



Australian
Human Rights
Commission

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

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

6 January 2016

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Australian Government's Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (Cth) (the Bill).

2 Summary

2. The Commission welcomes the opportunity to make a submission in relation to this Bill. The Commission's submission focusses on Schedule 1 of the Bill dealing with proposed changes to the *Proceeds of Crime Act 2002* (Cth) (POC Act).
3. These proposed amendments would expand the range of grounds on which a court must not stay proceedings under the POC Act. The Commission is concerned that if a court is prevented from staying proceedings in circumstances where it may prejudice a future criminal proceeding, this would interfere with the right of the defendant in that criminal proceeding to have a fair trial.
4. In particular, the Commission is concerned that the drafting of the proposed new s 319 is ambiguous and does not make clear that in all circumstances the court should have the power to stay proceedings under the POC Act if the court considers that it is in the interests of justice to do so.
5. The Commission is concerned that some of the grounds which the proposed new s 319 would require a court to ignore are highly likely to result in prejudice to an accused person in a future criminal trial.
6. Finally, while the Commission has no objection to the introduction of additional safeguards into the POC Act, the Commission does not consider that two proposed safeguards are sufficient to mitigate the increased prejudice to a fair trial likely to result from the proposed new s 319.

3 Recommendations

7. The Australian Human Rights Commission makes the following recommendations:

Recommendation 1

The Commission recommends that Schedule 1 of the Bill not be passed.

Recommendation 2

If recommendation 1 is not accepted, the Commission recommends that both of the following amendments be made to proposed s 319 of the *Proceeds of Crime Act 2002* (Cth) in item 4 of Schedule 1 of the Bill:

- (a) Subsection 319(2) be amended to read:

Unless it would be in the interests of justice to do so, the court must not stay the POCA proceedings on any or all of the following grounds: ...

- (b) Subsections 319(3) and (4) be deleted.

4 Right to a fair trial

8. As the Government acknowledges in the Explanatory Memorandum, the proposed changes to the POC Act engage the right to a fair trial which is guaranteed by article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).¹
9. Article 14 of the ICCPR relevantly provides that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
10. The right of an accused to receive a fair trial according to law is also a fundamental element of the Australian criminal justice system.²
11. Australian courts exercising criminal jurisdiction inherently ‘possess all the necessary powers to prevent an abuse of process and to ensure a fair trial’.³ In appropriate circumstances, this may involve granting a stay of proceedings.⁴
12. The proposed amendments to the POC Act deal with the non-conviction based asset recovery scheme. The amendments seek to overcome the recent unanimous judgment of the High Court of Australia in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5.
13. In *Zhao*, Mr Xing Jin had been charged with an offence of aiding and abetting another person to deal with the proceeds of crime. He was committed to stand trial. Before the trial commenced, the AFP Commissioner commenced civil proceeds of crime proceedings based on the same allegations.
14. The AFP obtained a restraining order under s 19 of the POC Act against certain property. The restrained property comprised the home of Mr Jin and his wife Ms Qing Zhao, a residential unit of Mr Jin’s and a motor vehicle. Under s 19, a court must order that certain property must not be disposed of if there are reasonable grounds to suspect that the property is the proceeds of an indictable or other specified type of offence.
15. The AFP then sought an order for forfeiture of the restrained property under s 49 of the POC Act. Under this section, a court must order that restrained property be forfeited to the Commonwealth if the court is satisfied that the property is the proceeds of one or more indictable offences or an instrument of one or more serious offences.
16. Mr Jin and Ms Zhao made an application for the exclusion of the two residential properties from the restraining order and an application for a stay of

the forfeiture proceedings until the completion of the criminal proceedings against Mr Jin.

