

The Senate

Legal and Constitutional Affairs
Legislation Committee

Crimes Legislation Amendment (Organised
Crime and Other Measures) Bill 2012
[Provisions]

March 2013

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RECOMMENDATION

Recommendation 1

2.47 The committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION AND BACKGROUND

Referral of the inquiry

1.1 On 28 November 2012, the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (Bill) was introduced into the House of Representatives by the Minister for Justice, the Hon Jason Clare MP.¹ On 29 November 2012, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 13 March 2013.²

Purpose of the Bill

1.2 The Bill consists of two schedules. Schedule 1 of the Bill seeks to amend the *Proceeds of Crime Act 2002* (POC Act) to:

- ensure that evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- allow the time limit for serving notice of a preliminary unexplained wealth order to be extended by a court in certain circumstances;
- harmonise provisions relating to the payment of legal expenses for unexplained wealth cases;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order;
- remove a court's discretion to make unexplained wealth restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are satisfied; and
- expand the Parliamentary Joint Committee on Law Enforcement's oversight of unexplained wealth investigations and litigation.

1.3 The Explanatory Memorandum to the Bill (EM) states that the amendments in Schedule 1 are designed to strengthen the Commonwealth's unexplained wealth regime and 'ensure that the Government has strong laws to target the substantial profits made by serious and organised crime'.³

1 *House of Representatives Votes and Proceedings*, 28 November 2012, p. 2002.

2 *Journals of the Senate*, No. 129–29 November 2012, p. 3480.

3 Explanatory Memorandum (EM), p. 2.

1.4 Schedule 2 of the Bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) to:

- provide that cross-border firearms trafficking offences cover firearm parts;
- introduce aggravated offences for dealing in 50 or more firearms and firearm parts;
- increase the penalties for illegal importation or exportation of larger numbers of firearms; and
- introduce aggravated offences for importing or exporting 50 or more firearms or firearm parts during a six month period.

Background

1.5 The proposed changes to the POC Act and the Criminal Code arise in the context of previous parliamentary committee recommendations, and announced reforms to the regulation of firearms in Australia.

Commonwealth unexplained wealth laws

1.6 In February 2010, the parliament passed amendments to the POC Act to introduce provisions relating to unexplained wealth orders.⁴ The unexplained wealth provisions are one of five types of asset confiscation proceedings provided for in the POC Act, and are designed to undermine organised crime by targeting the profits of crime. The Australian Federal Police (AFP) has stated:

These provisions can be used to target criminals who derive an income from criminal activity, but because of where they sit in criminal enterprise and their lack of proximity to the offences committed, cannot be pursued through criminal prosecution or traditional proceeds of crime action.⁵

1.7 The EM outlines how the Commonwealth's unexplained wealth provisions operate:

[I]f a court is satisfied that there are reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.⁶

4 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010.*

5 Australian Federal Police, *Submission to the Parliamentary Joint Committee on Law Enforcement Inquiry into Commonwealth unexplained wealth legislation and arrangements*, October 2011, p. 2.

6 EM, p. 4.

1.8 There are three types of orders which can be made by the courts under the unexplained wealth provisions in the POC Act. Subject to relevant criteria, a court may make:

- a restraining order, which prevents certain property from being disposed of or otherwise dealt with by any person;⁷
- a preliminary unexplained wealth order, which requires a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order in relation to the person;⁸ and
- an unexplained wealth order, which requires a person to pay an amount to the Commonwealth if the court is not satisfied that the whole or any part of the person's wealth was not derived from a Commonwealth offence, a foreign indictable offence, or a state offence that has a federal aspect.⁹

Parliamentary Joint Committee inquiry into unexplained wealth legislation

1.9 In July 2011, the Parliamentary Joint Committee on Law Enforcement (PJC-LE) initiated an inquiry into Commonwealth unexplained wealth legislation and arrangements. The PJC-LE's final report, tabled in March 2012, made 18 recommendations in relation to Commonwealth unexplained wealth arrangements, which that committee considered would significantly enhance the effectiveness of those arrangements, if implemented.¹⁰

