

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

Senate Legal and Constitutional Affairs Committee

7 January 2016

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Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee, the Business Law Section’s Privacy Law Committee, Corporations Law Committee and Working Party on Foreign Corrupt Practices in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide the following submission to the Senate Legal and Constitutional Affairs Committee (the Committee) on the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (the Bill).
2. This submission focuses on the following aspects of the Bill.
3. Schedule 1 of the Bill would amend the *Proceeds of Crime Act 2002* (Cth) (POCA) to clarify the operation of the non-conviction based proceeds of crime regime. This Schedule aims to override two Court decisions¹ and appears to be testing the limits of Constitutional validity. There is a question as to whether provisions in this Schedule may be constitutionally invalid on the basis that it is inimical to the exclusivity of the exercise of Commonwealth judicial power and the inherent powers of the court and/or contrary to an inviolable feature of the institution of trial by jury in section 80 of the Commonwealth Constitution.
4. For this reason, the POCA amendments in Schedule 1 should not be enacted. If they are to proceed, the provisions directing the court as to when it may not grant a stay of proceedings should be removed and replaced by a general discretion in the court that identifies various factors for a court to consider and weigh. These factors include those outlined in this submission.
5. The Bill would also create two new offences of false dealing with accounting documents. The proposed offences would carry significant penalties and should require, as a minimum, an intention on behalf of the defendant that a person receive or give a benefit, or incur a loss.
6. In addition, the Bill would amend the:
 - *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) to: expand the ability of designated officials and agencies to share information under the Act to for example, International Criminal Police Organisation (INTERPOL) and the European Police Office (Europol); and create a general regulation making power to prescribe additional international bodies;
 - *AusCheck Act 2007* (Cth) to clarify and extend the circumstances under which AusCheck can disclose AusCheck background check information to the Commonwealth and to certain state and territory government agencies.
7. The Law Council makes the following general observations on these amendments for further consideration by the Committee:
 - (a) Schedule 4 of the Bill, if passed, would create a very general regulation making power to prescribe additional international bodies which may receive AUSTRAC information. If the general regulation making power in Schedule 4 is to be enacted, it should be the subject of a (for example, 6 months) sunset clause; and
 - (b) The Bill, if passed, would create the potential for retrospective effect to the extent that clause 5 in Schedules 4 and 5 would permit the use and disclosure

¹ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; and *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390.

of personal information collected prior to the passage of the Bill to agencies and bodies created after the passage of the Bill. The Law Council recommends that, where reasonable or possible, the public be informed about the scope of such possible uses and disclosures.

Schedule 1 – Proceeds of Crime

Validity

8. A question arises as to whether section 319 of the Bill is likely to be constitutionally invalid.
9. This provision would direct a court as to when a stay of proceedings for non-criminal confiscation proceedings may and may not be granted. The proposed categories of what does not qualify as being in the interests of justice warranting a potential stay of proceedings is very broad. It includes under proposed section 319(2) on the ground that:
 - criminal proceedings have been, are proposed to be or may be instituted or commenced (whether or not under the POCA) against the person subject to the POCA proceedings. This applies even if *the circumstances* pertaining to the POCA proceedings are or may be the same as, or substantially similar to, the circumstances pertaining to the criminal proceedings (subsection 319(3) of the Bill);
 - criminal proceedings have been, are proposed to be or may be instituted or commenced (whether or not under the POCA) against another person in respect of matters relating to the subject matter of the POCA proceedings. This applies even if the *subject matter* of the POCA proceedings is the same as, or substantially similar to, the matter at issue in the criminal proceedings (subsection 319(4) of the Bill);
 - a person may consider it necessary to give evidence, or to call evidence from another person, in the POCA proceedings; and the evidence is or may be relevant (to whatever extent) to a matter that is, or may be, at issue in criminal proceedings that have been, are proposed to be or may be instituted or commenced (whether or not under the POCA) against the person or any other person;
 - POCA proceedings in relation to another person have been, are to be or may be stayed. This applies even if the staying of the POCA proceedings would avoid a multiplicity of POCA proceedings (subsection 319(5) of the Bill).
10. There seems to be little or no basis left for when POCA proceedings could be stayed.
11. The Explanatory Memorandum states that the:

*... non-conviction based forfeiture scheme is an essential tool under the POC Act, which is designed to target those who distance themselves from commission of offences, but profit as a result of illegal activity.*²
12. However, these provisions are principally dealing with people facing criminal trial and conviction in a conviction based scheme.
13. Proposed section 319 of the Bill may therefore be beyond legislative power on the basis that it is inimical to the:

² Explanatory Memorandum to the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015, [43].

