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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE

Crimes Legislation Amendment Bill (No. 2) 2011

THURSDAY, 4 AUGUST 2011

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SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE
Thursday, 4 August 2011

Senators in attendance: Senators Crossin, Furner, Humphries, Pratt and Wright

Terms of reference for the inquiry:

To inquire into and report on:

Crimes Legislation Amendment Bill (No. 2) 2011

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Committee met at 13:32

CHAIR (Senator Crossin): I formally declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee for its inquiry into the Crimes Legislation Amendment Bill (No. 2) 2011. The inquiry was referred to the committee by the Senate on 23 June 2011 for report by 23 August 2011. This bill expands the jurisdiction of the Australian Commission for Law Enforcement Integrity by including the Australian Customs and Border Protection Service within its jurisdiction. The bill also enhances processes for the confiscation of criminal assets by amending several acts, such as the Australian Federal Police Act 1979 and the Proceeds of Crime Act 2002. We have received eight submissions for this inquiry. They have all been authorised for publication and are available on the committee's website. I remind all witnesses that they are all protected by parliamentary privilege. I am sure the witnesses are aware of their obligations regarding parliamentary privilege and the fact that evidence is preferred to be given in public, but if they want to provide evidence in camera they can choose to do that.

I welcome representatives from the Commonwealth Director of Public Prosecutions. We have received a submission from the Commonwealth DPP as No. 5 for our purposes. Do you want to make an opening statement about that submission?

Mr Thornton: No, we do not.

CHAIR: Are you happy if we go straight to questions?

Mr Thornton: Certainly.

Senator HUMPHRIES: It seems to me that there is a reasonably high degree of consensus, certainly among the Commonwealth agencies on the need for this legislation, and in the submissions I have seen from outside the government on the appropriateness of this legislation. But there does seem to be some contention about the need for some of the powers relating to proceeds of crime to be conferred on the Australian Federal Police. The points made in the Law Council's submission that the case for the transfer of some of that power into the hands of the AFP is not made particularly clear in either the second reading speech or the explanatory memorandum to the bill. I take it that you support that transfer? Could you put to the committee exactly why you see that as being a necessary development in making effective our legislation with respect to proceeds of crime?

Mr Thornton: I am just looking at the explanatory memorandum to the legislation. The former Joint Parliamentary Committee on the Australian Crime Commission had first made a recommendation. If you look at the proceeds of crime, you will see that there are a range of options you could have in terms of models to enforce proceeds of crime legislation or the equivalent sorts of legislation. The suggestion was made that the government should consider having a model where the investigation and prosecution were undertaken within one agency. That has been looked at in some of the amendments that were made to the proceeds of crime legislation in terms of unexplained wealth. A decision was made that they would then follow that recommendation and look at enhancing the work that was done under the proceeds of crime legislation.

As to which models you would have is, I guess, largely a policy issue. I do not know whether I can comment on that particular policy. Some of the other agencies that are going to be giving evidence later this afternoon would probably be able to address that better than we can.

Senator HUMPHRIES: Do you have a comment to make on the argument that has been put by the Law Council that, potentially, there is an intrinsic conflict of interest in the AFP both investigating and then taking prosecutorial proceedings against parties under proceeds of crime legislation?

Mr Thornton: I guess it goes back to the whole idea that the suggestion made by the former parliamentary committee was that you have one agency do the investigation and the prosecution. That is the reasoning behind the changes that are being suggested. There may be a range of issues that flow from that but, again, that is getting into policy areas behind that approach.

Senator HUMPHRIES: There is also a suggestion—I think it is in the Law Council's submission—that one of the reasons for this transfer could be that there are rather inadequate resources available in the DPP and that a

transfer to the AFP is a better fit with their current resourcing than it is with yours. Do you have a comment on whether your office is adequately resourced to deal with proceeds of crime matters?

Mr Thornton: We made the comment in our submission that one of the determining factors in the implementation of this sort of legislation is the level of resources and the expertise of those resources. There obviously is a correlation there. But, again, in terms of the overall resourcing, I am not in a position to say whether what the Law Council has suggested is accurate. We have been able to deal with the cases that have been referred to us. Whether it is intended that there is an increased amount of work in this area and a different way of doing it are matters for the agencies that are handling it to deal with. At the moment, I am not in a position to say that there are cases that have been referred to us that could not be done within the resources that we currently have.

Senator HUMPHRIES: What sorts of resources have been dedicated by the Commonwealth DPP to proceeds of crime enforcement in the last couple of years?

Mr Thornton: If you look at the DPP budget generally, along with a lot of other agencies there has been a change in the resources that we have available and there has been a decrease, and a lot of agencies have had to deal with that. It has impacted on the proceeds of crime area and it has had an impact across the office generally. The resources that we have available at the moment vary. We have specialists but there is an ability to put other lawyers in for particular cases. I think we have about 20, though that number is not all lawyers; there are lawyers and support staff.

Senator HUMPHRIES: How many in total in the DPP?

Mr Thornton: I would have to verify this figure, but I think it is around 530 at the moment.

Senator HUMPHRIES: With the reduction in resources that you and many other agencies have experienced, has there been some a strain in dedicating sufficient resources to proceeds of crime proceedings?

Mr Thornton: Yes, across the office. When you have a reduction, it occurs across the whole office.

Senator HUMPHRIES: The DPP is not a permanent member of the task force at the moment?

Mr Thornton: No. There is an interim task force and we are a member of that, but the intention is that we will not be a member of permanent task force because of the power the Australian Federal Police will have to take the actions under the legislation.

Senator HUMPHRIES: Why shouldn't the DPP be a member of the permanent task force when it is established?

Mr Thornton: Again, that goes back to the model that has been decided. That is really a question of policy as to how that was set up. I cannot comment on that.

Senator HUMPHRIES: Comments were made by Law Council that proceeds of crime proceedings ought to be handled by lawyers, legal practitioners. As a matter of principle, would you say that is a reasonable position to take?

Mr Thornton: That has certainly been our experience.

Senator HUMPHRIES: All the people who work in DPP are lawyers, apart from the support staff?

Mr Thornton: All the people who are assessing and running the cases are lawyers. Obviously we have support staff and corporate management and those sorts of things. We have all legally qualified people doing that work.

Senator HUMPHRIES: Arguably, all the work of the AFP involves some interaction with and knowledge of the law. Is there any reason proceeds of crime legislation should particularly require the application of a legal mind as opposed to the other things that the AFP does?

Mr Thornton: I am not sure how the AFP is going to organise who does the work and whether it will all be done by lawyers. There is obviously an interaction between the investigators and lawyers as well. I do not know whether that same thing will apply for the AFP's conduct of this process. I imagine it might well be similar but they are questions that the AFP could answer.

Senator HUMPHRIES: If the AFP is going to take on some of the proceeds of crime work under this legislation which was previously all done by the DPP, is there a plan for a shift in resources to reflect that sharing of responsibilities?

Mr Thornton: One of the things that has not been finally determined is the exact delineation, if you like, between the work that will be done by the taskforce and the AFP and the remaining work still done by the DPP. There are cases that are on foot already. So to some extent the division of that and what happens to the cases on

foot will have an impact on what happens to the resources. If we still have to run the cases that we have before the courts then obviously we will need the resources that we currently have employed in that. If at the end of the process of working out who does what we still have a practice to run then we will need some resources for that. But that will be subject to discussions.

Senator HUMPHRIES: So it is possible that some transfer of resources could occur to account for this shifting of responsibility for proceeds of crime actions?

Mr Thornton: It may well be. I am not sure what the intention is in terms of those sorts of things. But at the end of the day, yes, that could be an outcome.

