NSW Legislative Assembly Hansard

Confiscation of Proceeds of Crime Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 21 September 2005.

Second Reading

Mr GRAHAM WEST (Campbelltown—Parliamentary Secretary) [10.04 a.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

This bill contains important amendments to the Confiscation of Proceeds of Crime Act 1989, the Civil Liability Act 2002, the Crimes Act 1900 and the Forfeiture Act 1995. These amendments will improve the processes involved in confiscating criminal assets, broaden the scope of existing laws, make prosecutions easier, create new offences of money laundering, prevent mentally ill offenders from misusing civil damages paid to them, and prevent mentally ill murderers from profiting from their crime by applying the forfeiture rule. The amendments to the Confiscation of Proceeds of Crime Act implement recommendations arising from a comprehensive review of criminal asset confiscation laws in New South Wales. This review was jointly conducted by the Attorney General's Department and the Ministry of Police.

The review was informed by a group of experts drawn from NSW Police, the Office of the Director of Public Prosecutions, the New South Wales Crime Commission, the Legal Aid Commission, the Public Trust Office, the New South Wales Law Society, the New South Wales Bar Association, and the Australian Crime Commission. Amendments to the money laundering provisions will implement an agreement reached by the Council of Australian Governments at its Summit on Terrorism and Multi-Jurisdictional Crime to reform money laundering laws. Those reforms will strengthen New South Wales criminal asset confiscation laws, target terrorist fundraising and other money-laundering schemes, and ensure that such laws are an effective deterrent to profit-motivated crime.

The Government is pleased that those reforms will benefit victims of crime. All of the proceeds of crime derived under the Confiscation of Proceeds of Crime Act are channelled into the Victim's Compensation Fund, which is used to compensate victims of crime for the harm they have suffered. I do not intend to canvass all of the provisions in the bill; many are self-explanatory and I intend to outline only the more major and significant reforms. The first major amendment under item [25] is to revamp the existing provisions for drug proceeds orders. A drug proceeds order is made by the court when a person is convicted of a drug trafficking offence to recover any assets obtained as a result of drug trafficking.

In such cases, a sentencing court must assess the value of all benefits the defendant has derived from drug trafficking at any time and order that the defendant pay that amount. The drug proceeds order provisions of the original Act introduced by the former Coalition Government have yet to be proclaimed, primarily due to the practical implications of commencing the provisions in their current form. They are cumbersome, unwieldy and differ in practical effect from pecuniary penalty orders that are available for non-drug crimes. In practice, assets of drug traffickers have been seized under the Criminal Assets Recovery Act, which is administered by the Crime Commission. The amendments set down in this bill will make it easier for the prosecution to seek those assets earlier and in a more comprehensive fashion.

The bill addresses the concerns about the existing drug proceeds orders provisions by aligning them more closely with pecuniary penalty orders, particularly in terms of procedure and assessment. As part of a more focused approach, the definition of "drug trafficking offence" has been amended by item [6]. It includes the offence of possession of precursors for the manufacture or production of prohibited drugs, offences involving more than a small quantity of prohibited drugs and the offence of ongoing supply of prohibited drugs. This reflects the objective of the Act to target profit-motivated crime rather than small-time users. The key changes to the drug proceeds orders provisions are as follows. First, under new section 13 (2), the procedure for applying for a drug proceeds order will be aligned with those for pecuniary penalty orders sought in non-drug cases. This will ensure that such orders are only sought in appropriate cases.

Second, the bill removes the current requirement under section 29 (1) for a drug proceeds order to be limited by the amount that may be realised at the time the order is made. With this amendment a drug proceeds order can be the value of any benefits derived in connection with drug trafficking at any time. This will assist in obtaining the value of property or goods that have been sold or otherwise disposed of in the course of the criminal conduct, rather than simply the amount available at the time of the order. In other words, drug traffickers will have to pay the full amount derived from their criminal activity. Third, the bill removes the requirement in current section 29 (2) for a court to take into account a drug proceeds order before imposing a fine.

Fourth, new section 30 sets out the matters to which the court may have regard in assessing the benefits derived in connection with drug trafficking. Those matters are of the same kind that are currently taken into account for pecuniary penalty orders. Fifth, the new section 31A contains provisions of general application relating to evidence that may be given in drug proceeds order proceedings as to the market value of substances involved in drug trafficking offences. Finally, new section 32 contains provisions similar to those for pecuniary penalty orders, which set out the circumstances when a court may treat property subject to the effective control of a defendant as property of a defendant. The definition of "tainted property" has been broadened to include property substantially derived or realised as a result of the commission of a serious offence, or property substantially derived or realised from property used in the commission of a serious offence.

