



COMMENTS

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RECENT LEGISLATIVE DEVELOPMENTS IN THE CRIMINAL LAW IN SOUTH AUSTRALIA

A. Crimes (Confiscation of Profits) Act Amendment Act, No 10 of 1990 (SA)

The South Australian version of criminal assets confiscation legislation¹ is more simply drafted and less complex than the Commonwealth model, more commonly adopted in other States.² It therefore has the virtue of being a great deal more intelligible,³ and for this reason, it may ultimately turn out to be more flexible than its more complex counterparts. Like similarly targetted Commonwealth and State legislation, it seems that the original South Australian Act was not tough enough, despite years of parliamentary consideration and lack of

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1 *Crimes (Confiscation of Profits) Act* 1986 (SA).

2 See, for example, Fisse, "The Rise of Money-Laundering Offences and the Fall of Principle" (1989) 13 *Crim LJ* 5; Fisse, "Confiscation of Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 *Crim LJ* 368.

3 Cf, for example, *R v Bolger* (1989) 16 NSWLR 115, *R v Fagher* (1989) 16 NSWLR 67 and *R v Lake* (1989) 44 A Crim R 63. Why must Commonwealth Parliamentary Counsel insist on drafting criminal statutes like the more obscure provisions of tax legislation? The recent legislation on mentally impaired Commonwealth offenders is equally a drafting nightmare - see *The Australian*, 9 August 1990 in which Hunt J is reported to have described the new provisions, cited at note 30 below, as "unnecessarily complicated and opaque legislation" which needed "urgent reconsideration".

empirical evidence. The national result has been annual amendments to the legislation in many jurisdictions.⁴ In this instance, the South Australian Act was amended very substantially indeed - many of the principal sections were rewritten. The major provisions of the amending legislation were summarised in the second reading speech as follows,⁵

- The definition of "property" is extended to include any interest in any real or personal property. This will enable a specific interest held by a person liable to forfeit property (for example, a leasehold interest) to be forfeited, and brings the South Australian definition in line with that incorporated in interstate Acts;

- Where the interest of a person liable to forfeit property cannot be severed or realised separately from other interests (for example, a joint tenancy) in the same property, provision is made for the whole property to be forfeited and the third party interests to be paid out. At present it is not possible to forfeit property in which an innocent third party has any interest. This has meant that in a number of instances the Crown has not tried to obtain forfeiture orders because the existence of the other interest made forfeiture impossible. ...

- The definition of "proceeds" of an offence has been expanded to include property derived directly or indirectly from the commission of the offence which is converted into another form in one or more transactions. In this way the intention of the Act cannot be subverted by a person who undertakes a series of transactions to hide the proceeds of crime. Property converted in this way will remain liable to forfeiture.

- In addition, a person who receives property or proceeds of crime knowing of its origin or in circumstances that should raise a reasonable suspicion as to its origin will also be liable to forfeit that property. ...

- A new provision is included in the Bill to ensure that a person who commits or is party to the commission of an offence and who obtains any benefit through the publication or prospective

4 At Commonwealth level, for example, as soon as we had the *Proceeds of Crime Act* 1987 (Cth), we also had amendments in the *Crimes Legislation Amendment Act* No 120 of 1987 (Cth), and the *Law and Justice Legislation Amendment Act* No 120 of 1988 (Cth); and now there is further amendment planned in the *Crimes Legislation Amendment Bill* 1990.

5 SA, Parl, *Debates* (1990) Vol 1 at 50-51.

publication of material concerning his or her exploits or opinions or the circumstances of the offence or in any other way exploits the notoriety of the offence will be liable to forfeit that benefit or its equivalent value.

- These provisions should serve as a useful deterrent to those persons who seek to sensationalise criminal activity...⁶

- The Bill provides that a person who commits or is a party to a serious drug offence is liable to forfeit all property except property that the court is satisfied (on evidence from that person) was not the proceeds of offences against the law of this State or any other law. The effect of this provision is that the onus will be on the person to prove that items of property were legitimately obtained, not on the Crown to prove that property was the proceeds of crime. The Government considers that such a provision will hit hard at serious drug traffickers and will provide a significant weapon for attacking the profit motive of such crime. ...