Senator WRIGHT: I would like to follow up a little bit more on the concerns raised in the submission from the Law Council. They seem to be concerned, as has already been pointed out, with the necessity to have people with legal expertise assessing the appropriateness of taking the action once an investigation has been carried out. I do not know if you have seen the submission from the Law Council, but they posit alternative ways of going about it if the DPP does not stay involved in that. It is really about the necessity of entrenching that people with legal qualifications should be involved. What do you think about that? I want to tease that out a little bit more. You are saying that you presume that the AFP would have people with legal expertise, but do you think that it is necessary to have those requirements in there—that persons assessing going ahead should be legally qualified?

Mr Thornton: I do not know that there is any magic in having legal qualifications as such in terms of assessing the cases. A lot would depend on the experience, the backgrounds and the capabilities of the people doing it. Whether they have qualifications or not may not be the real issue at the end of the day. As to having lawyers somewhere in that process or not, I would have thought that you would need to have lawyers somewhere in the process. But that is just a view that I have coming from the sort of organisation that I do. But I fully recognise that you can get very experienced investigators who make all sorts of decisions in terms of prosecutions and other things.

Senator WRIGHT: Following up on that, the point that they make is that, in terms of bringing a matter before the court, certain agencies are going to be officers of the court or will have that duty to the court. That will not necessarily be there if they do not have lawyers. Do you think that that has any weight or that that should be considered? This is about the duty of making sure that all information is available to the court and has been provided appropriately.

Mr Thornton: I think that you would need lawyers to do the court work. But I do not know that it has been suggested that it should be otherwise.

CHAIR: In the Attorney-General's submission to us, they talk about a working group that has been established between the AFP and the DPP to plan for the permanent taskforce arrangements. Issues to be considered include funding arrangements and delineation of responsibilities. What sort of delineation are we talking about here in terms of responsibilities? What would you do and what would they do? Can you give us a bit of an outline of that?

Mr Thornton: The proposal is that there be the capacity for both us and the AFP to take the action under the legislation. There will be some cases that will be very closely connected to a prosecution that we might be doing. In terms of that delineation, we will be looking at the most efficient way of doing those. If we get to the sentence stage, for example, and there is a question of some proceeds or assets to be forfeited then it might be more efficient for us to make those sorts of applications. But in terms of the larger cases that are investigated purely for the purposes of taking POCA action then it is envisaged that that would be part of what the taskforce would do. They would do the investigation and the litigation as well. But those fine lines about how that will work are still being worked on.

CHAIR: So there is no intent that the DPP would totally pull out and back away from this—you would still be involved in some way?

Mr Thornton: There would still be some work that we will be doing. Just exactly what has not been finally determined except that I suppose the indications are that it will be the smaller end, if I can put it that way. The bulk will be done by the task force. The other thing that would need to be decided is what happens to the cases currently before the court. Some of the fairly large litigation could go on for a while and there will be questions about whether it should be transferred to the task force or whether it should continue to be done by the DPP.

CHAIR: When the task force even gets to a stage where it needs to go to prosecution that would be done by AFP litigators—is that what you are saying—rather than DPP?

Mr Thornton: That is right.

CHAIR: And that is a change to the current practice?

Mr Thornton: It is. Under the present legislation it is only the DPP that has power to commence and take the action.

CHAIR: I see.

Senator FURNER: In respect of this process of moving the DPP from the task force what was the level of consultation involved in discussion between you and the department about that occurring?

Mr Thornton: There was a range of consultation in terms of potential models I guess that you might look at in enforcing the legislation. We were involved in that too.

Senator FURNER: So there were a range of measurements for consideration prior to a decision being made or the bill being proposed?

Mr Thornton: We were involved in some of that but obviously the department would be able to give you a more detailed answer in relation to exactly how that occurred.

Senator FURNER: Senator Humphries touched on the funding and resource issues. At this stage I think it is a little unclear as to what level has been either removed from DPP or moved over to the AFP. Is that going to place any impediments on the operation of the act at all?

Mr Thornton: Nothing has moved at the moment because it is all still being done by the DPP. I think that some of the issues to be decided in terms of the delineation as I said will have an impact on what the funding arrangements might be. Obviously the more work that is left with the DPP the more resources the DPP will need. Whether that is cases currently before the court or whether it is new matters that are going to be done by the DPP these are issues that will need to be worked through with the AFP and we have started looking at that.

Senator FURNER: No doubt with what has been established with the DPP and the AFP both having an opportunity to pursue prosecution on cases there might be a case about capacity with regard to transferring funds.

Mr Thornton: Yes, that could be the result.

Senator FURNER: Also with the AFP's involvement in cases would that lead to more efficient prosecution as a likelihood?

Mr Thornton: When using the term prosecution we are talking about litigation under the Proceeds of Crime Act. When it was decided to have the investigator able to prosecute I guess that is one of the things that was considered.

CHAIR: I want to explore the role of both parties in this. How is it envisaged that matters involving conviction based and non-conviction based actions might be administered in the regime?

Mr Thornton: The way the legislation is set up I do not think it splits neatly between conviction based and non-conviction based. To give you an example: if there was a matter that was being considered for prosecution but there was an urgent need to take proceeds of crime action to prevent assets being dissipated then you might start a civil action to restrain those assets. But if a prosecution subsequently was undertaken and there were convictions, then there are certain results that flow from that in terms of proceeds. You might actually finish up dealing with that matter you started civilly as a criminal proceeds of crime action. In fact, I think one of the strengths of the legislation is that it does give you that flexibility. I do not think that would necessarily be the best way to divide the work, but it is one option, I guess. There will be some actions which are very closely connected to a particular prosecution. If there are convictions, at the time of sentencing there may be a need to take some proceeds of crime action to forfeit something—

CHAIR: Will it lead to a conflict of interest inside the AFP if you have the same body investigating and taking action, as you have in prosecuting?

Mr Thornton: I think that is one of the issues. I think it is designed that way. I think it is designed to have the investigator do the prosecution; that is the whole intention.

CHAIR: Is that a good thing?

Mr Thornton: It goes back to a question of policy. I do not think it is really appropriate for me to comment on that.

CHAIR: Okay. I suppose that is the heart of the Law Council's submission and their issue—

Mr Thornton: They have put particular views on that, but that is a matter that they can comment on.

CHAIR: So it is one model? Whether it is preferred or not is a matter for us to decide? But there is no one particular model for the way you can deal with this?

Mr Thornton: I think the Law Council have referred to a number of different models. I think they have referred to the New South Wales Crime Commission. I think they have referred to some of the overseas models where you have separate asset forfeiture offices set up. There is a submission from the Victorian Director of Public Prosecutions where obviously their model is that they take the action. So yes, there is a range of models.

CHAIR: Is it likely you will be defunded to fund the AFP's extra provisions or do you have an indication they will get extra resources for this?

Mr Thornton: That goes back to the discussion I was having earlier about the delineation of the work.

CHAIR: And that is yet to be decided?

Mr Thornton: It would flow in terms of the delineation of the work, how much current work we have and how much new work we are likely to get.

CHAIR: So you are telling us that once that is perhaps decided the funding arrangements for that will be decided as well?

Mr Thornton: That will be part of that discussion.

CHAIR: Okay. Thank you for your time.

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights, Law Council of Australia

[13:59]

Evidence was taken via teleconference—

CHAIR: Welcome. The Law Council of Australia has provided us with a submission, and we thank you for that. We have numbered it No. 2 for our purposes. I invite you to make an opening statement and then we will go to questions.

Ms Donovan: The Law Council's submission is focused on part 1 of schedule 2 of the bill, which seeks to amend the Proceeds of Crime Act and related acts so that all the powers currently exercised by the Commonwealth Director of Public Prosecutions under the act can also be exercised by the Commissioner of the Australian Federal Police. For the reasons that are already set out in our written submission, the Law Council opposes these amendments and is of the view that the DPP, who is independent of the investigating agency, should retain responsibility for determining whether to commence or settle proceeds of crime litigation. In the Law Council's view, the DPP is the agency best placed and most experienced to make an objective assessment about whether and how to proceed with litigation under the Proceeds of Crime Act, in view of both the objectives of the legislation and the admissible evidence which is available or is likely to become available.