That means that where a defendant has traded in a tainted $30,000 Toyota Camry for a $40,000 Subaru WRX, the WRX is also considered tainted property and can be forfeited. The bill also introduces the term "value of property" at Item [15], which provides a method for determining the value of property other than cash. Item [33] inserts a new division 1A into the Act concerning freezing notices. The bill introduces a new and more efficient system involving the use of freezing notices for the seizure, restraint, management and disposal of tainted property. This will increase the ability of NSW Police and the Office of the Director of Public Prosecutions to pursue confiscation action under the Act. The system will be made more efficient by progressing the criminal prosecution and confiscation action together.

Criminal asset confiscation should be viewed as an important and integral part of investigating and prosecuting serious offences. People who commit serious offences need to know that any profit they make from committing those offences will be stripped from them when they are convicted. Under new section 42B (1) of the Act, an authorised officer may apply to an authorised justice for a freezing notice over specified property if a defendant has been, or is about to be, charged with a serious offence or has been convicted of a serious offence. When making the application, the authorised officer must have reasonable grounds to believe that: the defendant committed the offence, if the defendant has yet to be convicted; and the property is tainted property or the proceeds of drug trafficking. Under section 42B (2) a freezing notice may be sought over property effectively controlled by the defendant but held by another person.

An authorised justice may issue a freezing notice under section 42C if they are satisfied that: the defendant has been or is likely to be charged with the offence within 48 hours or has already been convicted; and there are reasonable grounds for the applicant's belief as to the matters set out in the applicant's statement. Section 42D provides that a freezing notice specify how the property is to be dealt with and who will hold the property, pending the confirmation of the notice by a court. Under section 42F, notice of the issuing of a freezing notice must be given to the defendant, any affected property owner and any other person subject to the notice. A court may either confirm or set aside the freezing notice. Section 42L sets out the matters a court must be satisfied of before confirming a freezing notice. The hearing to confirm a freezing notice will generally coincide with the first date for committal or trial proceedings for the offence on which the notice is based.

Under section 42J, the court may require the authorised officer to notify any person with an interest in the property of the application, including third parties, to confirm the freezing notice. Such persons will be entitled to appear and adduce evidence at the hearing. If a court confirms a freezing notice, it must make orders for the management of the property under section 42M. Section 42M (3) sets out the matters the court should have regard to in determining the property management orders it should make. One of the things the court must take into account at the property management hearing is any hardship to the offender or to any third parties, and the wider concept of family and kinship ties when considering hardship to Aboriginal offenders.

In most cases, if it is appropriate, the court will order the Commissioner of Police to retain or take control of the property, dispose of it and retain any proceeds until they are payable under the Act to another person or the State. If it is not appropriate for the property to be disposed of, the court may instead make other orders for the management of the property, for example, that the property remain with the defendant subject to certain conditions, or that the Commissioner of Police take control of the property and hold it until any confiscation hearing. It will be an offence under section 42O to knowingly contravene a freezing notice, carrying a maximum penalty of two years imprisonment. Provision is made in sections 42K and 42U for appeals against freezing notices issued by authorised justices, and appeals against a refusal to confirm a freezing notice. Section 42V enables confirmed freezing notices to be set aside or varied.

Under section 42R, a freezing notice may be discharged by payment to the State of an amount equal to the value of property subject to a freezing notice. Pursuant to section 42S, if a freezing notices ceases to be in force and the property is not subject to any other order under the Act, the person lawfully entitled to the property may apply to the Attorney General for its return, or for the payment of an amount equal to the value of the property plus interest. The Attorney General must, if satisfied that the person is lawfully entitled to the property, return the property or pay the amount required no later than six months after receiving the application. The bill also amends section 87 to increase the Local Court's monetary jurisdiction under the Act from $10,000 to the limit that would apply when the court exercises its general civil jurisdiction, which is currently $60,000.

Finally, the bill introduces the term "interstate crime related property declaration", and changes to the existing

definitions of "interstate forfeiture order", "interstate pecuniary penalty order" and "interstate restraining order" to ensure that New South Wales can recognise and enforce all relevant interstate confiscation instruments. I now turn to schedule 2 to the bill, which amends the Civil Liability Act 2002. In 2003, the Civil Liability Act was amended to limit the damages payable to people who are injured as a result of engaging in criminal conduct. Damages payable to a person who was mentally ill at the time of engaging in criminal conduct are limited to damages other than damages for non-economic loss and loss of earnings. In other words, such people can still recover damages for medical and care costs.

Schedule 2 to the bill further amends the Civil Liability Act to provide for the supervision of damages awarded to mentally ill people in these circumstances. Under section 54D, a court that awards such damages must make an order directing the Public Trustee to take control of the amount of damages if it is in the best interests of the mentally ill person. The Public Trustee will hold the amount in trust for the person, and must ensure that the amount is only used to cover the medical and care costs of the person. A damages supervision order is intended to ensure that a mentally ill person does not simply dissipate damages awarded to cover medical and care costs.