- exclusivity of the exercise of Commonwealth judicial power and the inherent powers of the court;³ and/or
- contrary to an inviolable feature of the institution of trial by jury in section 80 of the Commonwealth *Constitution*.⁴

14. It is clear that courts possess inherent jurisdiction to stay proceedings which are an abuse of process.⁵ In *Walton v Gardiner*⁶ the High Court (Mason CJ, Deane and Dawson JJ) (Brennan and Toohey JJ dissenting) held that:

*The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.*⁷

15. The majority referred to the breadth of the Court's power as enunciated in *Jago v District Court of NSW*⁸ in which case Mason CJ had referred to a court's power to prevent its processes being employed in a manner which gave rise to unfairness.

16. A law that 'requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power' is invalid.⁹ This principle operates on the basis that sections 1, 61, 71 read with Chapter III of the *Constitution* establishes the separation of powers doctrine.

17. However, regulating judicial processes (for example the power to exclude evidence) is permissible as the High Court has determined that it is not an incursion on the judicial power of the Commonwealth.¹⁰ An alteration of procedural rules will not constitute an invalid direction to exercise judicial power in a manner inconsistent with the essential characteristics of a court, or with the nature of judicial power.¹¹ This principle was relied on to uphold, for example, a provision in national security legislation that directed a court in a terrorism prosecution to have the 'greatest' regard to issues of national security in deciding whether to issue a certificate of non-disclosure to defence counsel.¹² Further, section 17 of the *Federal Court of Australia Act 1976* (Cth) provides that the court may make an order to close the proceedings to the public if it is considered in the interests of justice.

18. It is unclear, however, as to whether the High Court's inherent power to order a stay of proceedings should be distinguished from other procedural matters such as the rules of evidence.

19. Commonwealth judicial power under the Constitution also provides some limited protection to the right to a fair trial. Section 80 of the Constitution provides a limited guarantee of a trial by jury for a trial on indictment of any offence against any law of the Commonwealth. Justice Gaudron in *Nicholas v The Queen* (1998) noted:

³ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1; *Nicholas v The Queen* (1998) 193 CLR 173.

⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan J).

⁵ *Jago v District Court of NSW* (1989) 168 CLR 23.

⁶ (1993) 177 CLR 378.

⁷ *Ibid*, 392-393.

⁸ (1989) 168 CLR 23.

⁹ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

¹⁰ *Nicholas v The Queen* (1998) 193 CLR 173.

¹¹ *Ibid*, 189 (Brennan CJ).

¹² *R v Lodhi* (2007) 179 A Crim R 470 [58]-[73] (Spigelman CJ), [121] (Barr J), [215] (Price J); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(8).

In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute.¹³

20. A relevant question that may be required to be answered is whether limiting the discretion of a court as to when it may order a stay of proceedings in the manner proposed by the Bill is accompanied by adequate safeguards to ensure the:

- Constitutionally protected fair trial of an accused will not be prejudiced;¹⁴ and
- The court retains power over its processes thereby preserving the separation of powers as required by the Constitution.

21. The purported safeguards intended to ensure Constitutional validity include:

- providing that a court may stay non-criminal confiscation proceedings if the court considers that it is in the interests of justice to do so;¹⁵
- empowering the court to order that POCA proceedings (other than criminal proceedings) be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of justice;¹⁶ and
- empowering the court to prohibit disclosure of information to certain authorities.¹⁷

22. In *Zhao and Jin*¹⁸ it was held that the interests of justice are not served by requiring a person to defend forfeiture proceedings or pursue exclusion proceedings before his or her criminal proceedings are finalised, especially since the Commissioner would suffer no relevant prejudice from a delay in the continuation of the forfeiture proceedings. The High Court also rejected the AFP Commissioner's argument that protective orders to maintain confidentiality could be made or that the evidence could be given in closed court to avoid the risk of prejudice to the accused (at [44]). This may suggest the inadequacy of the purported safeguards in the Bill in terms of ensuring validity.

¹³ *Nicholas v The Queen* (1998) 193 CLR 173 at [74] per Gaudron J. While Justice Gaudron's comments were made in a dissenting judgment it has subsequently been applied in *Fardon v Attorney-General (QLD)* (2004) 223 CLR 575 and *Bass v Permanent Trustee Co Ltd* 198 CLR 334 at [56]; cited by French CJ in *Cesan v The Queen* [2008] HCA 52 at [70].

¹⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92 (French CJ and Crennan J).