Rather than restating the arguments set out in our submission, I would like to take the opportunity in this opening statement to directly address and respond to some of the other materials that are before the committee. Firstly, a brief comment in relation to the minister's second reading speech in support of the bill: in the Law Council's view, this speech demonstrates how superficial the debate has been to date about the necessity for and desirability of the proposed amendments. As with other recent bills relating to law and order and national security, the government has simply prefaced its reform proposal with a series of unrelated truisms and then suggested that the rationale for the reform is self-evident. This means that the debate is framed from the outset in incontestable terms and those who seek to object to the reforms are cast as resisting efforts to protect the community or to tackle organised crime.

Obviously, organised crime is bad—that is agreed, of course. However, that is not the issue for debate, and guesstimates about how much organised crime costs the community are not relevant to and do not help to resolve the question of which agencies should be responsible for proceedings under the Proceeds of Crime Act. Obviously, targeting the profits of organised crime is good. Again, that is agreed, of course. However, this is also not the issue for debate. Proselytising about the benefits of hitting the criminals where it hurts is irrelevant to resolving the issue at hand. Obviously, an integrated, coordinated, cooperative approach between agencies is best. Again that is agreed, of course. Who would disagree? However, it does not follow from these statements that in order to establish a criminal assets confiscation task force that is, in the words of the minister, specialised and more effective it is necessary for the AFP to be able to conduct its own proceedings under the Proceeds of Crime Act. Why would that be the case? Why can't the Commonwealth DPP remain a permanent member of the task force and be allocated the necessary resources to allow the director to properly participate in and contribute to its work? That is the obvious question here and there is not really even the hint of an answer to that question in the second reading speech.

Against that background, I would also like to make a few comments in response to the written submissions from the Attorney-General's Department and the Commonwealth Director of Public Prosecutions. The department's submission, firstly, states that the current arrangements under the Proceeds of Crime Act are essentially successful. However, it is asserted that the amendments will make the administration of the act more streamlined and more effective. I am not sure how we and other outside stakeholders can even begin to engage with this sort of opaque assertion. There appears to be an unwillingness to speak frankly on the public record about the current arrangements under the act and the purported shortcomings or frustrations of those arrangements. As a result, it is not possible to have a discussion about whether those frustrations are legitimate or whether the proposed amendment are the best way or an effective way to address any current shortcomings with the act and its administration. The department's submission also states that 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. In response I would note that the New South Wales Crime Commission and its practices and procedures and the conduct of actions under the New South Wales criminal assets legislation are currently the subject of a Police Integrity Commission inquiry. The Law Council suggests that the Commonwealth await the outcome and findings of that inquiry before moving to emulate the New South Wales model.

As for the UK, as noted in our written submission, the Serious and Organised Crime Agency, which has responsibility for proceeds of crime litigation, is not an ad hoc task force; it is a statutory body established by legislation with clear legislatively defined roles and responsibilities and staffing and reporting obligations. The amendments proposed in the current bill do not meaningfully replicate the UK model. On the contrary, they simply bolt on additional powers to an existing agency, the AFP.

As for Victoria, the committee has a submission from the Victorian DPP before it in which the Victorian DPP sort of questions the wisdom of the proposed amendments. At any rate, in the Law Council's view the fact that the reforms are not unprecedented does not necessarily advance the arguments very far either way.

Next the department's submission notes that the powers to make a restraining order and other orders under the act will continue ultimately to be vested in a court. The Law Council has acknowledged this in its submission. The court will retain responsibility under the act for making any orders; however, the important decisions about whether and when proceedings are commenced, against whom and on what basis, together with decisions about whether to settle proceedings and on what terms will be determined by the agency which commences and runs the proceedings.

Finally, the department's submission provides a number of assurances about how the AFP intends to give effect to its new powers and responsibilities under the Proceeds of Crime Act. We are informed that the commencement and conduct of proceeds of crime matters will be undertaken by suitably qualified and experienced lawyers within the task force. We are informed that these lawyers will hold independent practising certificates, have professional and ethical duties as officers of the court and be subject to the AFP legal charter of independence and ethical responsibility.

Further, a manager of litigation, as the delegate of the commissioner, will be appointed to oversee decisions about the litigation of proceeds of crime matters. This position will purportedly ensure an objective assessment about the appropriateness of proceeding with the matter. The manager of litigation will apparently operate independently of the operational arm of the task force, which undertakes proceeds investigations, and other areas of the AFP undertaking criminal investigations.

In the Law Council's view these assurances are welcome but they do not have legislative status. They are essentially general undertakings about likely administrative arrangements. Further, the nature of these proposed arrangements appears to acknowledge the validity of the Law Council's concerns. Essentially, the AFP is undertaking to create a mini DPP within the task force; however, in our view this model is inferior because it depends on the existence of Chinese walls and assurances about independence and objectivity which cannot be easily tested in the day to day. The question arises: when the experience and expertise is already there within the DPP with the requisite independence built in, why not use it?

Finally I have a few comments on the written submission from the Commonwealth DPP. There are a couple of important points in that submission that the Law Council would concur with. The DPP points out that the main factor determining the amount of confiscation activity at the Commonwealth level is the number of qualified specialist staff specifically dedicated towards pursuing confiscation work. They say that an important aspect of the resources is the legal expertise available. In that respect they note that property claims under the act are very complex and technical and sufficient legal expertise and resources are required to litigate these matters. They note that, although a focus on financial and investigative staff might lead to an increase in matters being commenced, if it is not balanced by adequate legal resources then it may result in pressured settled matters in inappropriate circumstances or on inappropriate terms. The Law Council has made a similar point in its submission, although perhaps a little more directly, which is that, if the Commonwealth DPP does not have adequate resources at present to devote to its responsibilities under the Proceeds of Crime Act then the Commonwealth needs to assess its priorities and address this as a budgetary issue. It is not an appropriate answer to simply remove the function from the Commonwealth DPP even though it might be the appropriate agency and allocate it elsewhere. As the DPP suggests, if the work is to be done well and done properly, it will require resources wherever it is done.

Before concluding my opening statement I should note that I was scheduled to appear today with Dr David Neal, Senior Counsel, a member of our criminal law committee. Unfortunately Dr Neal had a last minute timetable clash and the short notice for the hearing and the fixed time slot meant that other senior members of our committee were also unable to appear. Rather than cancel entirely I appear alone. I apologise in advance if I am unable to answer the committee's questions. I will take questions on notice if required.

CHAIR: Thanks, Ms Donovan, I appreciate that. I might start. I have one question I want to ask you. You say there has been no adequate explanation given for the change. The reason that has been cited is that in August 2009 the Parliamentary Joint Committee on the Australian Crime Commission recommended an integrated model of asset recovery in which the investigation and prosecution are undertaken within one agency. The minister in his

second reading speech said this bill is a response to that. Does the Law Council disagree with that very first and basic recommendation from the Parliamentary Joint Committee on the Australian Crime Commission?

Ms Donovan: Firstly, it was not a firm recommendation. It was a recommendation that the Commonwealth look further at the matter. The committee itself noted that was not the focus of their then inquiry and it was not an issue that was addressed by all stakeholders to that inquiry for that reason. It was very much a tentative recommendation to look into this further. To the extent that they suggested an agency, it was in fact the Australian Crime Commission that they recommended as the appropriate agency for undertaking both the investigation and the litigation of proceeds of crime matters. To the extent that there was anything firm about it, the government did not actually accept that recommendation.