1.10 The Australian Government has accepted, either wholly or in part, 15 of the PJC-LE's recommendations.¹¹ Schedule 1 of the Bill seeks to implement six of these recommendations in relation to the Commonwealth's unexplained wealth legislation.¹²

National firearm reforms

1.11 In the Bill's Second Reading Speech, the Minister explained that the proposed amendments to the Criminal Code in Schedule 2 of the Bill will complement a range of other measures to better regulate firearms in Australia, agreed to by the Standing Council on Police and Emergency Management. The initiatives outlined by the Minister include:

7 *Proceeds of Crime Act 2002* (POC Act), section 20A.

8 POC Act, section 179B.

9 POC Act, paragraphs 179E(1)(a)-(b).

10 Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp xiii-xvi.

11 Australian Government, *Government response to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Commonwealth unexplained wealth legislation and arrangements*, February 2013, p. 1.

12 EM, p. 5. The Bill seeks to implement Recommendations 5, 9, 10, 11, 12, and (in part) Recommendation 13 of the PJC-LE's report.

- establishing a National Firearms Register, to replace more than 30 different registers and databases currently used;
- nationwide rollout of the Australian Ballistics Identification Network;
- developing a National Firearms Identification Database for use by law enforcement agencies;
- specialised firearms training for Australian law enforcement officers;
- establishing a specialised Firearm Intelligence and Targeting Team within the Australian Customs and Border Protection Service (Customs);
- a national campaign on unlicensed firearms; and
- expansion of the Australian Crime Commission's Firearm Tracing Capability.¹³

Key provisions of the Bill

1.12 This section outlines the key provisions of the Bill which were commented on by submitters and witnesses during the inquiry.

Schedule 1 – amendments to the POC Act

1.13 The three main areas of Schedule 1 which attracted attention during the inquiry are the amendments that would: remove judicial discretion in relation to making unexplained wealth orders once certain criteria have been met; remove the ability for legal fees to be paid out of restrained assets; and enable the seizure of things relevant to unexplained wealth proceedings.

Removing judicial discretion in relation to unexplained wealth orders

1.14 The Bill seeks to amend the POC Act to remove the courts' general discretion to decide whether to make unexplained wealth restraining orders,¹⁴ preliminary unexplained wealth orders¹⁵ and unexplained wealth orders¹⁶ once relevant criteria are satisfied.¹⁷ Whereas the POC Act currently provides that a court 'may' make an order

13 The Hon Jason Clare MP, Minister for Justice, *House of Representatives Hansard*, 28 November 2012, pp 13661-13662.

14 Items 1 and 5 of Schedule 1 of the Bill (proposed new subsections 20A(1) and 20A(5) of the POC Act respectively).

15 Item 13 of Schedule 1 of the Bill (proposed new subsection 179B(1) of the POC Act).

16 Item 16 of Schedule 1 of the Bill (proposed new subsection 179E(1) of the POC Act).

17 The relevant criteria are outlined in the POC Act in: paragraphs 20A(1)(c)-(g) for unexplained wealth restraining orders; subsections 179B(1)-(2) for preliminary unexplained wealth orders; and paragraphs 179E(1)(a)-(b) for unexplained wealth orders. For example, an unexplained wealth order may be made once the court has made a preliminary unexplained wealth order in relation to a person, and the court is not satisfied that the person's wealth was not derived from a relevant Commonwealth, state or foreign indictable offence.

in such circumstances, under the proposed amendments, a court 'must' make an order once the relevant criteria are met.

1.15 For all three types of orders, the removal of judicial discretion is limited to cases where the unexplained amount exceeds \$100,000, in order to maintain the courts' discretion in cases where smaller amounts of wealth are unexplained.¹⁸

1.16 The EM emphasises the fact that the current discretion the courts have in relation to making unexplained wealth orders is in contrast to most other types of proceeds of crime orders, which a court must make if it is satisfied that the criteria have been met.¹⁹ Additionally, the courts can still refuse to make an unexplained wealth restraining order, or an unexplained wealth order, if 'it is not in the public interest to make the order'.²⁰ A court may also revoke an unexplained wealth restraining order or a preliminary unexplained wealth order in certain circumstances, if it is 'in the interests of justice' to do so.²¹

1.17 These amendments seek to implement Recommendations 12 and 13 of the PJC-LE's report.²²

Removing the ability for legal fees to be paid out of restrained assets

1.18 Item 2 of Schedule 1 repeals subsections 20A(3A) to (3C) of the POC Act, in order to remove the courts' ability to order that property which is the subject of a restraining order (under section 20A) may be disposed of for the purposes of meeting a person's reasonable legal fees.