17. In support of the stay application, Mr Jin said that if he was required to make a detailed affidavit or be cross examined in relation to the purchase of the two residential properties then there was a real risk that the evidence would prejudice the criminal case against him. The evidence that he would need to lead in order to defend the proceeds of crime proceeding would be directly relevant to the criminal charges. He said that if he provided this evidence he would effectively be waiving his right to silence.⁵
18. The Court of Appeal of the Supreme Court of Victoria considered that Mr Jin could not realistically defend the forfeiture proceedings without telegraphing his likely defence in the criminal proceedings.⁶ As the High Court put it, the question was whether Mr Jin should be placed in a position where he must decide whether to prejudice his criminal trial (by going into evidence in the forfeiture proceedings), or prejudice his defence of the forfeiture proceedings (by not going into evidence).⁷ Mr Jin was not seeking that the forfeiture proceedings be permanently stayed. Rather, he was seeking that the forfeiture proceedings be temporarily stayed, that the criminal trial proceed first and that the forfeiture proceedings follow.
19. The High Court held that:

The risk of prejudice to [Mr Jin] if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for [Mr Jin] to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.⁸
20. Further, the High Court said that '[t]he prospect that civil proceedings may prejudice a criminal trial and that such prejudice may require a stay of the civil proceedings is hardly novel. ... The risk of prejudice in a case such as this is real'.⁹
21. In other similar cases, courts have considered the kinds of prejudice that can flow from conducting a civil proceeds of crime proceeding prior to a criminal proceeding dealing with the same issues. This can include:¹⁰
 - the potential for prosecuting authorities in the criminal proceedings to take advantage of evidence disclosed in the prior civil proceedings;
 - the high potential for the privilege against self-incrimination to be removed;
 - the high potential for the right to silence to be lost.

5 Proposed amendments

22. The key amendment in Schedule 1 of the Bill is to s 319 of the POC Act.
23. At the time of the proceedings in *Zhao*, s 319 of the POC Act provided:

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which a court may stay proceedings under this Act that are not criminal proceedings.

24. The High Court noted that s 319 clearly contemplated that a person may apply for a stay of civil proceedings under the POC Act where related criminal proceedings have been instituted. However, the person must do more than point to the existence of the criminal proceedings in order to obtain a stay of the civil proceedings.¹¹ In order to obtain a stay of the forfeiture proceedings, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his or her defence at the criminal trial.¹²
25. The High Court said:

Section 319 impliedly acknowledges what is in any case true: that the courts have the power to control their proceedings and to order a stay in an appropriate case. It will be appropriate to do so where the interests of justice require such an order. Section 319 is not expressed to refer specifically to a circumstance where the issues in the forfeiture proceedings and the criminal proceedings are substantially identical. The POC Act does not presume to say what a court should do in such a circumstance.¹³
26. The Commission considers that the position articulated by the High Court is consistent with the right to a fair trial. As a result, the Commission's primary position is that no amendment of s 319 is required.
27. Following the judgment in *Zhao*, the Government has sought to amend s 319 through the present Bill. The proposed amendment would expand the range of grounds on which a court must not stay proceedings under the POC Act to comprise the following:
 - a. on the ground that criminal proceedings have been, are proposed to be or may be instituted or commenced (whether or not under this Act) against the person subject to the POCA proceedings;
 - b. on the ground that criminal proceedings have been, are proposed to be or may be instituted or commenced (whether or not under this Act) against another person in respect of matters relating to the subject matter of the POCA proceedings;
 - c. on the ground that:
 - i. a person may consider it necessary to give evidence, or to call evidence from another person, in the POCA proceedings; and
 - ii. 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 this Act) against the person or any other person;
 - d. on the ground that POCA proceedings in relation to another person have been, are to be or may be stayed.
28. The Commission has three main concerns about the proposed amendments to s 319.

29. First, the drafting is ambiguous and, on one reading, suggests that the court must not stay proceedings on particular grounds even if it would be in the interests of justice to do so.
30. Secondly, some of the grounds which the section requires a court to ignore are highly likely to result in prejudice to an accused person. This is likely to result in a breach of the right to a fair trial.
31. Thirdly, the additional safeguards contained in Schedule 1 are insufficient to address this prejudice.
32. Each of these issues are discussed in more detail below.