¹⁵ Proposed subsection 319(1) of the *Proceeds of Crime Act 2002* (Cth).

¹⁶ Proposed section 319A of the *Proceeds of Crime Act 2002* (Cth).

¹⁷ Proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* (Cth).

¹⁸ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.

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23. There may be a view that the Bill simply seeks to put in place the outcome of the High Court's decision in *Lee v New South Wales Crime Commission* (Lee No. 1)¹⁹. However, Lee No. 1²⁰ may be distinguished from *Zhao and Jin*.
24. The issue in *Lee No. 1* was whether the *Criminal Assets Recovery Act 1990* (NSW) (Criminal Assets Act) authorised the court to order an examination of a person who had already been charged with an offence arising from circumstances likely to be the subject of examination. The Court, by a majority, held that the Criminal Assets Act did authorise examination of a person who had already been charged and clearly abrogated the privilege against self-incrimination.²¹
25. In contrast, in *Zhao and Jin* the High Court unanimously accepted that provisions of the POCA relating to restraining orders and forfeiture orders may be made regardless of whether a person is charged with a similar criminal offence.²² However, the High Court held that this would not impact on a court's discretion to order a stay of forfeiture proceedings where the court determined that those proceedings would create a real risk of prejudice to the criminal trial.²³
26. Proposed section 315A of the POCA would also seek to undermine a decision of the Victorian Supreme Court made by applying common law principles that have been developed over many years. *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 ('*Zhang*') it was held that observations by the High Court in *Zhao and Jin* applied to an application for exclusion from a restraining order. Justice Forrest considered:

... 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. The Commissioner cannot rely on those sections because neither applicant for exclusion has been charged with or convicted of any criminal offence. 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.

From a case management perspective I can see no real disadvantage and some potential advantages in dealing with the forfeiture application at the outset.

...

*It follows that I shall hear and determine the forfeiture application first. Should it then be necessary, I will then hear and determine the exclusion applications.*²⁴

27. The amendment to section 315A provides that the court may only hear the application for the forfeiture order after the application for the exclusion order has been determined. This is similarly likely to be a disproportionate infringement on the right to a fair hearing.

¹⁹ *Lee v NSW Crime Commission* [2013] HCA 39.

²⁰ *Ibid.*

²¹ *Ibid* at [55] per French CJ, at [144] per Crennan J and at [331]–[335] per Gageler and Keane JJ.

²² *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 at [34] per *curiam*.

²³ *Ibid* at [47] per *curiam*.

²⁴ *In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 [39]–[41].

28. The result of the proposed amendments may be that POCA cases would proceed uncontested. Clients may be advised not to contest the civil proceedings on the basis that it may jeopardize their criminal trial. Individuals could therefore be in a position where they will have to relinquish their property rights so as not to put at risk a finding of guilt in the criminal proceedings.

Proposed alternative position

29. The Constitutional validity of the scheme may be more assured if the provisions directing the court as to when it may not grant a stay of proceedings in subsection 319(2) were removed and replaced by a general discretion of the court that identifies various factors for a court to consider and weigh. These factors could include for example:

- any prejudicial effect that is likely to arise to the person subject to POCA proceedings, or another person in respect of matter relating to the subject matter or circumstances of the POCA proceedings;
- that the POCA proceedings, and any criminal proceedings, should proceed as expeditiously as possible;
- the cost and inconvenience to the Commonwealth of retaining property to which the POCA proceeding relates and being unable to expeditiously realise its proceeds; and
- the risk of a proceeds of crime authority suffering any prejudice (whether general or specific) in relation to the conduct of the POCA proceedings if the proceedings were stayed.

30. Similar forms of the proposed subsections 319(3), (4) and (5) could remain. Further, before granting a stay of proceedings, the court could be satisfied that:

- any prejudice that a person (other than a proceeds of crime authority) would suffer if the POCA proceedings were not stayed cannot be addressed by the court by means other than a stay of proceedings; and
- no other orders (other than an order for the stay of the POCA proceedings) could be made by the court to address any prejudice that a person (other than a proceeds of crime authority) would suffer if the proceedings were not stayed.

31. Examples of orders the court could make to address prejudice that a person (other than a proceeds of crime authority) would suffer if the POCA proceedings were not stayed include an order under section 319A (closed court) or an order prohibiting the disclosure of information.