18 See: Item 3 of Schedule 1 of the Bill (proposed subsection 20A(4) of the POC Act) in relation to restraining orders; Item 15 of Schedule 1 of the Bill (proposed new subsection 179B(4) of the POC Act) in relation to preliminary unexplained wealth orders; and Item 17 of Schedule 1 of the Bill (proposed new subsection 179E(6) of the POC Act) in relation to unexplained wealth orders.

19 EM, p. 23.

20 Item 3 of Schedule 1 of the Bill (proposed new subsection 20A(4) of the POC Act) and item 17 of Schedule 1 of the Bill (proposed new subsection 179E(6) of the POC Act).

21 See: POC Act, section 42 (in relation to restraining orders) and subsection 179C(5) (in relation to preliminary unexplained wealth orders). Subsection 179C(5) provides that a preliminary unexplained wealth order may be revoked either in the 'public interest' or in the 'interests of justice'.

22 Recommendation 12 of the PJC-LE's report recommended that judicial discretion to make restraining orders or preliminary unexplained wealth orders should be removed for cases over \$100,000. Recommendation 13 recommended that judicial discretion to make unexplained wealth orders should be removed for cases over \$100,000, subject to additional statutory oversight arrangements. The recommendation for additional oversight has been partially adopted by the government, through items 21-22 of Schedule 1 of the Bill. See: Australian Government, *Government response to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Commonwealth unexplained wealth legislation and arrangements*, February 2013, pp 5-8.

1.19 Section 179S of the POC Act provides that a restraining order may be made in respect of property which is subject to a person's effective control, even if they are not the legal owner of that property. Item 20 of Schedule 1 repeals section 179SA, which currently allows a court to order that property which is the subject of an order under section 179S may be disposed of for the purposes of meeting a person's reasonable legal fees.

1.20 These amendments implement recommendation 10 of the PJC-LE's report.²³

Enabling the seizure of things relevant to unexplained wealth proceedings

1.21 Items 23-24 of Schedule 1 insert proposed new paragraphs 227(1)(h) and 228(1)(h) into the POC Act, in order to enable the seizure of things that are relevant to unexplained wealth proceedings during the execution of a search warrant granted by a magistrate.²⁴ Item 28 of Schedule 1 would insert a proposed definition of 'thing relevant to unexplained wealth proceedings' into section 338 of the POC Act, namely:

thing relevant to unexplained wealth proceedings means a thing (including a thing in electronic form) as to which there are reasonable grounds for suspecting that it may be relevant for the purposes of initiating or conducting proceedings under section 20A or Part 2-6.

1.22 The EM explains that the current search warrant provisions prevent officers from seizing some materials relevant to unexplained wealth proceedings:

For example, the current search warrant provisions would not necessarily allow the seizure of material relevant to ascertaining the total wealth of a person (such as evidence of a person's income or legitimately acquired property) or evidence of unlawful activities from which a person has derived wealth. Furthermore, officers are not able to collect evidence relating to summary offences and foreign offences, even though restraint action in unexplained wealth matters can be based on the commission of summary or indictable Commonwealth offences, or foreign indictable offences.²⁵

1.23 These proposed amendments implement recommendation 5 of the PJC-LE's report.²⁶

23 EM, p. 18.

24 EM, p. 29.

25 EM, p. 29.

26 EM, p. 29.

Schedule 2 – amendments to the Criminal Code

1.24 Proposed new aggravated firearm offences are provided for in Schedule 2 of the Bill.

Aggravated offences for dealing in 50 or more firearms and firearm parts

1.25 Schedule 2 would create several new aggravated firearm offences for dealing in 50 or more firearms or firearm parts in a six-month period. These offences relate to:

- cross-border disposal or acquisition of firearms or firearm parts within Australia, in the course of trade or commerce among the states and territories;²⁷
- taking or sending firearms or firearm parts across state or territory borders within Australia;²⁸
- importing prohibited firearms or firearm parts into Australia;²⁹ and
- exporting prohibited firearms or firearm parts from Australia.³⁰

1.26 These new aggravated offences would attract a penalty of life imprisonment or 7,500 penalty units, or both. The relevant basic offences attract a penalty of 10 years imprisonment or 2,500 penalty units, or both. The Minister stated in his Second Reading Speech that the penalties for these new aggravated offences 'will make the maximum penalty for trafficking in firearms the same as the maximum penalty for trafficking in drugs'.³¹

Conduct of the inquiry

1.27 The committee advertised the inquiry in *The Australian* newspaper on 5 December 2012. Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate/legalcon. The committee also wrote to 75 organisations and individuals, inviting submissions by 31 January 2013.

1.28 The committee received eight submissions, which are listed at Appendix 1. All submissions were published on the committee's website.

27 Item 7 of Schedule 2 of the Bill (proposed new subsection 360.2(2) of the Criminal Code).

28 Item 15 of Schedule 2 of the Bill (proposed new subsections 360.3(1A)-(1D) of the Criminal Code).

29 Item 21 of Schedule 2 of the Bill (proposed new subsections 361.2(2)-(6) of the Criminal Code).

30 Item 21 of Schedule 2 of the Bill (proposed new subsections 361.3(2)-(6) of the Criminal Code).

31 The Hon Jason Clare MP, Minister for Justice, *House of Representatives Hansard*, 28 November 2012, p. 13662.

1.29 The committee held a public hearing for the inquiry on 7 February 2013 in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.30 The committee thanks those submitters and witnesses who contributed to the inquiry.

Note on references

1.31 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

CHAPTER 2

KEY ISSUES

2.1 Submitters and witnesses commented on issues relating to the amendments proposed in both Schedules 1 and 2 of the Bill.

Schedule 1 – amendments to the *Proceeds of Crime Act 2002 (POC Act)*

2.2 Submitters expressed views on several issues in relation to Schedule 1, relating to: judicial discretion in making unexplained wealth orders; the removal of the ability for legal fees to be paid out of restrained assets; and enabling the seizure of things relevant to unexplained wealth proceedings.

Removing judicial discretion regarding the making of unexplained wealth orders

2.3 The Law Society of South Australia expressed concern at the removal of judicial discretion about whether to make restraining orders, preliminary unexplained wealth orders and unexplained wealth orders once relevant criteria are established:

The amendments compel a judicial officer to make orders sought by the applicant for an order. This is a fundamental inroad on judicial independence...[A] court may have good reason to decline to make an order. In those cases where it does, reasons for declining will be given. If the reasons are not acceptable to the State the decision may be appealed or reviewed. Viewed in this light, there can be no proper justification for the removal of the judicial discretion.¹

2.4 Dr David Neal SC, from the Law Council of Australia (Law Council), also expressed concern about removing judicial discretion in the area of unexplained wealth proceedings:

[U]nlike other provisions in this legislation, where the prosecution would have to establish a link between these proceeds and some criminal activity, the criterion for unexplained wealth—as the term 'unexplained' carries with it—is a very nebulous sort of a concept, much broader than the other concepts such as: 'This is the proceeds of crime or it is in some way tainted'. That vagueness seems to us to argue in favour of the use of the word 'may', where there is a broader range of discretions, to avoid the situation where some unanticipated injustice might be worked.²

2.5 Conversely, the Police Federation of Australia (PFA) and the Australian Federal Police Association (AFPA) expressed support for this measure, deeming it appropriate that unexplained wealth proceedings be brought into line with other kinds of proceedings under the POC Act.³

1 *Submission 8*, pp 2-3.

2 *Committee Hansard*, 7 February 2013, p. 1.

