

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 156

Issued by the authority of the Minister for Justice

Proceeds of Crime Amendment Regulation 2012 (No. 1)

This Regulation amends the *Proceeds of Crime Regulations 2002* (Cth) (the Principal Regulations) to:

- update references to State and Territory proceeds of crime legislation to account for recent legislative changes in the States and Territories
- change references in the Principal Regulations to ‘the Director of Public Prosecutions’ to ‘proceeds of crime authority’, accounting for the recent passage of the *Crimes Legislation Amendment Act (No. 2) 2011* (Cth), and
- update the list of offences that are considered ‘serious offences’, to include new offences and reflect recent changes to the *Criminal Code Act 1995* (Cth).

References to State and Territory proceeds of crime legislation

The *Proceeds of Crime Act 2002* (Cth) (the Principal Act) recognises prescribed interstate proceeds of crime orders for two purposes:

- where interstate forfeiture or restraining orders apply to property in a non-governing territory, they may be registered in that territory’s Supreme Court and enforced as if they had been made under the Act, and
- where a court makes orders in a proceeds of crime proceeding under the Act, it must take into account the effect of any interstate proceeds of crime orders that have already been made.

Section 338 of the Act provides that regulations may prescribe State and Territory laws to be corresponding laws and certain orders made under those laws to be interstate forfeiture orders, interstate pecuniary penalty orders and interstate restraining orders.

The Principal Regulations declare a number of State and Territory laws to be corresponding laws. The Principal Regulations also declare a number of orders made under those corresponding laws to be interstate forfeiture, pecuniary penalty and restraining orders. This Regulation is intended to update the laws declared to be corresponding laws and the orders declared to be interstate forfeiture, pecuniary penalty and restraining orders.

References to the Director of Public Prosecutions

The *Crimes Legislation Amendment Act (No. 2) 2011* (Cth) amended the Act to allow both the Director of Public Prosecutions (DPP) and the Commissioner of the Australian Federal Police (AFP) to litigate proceeds of crime matters on behalf of the Criminal Assets Confiscation Taskforce. Previously, only the DPP could litigate proceeds of crime matters.

The Principal Regulations contain a number of references to the DPP. This Regulation updates those references so that they refer to a 'proceeds of crime authority'. This will enable the Commissioner of the AFP to effectively litigate proceeds of crime matters on behalf of the Criminal Assets Confiscation Taskforce.

Serious offences

The Act allows a proceeds of crime authority to apply for a greater range of orders where the offence involved is defined as a 'serious offence'. A 'serious offence' is defined in section 338 of the Act to include a number of indictable offences. Paragraph (h) in section 338 includes in the definition of 'serious offence' an indictable offence specified in the Principal Regulations.

The Principal Regulations currently prescribe a number of indictable offences under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth) (the Code) to be 'serious offences'. This Regulation updates the list of serious offences prescribed in the Principal Regulations to account for recent changes to the Crimes Act and the Code, including the movement of child sex tourism offences from the Crimes Act to Division 272 of the Code under the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) and the creation of new offences relating to child pornography and child abuse material, people trafficking and involvement in serious organised crime. These offences are similar to other types of offences already prescribed in the Principal Regulations, including child sex offences, slavery and sexual servitude.

This Regulation prescribes as serious offences a number of offences under the *Australian Crime Commission Act 2002* (Cth). These offences, of failing to attend or answer questions at an Australian Crime Commission (ACC) examination (section 30), of providing false or misleading evidence to the ACC (section 33), and of obstructing, hindering, disrupting or threatening an ACC examiner or other person (section 35), are indictable offences punishable by a maximum of 200 penalty units or 5 years imprisonment. These offences directly support the ACC's role in uncovering wealth derived from serious and organised crime. By frustrating an ACC examination, a suspect can potentially thwart proceeds of crime litigation and protect large amounts of criminal wealth. Prescribing these offences as serious offences gives proceeds of crime authorities appropriate powers and more effective tools to restrain and confiscate criminal wealth.

Further details of measures included in this Regulation are at [Attachment A](#).

This Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

This Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

Details of the *Proceeds of Crime Amendment Regulation 2012 (No. 1)*

Regulation 1 – Name of Regulation

This regulation provides that the title of the Regulation is the *Proceeds of Crime Amendment Regulation 2012 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that regulations 1 to 3 and Schedule 1 commence on the day after the Regulation is registered.

