crime Act 2002 (Cth)* (the **Act**) in response to two decisions—*Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 (**Zhao**), and *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 (**Zhang**). Item 4 of the bill proposes to undermine the Zhao decision, while item 3 similarly undermines the Zhang decision. It is important in each case that the rationes decidendi are understood. In effect, they say that what this bill proposes is variously impractical and unfair. That also is the position of CCL.

Item 4. Amendments to section 319 of the Act.

5. In Zhao, the second respondent, Xing Jin, had been charged with dealing with the proceeds of crime, and was also subject of an application for forfeiture of his home (a unit) and a motor vehicle, under section 59 of the Act. He and his wife sought to have the application for forfeiture stayed until after the conclusion of his criminal trial, on the grounds that proceeding with the forfeiture case would prejudice his defence.

6. Unanimously, the five judges of the High Court agreed. In seven succinct paragraphs, they declared that the risk of prejudice if a stay was not granted is plain; that to require Jin to state specific matters of prejudice before a stay could be granted would itself prejudice his trial; that allowing Jin to give his evidence against forfeiture in a closed court would not be a proper reason contravene the open court principle; that in any case there would be no legal barrier to the disclosure of Jin's evidence in the forfeiture proceeding to the prosecution, which would affect his defence even if it could not be used in evidence; and that protective (non-disclosure) orders would not suffice to remove that risk to his defence.[1]

Issues with the drafting of item 4

7. Item 4 of the bill is, in our respectful submission, poorly drafted. On the one hand, proposed paragraph 319(2)(a) prohibits a court from using the fact that criminal proceedings have commenced (or are proposed to be or may instituted) against a person subject to proceedings under the proceeds of crime legislation (**POC proceedings**), as grounds for staying the POC proceedings. Paragraph (b) similarly prohibits the fact that another person is subject to criminal proceedings being used as a reason for staying POC proceedings.

8. On the other, paragraphs (6)(d) and (e) instruct the court to have regard to the possibility that the risk of prejudice to the person subject to POC Act proceedings might be addressed by other means than a stay of proceedings—which presupposes that the court might consider staying the proceedings in order to prevent prejudice to the defendant in a criminal case.

9. It may be the case that what is intended is that the court must not stay proceedings on the basis of the risk of prejudice to a criminal trial *alone*, but may do so if the person can demonstrate some specific, or further, grounds for holding that his or her trial would be prejudiced if the POC Act proceedings were to proceed. Whatever the proper construction, however, it seems that the aim of the bill is to attempt to

[1] The seven paragraphs are reproduced as an appendix.

encourage a court to prefer to address any potential prejudice in respect of a parallel criminal trial by:

a. making such orders as it can to address the prejudice that a person might suffer (including, orders that evidence not be disclosed to the prosecution); and/or

b. holding the POC proceedings in secret (by closed court).

Both of these ideas were rejected by the High Court in Zhao.[2] They require some closer scrutiny.

Non-disclosure orders

10. The disclosure regime under the current Act is substantively governed by s.266A. Item 1 of the bill proposes to amend that section. (We should not as an aside that the proposed amendment, as currently worded, would delete the table contained in s.266A(2), which is plainly not the intent of the drafters, but adds weight to CCL's view that the bill is inadequately drafted). That amendment purports to make plain that an order of a court may prevent disclosure of information uncovered during POC proceedings to "an authority" appearing in the table.

11. CCL does not consider that the non-disclosure regime is sufficient to stop prejudice to a criminal trial where:

    a. the orders are at the discretion of the Court;

    b. to secure such an order, a party will generally need to be represented by experienced counsel, familiar with the Act. This may not be the case, especially in circumstances where a person's sole asset is the subject of a restraining order;

    c. even if the evidence discovered during POC proceedings could not be used in subsequent criminal proceedings, its very existence might affect a person's defence. This was recognised by the High Court in *Zhao*, which stated that such a non-disclosure order "would not suffice to remove the risk of prejudice" to a defendant (at [46], see appendix).

    d. it would also appear to us that non-disclosure orders would be practically of little effect in respect of investigating (as opposed to prosecuting) authorities, where the investigating authority in respect of the POC proceedings and in

[2] At [44] and [46], see appendix.

respect of any criminal proceedings is likely to be the same entity, the Australian Federal Police. To ensure non-disclosure in such an instance might require a court to take a monitoring role over an investigating authority, which would not be practical or appropriate.