3 *Submission 2*, p. 3.

Use of the terms 'in the public interest' and 'in the interests of justice'

2.6 Liberty Victoria stated that, while some discretion has been removed, it 'takes comfort that the safeguards remain that orders must be in the public interest and in the interests of justice'.⁴ The Queensland Council for Civil Liberties (QCCL), however, noted that the term 'public interest' is not defined, and argued that the safeguard for the courts to refuse to make an order 'in the public interest' is insufficient.⁵

2.7 The Law Council raised additional concerns regarding the use of the terms 'in the public interest' and 'in the interests of justice' in the discretion retained by courts in relation to unexplained wealth orders.⁶ The Law Council noted that these two terms are used inconsistently across the different types of orders in the unexplained wealth provisions of the POC Act,⁷ and argued that their inclusion may be 'insufficient to avoid injustices' due to these inconsistencies:⁸

These different tests, which will assume increased significance in the absence of a general discretion to refuse to make the relevant orders, invite confusion and litigation about the scope of the court's authority to refuse to make an order or to revoke an order in difficult or unusual circumstances. They create the possibility that a person contesting an application may be more limited in their ability to resist the order sought, than a person seeking to revoke the order after it has been made. Further, they create the possibility that a court may be compelled to make an order first, before it can then consider whether such an order is in the 'interests of justice'.⁹

2.8 The Law Council suggested that the Bill should be amended such that an 'interests of justice' test or a combined 'interests of justice' and a 'public interest' test be adopted uniformly across the unexplained wealth provisions.¹⁰

2.9 The Department argued for the retention of both terms in the POC Act as currently envisaged under the Bill, noting that the 'public interest' test is used in several places across the POC Act in relation to making certain orders, while the 'interests of justice test' is used in relation to revoking certain orders.¹¹ The Department explained that it is 'appropriate to retain references to both tests as

4 *Submission 7*, p. 1.

5 *Submission 6*, p. 4.

6 *Supplementary Submission 3*, pp 3-6.

7 For example, a court may refuse to make an unexplained wealth order or an unexplained wealth restraining order if it is not in the 'public interest' to make the order; however, a court may revoke a preliminary unexplained wealth order or an unexplained wealth restraining order in certain circumstances if it is 'in the interests of justice' to do so. See: Law Council of Australia, *Supplementary Submission 3*, pp 3-5.

8 *Supplementary Submission 3*, p. 5.

9 *Supplementary Submission 3*, p. 6.

10 *Supplementary Submission 3*, p. 6.

11 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, pp 6-7.

they involve different considerations', and that the 'interests of justice' test ensures that a court has regard to matters which are relevant to the administration of justice when considering a revocation application.¹²

Removing the courts' discretion to allow legal expenses to be paid out of restrained assets

2.10 The PFA and the AFPA expressed support for these amendments, stating its view that assets subject to unexplained wealth restraining orders should not be able to be used to pay legal expenses.¹³ Several other submitters and witnesses, however, expressed opposition to these proposed amendments.¹⁴

Effectiveness of the current provisions

2.11 The EM offers the following rationale for the removal of an individual's ability to meet legal expenses through restrained assets:

The ability of a person to dispose of restrained property to meet their legal costs weakens the effectiveness of the unexplained wealth provisions by allowing the wealth suspected to have been unlawfully acquired to be used to contest proceedings. This may lead to fewer assets being available for confiscation if an unexplained wealth order is successful and is likely to cause more protracted litigation.¹⁵

2.12 The Law Council contested the assertion that the current ability of the courts to make orders for legal costs to be paid from restrained assets undermines the effectiveness of the unexplained wealth provisions in the POC Act. It argued that, as the current provisions relating to legal costs are yet to be tested (having only been introduced to the POC Act in 2010), there is no evidence that they do, in fact, have the effect of shrinking the asset base which could otherwise be drawn from in making an unexplained wealth order.¹⁶

2.13 The Law Council also noted that individuals are not automatically entitled to use restrained assets to pay legal costs under the current system, because:

- a person will only have access to their restrained assets to meet legal costs where the court so orders;
- the court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from

12 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, pp 6-7.