Regulation 3 – Amendments of *Proceeds of Crime Regulations 2002*

This regulation provides that Schedule 1 amends the Principal Regulations.

Schedule 1 – Amendments

Item [1] – Paragraph 4(da)

This item omits paragraph 4(da) from the Principal Regulations.

Current paragraph 4(da) declares the ‘*Crimes (Confiscation) Act 1989* of Queensland, as in force immediately before its repeal by the *Criminal Proceeds Confiscation Act 2002* of Queensland’ to be a ‘corresponding law’ under section 338 of the *Proceeds of Crime Act 2002* (Cth). As there are no longer any ongoing matters under the *Crimes (Confiscation) Act 1989* (Qld), it is no longer necessary to declare that Act to be a corresponding law.

Item [2] – After paragraph 4(e)

This item inserts new paragraph 4(ea) in the Principal Regulations.

New paragraph 4(ea) declares the *Criminal Assets Confiscation Act 2005* (SA) to be a ‘corresponding law’ under section 338 of the Principal Act.

Item [3] – Paragraph 4(i)

This item omits paragraph 4(i) from the Principal Regulations.

Current paragraph 4(i) declares the ‘*Crimes (Forfeiture of Proceeds) Act 1989* of the Northern Territory, as in force immediately before its repeal by the *Criminal Property Forfeiture (Consequential Amendments) Act 2002* of the Northern Territory’ to be a ‘corresponding law’ under section 338 of the Principal Act. As there are no longer any ongoing matters under the *Crimes (Forfeiture of Proceeds) Act 1989* (NT), it is no longer necessary to declare that Act to be a corresponding law.

Item [4] – Paragraph 4(j)

This item makes a typographical amendment to paragraph 4(j) to account for the omission of paragraph 4(k), as in item 5 below.

Item [5] – Paragraph 4(k)

This item omits paragraph 4(k) from the Principal Regulations.

Current paragraph 4(k) declares the '*Proceeds of Crime Act 1991* of the Australian Capital Territory, as in force immediately before its repeal by the *Confiscation of Criminal Assets Act 2003* of the Australian Capital Territory' to be a 'corresponding law' under section 338 of the Principal Act. As there are no longer any ongoing matters under the *Proceeds of Crime Act 1991* (ACT), it is no longer necessary to declare that Act to be a corresponding law.

Item [6] – After paragraph 5(a)

This item inserts new paragraphs 5(aa) and (ab) into the Principal Regulations.

New paragraph 5(aa) provides that an order made under subsection 29(1) of the *Criminal Assets Recovery Act 1990* (NSW), declaring that an interest in property is available to satisfy a proceeds assessment order or unexplained wealth order, is an 'interstate forfeiture order' under section 338 of the Principal Act.

New paragraph 5(ab) also declares an assets forfeiture order made under subsection 31A(3) of the *Criminal Assets Recovery Act 1990* of New South Wales to be an 'interstate forfeiture order' under section 338 of the Principal Act. Section 31A was inserted into the *Criminal Assets Recovery Act 1990* (NSW) by the *Criminal Assets Recovery Amendment Act 2005* (NSW).

Item [7] – After paragraph 5(b)

This item inserts new paragraph 5(ba) into the Principal Regulations to provide that an order declaring that specified property is available to satisfy a drug proceeds order made under subsection 32(2) of the *Confiscation of Proceeds of Crime Act 1989* (NSW) is an 'interstate forfeiture order' under section 338 of the Principal Act. Section 32 was inserted into the *Confiscation of Proceeds of Crime Act 1989* (NSW) in its current form by the *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW).

Item [8] – After paragraph 5(d)

This item inserts new paragraphs 5(da), (db) and (dc) into the Principal Regulations.

New paragraph 5(da) provides that a tainted property substitution declaration made under subsection 34C(1) of the *Confiscation Act 1997* (Vic) is an 'interstate forfeiture order' under section 338 of the Principal Act. Section 34C was inserted into the *Confiscation Act 1997* (Vic) by the *Confiscation (Amendment) Act 2003* (Vic).

New paragraph 5(db) provides that an order under subsection 36(1) of the *Confiscation Act 1997* (Vic) declaring that property has been forfeited under section 35 of that Act is an 'interstate forfeiture order' under section 338 of the Principal Act.

