

EXPLANATORY MEMORANDUM

CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

Part 1 - Preliminary

This Part contains the title of the Act, the commencement provisions, definitions of the terms used in the Act and provisions relating to the relationship of the Act to other written laws.

Clause 1. Short Title:- Cites the short title of the Act - *Criminal and Found Property Disposal Act 2005*.

Clause 2. Commencement:- The Act is to come into operation on a day, or different days, to be fixed by proclamation published in the Government Gazette. The phased proclamation of the Act will allow subsidiary legislation to be drafted and to enable the necessary infrastructure to be established.

Clause 3. Interpretation:- contains definitions of terms and expressions used in the Bill.

The term "appropriate court" is defined by reference to the courts' jurisdictional limits with respect to the value of property. It is intended that, if an application to a court relates to a number of items, the jurisdiction of the court depends on the value of the most valuable item rather than the aggregate value of some or all of the items.

The term "chief officer of a prescribed agency" means in relation to the Western Australia Police, the Commissioner of Police. In the case of a government agency, the chief executive officer or, if the agency is a body that does not have a chief officer, an officer of the body prescribed in the regulations is to be the chief officer.

The term "criminal investigation" refers to an investigation into "an offence", thus including simple and indictable offences.

The term "partly prohibited property" is defined to mean property the possession of which by a member of the public is prohibited except in prescribed circumstances. The circumstances would include the holding of a relevant licence or permit.

The term "prescribed agency" is defined to mean the Police Force, the department of the Public Service that assists in the administration of the *Police Act 1892*, and any other government that is prescribed for the purposes of the Act.

The term "seized property" is defined to mean property seized in the course of a criminal investigation, but not samples obtained in the course of forensic procedures under the *Criminal Investigation Act 2005* or things used to obtain identifying particulars under the *Criminal Investigation (Identifying People) Act 2002*.

The term "unregulated property" is defined by reference to wholly prohibited property and partly prohibited property to mean property the possession of which is not in any way prohibited by a written law.

The term "wholly prohibited property" is defined to mean property the possession of which by a member of the public is totally prohibited under a written law. That is, a member of the public is unable under a written law to come within an exception to the prohibition by way, for example, of a licence or permit.

Clause 4. This Act's relationship with other Acts:- provides that this Act will not affect any other written law that provides for the disposal of forfeited property or property that has been seized or found. The *Firearms Act 1973*, the *Misuse of Drugs Act 1981* and the *Weapons Act 1999* are therefore not affected.

Part 2 - General

This Part controls a prescribed agency's authority to retain seized property, creates an offence for dealing unlawfully with seized property and allows for a person to make an application to a court to have seized property released. The court's powers on an application, including the imposition of conditions on dealing with property, are provided.

Clause 5. Chief officer deemed to be in possession of certain property:- The chief officer is taken to be in possession of found, seized or forfeited property that is in possession of the agency or an employee or officer of the agency.

Clause 6. Chief officer's functions in relation to property:- The chief officer has control and management of property and must take reasonable steps to ensure the property is kept safely until the officer disposes of it under the Act. The chief officer is allowed to enter into contracts with others to store, manage and maintain property on the officer's behalf.

Part 3 – Seized property

This Part controls a prescribed agency's authority to retain seized property, creates an offence for dealing unlawfully with seized property and allows for a person to make an application to a court to have seized property released. The court's powers on an application, including the imposition of conditions on dealing with property, are provided.

Division 1 – General

This division sets out the chief officer's authority to retain possession of seized property and creates an offence of dealing with seized property unlawfully.

Clause 7. Interpretation:- intentionally defines the term “deal with” broadly for the purpose of this part .

Clause 8. Application of this Part:- specifies that this Part applies to seized property in possession of a chief officer of a prescribed agency.

Clause 9. Authority to retain seized property:- provides that the chief officer may retain seized property subject to any court orders that may be made in accordance with Clause 13.

The clause sets out the circumstances when the authority to retain seized property ceases. When that occurs, the property is taken to be held property which the chief officer must release to the person entitled to it or dispose of under Part 5.

Clause 10. Unauthorised dealing with seized property prohibited:- creates an offence of dealing with seized property while knowing it to be seized unless authorised by an order of a court under clause 13 or a written authorisation of the chief officer. That offence does not apply to the chief officer or an employee or officer acting in the course of duty. Any dealing with seized property contrary to this section will have no effect on rights to the property.

Division 2 – Courts orders as to seized property

This division deals with how and by whom an application is to be made to an appropriate court for an order for the release of seized property. It also sets out a court's powers when dealing with such applications.

Clause 11. Application for release of or permission to deal with seized property:- permits an aggrieved person to apply for an order from an appropriate court for the chief officer to release seized property or to allow the applicant to deal with the property.