Further, as we have noted in our submission, at the time that inquiry was held the parliamentary joint committee heard some evidence about how successful the New South Wales model had been in recouping criminal assets. I think that there have been some developments of late which would suggest that just looking at the amounts recovered is not necessarily the best basis on which to assess the success or otherwise of a criminal assets confiscation model because it may mask issues of procedure.

CHAIR: Because of a perceived conflict of interest when you have got the same agency doing the investigation as well as the prosecution?

Ms Donovan: Would we call it a conflict of interest?

CHAIR: Yes.

Ms Donovan: I think our submission is that it certainly is better that there is a separation between the agency which does the investigation and then the agency which comes fresh to the available evidence and the speculation about evidence that might become available and makes an assessment about whether or not it is appropriate to proceed at that time and in which way it is appropriate to proceed. Otherwise there is not the necessary distance and objectivity from the investigation. I think that the AFP itself would acknowledge that. That is why they are suggesting that their internal arrangements will try to build this in. But, as I alluded to in my opening statement, the model that is proposed is an inferior one because it is based on the idea that there will be Chinese walls within the Criminal Assets Confiscation Taskforce and that the legal team will somehow sit separately and exercise its judgment objectively and independently. Why implement this inferior model when you already have the Commonwealth DPP doing this work and when it already has the expertise and experience to do this work?

CHAIR: Thanks for that. Senator Wright, do you have some questions?

Senator WRIGHT: No, I do not. That has been helpful.

CHAIR: Senator Pratt?

Senator PRATT: No, thank you.

CHAIR: Senator Humphries?

Senator HUMPHRIES: Ms Donovan, I am not entirely clear why the Law Council put so much emphasis on the proceeds of crime matters being dealt with by legal practitioners. I would have thought that in suggesting that the AFP ensure that legal practitioners within their ranks are involved in this or conduct the proceeds of crime proceedings presupposes that there is some greater need for lawyers to be involved in this particular aspect of the AFP's work when I would have thought that, in a sense, everything that the AFP does is essentially an interaction with the law and so arguably lawyers could be involved in every aspect of the AFP's brief. Why is it particularly important for lawyers to be involved in this particular exercise?

Ms Donovan: I should clarify. Our submission is not that lawyers should be involved in the process from the beginning. They should not necessarily be involved in the investigative aspect of the work, just as they are not with an ordinary criminal investigation. But, just as with an ordinary criminal investigation, the lawyers necessarily become involved when an assessment is made at the end of the process about whether to proceed to court and on what basis to proceed. We would submit that lawyers should also be involved in this process in that way in assessing the evidence against the aims and requirements of the legislation. I do not think that that is in dispute. From the department's submission, it is clear that the department and the AFP believe that it is necessary that legal practitioners be involved at that point in the process once targets have been identified and evidence has been gathered. But it will always be a matter for the investigating agency to determine how evidence is gathered and who the targets are. There is a division of responsibility and expertise between the DPP and the AFP in ordinary criminal matters. There is no suggestion that legal practitioners know all and should be involved in all aspects of this. There are different areas of expertise.

Senator HUMPHRIES: As I read your submission, though, you actually go one stage further than simply saying that lawyers need to be involved. You say that, if the committee rejects your contention that the DPP remain the primary agency responsible for this and that it goes to the AFP, the bill should be amended so that the AFP commissioner's powers as a proceeds of crime authority may only be delegable to a senior executive AFP employee who is admitted as a legal practitioner. In your submission, you are saying that the AFP officer responsible must be a lawyer.

Ms Donovan: That is right. The AFP officer responsible for determining whether or not to commence proceedings or to settle proceedings or on what basis to commence proceedings ought to be a legal practitioner.

Senator HUMPHRIES: Why? Wouldn't there be many AFP officers who would make day-to-day decisions about proceedings and taking various steps against individuals under powers available to the AFP under a range of legislation who would not themselves be legal practitioners? Why is a legal practitioner so important in this context?

Ms Donovan: It is true that AFP officers make those decisions on a day-to-day basis about arrests, charges and other things under the whole range of powers available to them. But even in ordinary criminal matters it is ultimately the DPP that makes the decision about whether to proceed with a prosecution. The decisions about whether to commence litigation under the act are more akin to making a decision about whether to proceed with prosecution. Further, as we also note in our submission, legal practitioners have particular duties to the court above and beyond their duties to their clients. The court has confidence in what is represented to them on the basis that the legal practitioners who appear before them understand that their duty lies first and foremost with the court.

Senator HUMPHRIES: All right. You make reference in your submission to problems that have occurred in New South Wales under their Criminal Assets Recovery Act. You say that particular actions under that act are now the subject of a Police Integrity Commission inquiry. I have to confess to having followed that matter very closely. Can you outline to the committee what happened in that instance and the relevance of that to the legislation now before the committee?

Ms Donovan: I am not an expert in the details of corruption allegations which have been made against particular individuals, I must confess. It is important to note first that in New South Wales it is the same agency that is responsible for investigating and then pursuing confiscation proceedings, to the extent that they are pursued outside of a criminal prosecution. There is some suggestion that in that process a degree of informality has perhaps crept in where there have been arrangements between the legal practitioners involved representing the commission and representing various people who have been targeted, and the decisions about whether to commence and then to settle proceedings may have been made on an inappropriate basis.

We noted in our submission that the situation in New South Wales is a little different from what is proposed at the Commonwealth level. As I understand it, the commission in New South Wales is able to take its own costs out of money that is recovered. Therefore, that may colour things in terms of incentives for commencing and settling matters in a way that would not necessarily be the case under the model proposed at the Commonwealth level. That is why we have noted that there are differences. To the extent that some sort of impropriety is alleged to have crept into this process, this may have been allowed to occur and fester precisely because there has been no independent agency involved in determining not only when to commence matters but also, more importantly, when to settle them and how to settle them.

Senator HUMPHRIES: Your submission notes that it is unclear as to why a multi-agency approach to combating organised crime requires the centralisation of functions in the AFP. I am not sure I picked up in the other submissions or in the legislation that it is intended that the process be centralised in the AFP. Perhaps I missed something in my, admittedly, superficial reading. Do you understand it to be the case that under these proposals the AFP will actually be the centralised agency responsible for proceeds of crime matters as opposed to an ad hoc sharing of that responsibility with the DPP?

Ms Donovan: That is precisely what is intended. The explanatory memorandum explains how the legislation will work in practice. My understanding is that the AFP will have primary responsibility for proceeds matters which are not linked to a criminal prosecution and will undertake all the litigation that relate to matters that have been investigated by the task force. In that sense, yes, there is a centralisation of functions within the AFP rather than the present situation where the interim task force involves staff and expertise being drawn from different agencies. I think they are housed at the AFP, though not necessarily the Commonwealth DPP participants, and are coordinated by the AFP but each agency continues to perform its own functions as part of the team as it ordinarily would. This legislation proposes something different. It actually proposes a transfer of functions from the Commonwealth DPP to the AFP.

Senator HUMPHRIES: Thank you.

CHAIR: I have one question that came to mind in your answer a minute ago. Is the New South Wales Crime Commission the only agency in that state that can investigate and prosecute?

Ms Donovan: No, it is very similar to these arrangements. The New South Wales DPP retains some responsibility for proceeds of crime litigation but I understand that it is generally exercised where there is also a criminal prosecution afoot.

CHAIR: The DPP will retain some responsibility here as well.

Ms Donovan: Yes, the act does not replace the DPP with the AFP; it envisages that the DPP and the AFP will share these responsibilities. The legislation does not contain any detail about what the precise arrangements will be, but the explanatory memorandum says that administrative arrangements will probably divide responsibilities so that the DPP has primary responsibility for proceeds of crime litigation where it is linked to a criminal prosecution and the AFP will have responsibility where it relates to a matter that has been investigated by the task force or where it is a civil proceeds of crime litigation matter—that is, one that is not linked to a criminal prosecution.