New paragraph 5(dc) provides that a tainted property substitution declaration under subsection 36F(1) of the *Confiscation Act 1997* (Vic) is an 'interstate forfeiture order' under section 338 of the Principal Act.

Item [9] – Paragraph 5(e)

This item amends paragraph 5(e) of the Principal Regulations to account for the repeal of the *Crimes (Confiscation Act) 1989* (Qld) by the *Criminal Proceeds Confiscation Act 2002* (Qld).

The amended paragraph accounts for the fact that forfeiture orders are now made under subsections 58(1) and 151(1) of the *Criminal Proceeds Confiscation Act 2002* (Qld).

Item [10] – After paragraph 5(e)

This item inserts new paragraph 5(ea) to declare a tainted property substitution declaration under subsection 153D(1) of the *Criminal Proceeds Confiscation Act 2002* (Qld) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act. Section 153D was inserted into the *Criminal Proceeds Confiscation Act 2002* (Qld) by the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld).

Item [11] – Paragraph 5(f)

This item amends paragraph 5(f) of the Principal Regulations to account for the repeal of the *Criminal Assets Confiscation Act 1996* (SA) and, as matters are still on foot which concern that Act, the transitional arrangements under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* (SA).

Item [12] – After paragraph 5(f)

This item inserts new paragraphs 5(fa), 5(fb) and 5(fc) in the Principal Regulations.

New paragraph 5(fa) declares a forfeiture order made under subsection 47(1) of the *Criminal Assets Confiscation Act 2005* (SA) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraph 5(fb) declares an instrument substitution declaration made under section 48 of the *Criminal Assets Confiscation Act 2005* (SA) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraph 5(fc) declares a declaration that particular property has been forfeited made under section 77 of the *Criminal Assets Confiscation Act 2005* (SA) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

Item [13] – After paragraph 5(i)

This item inserts new paragraph 5(ia) into the Principal Regulations to declare a confiscable property declaration made under subsection 28(1) of the *Criminal Property Confiscation Act 2000* (WA) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

Item [14] – Paragraphs 5(k) and (l)

This item substitutes current paragraphs 5(k) and (l) in the Principal Regulations with new paragraphs. The item also inserts new paragraphs 5(m), (n) and (o) in the Principal Regulations.

New paragraph 5(k) accounts for the repeal of the *Proceeds of Crime Act 1991* (ACT) by the *Confiscation of Criminal Assets Act 2003* (ACT) and the fact that forfeiture orders are now made under subsections 54(1), 59(2) and 67(2) of the *Confiscation of Criminal Assets Act 2003* (ACT). The new paragraph declares an order made under those sections to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraphs 5(l), (m), (n) and (o) account for the repeal of the *Crimes (Forfeiture of Proceeds) Act 1988* (NT) by the *Criminal Property Forfeiture (Consequential Amendments)*

Act 2002 (NT) and the range of orders available under the *Criminal Property Forfeiture Act* (NT).

New paragraph 5(l) declares a crime-used property substitution declaration under subsection 81(2) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraph 5(m) declares a declaration that specified property not owned by a respondent is available for forfeiture made under subsection 92(1) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraph 5(n) declares a forfeiture declaration under subsection 94(4) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

New paragraph 5(o) declares a forfeiture order under subsection 96(1) or sections 97, 99, 100 or 101 of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate forfeiture order’ under section 338 of the Principal Act.

Item [15] – After paragraph 6(a)

This item inserts new paragraphs 6(aa) and (ab) into the Principal Regulations.

New paragraph 6(aa) declares an unexplained wealth order under subsection 28A(2) of the *Criminal Assets Recovery Act 1990* (NSW) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act. Section 28A was inserted into the *Criminal Assets Recovery Act 1990* (NSW) by the *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW).

New paragraph 6(ab) declares a proceeds assessment order or unexplained wealth order under subsection 31B(4) of the *Criminal Assets Recovery Act 1990* (NSW) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act. Section 31B was inserted into the *Criminal Assets Recovery Act 1990* (NSW) by the *Criminal Assets Recovery Amendment Act 2005* (NSW).

Item [16] – Paragraph 6(e)

This item substitutes current paragraph 6(e) in the Principal Regulations with a new paragraph. The item also inserts new paragraphs 6 (ea) and (eb) in the Principal Regulations.

New paragraphs 6(e), (ea) and (eb) account for the repeal of the *Crimes (Confiscation) Act 1989* (Qld) by the *Criminal Proceeds Confiscation Act 2002* (Qld) and the range of orders available under that later Act.