5.1 Ambiguity in drafting

33. The first subsection of s 319 reflects what the High Court has said ‘is in any case true: that the courts have the power to control their proceedings and to order a stay in an appropriate case’. It provides:

A court may stay proceedings (the **POCA proceedings**) under this Act that are not criminal proceedings if the court considers that it is in the interests of justice to do so.
34. However, the second subsection then provides that the court ‘must not stay the POCA proceedings on any or all of the following grounds ...’. Those grounds are set out in paragraph 27 above. What is not spelt out is the relationship between subsection (1) and subsection (2). That is, there is no indication of which provision takes precedence.
35. On one possible reading, subsection (2) takes precedence in that it prohibits a court from staying a proceeding on one of the listed grounds *even if* it would be in the interests of justice for the proceeding to be stayed. This would mean that subsection (2) would act as an exception to subsection (1).
36. There may well be Constitutional questions that arise if a statute purports to require a court to act in a way that is contrary to the interests of justice. It has been said that ‘the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused’.¹⁴ A predetermination by the executive of what is or is not in the interests of justice may amount to a ‘usurpation’ of Commonwealth judicial power contrary to Ch III of the Constitution.¹⁵
37. It appears that the intention of subsection (2) is that it is not enough that one of the circumstances described in the subsection is present, even if this is likely to cause prejudice and would ordinarily be sufficient for a stay to be granted in the interest of justice. Rather, it appears to be intended that an applicant for a stay provide other evidence that prejudice is likely to occur. The Explanatory Memorandum says:

... new subsections 319(2)-(5) clarify when a court must not grant a stay. ...
The proposed amendments are primarily designed to ensure that the court will

consider the individual circumstances of the proceedings, including the nature of the overlap between civil and criminal proceedings, and prevent the risk that a person need only claim a risk of prejudice but not provide evidence explaining the nature of that risk.¹⁶

38. The problem with this explanation is that, in some cases the prejudice will be plain and a requirement to lead additional evidence may itself cause prejudice. As the High Court said in *Zhao*:

The commissioner contends ... that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for a stay seeks to avoid.¹⁷

39. It may be possible to reconcile these positions by making clear in the drafting that subsection (1) takes precedence over subsection (2). One way in which this could be done would be to amend subsection (2) to read:

Unless it would be in the interests of justice to do so, the court must not stay the POCA proceedings on any or all of the following grounds: ...

40. This would make clear that the overriding test is what is in the interests of justice. A civil proceeding could proceed without a stay in the circumstances described in subsection (2) if this would not be contrary to the interests of justice.

5.2 Matters likely to result in prejudice

41. The second issue of concern for the Commission is that some of the grounds which the proposed new s 319 would require a court to ignore are highly likely to result in prejudice to an accused person and increase the risk that their trial would not be fair.
42. The most obvious of these are proposed ss 319(3) and (4). These provide as follows:
- (3) Paragraph (2)(a) 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.
 - (4) Paragraph (2)(b) 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.
43. On its face s 319(3) would prevent a court from staying a proceeding under the POC Act against a person on the ground that criminal proceedings have been commenced against the same person on the same basis. This is the quintessential case in which prejudice is likely to ensue.
44. It is the case that the court faced in *Zhao*. There were civil proceedings under the POC Act seeking forfeiture of Mr Jin's property on the basis that it was the proceeds of crime. At the same time, Mr Jin had been committed to stand trial

to face a criminal charge that he had aided or abetted another person to deal with the proceeds of crime.

45. To suggest that in such circumstances that there is not already a sufficient basis to stay the civil proceeding and that it is necessary for the person to provide further 'evidence explaining the nature of the risk' of prejudice is surprising.
46. Section 319(4) applies in the same way to civil and criminal proceedings involving another person.
47. If the Bill is to proceed, then at least subsections (3) and (4) should be removed, along with the change to subsection (2) set out above.