CHAIR: Are you suggesting that the system in New South Wales is not as efficient as it could be? Is that what you are flagging may happen here?

Ms Donovan: What we are flagging is that in New South Wales there is now some suggestion that the Crime Commission has not properly exercised the policy powers that have been given to it. There are some allegations of corruption against individuals who have been involved in that process, which I understand are subject to proceedings. These may hold up the broader PIC inquiry into the administration of the legislation more generally, including how effective and properly administered it has been by the Crime Commission.

What I was saying initially about the parliamentary joint committee inquiry is that at that time there was agreement amongst a lot of law enforcement agencies that the New South Wales model was a particularly good one because New South Wales was seen to be recouping great amounts of assets. I think they had a higher percentage than anybody else. Now there is some suggestion that whilst that may have been the case, the means that were employed to secure those returns were not necessarily proper and there may have been a degree of corruption involved.

I do not want to wildly speculate about it; we are obviously limited to reading the media coverage and what is now available on the PIC's webpage about their inquiry. I note that inquiry has been stalled to some extent because of the need to finalise some of the individual corruption allegations before the more general inquiry commences. There have also been some legal proceedings between the Crime Commission and the PIC with the Crime Commission sort of seeking to shut down that inquiry and certainly seeking to ensure that whatever hearings it does hold are not held publicly. Thus far, the PIC has succeeded in court and the inquiry will continue.

In short, I can say that it is a matter of controversy and it is certainly worth watching this space before anybody points to New South Wales as an example of where combining the investigative function with the litigation function has been a success.

CHAIR: Okay. Thank you for your submission and making yourself available this afternoon.

ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

BAKER-GOLDSMITH, Ms Sarah, Principal Lawyer, Australian Commission for Law Enforcement Integrity

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

COLVIN, Deputy Commissioner Andrew, APM, OAM, Deputy Commissioner, Australian Federal Police

McCARTNEY, Commander Ian, Manager, Criminal Assets, Australian Federal Police

MANN, Mr Neil Edward, Deputy Chief Executive Officer, Passenger and Trade Facilitation, Australian Customs and Border Protection Service

MOSS, Mr Philip, Integrity Commissioner, Australian Commission for Law Enforcement Integrity

WHOWELL, Mr Peter, Manager, Government Relations, Australian Federal Police

[14:31]

CHAIR: I welcome representatives from the Attorney-General's Department, the Australian Federal Police, the Australian Commission for Law Enforcement Integrity and the Australian Customs and Border Protection Service. We have submissions from all of you, except the Australian Federal Police. The Attorney-General's Department submission is numbered 7, the Australian Commission for Law Enforcement Integrity submission is numbered 3 and the Australian Customs and Border Protection Service submission is numbered 6. Do any of you have opening statements?

Mr Colvin: The AFP does.

Mr Mann: Customs does.

Mr Anderson: Madam Chair, I would be happy to address some of the matters that have already been discussed if that would help the committee.

CHAIR: We will probably come to that in questions. We will go to opening statements, starting with the Australian Federal Police.

Mr Colvin: Thank you very much for the opportunity to appear here this afternoon. I have two officers with me who I am sure will be able to help the committee in terms of the details of questions the committee might have. As you pointed out, Madam Chair, we did not put in a submission, but I think this statement will help in the committee's business this afternoon. I guess it will be no surprise that most of the comments in the statement will be directed to the proceeds of crime aspects of the bill that we are considering.

Organised crime, as you know, Madam Chair, operates in a very fluid and dynamic environment, and the law enforcement response to organised crime needs to be equally proactive, flexible and adaptive. Money is the lifeblood of organised crime. If we can deprive criminals of funds, we remove the business incentive to commit crime and we prevent those funds being used to undertake additional criminal activity.

One of the key capabilities identified in the 2009 Commonwealth Organised Crime Strategic Framework is the targeting of the criminal economy to make the business of organised crime unviable. During the 2010 federal

election campaign the government committed to establishing a multi-agency assets confiscation task force to boost the identification of assets that should be seized and to strengthen the pursuit of wealth collected by criminals at the expense of the community. As you heard previously, an interim criminal assets confiscation task force led by the AFP has been established within the AFP. This interim task force brings together Commonwealth agencies in a collaborative arrangement to ensure that the skills, expertise and knowledge, as well as the legislative mandate, of each agency are fully exploited. The bill that you are considering will facilitate the implementation of the task force and enable the AFP to commence and conduct litigation under the Proceeds of Crime Act 2002. There are significant operational and administrative benefits which can be realised by consolidating proceeds of crime investigations and litigations within the one agency. These benefits include adopting a more proactive approach by being able to respond and take restraint much earlier in the proceedings, effective collaboration in the coordinated use of resources, and the streamlining of issues between investigative and litigation resources.

It may be useful for the committee's understanding of the bill if I outline the following key issues in relation to the bill. Let me say upfront that the bill does not make any substantive changes to the kinds of proceeds action that can be taken, the threshold tests for taking that action or the basis on which a court can make proceeds orders. What the bill does is enable the AFP commissioner to exercise the same powers, duties and functions as the current Commonwealth Director of Public Prosecutions in relation to proceeds action. Under the proposed changes, the AFP will be able to litigate both non-conviction and conviction based proceeds of crime actions. It is important to note that both of these actions are essentially civil proceedings, not criminal proceedings. With conviction based proceeds action, the AFP is not litigating the criminal prosecution but is instead litigating restraint and forfeiture of assets linked to a criminal conviction. The legislation does not change the present arrangements, where the DPP will conduct criminal prosecutions; furthermore, there are safeguards in place to deal with the use of information obtained from proceeds matters being used in other criminal investigations or prosecutions.

As I am sure you have already heard, there are precedents in place that place the AFP well undertake this role. There is domestic and international precedent for agencies conducting both investigation and litigation of proceeds action. There is also precedent for Commonwealth agencies investigating and litigating civil matters and a well-established practice of police prosecutors which continues today. The AFP already has significant expertise in proceeds of crime matters, and the task force builds upon the AFP's investigative expertise by bringing in officers from other Commonwealth agencies to ensure that the task force has the necessary skills, expertise and knowledge to effectively execute the responsibility that the bill will place upon it.

It is also important to emphasise that the investigation and conduct of proceeds of crime actions by the AFP will be subject to robust and comprehensive accountability arrangements, many of which I know you are quite familiar with. Litigation undertaken by the task force will be subject to the scrutiny of the court to ensure all legislative requirements have been complied with, and the Commonwealth DPP proceeds action is subject to the same scrutiny by the courts at the moment.

The arrangements proposed by the bill can, we believe, actually provide for greater independence between the criminal and confiscation processes. The decision to litigate for asset confiscation and the decision to prosecute a person for a criminal offence will now rest with separate agencies. Under the current proposal of the bill, the AFP will appoint a manager of proceeds of crime litigation, which will be an SES officer, within the AFP, who will be appointed to oversee and manage the proceeds of crime litigation functions. The manager of proceeds of crime litigation will be a suitably qualified legal practitioner. The manager of proceeds of crime litigation will operate independently of the operational arm of the task force and other areas of the AFP that undertake criminal investigations at the moment. However, decisions on whether to litigate high-risk matters will be elevated to the commissioner. External legal advice, as always with many matters that the AFP undertakes, would quite often be sought in relation to particular matters.

The AFP's existing accountability framework will also apply to proceeds investigations and the ultimate litigation. This includes internal measures, including the AFP's professional standards regime, and external measures, including oversight by the Ombudsman and the Australian Commission for Law Enforcement Integrity, and the AFP, as you are well aware, is also accountable to the public through parliamentary joint committees and Senate estimates processes. These measures will ensure that the proceeds action undertaken by the AFP will be done in a measured, objective way that meets all legislative requirements and applies an appropriate level of independence on high-risk decisions. We are happy to take questions.