New paragraph 6(e) declares a proceeds assessment order under subsection 78(1) of the *Criminal Proceeds Confiscation Act 2002* (Qld) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

New paragraph 6(ea) declares a pecuniary penalty order under subsection 184(1) of the *Criminal Proceeds Confiscation Act 2002* (Qld) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

New paragraph 6(eb) declares a special forfeiture order under subsection 202(1) of the *Criminal Proceeds Confiscation Act 2002* (Qld) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

Item [17] – Paragraph 6(f)

This item amends paragraph 6(f) of the Principal Regulations to account for the repeal of the *Criminal Assets Confiscation Act 1996* (SA) and, as matters are still on foot which concern that Act, the transitional arrangements under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* (SA).

Item [18] – After paragraph 6(f)

This item inserts new paragraphs 6(fa) and (fb) in the Principal Regulations.

New paragraph 6(fa) declares a pecuniary penalty order made under subsection 95(1) of the *Criminal Assets Confiscation Act 2005* (SA) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act and account for the repeal of the *Criminal Assets Confiscation Act 1996* (SA) by the *Criminal Assets Confiscation Act 2005* (SA).

New paragraph 6(fb) declares a literary proceeds order under subsection 111(1) of the *Criminal Assets Confiscation Act 2005* (SA) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

Item [19] – After paragraph 6(h)

This item inserts new paragraph 6(ha) into the Principal Regulations to declare a criminal benefits declaration made under subsection 17(1) of the *Criminal Property Confiscation Act 2000* (WA) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

Item [20] – Paragraphs 6(l) and (m)

This item substitutes current paragraphs 6(l) and (m) in the Principal Regulations with new paragraphs.

New paragraph 6(l) accounts for the repeal of the *Proceeds of Crime Act 1991* (ACT) by the *Confiscation of Criminal Assets Act 2003* (ACT) and the fact that a penalty order is now made under subsection 84(1) or 85(1) of the *Confiscation of Criminal Assets Act 2003* (ACT). The new paragraph declares an order made under those sections to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

New paragraphs 6(m), (n) and (o) account for the repeal of the *Crimes (Forfeiture of Proceeds) Act 1988* (NT) by the *Criminal Property Forfeiture (Consequential Amendments) Act 2002* (NT), and the range of orders available under the *Criminal Property Forfeiture Act* (NT).

New paragraph 6(m) declares an order that a person has unexplained wealth made under subsection 71(1) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

New paragraph 6(n) declares a declaration that a person has acquired a criminal benefit made under subsection 75(1) or 76(1) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

New paragraph 6(o) declares a crime-used property substitution declaration made under subsection 81(2) of the *Criminal Property Forfeiture Act* (NT) to be an ‘interstate pecuniary penalty order’ under section 338 of the Principal Act.

Item [21] – Paragraph 7(a)

This item amends paragraph 7(a) of the Principal Regulations to account for the amendments made to the *Criminal Assets Recovery Act 1990* (NSW) by the *Criminal Assets Recovery Amendment Act 2009* (NSW) and the fact that restraining orders are now made under subsection 10A(5) of the *Criminal Assets Recovery Act 1990* (NSW). The new paragraph declares an order made under that section to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [22] – After paragraph 7(a)

This item inserts new paragraphs 7(aa) and (ab) in the Principal Regulations.

New paragraph 7(aa) declares an order pending forfeiture made under subsection 22(2) of the *Confiscation of Proceeds of Crime Act 1989* (NSW) to be an ‘interstate restraining order’ under section 338 of the Principal Act.

New paragraph 7(ab) accounts for amendments made to the *Confiscation of Proceeds of Crime Act 1989* (NSW) by the *Confiscation of Proceeds of Crime Amendment Act 2005* (NSW). The new paragraph declares the confirmation of a freezing notice under subsection 42L(1) of the *Confiscation of Proceeds of Crime Act 1989* (NSW) to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [23] – After paragraph 7(d)

This item inserts new paragraph 7(da) in the Principal Regulations to declare a civil forfeiture restraining order under section 36M of the *Confiscation Act 1997* (Vic) to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [24] – Paragraph 7(e)

This item amends paragraph 7(e) of the Principal Regulations to account for the repeal of the *Crimes (Confiscation) Act 1989* (Qld) by the *Criminal Proceeds Confiscation Act 2002* (Qld) and the fact that a restraining order is now made under subsections 31(1), 122(1), (2) and (3) of the *Criminal Proceeds Confiscation Act 2002* (Qld). The amended paragraph declares an order under those subsections to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [25] – Paragraph 7(f)

This item amends paragraph 7(f) of the Principal Regulations to account for the repeal of the *Criminal Assets Confiscation Act 1996* (SA) and, as matters are still on foot which concern that Act, the transitional arrangements under item 11 of Schedule 1 to the *Criminal Assets Confiscation Act 2005* (SA).