- The Bill makes provision for the appointment of a person to administer forfeited and restrained property. The Deputy Crown Prosecutor advised that she considered it appropriate for an officer to be appointed both to manage property which has been restrained and to supervise the sale and distribution of proceeds of forfeited estates. It is her view that such an officer should be located in the Attorney-General's Department and should work closely with prosecutors and solicitors who handle proceedings under the Act. The Administrator's salary will be paid from the proceeds of confiscated assets and it is hoped that such an appointment will facilitate the further and better utilisation of the Act in the future...

- The present Act contains no information gathering powers other than provisions relating to search warrants. The Acts in operation elsewhere contain extensive information gathering powers. The Bill includes wide ranging and effective powers to allow enforcement officers and investigators to gain access to documents relevant to following the money trail and the transferring of tainted property. The Supreme Court will be

⁶ As a matter of straightforward personal opinion, I thoroughly approve of this measure. If we are going to have draconian and excessive legislation in this area, why not extend the provision to cover anyone charged with a criminal offence or who receives a pardon or indemnity in relation to a criminal offence? The idea of the sensational media in effect subsidizing the fund for the compensation of the victims of crime appeals immensely.

able to order the production of documents relevant to identifying, tracing, locating or qualifying forfeitable property; order the seizure of such documents; or order that a person appear to answer questions relevant to identifying, tracing or locating such property.

- A further significant power is provided by the introduction of monitoring orders which will be issued by the Supreme Court and will require a financial institution to report on transactions affecting an account or accounts. These orders should significantly improve the chances of tracing the proceeds of crime...

- Full recognition is given to forfeiture and restraining orders made by the courts in other States under corresponding laws.

Aside from the comment made in a note to the text, there is little that may usefully be said at this point on the amendments. While it is conceded on all hands that legislation aimed at depriving convicted criminals of the profits of crime is necessary and appropriate, the academic, judicial, and practitioner cries of horror at the way in which governments have chosen to achieve this end have fallen on stony ground indeed. In debate, the Opposition proposed amendments as follows,

- (a) The first amendment would have replaced the Administrator with the Sheriff, on the ground that an Administrator in the Attorney-General's Department might well find him or herself opposed in court by the Crown Prosecutor, in effect creating a situation in which the Crown is fighting the Crown, whereas the Sheriff, as an officer of the court, would not be placed in a position of such a "conflict of interest".⁷ This amendment was lost because the Australian Democrats opposed it on the obscure ground that they saw its logic but were persuaded by the Attorney-General's conviction that he had the right formula;
- (b) The second amendment related to the forfeiture of profits from publication of an offender's memoirs or notoriety, and would have limited forfeiture to commercial exploitation within ten years of the commission of the offence. Further, the amendment sought to give the court an explicit discretion to apportion the subsequent profit forfeited in relation to the degree to which the publication dealt with

7 SA, Parl, *Debates* (1990) Vol 1 at 456-457.

the commission of the offence as opposed to other (innocent) matters. This amendment was defeated.⁸

- (c) The third amendment sought to give the court a discretion so that, in addition to its power to order the forfeiture and hence sale of property in which an offender has an interest but also in which an innocent third party has an interest, the court would have the power to vest the ownership of the property in the innocent third party subject to a statutory charge to the amount of the interest of the offender, payable when the property is sold. This amendment was also defeated.⁹
- (d) The fourth amendment provided that an allegation that a person was involved in the commission of an offence must, if that person is not convicted, be proven beyond reasonable doubt. That amendment was accepted.¹⁰
- (e) The fifth amendment sought to give the forfeiting court a discretion to order that a specified amount be paid out of the forfeited property toward meeting the costs of legal representation of the offender. This amendment was defeated, the Democrats again stating that they thought it a reasonable proposition but "this is the Government's Bill".¹¹
- (f) The sixth amendment originated from consultation held by the Opposition spokesman with the Australian Finance Conference. It dealt with the statutory obligation placed on financial institutions to provide information about transactions. The amendment sought to require the court to specify the account, the person, the kind of information required and the manner in which the information is required to be given. The amendment also sought to create a specific offence of disclosure of that order or its details except where necessary for the purpose of compliance with the order. That amendment was accepted.¹²