A damages supervision order may: regulate the manner in which the Public Trustee exercises his or her functions under the order; specify the purposes for which amounts may be disbursed; specify the obligations of the Public Trustee and the person awarded the damages; and make any other provision the court considers appropriate. A damages supervision order will remain in force until an appropriate court revokes it or until the death of the person awarded the damages. Schedule 3 to the bill amends the Crimes Act 1900 to create new money laundering offences As honourable members would know, money laundering is the process by which cash and other assets derived from criminal activity are introduced into an economy to make them appear to have been legitimately obtained.

Through money laundering, criminals distance themselves from the criminal activity that generates their wealth, making it harder to prosecute them and confiscate their ill-gotten gains. Money laundering is a significant global problem. The International Monetary Fund has estimated that money laundering accounts for between 2 per cent and 5 per cent of global gross domestic product. Since the terrorist attacks of 11 September 2001 there has been an increased focus by governments around the world on strengthening their anti-money laundering regimes and on targeting terrorist financing. Like the amendments to the New South Wales asset confiscation regime, the amendments to the New South Wales anti-money laundering regime are part of this Government's commitment to ensuring that those who engage in criminal activity as a business can effectively be dealt with under the law and do not profit from that activity.

In addition to being part of a national initiative to address money laundering and organised criminal networks, the amendments will ensure that the New South Wales anti-money laundering regime is consistent with international standards set by the OECD's Financial Action Task Force on Money Laundering. The New South Wales money laundering offence is currently found in the Confiscation of Proceeds of Crime Act 1989. The bill will re-enact an improved form of the existing money laundering offence in the Crimes Act 1900 and create additional money laundering offences. This will give New South Wales strong, comprehensive money laundering laws. The new offences will be located in the Crimes Act 1900, which appropriately emphasises the serious criminal nature of these offences.

Section 193B will create three offences for dealing with the proceeds of crime, that is, any property, including money, that is derived from the commission of a serious offence. "Dealing with" includes receiving, possessing, concealing or disposing of property. First, it will be an offence for a person to deal with the proceeds of crime knowing they are proceeds of crime and intending to conceal that they are proceeds of crime. This offence will carry a maximum penalty of 20 years imprisonment. Second, it will be an offence for a person to deal with the proceeds of crime knowing they are proceeds of crime. This offence will carry a maximum penalty of 15 years imprisonment. Third, it will be an offence for a person to deal with the proceeds of crime being reckless as to whether they are proceeds of crime. This offence will carry a maximum penalty of 10 years imprisonment.

Section 193C will create a summary offence for dealing with property where there are reasonable grounds to suspect the property is the proceeds of crime. This offence will carry a maximum penalty of 50 penalty units and/or 2 years imprisonment. It will be a defence to a prosecution for this offence if the defendant satisfies the court that the defendant had no reasonable grounds for suspecting that the property was the proceeds of crime. Section 193D will also create two offences for dealing with property, being money or other valuables, that subsequently becomes an instrument of crime. First, it will be an offence for a person to deal with property intending that the property will become an instrument of crime, and the property subsequently becomes an instrument of crime. This offence will carry a maximum penalty of 15 years imprisonment. Second, it will be an offence for a person to deal with property being reckless as to whether the property will become an instrument of crime, and the property subsequently becomes an instrument of crime. This offence will carry a maximum penalty of 10 years imprisonment. Prosecutions for the instruments of crime offences will require the consent of the Director of Public Prosecutions. Section 193E makes provisions for alternative verdicts to be reached on certain money laundering offences.

Finally, I turn to schedule 4 to the bill, which contains amendments to the Forfeiture Act 1995. The common law forfeiture rule operates to prevent killers from benefiting financially from their victim's estate. The Forfeiture Act 1995 leaves the common law rule intact but allows the court to modify the effect of the rule if justice demands it. The forfeiture rule currently cannot be applied to people found not guilty of a killing by reason of mental illness. The bill amends the Forfeiture Act 1995 to enable the forfeiture rule to be applied to people found not guilty of murder by reason of mental illness where it would not be just for them to inherit from their victim's estate.

Section 11 provides that where an offender has been found not guilty of murder by reason of mental illness, any interested person may apply to the Supreme Court for a forfeiture application order to enable the forfeiture rule to apply as if the offender had been found guilty of murder. The court may make an order applying the forfeiture rule if it is satisfied that justice requires the rule to be applied. In determining whether justice requires the rule to be applied, the court is to have regard to: the conduct of the offender; the conduct of the deceased person; the effect of the application of the rule on the offender or any other person; and any other matter the court considers relevant. Section 12 provides that a forfeiture application order must be sought within six months after the day on which it is determined that the offender was not guilty of murder, although the court may grant leave for a late application.

Section 13 makes provision for the court to accept applications for the revocation of a forfeiture application order that has already been made. The Confiscation of Proceeds of Crime Amendment Bill contains important reforms. The reforms will strengthen criminal asset confiscation and money laundering laws in New South Wales and, as such, has the support of the key New South Wales law enforcement and prosecuting authorities. The bill also contains important reforms relating to mentally ill people who commit serious offences. I commend the bill to the House.