Item [26] – After paragraph 7(f)

This item inserts new paragraph 7(fa) in the Principal Regulations to account for the repeal of the *Criminal Assets Confiscation Act 1996* (SA) by the *Criminal Assets Confiscation Act 2005* (SA) and the fact that restraining orders are now made under subsection 24(1) of the

Criminal Assets Confiscation Act 2005 (SA). The new paragraph declares an order made under that subsection to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [27] – Paragraphs 7(k) and (l)

This item substitutes current paragraphs 7(k) and (l) in the Principal Regulations with new paragraphs.

New paragraph 7(k) accounts for the repeal of the *Proceeds of Crime Act 1991* (ACT) by the *Confiscation of Criminal Assets Act 2003* (ACT) and the fact that a restraining order is now made under subsections 30(2) and 31(2) of the *Confiscation of Criminal Assets Act 2003* (ACT). The new paragraph declares an order made under those subsections to be an ‘interstate restraining order’ under section 338 of the Principal Act.

New paragraph 7(l) accounts for the repeal of the *Crimes (Forfeiture of Proceeds) Act 1988* (NT) by the *Criminal Property Forfeiture (Consequential Amendments) Act 2002* (NT) and the fact that a restraining order is now made under subsections 43(1), (2) and 44(1) of the *Criminal Property Forfeiture Act* (NT). The new paragraph declares an order made under those subsections to be an ‘interstate restraining order’ under section 338 of the Principal Act.

Item [28] – After subparagraph 9(a)(x)

This item inserts new subparagraphs 9(a)(xi) to (xlvii) in the Principal Regulations to list additional indictable offences as ‘serious offences’ for the purposes of the Act. Listing these offences as ‘serious offences’ allows a proceeds of crime authority to apply for more serious proceeds of crime orders in relation to those offences.

If a person engages in conduct which would constitute a ‘serious offence’:

- a proceeds of crime authority may, under section 18 of the Principal Act, obtain a restraining order over some or all of the person’s property
- the person may exclude property from that restraining order by proving, on the balance of probabilities, that the property is neither the proceeds nor an instrument of unlawful activity (that is, an act or omission constituting an offence against a Commonwealth, State, Territory or foreign law) under section 29 of the Principal Act
- the person may also exclude property from any forfeiture order under section 47 of the Principal Act by proving, on the balance of probabilities, that the property is neither the proceeds of unlawful activity (that is, an act or omission constituting an offence against a Commonwealth, State, Territory or foreign law) nor the instrument of any serious offence under section 73 of the Principal Act, and
- the proceeds of crime authority may, under section 47 of the Principal Act, obtain a forfeiture order in relation to the restrained property that has not been excluded under section 73 by proving, on the balance of probabilities, that the person engaged in conduct which constituted a ‘serious offence’.

Alternatively:

- a proceeds of crime authority may, under section 17 or 18 of the Principal Act, obtain a restraining order over some or all of the person’s property

- the person may exclude property from that restraining order by proving, on the balance of probabilities, that the property is neither the proceeds nor an instrument of unlawful activity (that is, an act or omission constituting an offence against a Commonwealth, State, Territory or foreign law) under section 29 of the Principal Act,
- the person may also exclude property from any forfeiture order under section 92 of the Principal Act by proving, on the balance of probabilities, that the property is neither the proceeds nor an instrument of unlawful activity (that is, an act or omission constituting an offence against a Commonwealth, State, Territory or foreign law) under section 94 of the Principal Act, and
- restrained property that has not been excluded under section 94 would, under section 92 of the Principal Act, be automatically forfeited six months after the person was convicted of the serious offence.

