New Zealand Law Society
Te Kāhui Ture o Aotearoa

Criminal Proceeds (Recovery) Amendment Bill

25/10/2022

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1 Introduction

1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Criminal Proceeds (Recovery) Amendment Bill (the **Bill**).

1.2 In summary, the Law Society considers the Bill would benefit from addressing two matters:

(a) The Bill should clarify who is to be considered an 'associate' of a member or participant in an organised criminal group, in relation to the proposed new restraining and type 2 assets forfeiture orders provided in the Bill.

(b) The Bill should prescribe when source orders are available and the terms these should contain.

1.3 This submission has been prepared with input from the Law Society's Criminal Law Committee.[1]

1.4 The Law Society does not wish to be heard.

2 Restraining and assets forfeiture orders for associates

2.1 Clause 15 of the Bill proposes a new section 24A, which would allow the High Court to make a restraining order in relation to specific property belonging to a respondent who is an associate of a member or participant in an organised criminal group. Similarly, clause 21 provides for a forfeiture regime for such property (referred to as a type 2 assets forfeiture order under proposed sections 50A-50D).

2.2 Under these proposed sections, the High Court can make an order if it is satisfied that it has reasonable grounds to believe (in the case of a restraining order), or is satisfied on the balance of probabilities (in the case of a type 2 assets forfeiture order) that the following criteria are met:

(a) When the respondent acquired the specific property, the respondent was an associate (rather than 'a mere acquaintance') of one or more members of, or participants in an organised criminal group (as defined in the new section 5A – discussed below);

(b) As a part of their association with the group, all or any of those members or participants have been involved in, or unlawfully benefited from, significant criminal activity (as defined in section 6) at any time;

(c) At the relevant time before the respondent acquired the specific property, the legitimate property of the respondent that was readily available would have been insufficient to acquire the specific property at or near reasonable market value; and

(d) When the application was made, the reasonable market value of the specific property, excluding the value represented by the exempt proportion of that

[1] More information regarding this committee is available on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

property (i.e., that which could have been funded from the respondent's available resources), was at least the threshold amount (as would be defined in section 5).

2.3 'Associate' is defined in the Act under proposed section 5A. In the Law Society's view, the Bill could be improved by the inclusion of further clarity as to who is to be considered an associate.

2.4 The Bill would allow for the restraint or forfeiture of property based in part on the respondent's relationship with individuals who are members or participants in an organised criminal group. In both situations, the applicant (being the Commissioner of Police) is not required to establish the property was obtained unlawfully or with illegitimately held funds. Given an individual may be liable for restraint or forfeiture (and potentially subject to Police scrutiny, regardless of whether there has been an order sought) based on these relationships, the term 'associate' requires clarity.

2.5 The definition proposed in the Bill is circular, in that it defines an associate as someone who is associated with a member or participant in an organised criminal group. While the Bill distinguishes between being 'associated with' and being a 'mere acquaintance of', it is not clear where the boundary between these terms is intended to lie.

2.6 'Associate' could also be interpreted in a way as including people that have had little or no choice in being involved with a member or participant in an organised criminal group. For example, this could include people who have both been employees of the same company, been neighbours, or who have been required to share a prison cell or community work programme while serving a sentence. A wide definition may also engage concerns about potential unreasonable searches and seizures under the New Zealand Bill of Rights Act 1990.

2.7 The Law Society recommends that the definition of 'associate' be clarified, and that it should include a requirement than any association be voluntary.

2.8 The Select Committee could also consider recommending that both 'associate' and 'participant' are defined in the Bill. It can be inferred from reading proposed sections 5A(2) and (3) together that participants are intended to be individuals who take part in an organised criminal group while not necessarily having the same objectives of the members of the group (that objective being to obtain a material benefit from significant criminal activity). The Law Society notes that, if this is the intended interpretation of these roles, this could be made clearer in the Bill.

2.9 The proposed section 5A(4) also provides a definition of 'obtaining a material benefit from significant criminal activity'. Some criminal activity could involve a failure to comply with an obligation (for example, failing to report a suspicious cash transaction), rather than requiring a positive action. In order to include such behaviour within the definition, the proposed section5A(4)(b) could be amended to begin "doing *or omitting to do* any thing ...".

3 Disclosure of source orders

3.1 Clause 33 inserts a new section 109A, which enables the High Court to make a 'disclosure of source order' (**DSO**) in regard to a person to whom a section 24 restraining order applies. A DSO can only be ordered where the High Court is satisfied that there are reasonable grounds to believe that the respondent:

(a) is residing outside or absent from New Zealand, or

(b) is a corporation that is incorporated outside New Zealand (other than an overseas company that is registered under Part 18 of the Companies Act 1993).

3.2 A DSO will require the respondent to provide the Commissioner certain information (**source information**) about the restrained property, including the name of people who are believed to have an interest in the property, how the property was obtained, and the source of any funds or property used to acquire it. In addition, there are 'catch-all' provisions requiring a provision of any other information of a kind specified in the DSO, and any documents of a kind specified in the order to substantiate other source information.

3.3 As drafted, an order could be sought even when an intended respondent was only briefly outside New Zealand, and where Police could reasonably proceed using the information gathering powers already available under the Act on their return to New Zealand. The Law Society suggests that the Bill provide a minimum period of absence from New Zealand before a DSO can be sought.

3.4 Under the proposed section 109A(4), a respondent to a DSO must reply within the time period stated in the order, which must be no longer than 2 months from the date that it was made (subject to the Court considering there are special circumstances supporting a longer response period or an application for additional time by either the Commissioner or respondent). The Law Society notes there is no minimum period that must be given for a response. This may have been intentional, in order to leave the issue of an appropriate time period up to the discretion of the issuing High Court Judge.

3.5 However, new section 50(2A) provides that the consequence of failing to provide a response within the period specified in the order is that the property is presumed to be tainted property which can be subject to a type 1 asset forfeiture order. Given the significance of this, it may be appropriate for the Bill to specify a minimum period that should be given for a respondent to provide the information. As with the maximum period, this could be subject to an exception for the Court to allow a shorter period in special circumstances.

3.6 This presumption is similarly engaged where a respondent, in responding to an order, makes a statement that is false or misleading in a material particular (proposed section 50(2A)(b)). The Law Society recommends this provision require that the respondent "deliberately or recklessly made a statement that is false or misleading in a material particular'. This would avoid the presumption being engaged where a respondent carelessly or mistakenly makes an incorrect statement in response to an order. The inclusion of a mental element would also bring the provision in line with section 152(1)(b) of the Act, which makes it an offence to provide a statement or document to the Commissioner in response to an examination or production order, knowing that it is false or misleading in relation to a material particular.

3.7 Finally, clause 39 would insert a new section 165A, which provides that self-incriminating statements made in response to a disclosure of source orders are not admissible against that person in civil or criminal proceedings (subject to some exclusions). The Law Society suggests that the effect of the proposed section 165A should be required to be set out in any DSO. This will both enhance the likelihood of compliance with an order, while also informing respondents of their legal position (noting that anyone who is subject to such an order will

be outside of New Zealand and may therefore not be in a position to obtain legal advice from counsel with sufficient experience in New Zealand law). This could be done by including a reference to section 165A in section 109A(6).

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