Closed court orders

12. The second safeguard proposed by Item 4 of the bill is the proposed section 319A. This would permit forfeiture matters to be heard in closed court, if that is necessary *"to prevent interference with the administration of criminal justice"*. If, as the "Note" under Clause 319 suggests, the idea behind this phrase is to safeguard against prejudice to an accused, we are not sure that the particular phrase "to prevent interference" is appropriate to secure that end. A more appropriate phrase may be *"to ensure the fair and impartial administration of justice"*[3] Assuming the proposed phrase is appropriate, it would seem to CCL to be likely that in every case where there are, or could be, parallel proceedings, the court will order that the POC proceedings be closed.[4]

13. CCL does not consider it proper that forfeiture proceedings be held in secret as a matter of course. The High Court said as much in *Zhao* (at [44], see appendix). The requirement that courts be open, except in circumstances of delicacy, is well established. For example, Justice Gibbs, in Russell v Russell[5], said:

> *It is the ordinary rule of the …courts of the nation, that their proceedings shall be conducted "publicly and in open view" (Scott v. Scott (1913) AC 417, at p 441).* ***This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected.*** *Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hall-mark of judicial as distinct from administrative procedure" (McPherson v. McPherson (1936) AC 177, at p 200)*
> Emphasis added.

14. Open courts are not only an historical tradition and right in the Australian polity, they also form part of Australia's international obligations. Article 14 of the *International Covenant on Civil and Political Rights*, to which Australia is a party, requires that, as a

[3] See: *Walton v Gardiner* (1993) 177 CLR 378 at 392-393, from where those terms are paraphrased.
[4] See the Australian Human Rights Commission submission at 54 to this effect.
[5] [1976] HCA 23 paragraph 8

general rule and unless there are compelling reasons, court processes should be open. The High Court in *Zhao* did not consider the (legitimate) aim of proceeds of crime activities by the executive branch of government to be compelling enough to close a court (again, at [44]). CCL does not either. The potential for abuse and injustice is too great.

15. Further, it is our view that closing the court would be ineffective as a means of preventing prejudice in a related criminal proceeding, for the same reasons as described in paragraph 11(c) and 11(d) above in respect of non-disclosure orders.

Item 3: Hearing an application for a forfeiture order before hearing one for an exclusion order to a restraining order.

16. The amendment to s.315A(2) of the Act proposed by item 3 of schedule 1 attempts to reverse the decision reached in Zhang. In that case, Justice Forrest found that:

"…to require the Commissioner to present his case on forfeiture at the outset is procedurally fair. The Commissioner has at his disposal an Act which in certain circumstances can operate to forfeit property automatically…Zhang is the registered proprietor of two houses and the Mercedes. The Commissioner wants them to be forfeited to the Commonwealth. In my view, fundamental notions of fairness dictate that where the state seeks to seize property, the state or its agent ought provide some evidentiary basis for that extraordinary interference with proprietary rights before the proprietor ought be called upon to answer anything at all."[6]

20. Under the Act, a restraining order against property can be obtained on the basis of mere justified suspicion that it is part of the proceeds of crime. (There need be no accusation of wrongdoing against the person currently in possession of the property.) A stronger standard, of proof on the balance of probability, is required before a property can be declared to be forfeited. However, if no exclusion order is sought from the restraining order, the Commissioner of Police does not have to present any evidence in order for the property to be forfeited. This is achieved by Section 49(3) of the Act, which relieves the Commissioner of the burden of proving the property is the proceeds of, or an instrument of, crime in section 49 forfeiture proceeding if the court is satisfied:

"(a) that no application has been made under Division 3 of Part 2 – 1 for property to be excluded from the restraining order (s 29 and s 31 of the Act are within this Division); or

[6] Paragraph 39

(b) any such application that has been made has been withdrawn."