New subparagraphs 9(a)(xi) to (xiv) specify the following offences against the *Criminal Code 1995* (Cth) (Code) as ‘serious offences’ under section 338 of the Principal Act:

- section 271.2 (offence of trafficking in persons)
- section 271.4 (offence of trafficking in children)
- section 271.5 (offence of domestic trafficking in persons), and
- section 271.7 (offence of domestic trafficking in children).

These offences were inserted into the Code by the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). Prior to the amendments made by this Regulation, they were not covered by the definition of serious offence in section 338 of the Principal Act and were similar to other offences currently prescribed in the regulations, such as people smuggling and slavery offences.

New subparagraphs 9(a)(xv) to (xxvi) specify the following offences against the Code as ‘serious offences’ under section 338 of the Principal Act:

- section 272.8 (sexual intercourse with child outside Australia)
- section 272.9 (sexual activity (other than sexual intercourse) with child outside Australia)
- section 272.11 (persistent sexual abuse of child outside Australia)
- section 272.12 (sexual intercourse with young person outside Australia—defendant in position of trust or authority)
- section 272.13 (sexual activity (other than sexual intercourse) with young person outside Australia—defendant in position of trust or authority)
- section 272.14 (procuring child to engage in sexual activity outside Australia)
- section 272.15 (‘grooming’ child to engage in sexual activity outside Australia)
- section 272.18 (benefiting from offence against Division 272 of the *Criminal Code*)

- section 272.19 (encouraging offence against Division 272 of the *Criminal Code*)
- section 272.20 (preparing for or planning offence against Division 272 of the *Criminal Code*)
- section 273.5 (possessing, controlling, producing, distributing or obtaining child pornography material outside Australia), and
- section 273.6 (possessing, controlling, producing, distributing or obtaining child abuse material outside Australia).

These offences were inserted into the Code by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth). The *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth) repealed the child sex tourism offence regime in the *Crimes Act 1914*, moved the provisions to the Code and introduced new offences to the regime.

New subparagraphs 9(a)(xxvii) to (xxx) specify the following offences against the Code as ‘serious offences’ under section 338 of the Principal Act:

- section 390.3 (associating in support of serious organised criminal activity)
- section 390.4 (supporting a criminal organisation)
- section 390.5 (committing an offence for the benefit of, or at the direction of, a criminal organisation), and
- section 390.6 (directing activities of a criminal organisation).

These offences were introduced into the Code by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010* (Cth). These offences punish activities that could reasonably be connected with proceeds of crime related activities relevant to the confiscation of assets under the Commonwealth confiscation of proceeds of crime regime.

New subparagraphs 9(a)(xxxi) to (xxxviii), (xliii), (xliv) and (xlvii) specify the following offences against the Code as ‘serious offences’ under section 338 of the Principal Act:

- section 471.16 (using a postal or similar service for child pornography material)
- section 471.17 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service)
- section 471.19 (using a postal or similar service for child abuse material)
- section 471.20 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a postal or similar service)
- section 471.22 (aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
- section 471.24 (using a postal or similar service to procure persons under 16)
- section 471.25 (using a postal or similar service to ‘groom’ persons under 16)

- section 471.26 (using a postal or similar service to send indecent material to persons under 16)
- section 474.24A (aggravated offence—offence involving conduct on 3 or more occasions and 2 or more people)
- section 474.25A (using a carriage service for sexual activity with person under 16 years of age), and
- section 474.27A (using a carriage service to transmit indecent communication to person under 16 years of age).

These offences were inserted into the Code by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth). They are not covered by the definition of serious offence in section 338 of the Principal Act and are similar to other offences currently prescribed in the regulations, such as child sex offences.

New subparagraphs 9(a)(xxxix) to (xlii), (xlv) and (xlvi) specify the following offences against the Code as ‘serious offences’ under section 338 of the Principal Act:

- section 474.19 (using a carriage service for child pornography material)
- section 474.20 (possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service)
- section 474.22 (using a carriage service for child abuse material)
- section 474.23 (possessing, controlling, producing, supplying or obtaining child abuse material for use through a carriage service)
- section 474.26 (using a carriage service to procure persons under 16 years of age), and
- section 474.27 (using a carriage service to ‘groom’ persons under 16 years of age).

These offences were introduced into the Code by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No. 2) 2004* (Cth). They are not covered by the definition of serious offence in section 338 of the Principal Act and are similar to other offences currently prescribed in the regulations, such as child sex offences.