Clause 12. Dealing with an application made under s. 11:- entitles the chief officer and the aggrieved person to be heard in any proceeding commenced under section 11. However, the chief officer may apply to the court for an order that information given to the court not be disclosed to the aggrieved person where such disclosure might prejudice the safety of any person or the investigation of an offence related to the property. The court may hear and decide the chief officer's submission in private and in the absence of the aggrieved person.

Clause 13. Court's powers on an application made under s. 11:- The court may make any order it thinks fit, including an order -

- requiring that the application be served on interested parties;
- that could be made under clause 27 in relation to a disputed claim for property;
- imposing conditions on a person allowed to deal with the seized property. A person contravening such a condition commits an offence carrying a penalty of 12 months imprisonment or a \$12 000 fine;
- requiring security for payment to the State of the value of the property;
- as to costs of the application.

The court is prohibited from ordering the release of the seized property to a person unless it is satisfied:

- the person is entitled to the property;
- it is lawful for the person to possess it; and
- the chief officer's authority to retain the property has ceased.

Part 4 – Found property

This Part provides how prescribed agencies must deal with found property.

Clause 14. Finder of property, entitlement of:- provides a person who hands in found property to a prescribed agency with an entitlement to a receipt and to be advised of that entitlement.

Clause 15. Found property that is wholly or partly prohibited property:- provides that where the property is wholly or partly prohibited and comes into the possession of a government agency, or an employee or officer of a Government agency, the property may be seized and, where the agency or its employee is not entitled by a written law to seize the property, the property is to be handed to police. Once police come into possession of that property it is to be dealt with as seized property.

Clause 16. Chief officer's functions in relation to found property:- provides that the chief officer who is in possession of found property or held property must dispose of it under Part 5 of the Act. If the property is not released to a person entitled to it, the chief officer must not otherwise dispose of it until one month has elapsed.

Part 5 – Disposing of held property

This Part deals with the disposal by a prescribed agency of the different types of property.

Clause 17. Perishable or dangerous property, disposal of:- Where the chief officer comes into possession of perishable or dangerous property that is not wholly prohibited property and it is likely that the property would perish before it could be disposed of in accordance with this Part, or it would be dangerous to keep it until then, the chief officer may sell the property or, if that is not practicable, release it to a charity or an educational institution, or destroy it.

Clause 18. Unregulated property, disposal of:- Provides for the disposal of unregulated property.

Where the chief officer has property that is unregulated property, the officer must release the property to the entitled person where the identity and whereabouts of the person are known.

Where the identity of the entitled person is known but not the whereabouts

- if the property is money, the officer must deal with under the *Unclaimed Money Act 1990*;
- if the property is not money and its value is equal to or greater than the prescribed amount, the officer must sell it and deal with the net proceeds under the *Unclaimed Money Act 1990*; or
- if the property is not money and the value is less than the prescribed amount, the officer may as the officer sees fit:
 - sell it and credit net proceeds to the Consolidated Fund;
 - give to a charitable or educational institution;
 - retain it;
 - give it to a government agency; or
 - destroy it.

Where neither the identity nor the whereabouts of an entitled person are known

- if the property is money, the officer must credit it to the Consolidated Fund;
- the property is not money, the officer may as the officer sees fit:
 - sell it and credit the proceeds to the Consolidated Fund;
 - give the property to a charity or educational institution;
 - retain it for the use of the agency;
 - give it to another agency; or
 - destroy it.

Where the officer must release property to a person, the officer must notify the person in writing that the person may collect the property within one month or a longer specified time. If the person does not collect the property in the time specified in the notice, the officer may dispose of it.

Clause 19. Partly prohibited property, disposal of:- provides for the disposal of partly prohibited property.

If the identity and whereabouts of the person are known and it is lawful for the person to possess the property, the officer must release the property to the entitled person .

If the identity and whereabouts of the entitled person are known, but it is not lawful for that person to possess the property -

- if the person so requests and pays the chief officer's cost to modify the property to make it lawful to possess, modify it and release it to the person; or
- if the person requests the property to be released to another person who may lawfully possess it, release it to that other person.

If the identity of the entitled person is known but not the whereabouts:

- if the value of the property is equal to or greater than the prescribed amount, the officer must sell it and deal with net proceeds under the *Unclaimed Money Act 1990*; or
- if the value of the property is less than the prescribed amount, the officer must-

- sell the property and credit the proceeds to the Consolidated Fund;
- retain the property for training or educational purposes;
- give the property to another government agency for training or educational purposes; or
- destroy the property.

If neither the identity nor the whereabouts of the entitled person are known, the officer may

- sell the property and credit the proceeds to the Consolidated Fund;
- retain the property for training or educational purposes;
- give it to another government agency for training or educational purposes; or
- destroy it.

Where the officer must release property to a person, the officer must notify the person in writing that the person may collect the property within one month or a longer specified time. If the person does not collect the property in the time specified in the notice, the officer may dispose of it.