B. The Statutes Amendment (Victims of Crime) Act, No 27 of 1990

This Act amended both the *Criminal Law (Sentencing) Act 1988* (SA) and the *Criminal Injuries Compensation Act 1978* (SA). First, s53 of the former Act empowers a court to make an order requiring an offender to pay a sum in

8 At 457-458.

9 At 459-460.

10 At 460.

11 At 461.

12 At 461-462.

compensation for injury loss or damage resulting from the commission of the offence to an amount not exceeding \$20,000. The Bill sought to amend the section so that, if a court does not make an order for compensation, it is required to give reasons for taking that course. Secondly, the Bill sought to amend the latter legislation to (a) raise the maximum amount payable by way of compensation to a victim of crime from \$20,000 to \$50,000; (b) make provision for the payment of funeral expenses of any person who dies as a result of the commission of a criminal offence to a maximum of \$3,000; and (c) to empower the Attorney-General to make *ex gratia* payments to victims of crime where an offence has not been or cannot be established. This last amendment regularised a practice that had taken place in the past and also ensured that payments were chargeable to the Criminal Injuries Compensation Fund rather than general revenue.¹³ The Bill was supported by the Opposition and passed without significant amendment.

C. The Summary Offences Act Amendment Act, No 38 of 1990 (SA)

The objective of this Bill was three-fold. First, it was designed to legalise the police practice of the establishment of road blocks where, for example, police had reason to believe that a prison escapee was being transported in a motor vehicle. Secondly, the Bill sought to provide police with powers to, in effect, seal off an area considered to be dangerous to the public. Thirdly, the Bill sought to give police the power to enter premises in which police had reason to believe that someone had died or was in need of assistance. It is convenient to consider the legislative history of each of these initiatives separately.¹⁴

(i) Road Blocks¹⁵

The Bill sought to empower a police officer of or above the rank of Inspector to establish a road block where that officer believes on reasonable grounds that the establishment of that road block will significantly improve the prospects of apprehending a person who is suspected of having escaped

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- 13 The second reading speech is to be found in SA, Parl, *Debates* (1990) Vol 2 at 906-907. Both Acts were also amended to provide that no compensation was to be payable where the offence related to a breach of statutory duty owed by an employer to an employee where the injury is compensable under the workers' compensation legislation.
 - 14 The initial second reading speech is to be found in SA, Parl, *Debates* (1990) Vol 1 at 536-538.
 - 15 It seems clear that police in South Australia were in fact using road blocks despite the fact that they had (arguably at least) no statutory powers to do so. The Attorney-General estimated that there had been about 100 such road block/dangerous area incidents the 1989 fiscal year. SA, Parl, *Debates* (1990) Vol 2 at 1248.

lawful custody or having committed an offence attracting a maximum penalty of seven years imprisonment or more. The authorisation would be subject to an initial maximum of 12 hours with an option to renew the period for another maximum of twelve hours. A member of the police force at the road block would then be empowered to stop a vehicle, search the vehicle, require any person in the vehicle to give his or her full name and address and take possession of any object found during the search which the police officer suspects on reasonable grounds constitutes evidence of the offence committed by the person whose apprehension warranted the road block. In addition, offences were created in relation to non-co-operation, and a statutory requirement was imposed upon the Police Commissioner to report all details of such authorisations annually and upon the Minister to table that report in Parliament.

In the House of Assembly, the Opposition sought to amend the Bill¹⁶ so that (a) any extension of the period of a road block must be authorised by a justice, this particular amendment was at the instance of the Council of Civil Liberties; (b) the police would be empowered to seize *any* evidence of a criminal offence committed by *anyone*; and (c) the Police Commissioner be required to report to the Minister and the Minister to the Parliament within seven days. All amendments were defeated in the House of Assembly.