13 *Submission 2*, p. 3.

14 Law Council of Australia, *Submission 3*, pp 4-8; Queensland Council for Civil Liberties, *Submission 6*, pp 2-3; Liberty Victoria, *Submission 7*, pp 2-3; Law Society of South Australia, *Submission 8*, p. 3; Dr David Neal SC, Law Council of Australia, *Committee Hansard*, 7 February 2013, p. 2.

15 EM, p. 18.

16 *Submission 3*, p. 4; Ms Helen Donovan, Law Council of Australia, *Committee Hansard*, 7 February 2013, p. 3.

restrained funds, and may make any further or ancillary orders it considers appropriate; and

- where an unexplained wealth order is made against a person which cannot be completely met from restrained assets because some of those assets have been released to meet legal expenses, the Commonwealth can still pursue the person who is subject to the order for any remaining amount.¹⁷

2.14 The Law Council argued that a court is 'highly unlikely' to make an order allowing legal costs to be paid from restrained assets where it can be demonstrated that a person has the ability to meet their expenses from unrestrained assets.¹⁸

Harmonisation with other kinds of proceedings under the POC Act

2.15 The EM states that this amendment 'will harmonise provisions relating to the payment of legal expenses for unexplained wealth cases with those for other proceedings under the POC Act'.¹⁹ The Law Council argued that such harmonisation is unnecessary, as unexplained wealth proceedings have a number of unique features, including a lower threshold before an individual's assets can be restrained, and a reverse onus of proof:

There is no move to harmonise the thresholds that must be met before assets may be restrained for different types of proceedings under the [POC Act] or to harmonise the matters of which the court must be satisfied before different types of final orders are made. Such a move towards harmonisation within the [POC Act] would be illogical because the different types of proceedings are directed towards different circumstances and scenarios. So too, it is also misguided to suggest that the provisions relating to the payment of legal expenses should be harmonised when they relate to different types of proceedings, which place respondents in different positions.²⁰

Access to appropriate representation

2.16 The EM states that people who are subject to POC Act proceedings may seek legal representation through legal aid if their unrestrained assets are not sufficient to meet legal costs, to 'ensure that they are appropriately represented, are not disadvantaged and continue to be equal before courts and tribunals'.²¹

2.17 Submitters argued that despite potential access to legal aid services, individuals may in many cases be unable to mount an appropriate defence in unexplained wealth proceedings, and may have their choice of legal representative inappropriately limited. For example, the Law Council argued:

17 *Submission 3*, p. 5. See also: Liberty Victoria, *Submission 7*, p. 2.

18 *Submission 3*, p. 5.

19 EM, p. 18.

20 *Submission 3*, p. 6.

21 EM, p. 7.

Proceeds of crime litigation can be complex, and significant resources are expended by the law enforcement agencies in identifying targets, gathering evidence and preparing a matter for court. To contest such proceedings, respondents must also expend resources, including potentially on their own expert witnesses. However, respondents reliant on legal aid may find themselves unduly restricted in this regard.²²

2.18 Dr Neal from the Law Council elaborated at the committee's public hearing:

The idea that there is any genuine equality in saying that these people can depend on legal aid to run litigation of this complexity is really not confronting the reality of life in the courts at this stage...It is just unrealistic to think that the cases which have commercial and financial complexity to them can be done within the confines of legal aid rates. And given the nebulous nature of the unexplained wealth provisions, it seems particularly unreasonable to say: 'Your asset base is suspicious. We're going to stop you from using any of it to prove that it's not.'²³

2.19 QCCL agreed, arguing that proceedings involving asset confiscation are often very time-consuming and complex, and require 'a higher level of skill than might otherwise apply in civil litigation'.²⁴

2.20 Dr Neal also argued that many respondents may not meet the relevant legal aid means test in order to qualify for legal aid, yet still not have enough unrestrained assets to mount a proper defence:

The legal aid means tests are so low in a number of jurisdictions that, for instance, in New South Wales, the poverty line is the cut off for legal aid. There will be numbers of these people who, if they have some assets left, simply will not qualify for legal aid but certainly would not have sufficient assets to defend or run the proof of how they came by all of this money.²⁵

2.21 Liberty Victoria argued that in cases where legal aid is not granted, respondents may become self-represented, at 'a significant cost to the resources of the Courts and to taxpayers'.²⁶ Consequently, Liberty Victoria argued that the amendments in the Bill 'may actually result in more cost being incurred to the public due to the limited and valuable resources of the Legal Aid Commission and the Courts'.²⁷

2.22 Finally, the Law Council noted that, as legal aid costs incurred in the representation of individuals whose property is restrained are reimbursed from the

22 *Submission 3*, p. 7. See also: Law Society of South Australia, *Submission 8*, p. 3; Liberty Victoria, *Submission 7*, pp 2-3.

23 *Committee Hansard*, 7 February 2013, pp 2 and 4.

24 *Submission 6*, p. 3.

25 *Committee Hansard*, 7 February 2013, p. 2.

26 *Submission 7*, p. 2.

27 *Submission 7*, pp 2-3.

Commonwealth's Confiscated Assets Account, the revenue gained by proceeds of crime is still diminished in the model proposed by the Bill.²⁸

Departmental response

2.23 The Department made several points in response to the concerns raised by submitters and witnesses about removing the courts' discretion. It noted that the rationale for removing the ability to use restrained assets is not 'harmonisation for harmonisation's sake', but rather is based on lessons learned from the experience of the *Proceeds of Crime Act 1987* (POC Act 1987):

Under the original [POC Act 1987], restrained assets could be accessed for the purposes of meeting legal expenses...In essence, defendants would actively frustrate [proceeds of crime] proceedings, either through frivolous or unreasonable legal defences to dissipate restrained funds, or using legitimate avenues to reclaim the restrained assets (using money laundering type practices)...[T]he amendments [in the Bill] are intended to ensure that the experience in proceeds of crime proceedings from 1987 to 2002 is not replicated in proceedings for unexplained wealth matters.

To date, no unexplained wealth proceedings have been commenced. As such, it is not possible to point to cases in which respondents have sought to dissipate restrained assets to meet the costs of legal expenses related to [POC Act] proceedings. However, there is clear evidence that similar provisions were abused under [the POC Act 1987] and there is nothing to suggest that similar dissipation of assets will not occur under the unexplained wealth provisions.²⁹

2.24 The Department also argued that unexplained wealth proceedings are not, in fact, fundamentally different to other proceedings under the POC Act, pointing out that several other types of proceedings under the POC Act, such as proceedings where a person suspected of committing a serious offence has their assets restrained, also place the onus of proof on the respondent in relation to restrained property.³⁰

2.25 Further, retaining the ability for legal costs to be met from restrained assets may affect whether unexplained wealth proceedings can be brought forward at all:

[T]he ability to use restrained assets to meet a person's legal costs is a significant deterrent to the use of the unexplained wealth provisions, as it is necessary to take into account that a large proportion of the restrained assets may be dissipated prior to their confiscation in deciding whether it is in public interest to commence proceedings.³¹

28 *Submission 3*, p. 5.

29 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, Attachment A, p. 1.

30 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, Attachment A, p. 7.

31 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, Attachment A, p. 1.

2.26 In relation to whether respondents would have their choice of legal representation restricted, a representative from the Department noted that similar concerns had been raised about other proceeds of crime proceedings:

[I]nitially, with proceeds of crime, restrained assets could be used to fund legal expenses, and people justified that by saying it would be unfair if people were not allowed to choose their own legal representatives and to defend themselves to the full extent of their assets...[T]he experience has been that the ability of people to defend themselves in proceeds of crime actions has been ample and sufficient and adequate under the [current] legal aid arrangements...[W]e have seen those concerns before with respect to proceeds of crime and they have not actually been borne out in practice.³²

2.27 The Department also highlighted that the Parliamentary Joint Committee on Law Enforcement (PJC-LE) inquiry into unexplained wealth arrangements had examined other options for dealing with the payment of legal costs in unexplained wealth proceedings, including: the introduction of a cap on fees for legal costs in those proceedings; and making greater use of independent cost assessors.³³ The PJC-LE ultimately recommended that the model proposed in the Bill should be adopted.