CHAIR: Mr Mann, do you wish to make an opening statement?

Mr Mann: As you are aware, from 1 January 2011 the law enforcement functions of the Australian Customs and Border Protection Service were included within the jurisdiction of the Law Enforcement Integrity Commissioner Act 2006. The Customs and Border Protection Service welcomed the change and continues to work closely with the Australian Commission for Law Enforcement Integrity, ACLEI, to be well positioned for a successful transition period. The measure recognises the important role played by officers from the Customs and Border Protection Service in safeguarding Australia's borders and the corruption risk that is associated with this role.

We have developed a robust integrity framework to resist corruption and infiltration and we are working closely with ACLEI to identify and manage all sources of corruption risk. We have been working closely with ACLEI as part of an integrity partnership and have undertaken initiatives to familiarise ACLEI and the integrity commissioner with our operating environment and to educate customs and border protection officers about their responsibilities in reporting allegations of corruption. Initiatives have included site visits in the regions, briefings by senior customs and border protection officers and a joint online media presentation for staff stressing this integrity partnership. The DVD and intranet presentation, jointly developed by customs and border protection and ACLEI and made available to all of our staff, outlines the importance of this relationship between our two organisations. It emphasises the crucial role played by all customs and border protection officers in protecting the integrity of our agency and helps staff to know what to do if they suspect inappropriate, corrupt or criminal behaviour in the workplace.

As at 1 August 2011, customs and border protection has notified to ACLEI a total of 22 matters that meet the definition of corruption in the Law Enforcement Integrity Commissioner Act. It is important to note that ACLEI has advised that the number of notifications and referrals is not evidence of a problem of systemic corruption in customs and border protection. It is a sign that customs and border protection continues to notify ACLEI of matters in accordance with the requirements under the act and that we work closely with ACLEI to resolve matters under investigation. Customs and border protection currently has risk management strategies and a well-developed fraud control and corruption prevention methodology based around preparedness, prevention, detection and resolution that allows the organisation to foster an environment that is resistant to criminal infiltration and corruption.

A new development in the integrity partnership is our participation in a community of practice for corruption prevention practitioners. This community of practice, led by ACLEI, will include all of the agencies in their jurisdiction. While this is in its early stages, we believe that this will provide an avenue for agencies to share best practices and ideas on corruption prevention. With this preparation, customs and border protection is prepared for and fully supports the amendments in the Crimes Legislation Amendment Bill (No. 2) 2011 as they apply to our agency.

CHAIR: Thank you. As there are no other opening statements or questions, we will go to questions.

Senator HUMPHRIES: I want to be clear on the earlier processes, including the inquiry by the joint parliamentary committee. Have they led to this proposed new regime and this legislation, which includes, if I understand it correctly, a centralisation of the proceeds of crime functions in the AFP? Is that what is proposed?

Mr Anderson: That is what is proposed. Following on from that PJCACC recommendation, there has been a process of extensive consultation within the Commonwealth. There was of course an election commitment announced in the 2010 election campaign to go down this path as well. What is going to occur if the bill is enacted is that the function will be centralised in the AFP. But the DPP will retain the ability to take proceeds actions. It will be a question of whether a particular matter has such a nexus to a criminal proceeding that it is more appropriate that the DPP take that matter rather than the AFP. But the expectation is that as a general rule the AFP will take the primary role.

Senator HUMPHRIES: What are the resourcing implications for that new emphasis or new focus on this task by the AFP? Will the AFP's resources be increased? Is there any likelihood that the DPP's will be decreased?

Mr Anderson: As you heard from the DPP earlier, the fine detail still has to be worked through and in particular the carriage of the matters that are currently on hand. If those matters are at a stage such that it is best to leave them with the DPP, for example, then it would not be appropriate to transfer resources from the DPP while it had carriage of those matters.

Senator HUMPHRIES: Does the ACLEI oversight of Customs and Border Protection inherently involve more resources being dedicated to that extra workload?

Mr Moss: When the Customs service came under ACLEI's jurisdiction with effect from 1 January this year, we were provided with additional resources for the workload that was going to ensue.

Senator HUMPHRIES: Can you outline what those extra resources are?

Mr Moss: Yes. Five extra positions came to ACLEI and that provision was made from the Customs budget for transfer to ACLEI.

Senator HUMPHRIES: It was an internal transfer not additional resources per se?

Mr Moss: Yes.

Senator HUMPHRIES: On the question of these extra responsibilities within the AFP and who handles those responsibilities, there is an expectation that additional legal resources might be available within the AFP. Could you outline how that would work? How will the concerns from bodies like the Law Council be picked up in the way this is handled within the AFP?

Mr Colvin: In large part, the task force both in its interim form and in its final form is an amalgamation of resources that currently exist within the AFP as well as within other agencies that will form part of the task force. But, of course, when and if the bill is enacted, it will place on the AFP an additional responsibility that we do not have now which is effectively the litigation of proceeds of crime matters both conviction and non-conviction based. With that will be the requirement for us to bring on a new business within the AFP which will require us to bring on a litigation service, if you like, which will involve lawyers and a manager of litigation, which will be an SES officer to sit over the top of that. The way we envisage this and the beauty of the legislation and the task force is that one agency, albeit with other agencies as part of the task force, will be responsible for both investigation and decisions around the most appropriate course of proceeds of crime action is. At any given stage during the investigation that could change from a conviction based proceeds of crime action to a non-conviction based, depending on the investigation.

We are very conscious of the Law Council's evidence and their submission and while we would not agree with every aspect of what they said, we are having discussions and need to have those discussions about how to appropriately manage the separation of responsibilities between what is properly an investigation decision and what may ultimately be a litigation decision. That is why the manager of litigation is proposed to be quite independent within the task force of the investigation progress. It will be like the responsibilities of the Commonwealth DPP at the moment whereby they receive independent advice about making a decision, particularly on high-risk matters. You can imagine what some of those may be—large matters that involve large number of amounts of assets. The commissioner needs to be assured that he is getting good independent advice that is objective. Until the bill is settled and until we can progress the discussions a little further with the DPP on the basis of the bill, we cannot finalise what those arrangements are. But, as I said in my opening statement, we will be bringing on trained, experienced legal professionals to assist us with that who will sit under an SES officer, who is independent of the investigation process.

Senator HUMPHRIES: These trained legal officers will be officers of the AFP or will they be lawyers employed as civilian officers?

Mr Colvin: They will be lawyers employed as a civilian officers. I have not considered the possibility that we could have an AFP officer now who meets all those criteria, but it is envisaged that we will be bringing in expertise to be employed by the AFP.

Senator HUMPHRIES: This is all based on the assumption that proceeds of crime proceedings are particularly legally complex and need to close input from lawyers before they can be undertaken?

Mr Colvin: That is correct, and they are complex. As I heard the Law Council say as I came into the room a little late, quite properly, under the current arrangements a separate legal set of eyes looks over a matter before it proceeds. Those eyes are in the DPP at the moment. We are envisaging replicating those functions, but not to the degree that we minimise the efficiency and productivity that we believe streamlining and bringing together one agency to have responsibility could produce.

Senator HUMPHRIES: What is there in those arrangements to stop the AFP from beginning proceeds of crime proceedings against a particular party for strategic, rather than good, legally based, reasons? You may be, for argument's sake, investigating an organised crime syndicate and believe that it would be efficacious for you to put some pressure on the syndicate by bringing proceedings against them under proceeds of crime legislation. Is that an acceptable tactic?

