CRIMES AMENDMENT (MONEY LAUNDERING) BILL 2022

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

The Australian Institute of Criminology has estimated that organised crime cost the Australian community between $24.8 and $60.1 billion dollars in 2020-21 alone, with prevention and response costs estimated at up to $16.4 billion over the same period.

This Bill targets an essential enabler of organised crime by introducing some of the most comprehensive anti-money laundering laws in the country.

Key drivers of the need to strengthen money laundering offences in NSW include:

(a) Law enforcement has advised that organised criminal groups are increasingly engaging professional money launderers, who remain at arm's length from the direct criminal activity that generates the criminal proceeds being laundered. This enables money launderers to practise what can be referred to as "strategic ignorance" about the criminal source of the funds, making it challenging to be successfully prosecuted under the primary money laundering offences in NSW.

(b) Organised criminal groups are also increasingly evolving their methods to avoid detection and law enforcement have identified circumstances which are generally consistent with dealing with suspected proceeds of crime.

(c) Recent court decisions in *Chen v Director of Public Prosecutions (Cth)* [2011] and *R v McKellar (No 3)* [2014] have had a significant impact on how primary money laundering offences under section 193B of the *Crimes Act 1900* are interpreted. These decisions mean that in order to prove an accused knowingly, or even recklessly, dealt with proceeds of crime, the prosecution must prove that the accused had knowledge of the type of offence that generated the alleged proceeds of crime. These court decisions held that s193F of the *Crimes Act 1900* only relieved the prosecution of the burden of proving the alleged proceeds of crime were derived from a particular criminal event. This makes successful prosecution very difficult where money launderers practise strategic ignorance to distance themselves from the offending that generates the proceeds of crime.

Key amendments to address these include new offences for recklessly dealing in proceeds of general crime, a new offence for dealing in suspected proceeds of rime worth $5 million or more and new circumstances of aggravation, expanding the circumstances that give rise to reasonable grounds to suspect that property is proceeds of crime for the purposes of section 193C, and clarifying that property represented to be proceeds of crime during the course of an approved Controlled Operation is taken to be proceeds of crime.

Objectives: What is the policy's objective couched in terms of the public interest?

The objective of the Bill is to strengthen the existing money laundering offence framework and making necessary definitional updates and amendments to close off current loopholes.

There is a strong public interest in tackling money laundering, which is a key enabler of organised crime in NSW. The objectives of the key amendments are outlined below.

New offences for recklessly dealing in proceeds of general crime

This Bill addresses barriers to prosecuting money laundering offences by introducing two new offences for dealing with proceeds of general crime. It is in the public interest to ensure that organised criminals cannot practise strategic ignorance to evade prosecution under primary money laundering offences in section 193B.

The first new offence deals with property being reckless as to whether it is proceeds of general crime and intending to conceal or disguise features of the property, carrying a maximum penalty of 15 years' imprisonment. The second offence deals with property being reckless as to whether it is proceeds of general crime and will carry a maximum penalty of 10 years' imprisonment. Both these offences have a minimum $100,000 threshold that applies to the alleged proceeds of general crime to focus the offences on more serious criminal offending.

New offence for dealing in suspected proceeds of crime worth $5 million or more

It is in the public interest to ensure that penalties are commensurate with the seriousness of the crime.

Currently, the maximum penalty in section 193C for dealing in suspected proceeds of crime is 5 years' imprisonment where the property value is more than $100,000. However, law enforcement have advised that the higher the value, the more serious the criminality.

Dealing in suspected proceeds of crime worth $5 million is not the same as dealing with $100,000. Accordingly, this Bill reflects the higher criminality by introducing a new offence for dealing in suspected proceeds of crime worth $5 million or more, attracting a maximum penalty of 8 years' imprisonment.

New circumstances of aggravation for offence of dealing in in suspected proceeds of crime worth $5 million or more

The maximum penalty for dealing in suspected proceeds of crime worth $5 million or more to 10 years' imprisonment when a circumstance of aggravation is present. The circumstances of aggravation were developed in consultation with NSW Police Force and the NSW Crime Commission – our enforcement experts on money laundering offences.

These circumstances include where the offence was committed in the context of a criminal group, serious crime organisation or serious criminal activity, and where the person used a position of professional trust or fiduciary duty to commit the offence. In the context of money laundering, these factors signal a higher degree of seriousness and, consequentially, it is in the public interest that a higher penalty should apply.

Expanding the circumstances that give rise to reasonable grounds to suspect that property is proceeds of crime

This Bill will expand the circumstances that give rise to reasonable grounds to suspect that property is proceeds of crime for the purposes of establishing an offence in section 193C. These include the use of a token or other unique identifier that preserves the anonymity of any party and the use of a dedicated encrypted communication device.

The NSW Police Force and the NSW Crime Commission have advised that the expanded list of circumstances reflects the emerging methods being exploited by criminals. It is in the public interest that the legislation is updated to capture these indicators of suspected proceeds of crime.

Facilitating prosecutions for money laundering offences during controlled operations

The Bill also makes amendments in section 193CB to assist Controlled Operations where an undercover operative may use police property and represent it to be proceeds of crime to a

suspect. In such circumstances, it is appropriate that money laundering offences could apply – even if the police property itself does not meet the full definition of 'proceeds of crime'.

Section 193CB of the Bill provides that for the purpose of the money laundering offences, where property is represented to be proceeds of crime or proceeds of general crime in the course of a Controlled Operation under the *Law Enforcement (Controlled Operations) Act 1997*, that property will be taken to be proceeds of crime or proceeds of general crime, irrespective of whether it is or not. This will ensure that the public interest is met in controlled operations by ensuring money laundering offences can apply in these situations. It is in the public interest to ensure that those who act in bad faith and wilfully do the wrong thing cannot escape legal action based on a mere technicality.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Reform of the money laundering provisions in the *Crimes Act 1900* can only be achieved through legislative amendments. All key provisions outlined above cannot be achieved without legislative reform.

Analysis: What were the pros/cons and benefits/costs of each option considered?

These reforms resolve barriers to prosecution and ensure the anti-money laundering provisions are keeping up with the increasingly sophisticated methods employed by organised criminals. These reforms can only be achieved through legislative change.

Keeping the status quo by leaving the anti-money laundering provisions would negatively impact the public at large. Organised criminals would be able to continue to exploit loopholes made abundantly clear by the *Chen/McKellar* cases and certain money laundering related Controlled Operations would remain potentially unviable.

As with any reforms to strengthen criminal offences, there may be resource implications on the criminal justice system associated with prosecutions for offences under the laws. However, the public interest to tackle money laundering in NSW outweighs any potential cost.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

This Bill commences on assent.

The amendments will be made to the *Crimes Act 1900*, which is administered by the Attorney General.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

Yes. When developing these reforms, NSW government agencies such as the Department of Communities and Justice, NSW Police Force, NSW Crime Commission and the Office of the Director of Public Prosecutions were consulted.

The draft Bill was consulted on more widely on an urgent basis, with key stakeholders including from the private sector, the legal sector, the Courts, and Commonwealth Government Departments.