Item [29] – Paragraph 9(b)

This item substitutes current paragraph 9(b) of the Principal Regulations with a new paragraph.

Current paragraph 9(b) specifies a number of child sex tourism offences in the *Crimes Act 1914* (Cth) as ‘serious offences’. These offences were repealed from the *Crimes Act 1914* (Cth) and moved to the Code. The offences constituting the child sex tourism offence regime would be listed as serious offences in new subparagraphs 9(a)(xv) to (xxvi) (see item [28], above).

New paragraph 9(b) specifies the following offences against the *Australian Crime Commission Act 2002* (Cth) (ACC Act) as ‘serious offences’:

- section 30 (failure of witnesses to attend and answer questions)

- section 33 (false or misleading evidence)
- section 35 (obstructing or hindering the Australian Crime Commission or an examiner etc.)

These offences are indictable offences punishable by a maximum of 200 penalty units or 5 years imprisonment. They are not covered by the definition of serious offence in section 338 of the Principal Act and are directly related to the Australian Crime Commission's critical role in uncovering wealth derived from serious and organised crime.

As the above offences are indictable offences, a proceeds of crime authority is already able to apply for orders under the Principal Act seeking the restraint and ultimate forfeiture of property that is the proceeds or instrument of the offence.

Listing the offences in sections 30, 33 and 35 of the ACC Act as 'serious offences' allows a proceeds of crime authority to apply for a greater range of orders in relation to the property of persons who have engaged in conduct constituting an offence against those subsections. As set out in relation to item [28], above, these orders include non-conviction based orders and the ability to restrain and confiscate all a person's property that was not derived from unlawful activity. Making a greater range of orders available to a proceeds of crime authority in this way is desirable in light of the ACC's focus on disrupting and combating serious and organised crime, against which ordinary police methods of investigation are comparatively ineffective. The consequences of frustrating examination proceedings should reflect the seriousness of such behaviour.

Item [30] – Further amendments

Item 30 amends regulations 4, 5, 6, 7, 9A, 9B and 19 of the Principal Regulations.

The item makes typographical amendments to references to 'Confiscation Act 1997' in regulations 4, 5, 6 and 7 of the Principal Regulations.

The item also amends references to the 'DPP' in each of regulations 9A, 9B and 19 of the Principal Regulations to refer to 'responsible authority'. These changes account for amendments made to the Principal Act by the *Crimes Legislation Amendment Act (No. 2) 2011* (Cth). The amended regulations provide that the responsible authority will confer the necessary functions and powers under the Principal Regulations on a responsible authority.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Proceeds of Crime Amendment Regulation 2012 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Legislative Instrument

This Legislative Instrument makes a number of amendments to the *Proceeds of Crime Regulations 2002* (Cth) (the Regulations).

Firstly, this Legislative Instrument updates references in the Regulations to State and Territory proceeds of crime legislation. Prescribing these matters allows orders and declarations made under State and Territory proceeds of crime legislation to be registered and enforced in non-governing Territories and for a court to take those orders and declarations into account in making orders under the *Proceeds of Crime Act 2002* (Cth) (the Act).

Secondly, pursuant to changes made by the *Crimes Legislation Amendment Act (No. 2) 2012* (Cth), this Legislative Instrument changes references in the Regulations to the Director of Public Prosecutions (DPP) to ‘proceeds of crime authority’. These amendments will enable both the DPP and the Commissioner of the Australian Federal Police to conduct proceeds of crime proceedings.

Finally, this Legislative Instrument updates the list of offences that are considered ‘serious offences’ for the purposes of the Act. By prescribing an offence as a ‘serious offence’ for the purposes of the Act, a proceeds of crime authority may apply for a greater range of proceeds of crime orders in relation to that offence, a consequence of which would include the restraint and confiscation of all property held by the person and that is neither the proceeds nor an instrument of unlawful activity. Forfeiture may occur automatically following conviction for a serious offence or by a proceeds of crime authority proving, on the balance of probabilities, that the person engaged in conduct constituting a serious offence. In addition, the Act places additional restrictions on the property that can be excluded from restraining or forfeiture orders relating to serious offences. This increases the potential for criminal profits to be confiscated.