21. The result is that if a possessor of an asset wishes to challenge a forfeiture order, he or she must, in practical terms, first seek an exclusion order, excluding the property from a restraining order.[7]

22. If item 3 of schedule 1 is accepted, the possessor of property suspected to be tainted will have to present a case for exclusion of the property before he or she has heard the case for it being tainted. As noted above, Justice Forrest found that this procedure is contrary to fundamental notions of fairness.

23. CCL agrees with his honour, and urges the Senate to do so also. Item 3 of the bill should be rejected.

Conclusion

24. In summary, items 1, 3 and 4 of schedule 1 of the bill should be rejected because they are inadequately drafted, they will lead to unfair trials in contravention of Australia's common law tradition and international obligations, they propose procedures which are impractical and safeguards which are inadequate, and they will result in a framework which will be manifestly unjust.

25. If the bill is to proceed, then it is the CCL's view that, at the very least, proposed sections (2)-(5) of s.319 ought be deleted. This should cure the more substantial ills contained in the bill and described above.

26. We are available to meet with the Committee in respect of the above, if the Committee considers that will be of assistance.

Yours faithfully,

(sent electronically)

Dr. Martin Bibby, Committee member
Jackson Rogers, Convenor, Criminal Justice, Police Powers and Mental Health Action Group
New South Wales Council for Civil Liberties

[7] 'It is clear enough that a person who claims an interest in restrained property (under s 19(1)) must make and persist with an application for exclusion. If this does not occur and that person simply elects to contest the forfeiture application he or she will be confronted with s 49(3). The Commissioner, as a responsible authority, will be relieved of the obligation to prove that the property is 'tainted'[11] property and his application for forfeiture will be immeasurably improved. In my view, a person claiming an interest in restrained property has no practical option but to seek exclusion from the restraining order.' Zhang, Paragraphs 17 and 24.

Appendix: Extract from *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 (12 February 2015)

42 The risk of prejudice to the second respondent if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.

43 The Commissioner contends, as the primary judge had held, that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for a stay seeks to avoid. Similarly, the Commissioner's contention that the court should defer making an order for a stay until the parties have exchanged their evidence is beside the point.

44 The Commissioner suggests that protective orders could be made, which might maintain the confidentiality of evidence, and that evidence could be given in closed court. In the latter regard, the open court principle, to which the law adheres[25], now finds expression in s 28 of the Open Courts Act 2013 (Vic). The rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary to the principle save in exceptional circumstances. Closing the court so that the Commissioner might progress forfeiture proceedings and receive the second respondent's evidence does not qualify as a proper reason for departing from the principle.

45 During the course of argument, at a point when the power given by s 266A of the POC Act to disclose to a prosecutor evidence obtained by compulsion was mentioned, the Commissioner was at pains to reassure the Court that he does not contend that s 266A provides a licence to communicate information obtained in the civil proceedings to the prosecuting authorities. The Commissioner emphasised that the Proceeds of Crime Litigation section is not regarded as an arm of the prosecution, which appears to have been the perception of the New South Wales Crime Commission in Lee No 2.

46 Regardless of the conduct in Lee No 2, it would not be correct to approach a matter such as this on the basis that a wrong would be committed. However, s 266A would not render the provision of the second respondent's evidence to the prosecution unlawful. Even if it could not be used as evidence against him, its possession by the prosecution might affect his defence. The Court of Appeal's view, that protective orders would not suffice to remove the risk of prejudice to the second respondent's defence, is clearly correct.

47 The prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. In some jurisdictions, procedures are provided for making an application for a stay in such circumstances[26]. The risk of prejudice in a case such

as this is real. The second respondent can point to a risk of prejudice; the Commissioner cannot.
48 So far as concerns the first respondent, the Court of Appeal was correct to identify as relevant that to permit the forfeiture proceedings to proceed against her would produce two sets of proceedings, rather than one. The principle of the common law that seeks to prevent a multiplicity of actions has a long history and cannot be ignored[27]. The principle is stated in the County Court Civil Procedure Rules 2008 (Vic)[28].