Mr Colvin: Ultimately, law enforcement agencies are in the business of having an effective long-term impact on organised crime. We can do that in a number of ways. At times we may need to make tactical decisions about what is the most effective option available to us. Of course, the bill is not bringing in civil confiscation or unexplained wealth provisions; they already exist. This is about how we may best use them. But, as I said before, we will be subject to appropriate accountability arrangements. These will include scrutiny by the courts,

separation of proceeds, action and criminal prosecutions internally and the internal measures that we have around professional conduct. We are also working with the Commonwealth DPP and the Attorney-General's Department and other agencies on the appropriate policies for what matters should proceed along certain non-conviction based and conviction based or unexplained wealth lines. It is very difficult to give a hard and fast answer because the idea of bringing it together is that we will have all options available and be able to freely move between the options according to what we are investigating and the changing nature of what we are investigating.

Commander McCartney: As the deputy stated, litigation action is undertaken in a measured and objective way by the AFP. In terms of planning for the permanent task force, the AFP will draw upon guidelines that are currently in place with the DPP. They have a protocol on the proceeds of crime. There are a number of factors that they and the AFP will take into consideration in initiating litigation under the act. They include: the strength of the evidence available, the seriousness of the alleged crime, the total value of the assets potentially subject to confiscation action, the potential costs of an undertaking as to damages and the potential impact of confiscation action on any ongoing investigation. So, in terms of the litigation framework within the AFP, there will be strong and robust guidelines in regard to the work they will undertake.

Ms Chidgey: I will add a couple of things about the safeguards in the act itself. It is obviously a requirement to reach the thresholds that are imposed there in order to make applications for restraining orders and forfeiture orders. As Commander McCartney mentioned, a court is able to refuse to make a restraining order if there is a failure to give an undertaking with respect to the payment of damages or costs. A court is able to award costs against either the AFP or the CDPP in these actions as well, which obviously acts as a safeguard in these matters.

Mr Anderson: Civil litigation is also subject to scrutiny by the Attorney-General under the legal services directions, which require that the Commonwealth does not embark upon litigation for a tactical reason but does so for a reason that is soundly based.

Senator HUMPHRIES: So you are saying that tactical proceedings could not take place even if, under the last of those criteria mentioned by Commander McCartney, it could be helpful with respect to other proceedings against a particular organisation or individuals. You still could not launch a tactical action against a party.

Mr Anderson: What I am saying is that any individual action mounted, even if it has a tactical benefit I guess, would have to be soundly based in order to be brought by a Commonwealth agency.

Senator HUMPHRIES: You have heard reference to the problems in New South Wales with their proceeds of crime act being subject to a police integrity investigation at the moment. I am not familiar with the circumstances of that, but does that send a signal about the danger of going down this path in this legislation?

Mr Anderson: From a policy perspective we do not believe that the inquiry of the New South Wales Crime Commission is of particular relevance to this situation. As the Law Council witness indicated, there are allegations of corruption involving particular officers. The AFP is subject to extensive scrutiny, not least by ACLEI, in relation to allegations of corruption. There are also different scrutiny regimes with respect to the exercise of powers under the Proceeds of Crime Act as opposed to under the New South Wales Crime Commission legislation. For example, the New South Wales Crime Commission can conduct examinations on its own motion without actually having court supervision whereas examinations of witnesses for proceeds purposes have to be supervised by the court. So there are some important distinctions with it.

Mr Colvin: As Iain has pointed out, there are a number of differences between what is proposed and the New South Wales Crime Commission. I echo the comments that we need to obviously be very careful about ongoing inquiries and current matters that have been subject to other proceedings. A question is: not the appropriateness of one agency having both responsibilities but the appropriateness of how legislation, procedures and protocols were actually enacted and followed. I think it is also important to note that, while the New South Wales Crime Commission is one agency wholly vested in doing this, the task force arrangements will fit into an AFP which is a much larger organisation with a much broader remit, which I think helps to provide that level of comfort about actions taken by the task force within a much broader organisation.

One key issue that is often raised in this type of discussion about an agency having both responsibilities, and certainly in the context of some of the reporting previously around New South Wales jurisdiction, is negotiated settlement and the policies that have been discussed there. I think it will be useful for me to put on the record some of the thinking of the AFP in consultation with AGD around that. An AFP negotiation settlement policy is under development at the moment and will incorporate the following elements, which will give the committee some comfort. Approval for any settlement will be decided by the manager proceeds of crime litigation, the legal practitioner at SES level that I mentioned earlier. That person will be required to take into account: the prospects of a successful litigation; the risks of litigation; the costs of investigation and litigation, including as to what stage

the maximum benefit of a settlement versus litigation are realised; importantly, the public interest test about whether the return of assets may facilitate the commission of further offences, so in terms of a settlement; any precedent value that the decision may have; and the deterrent effect of the litigation. It is certainly the AFP's intention to maintain the current Commonwealth Director of Public Prosecutions position whereby an agreement to settle a matter will not be used as a trade-off for reduced criminal charges or for any other favourable treatment to the offender in respect of current or potential criminal proceedings and the consent to forfeiture on criminal cases may be used as mitigation in sentencing as set out in the proceeds of crime legislation at the discretion of the court in only limited circumstances.

We are very conscious of experience both in Australia and overseas with these matters. It was explained to me earlier today, and I think this is right, that we are taking all the bits of experience we can and putting them in the context of Commonwealth law enforcement here in this country. Certainly I am very comfortable and confident that the appropriate decisions will be made.

Senator HUMPHRIES: Is there a mechanism for the AFP or any of the other agencies—I suppose it is mainly the AFP and the DPP—to report in their annual reports on the number and the nature of the proceeds of crime actions that they have taken in any given year?

Mr Anderson: The DPP does currently report on the number of proceeds actions in their annual report. Certainly there is no reason why that practice would not be continued by the AFP and the DPP in respect of the matters that they were both handling.

Senator HUMPHRIES: Will the AFP do that too?

Mr Colvin: Absolutely. We report now on our proceeds of crime statistics. It is simply a matter of adjusting the way we report to meet the needs of the parliament.

Senator HUMPHRIES: Why should the committee not recommend that the Commonwealth DPP be a permanent member of this task force?

Mr Colvin: Obviously that is open to the committee and we would have no objection to that. Even if the DPP is not a permanent member of the task force, it would be our position that the liaison between the two would need to be close. We cannot look at any of these matters in isolation. We cannot look at a proceeds matter in isolation from a criminal conviction. You cannot look at a proceeds matter in isolation from the advice we might be getting about the prospects of a criminal conviction. That is clearly an area that the Commonwealth DPP will be working with us on. Whether it is a member of the task force or not, it would certainly be my expectation that Commander McCartney and his team would be very well engaged with the Commonwealth DPP on these issues, as I know they are now. I would have no concerns if that was an outcome of the committee.

Mr Anderson: There is certainly the expectation from our perspective that there will continue to be very close working relationships between the different members of the task force, particularly between the AFP and the DPP, because under these arrangements it is envisaged that matters could be transferred at any time from the AFP to the DPP or vice versa. So there will need to be continued close working relationships. I think it is also worth noting that the area of proceeds of crime, broadly, is continuing to evolve. If you look back to 1987 when it was all conviction based, in 2002 the non-conviction based was brought in and in 2010 we had unexplained wealth being brought in. It might be that as the work of the task force continues to evolve it moves further and further away from the work that the DPP has been involved in. I think that would just need to be considered.

Senator HUMPHRIES: It just seems strange to me that the body which at the moment is chiefly responsible for prosecuting proceeds of crime actions is not proposed to be a permanent member of the task force. That is just a reflection rather than a question.

Senator WRIGHT: Mr Anderson, when we were discussing earlier the decision about tactical litigation, I think you said that any individual benefit to commencing litigation would have to be soundly based and subject to the scrutiny of the Attorney-General. Correct me if I am wrong on that. I was interested in at what point that scrutiny would occur. Would it be something that occurs after the event, for accountability, or would it be something that would have to be determined before those sorts of decisions are made?