Clause 20. Wholly prohibited property, disposal of:- Where the property is wholly prohibited property the chief officer must deal with as if it were forfeited property.

Part 6 – Determining who is entitled to property

This part sets out the procedure to determine who is entitled to the property, to deal with disputed claims; and a court's powers in relation to disputed claims.

Clause 21. When the identity or whereabouts of a person entitled are known:- The chief officer knows the identity of a person entitled to the property if –

- the officer is satisfied on the balance of probabilities that the identity of the person is known to the officer and there is no notice of any other person entitled to the property;
- the officer admits a claim to the property under clause 25(1)(a); or
- a court orders that a claim by the person be admitted.

Clause 22. Measures to ascertain who is entitled:- provides that the chief officer must take reasonable measures to ascertain the identity or whereabouts of the entitled person before disposing of the property.

Clause 23. Finder of property may be taken to be owner in some cases:- The finder may be taken to be the owner of the property if –

- one month has elapsed since the property came into the possession of the chief officer;
- the finder's claim is the only claim for the property; and
- the chief officer does not know the identity or whereabouts of the person entitled to the property.

Clause 24. Claim to property, making of:- A person making a claim can be either the person entitled to the property or the finder.

A notice of claim cannot be made by-

- a member of the police force; or
- an employee or officer of a government agency if the officer found the property in the course of duty.

Clause 25. Dealing with claims to property:- Where the chief officer receives a claim, the officer

- may admit the claim if satisfied on the balance of probabilities that the claimant is entitled to the property; or reject the claim; and
- must give notice of the decision to the claimant as soon as practicable.

Where the chief officer receives 2 or more claims for the same property, the officer must advise each claimant of each other claim and, where the claims are rejected, retain the property until a court has ordered its release.

Clause 26. Disputed claims etc., application to court may be made:- Where a claim is rejected, the claimant may apply to the appropriate court for an order to have the property released to him. This application must be made within 21 days after a notice has been sent to the claimant advising him that the claim had been rejected.

If there are competing claims or the chief officer wants directions, the officer may apply to the appropriate court for an order under clause 27.

Clause 27. Court's powers on disputed claims:- A court hearing an application pursuant to section 26 the court may-

- admit the claim
- reject the claim, and order the claimant or any other claimant be barred from claiming the property;
- give directions as it thinks fit to the claim; and
- make orders as to payment relating
 - to the holding expenses for the property;
 - to the cost of the application. Where the application is brought by a chief officer in relation to competing claims, the officer is entitled to an order for costs.

Part 7 – Disposing of forfeited property

This part deals with the disposal of forfeited property.

Clause 28. Disposal to be delayed until the outcome of any appeal:- provides that a person must not dispose of forfeited property before the time for lodging an appeal relating to the forfeiture order has expired, or if an appeal has been lodged, before any appeal has been determined.

Clause 29. How forfeited property must be disposed of:- If the forfeited property is money the chief officer must credit it to the Consolidated Fund.

If the property is wholly or partly prohibited property the chief officer may, as the officer thinks fit-

- modify or treat the property to make it lawful and –
 - give it to a charitable or educational body or a government agency; or
 - sell it and credit the net proceeds to the Consolidated Fund;
- retain the property for training or educational purposes;
- give the property to another government agency for training or educational purposes; or
- destroy it.

Where the property is not money nor wholly or partly prohibited property, the chief officer may-

- retain it for the use of the agency;
- give it to a charitable or educational body or a government agency;
- sell it and credit the net proceeds to the Consolidated Fund; or
- destroy it.

Part 8 – Miscellaneous

This part deals delegation, how property is to be valued and sold, the effect on title of property, protection from liability, and regulations.

Clause 30. Delegation by chief officers:- The chief officer may delegate any function under the Act other than the power of delegation. Any delegation given must be in writing.

Clause 31. Valuation of property:- Where the chief officer has to determine the value of property, the officer must take reasonable measures to determine the value.

In order to determine if it is the appropriate court, a court may determine the value of the property.

Clause 32. Sale of property:- Property must be sold by public auction or public tender unless the property value is less than the amount prescribed in the regulations or the property is of a kind prescribed.

The chief officer may enter contracts to sell property on terms the officer thinks fit and may sign any documents needed to transfer property.

Clause 33. Title to property disposed of under this Act:- Where the chief officer releases or sells any property in good faith, the person who takes the property in good faith receives good title against every other person, including the true owner.

Where the property is released or sold in good faith, no person may recover from the State any compensation in respect to any interest the person may have had before the property was released or sold.

Clause 34. Officials protected from personal liability:- This provision provides that an action in tort does not lie against an official or the State for anything the official has done or omitted to do in the performance or purported performance of a function under the Act in good faith. It is intended that this clause will protect the State from any direct or vicarious tortious liability for the acts or omissions of officials.

Clause 35. Regulations:- This clause allows the Governor to make regulations to give effect to the purposes of the Act.