5.3 Additional safeguards are insufficient

48. The Bill proposes to add two additional safeguards into the POC Act.
49. While the Commission has no objection to the introduction of the safeguards, in the Commission's view these additional safeguards are insufficient to mitigate the increased prejudice to a fair trial likely to result from the proposed new s 319. The amendments to s 319 described above would still be necessary if the Bill is to proceed.
50. The first safeguard is a proposed amendment to s 266A(2) which would allow a court to make an order prohibiting the disclosure of information obtained in proceedings under the POC Act to a prosecutor in a subsequent criminal proceeding.
51. This power is discretionary and is only likely to have any utility if it is also combined with the second safeguard of a closed hearing.
52. The second safeguard is the power granted to the court in proposed s 319A to conduct civil proceedings under the POC Act in closed court if this is necessary in order to prevent interference with the administration of criminal justice.
53. As set out above, article 14 of the ICCPR provides that everyone is entitled to a 'fair and public' hearing. Courts in Australia value highly the principle of open justice. As a general rule, adherence to the open court principle is one of the defining characteristics of a court.¹⁸ In some cases, it may be necessary to close the court but this should be the exception rather than the rule.
54. If s 319 is passed as proposed, there is a real risk that forfeiture proceedings may become closed proceedings as a matter of course, which would be contrary to the public interest.
55. The High Court addressed a submission about closing the court in *Zhao* in the following way:

The rationale of the open court principle is that court proceedings should be subjected to public and professional scrutiny, and courts will not act contrary

to the principle save in exceptional circumstances. Closing the court so that the commissioner might progress forfeiture proceedings and receive [Mr Jin's] evidence does not qualify as a proper reason for departing from the principle.¹⁹

56. The Commission considers that if there is a risk of prejudice to future criminal proceedings, the most appropriate course is for the civil POC Act proceedings to be stayed pending the determination of the criminal proceedings. This is preferable to conducting secret proceedings under the POC Act combined with a discretionary power to order that prejudicial material not be provided to the prosecutor of the criminal proceedings.

¹ Explanatory Memorandum, Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (Cth), at [78].

² *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J); *Dietrich v The Queen* (1992) 177 CLR 292 at 298-300, 311 (Mason CJ and McHugh J), 326 (Deane J), 353 (Toohey J), 363, 371, 372 (Gaudron J).

³ *Barton v R* (1980) 147 CLR 75 at 96-97 (Gibbs ACJ and Mason J).

⁴ *Dietrich v The Queen* (1992) 177 CLR 292 at 300, 311, 315 (Mason CJ and McHugh J), 332 (Deane J), 356-357 (Toohey J).

⁵ *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 (**Zhao**) at [9].

⁶ *Zhao* at [17].

⁷ *Zhao* at [19] (the Court).

⁸ *Zhao* at [42] (the Court).

⁹ *Zhao* at [47] (the Court).

¹⁰ *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17 at [17]-[19] and [20], referred to in *Zhao v Commissioner of the Australian Federal Police* [2014] VSCA 137.

¹¹ *Zhao* at [30] (the Court).

¹² *Zhao* at [35] (the Court).

¹³ *Zhao* at [36] (the Court).

¹⁴ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 60 [41] (French CJ), citing Jacob, 'The Inherent Jurisdiction of the Court', (1970) 23 *Current Legal Problems* 23 at 27.

¹⁵ *Haskins v Commonwealth* (2011) 244 CLR 22 at 36 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁶ Explanatory Memorandum, Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 (Cth), at [49].

¹⁷ *Zhao* at [43] (the Court).

¹⁸ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 71 [67] (French CJ); *Hogan v Hinch* (2011) 243 CLR 506 at 541-542 [46] (French CJ), 553-4 [90] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

¹⁹ *Zhao* at [44] (the Court).