Mr Anderson: The accountability there is not before the event. It is just a general principle under the Legal Services Directions issued by the Attorney-General that when the Commonwealth commences proceedings it must do so on a sound basis. Complaints can be made to the department if there is a belief that a Commonwealth agency has instigated litigation without having a proper basis for doing so.

Senator WRIGHT: What is the mechanism for those complaints being made and what is the process for dealing with those?

Mr Anderson: The mechanism is laid out in the Legal Services Directions which are available on the departmental website. A complaint is made to the Office of Legal Services Coordination in the Attorney-General's Department, which then looks into the complaint.

Senator WRIGHT: Can you give me any idea of how long that process might take?

Mr Anderson: It would depend upon the nature of the complaint and the nature of the matter. It might be a relatively simple matter or it might be a more complex matter. Obviously a more complex matter would take more time to investigate.

Senator FURNER: Mr Colvin, in your opening statement you mentioned the operational and administrative efficiencies gained. You went to some length in describing the measures through earlier actions and that sort of area. Can you expand a little bit more on that area and also on the administrative efficiencies that can be gained out of this exercise?

Mr Colvin: As Mr Anderson has said, this change is about an evolution of the process from where we were in 1987 to where we are now and the changing environment that we are challenged with in terms of the criminal environment, organised crime and the significant benefits and money that can be made within that criminal environment. This is very much about an evolution. Part of that evolution, as we have seen around the world, is the experience of agencies who have brought both the investigation and litigation processes into the one agency. It has made much more of a streamline in terms of how decisions are made, how quickly decisions can be made and how adaptable those decisions are to what the investigation may be facing.

I do not want to give the impression that what we have at the moment is not working. What this is about is improving on what we have to meet the current challenges. There will need to be an increase in resources, so it is not a complete efficiency in terms that resources are no longer required to do this. Obviously the AFP will need resources to help it with its new functions, but we believe that it will be far more efficient for Commander McCartney, for instance, as our manager of the criminal assets branch, working alongside the manager of litigation on a daily basis, making daily decisions about the most effective course of conduct that is presented to them at any moment on any particular investigation. This is as opposed to needing to move between agencies, which at times can be inefficient, to get advice and to make decisions. This is about making it faster in terms of our ability to react to the criminal environment, and I think out of that will come a lot of efficiencies.

Senator FURNER: The Law Council had some concerns. I think the way they couched it was that these trained legal officers did not have the same sort of relationship with the courts. Is that a reasonable enough argument to present to suggest that there is going to be some issue with a trained legal officer as opposed to a lawyer appearing before courts?

Mr Colvin: I am not too sure what point the Law Council was trying to make. As we said, we will be employing lawyers, effectively—people who will be registered—and experience in the proceeds of litigation would certainly be our preference. These people will be officers of the court. They will be attending court and litigating matters in the same way that a Commonwealth DPP lawyer would do now. That said, I note Senator Humphries's comments. Certainly, we would not want to draw a distinction between the ability of a non-lawyer within the AFP—a police officer—to make similar judgments that are just as accountable as anyone who is a member of the court. I was not clear on what the Law Council was trying to say there, to be honest.

CHAIR: Mr Colvin, in closing, I have a question. The Law Council made a suggestion today publicly and also in its submission that there had been no consultation prior to the amendments proposed in schedule 2. I am not sure if this should go to you or the Attorney-General's Department. I think, Mr Anderson, you said that there had been consultation. Just to clarify that matter, can you let us know what consultation occurred?

Mr Anderson: Certainly. Just to put that beyond doubt, the consultation that occurred was within the Commonwealth only. It was not public consultation.

CHAIR: I see.

Mr Anderson: So we did consult as a department with a broad range of other agencies and departments who are involved in either law enforcement or process type actions or investigations that might give rise to proceeds actions. There was not public consultation but there was, of course, the public announcement through the election commitment.

CHAIR: Also, the Law Council put to us today that there was no firm recommendation by the Joint Committee on the Australian Crime Commission—that their recommendation was simply that the government should look at this. Would you put to us that that was then taken up as an election commitment?

Mr Anderson: No. What actually happened was that we looked at this prior to the election and prior to the election commitment being made. The consultation within the Commonwealth that I referred to happened prior to the 2010 election, so we took on board the suggestion by the committee that it should be looked into, considered a range of possible options, had that consultation, and that was followed subsequently by the election commitment.

CHAIR: Yes, I see. I just wanted to clarify those points. Otherwise, we do not have a balance of evidence that is before us, so I just wanted to ensure that we had cross-referenced any in that matter. I do not think there are any other questions on this. I thank you all for attending today. Senator Wright or Senator Pratt, do you have anything before we finish?

Senator WRIGHT: If I could follow up on one answer that was just given. I think it may have been from Mr Anderson. It was in relation to whether a legal practitioner is an officer of the court and to the submission that was made by the Law Council. My understanding of the point that the Law Council was making there—and I would just like your comments on this—is that when you have a particular agency or legal practitioner whose primary duty is an officer of the court and the Crown in terms of determining whether to bring litigation and then how to conduct it, although we understand that the court is the ultimate arbiter and is really the check and balance, it is reliant on the quality of the information that is coming before it. I think the Law Council is suggesting that, with the Department of Public Prosecutions being involved, those officers certainly have that duty but it is not so sure that that would be the case if it were a legal practitioner working for the Australian Federal Police. Do you have any comments you would like to make about that?

Mr Anderson: It was actually Mr Colvin from the AFP who made those comments, but I will briefly say something on this, if I may. Just to note that this would not be the only situation where, in the Commonwealth, lawyers were employed by an agency conducting civil litigation and in that process were themselves properly acting as officers of the court, with the duties and obligations that attend to legal practitioners. So the mere fact that they are employed by the AFP does not of and in itself remove from them those obligations, provided that they are operating as legal practitioners. There are some conditions set down in the Legal Services directions for the conduct of civil litigation by agencies that the AFP would need to have regard to to ensure that those obligations were not removed from the employees. I will pass to Mr Colvin.

Mr Colvin: I think Mr Anderson has covered that. We envisage that these people would have professional and ethical duty as officers of the court, as do Commonwealth DPP members currently. As I said before, the AFP has a very robust and active oversight mechanism that extends a lot further, I would suggest, than that of any Commonwealth agency currently in the Commonwealth. There are many checks and balances on the actions of our officers. Those litigation officers would be subject to the same, as I say, ethical and professional standards as a Commonwealth DPP officer is currently subjected to. So I reject the Law Council's inference that putting this power or this ability in the AFP is, in some way, diminishing the accountability of the Commonwealth. In fact, the AFP, through the commissioner of the AFP, is very accountable and the commissioner will take his responsibilities very seriously in respect of discharging those responsibilities under this act.

Senator WRIGHT: Can I just add that I did not wish to misrepresent the position of the Law Council. It is in their submission, so people can go to the wording of that. I just wanted to clarify the question. The other aspect is that I think the Law Council make the point—and I am not wishing to impugn any ethics of any legal officers who will be working for the AFP—about the independence of the decision making about whether to commence the litigation. The ability to make an objective assessment is the argument that the Law Council puts in terms of an outside agency not being the agency that has done the initial investigation. Would you like to make a comment about that Commander Colvin?

Mr Colvin: Ultimately, we will be judged by the decisions of the court and there are, as I say, a number of accountability mechanisms. The Commonwealth DPP currently seek external objective advice and we will do the same, particularly on high-value or potentially contentious matters. I do not see that the current arrangements for the Commonwealth DPP are, in effect, all that different from what is proposed for the commissioner of police.

Senator WRIGHT: I do not have any other questions.

CHAIR: I thank all of you for your attendance this afternoon and for your submissions. I appreciate your efforts.

Mr Colvin: Thank you very much, Madam Chair.

Committee adjourned at 15:14