Section 338 of the Act and the Regulations currently prescribe a number of indictable offences under the *Crimes Act 1914* and the *Criminal Code Act 1995* as ‘serious offences’. Except for the addition of two people smuggling offences in 2010, the list of serious offences in the Regulations has not been substantially updated since 2003. During this time, there have been a number of changes to Commonwealth offences, including the creation of new offences and the movement of child sex tourism offences from the Crimes Act to the Criminal Code under the *Crimes Legislation Amendment (Sexual Offences Against Children)*

Act 2010 (Cth). The updated list of serious offences reflects recent changes to Commonwealth criminal law since 2003. This Legislative Instrument also lists as ‘serious offences’ three indictable offences contained in the *Australian Crime Commission Act 2002* (ACC Act) of failing to attend or answer questions at an ACC examination (section 30), providing false or misleading evidence to the ACC (section 33), and obstructing or hindering an ACC examiner (section 35). The ACC offences are designed to prevent people from frustrating ACC examinations and protecting large amounts of criminal wealth from confiscation action. These offences have high maximum penalties (up to five years imprisonment) that are comparable to those that apply to other ‘serious offences’ listed.

The offences listed by this Legislative Instrument are indictable offences and serious criminal consequences attach to their commission. They are either similar to the offences currently listed in the Regulations pursuant to the definition of ‘serious offence’ in section 338 of the Act, or serve to punish activities connected with organised crime.

Human rights implications

This Legislative Instrument expands the number of offences to which a wider range of proceeds of crime orders can attach, including civil forfeiture and automatic forfeiture on conviction.

Prohibition against retrospective punishment

Article 15 of the International Covenant on Civil and Political Rights (ICCPR) prohibits the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed.

The Proceeds of Crime Act applies to offences and convictions regardless of whether they occurred before or after the commencement of the Act. As a result, any changes to the Commonwealth’s proceeds of crime regime will apply to people who have committed offences at any time in the past. Accordingly, this Legislative Instrument will expand the range of Proceeds of Crime Act orders to which people who have committed serious offences in the past may be exposed.

Human rights jurisprudence views asset confiscation as a penalty capable of engaging the prohibition on retrospective criminal laws. However, orders under the Proceeds of Crime Act cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to criminal sanctions. Proceeds of crime proceedings are civil proceedings only.

Right to a fair hearing

The guarantees in Article 14 of the ICCPR include equality of arms, and the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

This Legislative Instrument does not affect the civil court procedures applicable to Proceeds of Crime Act proceedings. Proceedings under the Act are heard by Commonwealth, State and Territory courts, and the procedures afford an affected person an adequate opportunity to present his or her case, such that the fair hearing right is not limited.

Right to privacy and protection of families and children

Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. This includes the right to protection from interferences with a person's territory, property and personal information. Accordingly, lawful interferences with a person's privacy will be permitted provided they are not arbitrary. The ICCPR and the Convention on the Rights of the Child (CRC) also set out a number of rights for the protection of families and children.

The Proceeds of Crime Act contains provisions which allow a person's property, potentially including his or her house, to be confiscated or forfeited if a court finds that the requirements of the Act are satisfied. This could affect a person's family or dependents in some circumstances.

A person who committed an offence which was previously not prescribed as a serious offence, but which has been prescribed as one by this Legislative Instrument, would still potentially have been exposed to confiscation or forfeiture orders affecting his or her property. This legislative instrument simply expands the range of proceeds of crime orders that are able to be applied.

Additionally, under the Proceeds of Crime Act, courts have a general discretion to allow the following to be met out of property covered by a restraining order: the reasonable living expenses of any of the dependants of a person whose property is the subject of a restraining order; the reasonable living expenses of the person whose property is restrained; the reasonable business expenses of that person; and a specified debt incurred in good faith by that person.

When making forfeiture orders (not including automatic forfeiture), courts also have a general discretion to order that a specified amount be paid to a person's dependants, if satisfied that a forfeiture order would cause hardship to a person's dependants, that the specified amount would relieve that hardship, and that, if the dependants are more than 18 years of age, they had no knowledge of the person's conduct that is the subject of the forfeiture order.

To the extent that this Legislative Instrument may affect relevant rights, such limitation is aimed at disrupting and combating serious and organised crime. The Legislative Instrument does this by increasing the circumstances in which those persons may be deprived of the proceeds, instruments and benefits derived from unlawful activity.

Any limitations are necessary to achieve, and are reasonable in achieving, the aim of disrupting criminal activity and combating serious and organised crime.

Conclusion

This Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Jason Clare MP
Minister for Justice