Recommendation:

- **The *Proceeds of Crime Act 2002 (Cth)* amendments in Schedule 1 should not be enacted. If they are to proceed, the provisions directing the court as to when it may not grant a stay of proceedings should be removed and replaced by a general discretion of the court that identifies various factors for a court to consider and weigh. These factors include those as outlined in this submission.**

Schedule 2 – False accounting

32. The proposed false accounting provisions would impose substantial penalties (up to 10 years imprisonment, or a fine of \$1.8 million, or both, or a fine of \$18 million for a body corporate). This new measure is apparently aimed at false accounting connected with foreign bribery, and is being introduced to address Australia's obligations under the OECD Convention.²⁵
33. However, proposed section 490.5 of the *Criminal Code Act 1995* (Cth) (Criminal Code) would provide that in a prosecution for an offence against Division 490, it is not necessary to prove:
- (a) the occurrence of any of the following:
 - (i) the defendant receiving or giving a benefit;
 - (ii) another person receiving or giving a benefit;
 - (iii) loss to another person; or
 - (b) that the defendant intended that a particular person receive or give a benefit, or incur a loss.
34. The proposed legislation is therefore not limited to foreign bribery situations – there is no required nexus and the key provision in the foreign bribery offence provision has not been included (paragraph 70.2(1)(c) of the Criminal Code – an intention of influencing a foreign public official, even if the identity of the official need not be proved).
35. Such a provision may be appropriate for a baseline offence, but not for one that has the potential to carry a 10 year term of imprisonment or a fine of \$1.8 million, or both, or \$18 million for a body corporate as proposed by section 490.1 of the Criminal Code. For such a lengthy and substantial penalty in circumstances where there is no connection with foreign bribery, there should at least be an intention on behalf of the defendant that a person receive or give a benefit, or incur a loss.
36. Moreover, the Law Council's Business Law Section's Working Party on Foreign Corrupt Practices has noted the following:
- the provisions are widely drawn to cover 'accounting documents' (which could cover many documents generated in commercial and financial transactions);
 - they depend on whether 'benefits' are to be given or received that are 'not legitimately due' – which if read literally could apply to a wide range of situations, well beyond the intended purpose of the legislation (for example, a tax deduction to which the tax payer is not entitled may be captured);
 - there is a provision that imposes liability for reckless conduct (section 490.2), but the threshold under the Criminal Code is not a high one – a 'bare logical possibility' can fulfil the requirement for a 'substantial risk' and then the question is whether the risk is unjustifiable;

²⁵ *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions.*

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- there is potential for individuals to be liable, both a primary level but also as accessories. There is also clear potential for corporates to bear criminal responsibility for the acts of their employees. While the Criminal Code provisions impute the *mens rea* of 'high managerial agents' seems consistent with well-understood principle, the way the case law has interpreted that expression means that a corporate could be liable for the actions of a wide range of managers (noting the \$18,000,000 penalties).

37. Having regard to the above, there could be some significant unintended consequences if the legislation is passed in its current form.

Recommendation:

- **The proposed accounting offences in the Criminal Code that carry significant penalties should require as a minimum an intention on behalf of the defendant that a person receive or give a benefit, or incur a loss.**

Schedules 4 and 5 – AUSTRAC and AusCheck information

38. Schedule 4 would amend the definition of 'foreign law enforcement agency' in section 5 of the AML/CTF Act to specifically include the INTERPOL and Europol. The amended definition would also provide for a very general regulation-making power that is intended to enable additional international bodies, including those with multijurisdictional law enforcement coordination and cooperation functions, to be prescribed.²⁶ As regulations are a disallowable instrument, the prescription of any additional bodies will remain subject to Parliamentary scrutiny.
39. If these measures are to be enacted, any such general regulation making power should be the subject of a (for example, 6 months) sunset clause. A sunset clause would provide law enforcement agencies and the public with assurance that the Parliament will consider the effectiveness of the power and any necessary oversight measures within a definite timeframe. It would also provide those stakeholders with the opportunity to comment further on the necessity and proportionality of the power.
40. The Bill, if passed, would create the potential for retrospective effect to the extent that clause 5 in Schedules 4 and 5 would permit the use and disclosure of personal information collected prior to the passage of the Bill to agencies and bodies created after the passage of the Bill. The Law Council recommends that, where reasonable or possible, the public be informed about the scope of such possible uses and disclosures.

²⁶ Explanatory Memorandum to the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015, [71].

Recommendations:

- **If the general regulation making power in Schedule 4 is to be enacted, it should be the subject of a (for example, 6 months) sunset clause.**
- **Given the potential for retrospective effect of Schedules 4 and 5 of the Bill, where reasonable or possible, the public should be informed about the scope of possible uses and disclosures.**

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.