In the Legislative Council,¹⁷ amendment (a) was supported by the Democrats and hence carried; amendment (b) was conceded by the Government and carried; and, since it was quite clear that the Bill would now go to a conference of both Houses, amendment (c) was carried. In addition, the Government amended the search power so that the power to *search* was limited to a search for the person of the individual whose apprehension was sought. It should be noted that the power to search was being limited as the power to seize was being widened. This has the potential to prove interesting.

After the conference of both Houses,¹⁸ the compromise reached was that (a) the power to extend the road block for an additional period of up to 12 hours was given to a magistrate; (b) the wider power of *seizure* was conceded by the Government; and (c) the Commissioner was required to report to the Minister every three months. The Government amendment in relation to *search* stood.

16 SA, Parl, *Debates* (1990) Vol 2 at 797ff.

17 At 1250ff.

18 At 1461ff.

(ii) Dangerous Areas

These provisions in the Bill sought to clarify and detail the powers of police in relation to areas in which conditions are dangerous for a short period, for example, where there is severe flooding, or a bomb threat, or a disaster has occurred or is expected to occur. The Bill provided that a police officer of or above the rank of Inspector, who believes on reasonable grounds that an area is unsafe to the general public, can declare that area dangerous effective for a maximum of two days. That declaration must be publicly broadcast as soon as practicable in the most effective way possible. When a declaration is in force, a member of the police force is empowered to warn a member of the public against entering the area and may stop a vehicle for the purpose of issuing such a warning. Failure to comply with a warning or an order to stop to be warned is made a criminal offence and, in addition, any person who ignores the warning may be liable to the Crown for the costs of finding and/or rescue.

In the House of Assembly, the Opposition sought to amend the Bill in a variety of ways but, although the Government desired to consider the amendments, they were defeated on the promise that they would be considered in the Legislative Council. At Legislative Council level, an amendment to restrict the period of time involved into two periods of 24 hours was defeated; then a succession of amendments were debated half-heartedly in the certain knowledge that the Bill was destined for a conference.¹⁹

After the conference,²⁰ it was agreed that the liability of a person, who failed to heed a warning, to repay any costs of finding and/or rescue, would be conditional on his or her being found guilty of an offence of failing to heed a warning or failing to stop a vehicle to be warned when asked to do so; it was also agreed that the offence of failing to heed a warning would not apply to *either* a person if it is reasonably necessary for that person to enter the area to protect life or property *or* a representative of the news media *unless* the police officer believes on reasonable grounds that the entry of the representative of the media into that locality is dangerous to the life or bodily safety of *another* person and so warns that representative. It was also agreed that the Commissioner must report on the details of such declarations to the Minister every three months.

(iii) Special Powers of Entry

The Bill sought to detail and clarify police powers to enter into premises in cases of suspected medical emergencies or deaths. There were two parts to

19 At 1253ff.

20 At 1461ff.

this portion of the Bill. The first empowers a police officer of or above the rank of Inspector who has reasonable grounds to suspect that an occupant of premises has died or is in need of medical or other aid, to authorise a member of the police force to enter the premises and take such action as is required in the circumstances. That authorisation should be in writing unless the matter is considered to be urgent. The second part provides that where a person has died and the Commissioner of Police considers it to be necessary, the Commissioner may issue a warrant to a member of the police force to enter premises to search for and take custody of any evidence of the identity of the deceased or his or her relatives and any property of the deceased requiring safe custody. There were also provisions permitting the use of reasonable force in both cases and a requirement of record keeping.

In the Legislative Council, the Opposition moved to have the warrant issued by a justice rather than the Commissioner of Police. The Government opposed the amendment and the Democrats supported the Government to defeat it.²¹ However, an amendment requiring reporting of such authorisations by the Commissioner to the Minister and the Minister to the Parliament within seven days was carried despite Government opposition. After the conference, that requirement was enlarged to an annual report.

21 At 1255ff. The reader should be aware that South Australia retains general search warrants issued by the Commissioner of Police (*Summary Offences Act 1978 (SA) s67*) and that these general warrants can be used whether or not legislation provides for specific search warrants (*R v Romeo (1982) 34 SASR 243*) so the amendment would have made no difference at all in reality.