Allowing officers to seize things relevant to unexplained wealth proceedings

2.28 Submitters and witnesses commented on the proposed amendments to the POC Act that would allow officers to seize things relevant to unexplained wealth proceedings when carrying out a search warrant. The PFA and the AFPA supported these provisions, as recommended by the PJC-LE.³⁴

2.29 The Law Council, however, argued that these powers are too broad:

[U]nexplained wealth proceedings essentially concern the entirety of a person's financial affairs over their lifetime. There is no aspect of a person's income, expenditure, investments and business dealings (and potentially that of their family and close associates) which is not of possible relevance...[T]he amendments in their current form will mean that there are no practical limits placed on the type of information that may be seized in the course of executing a search warrant under the [POC Act].³⁵

32 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 7 February 2013, p. 8.

33 Attorney-General's Department, Response to questions on notice provided on 27 February 2013, Attachment A, pp 4-6.

34 *Submission 2*, p. 3.

35 *Submission 3*, p. 8.

Schedule 2 – amendments to the *Criminal Code Act 1995* (Criminal Code)

2.30 Submitters that commented on Schedule 2 of the Bill were generally supportive of the new firearms offences created by the proposed amendments.³⁶

2.31 The NSW Government commented on two issues relating to the four aggravated firearm trafficking offences proposed in the Bill.

Threshold number of firearms or firearm parts for aggravated trafficking offences

2.32 The NSW Government argued in its submission that the thresholds for the new aggravated firearm offences created by the Bill (trafficking of 50 or more firearms or firearm parts within a six-month period) should be significantly lowered to ensure that prosecutions can be made under these offences:

In prosecutions commenced for the ongoing sale of firearms in NSW since 2008, the maximum number of firearms involved was 25, and the average was seven. These were sold over a period of twelve months, rather than six months. None of these cases would have been captured as an aggravated offence under the proposed new Commonwealth provisions.

NSW is concerned that, unless the threshold for aggravated offences is set at a substantially lower level than 50 firearms, the provisions may not result in any prosecutions. The period should also be extended from six months to 12 months to ensure that the offence captures serious cases.³⁷

2.33 The EM notes that the threshold quantity of 50 firearms or firearm parts 'represents a significantly higher threshold than those in existing State or Territory offences, reflecting the severity of the penalties proposed' (life imprisonment).³⁸

2.34 At the committee's public hearing, a departmental representative explained the rationale for including a six-month time period for the aggravated offences, and stated that this period could potentially be extended:

Six months is aimed at capturing a process where someone seeks to structure what they are doing—the trafficking arrangement—where they are sending small consignments on a regular basis. Six months would be sufficient to capture a number of shipments through international cargo channels, for example. So, if someone is engaged in this behaviour, six months should be adequate to prove the offence, but it could always be extended to 12 [months].³⁹

36 Australian Federal Police Association and Police Federation of Australia, *Submission 2*, p. 3; Australian Customs and Border Protection, *Submission 5*, pp 1 and 4; Australian Crime Commission, *Submission 1*, p. 2.

37 *Submission 4*, p. 2.

38 EM, p. 43.

39 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 7 February 2013, p. 11.

2.35 Customs expressed the view that the six-month time period is appropriate:

The inclusion of a six-month period for the accumulation of firearms or parts of firearms to make up the 50 or more threshold seems reasonable given the severity of the penalties proposed for the aggravated offences...It is essential that these offences only apply to serious examples of offending.⁴⁰

Formulation of aggravated trafficking offences – number of firearm parts

2.36 The aggravated offences will apply where it can be shown that the individual has been involved in the trafficking of either:

- (i) 50 or more firearms;
- (ii) 50 or more firearm parts that might be used to constitute one or more firearms;
- (iii) a combination of firearms and firearm parts such that the sum of the actual firearms and the firearms that might be constituted by the parts is 50 or more.⁴¹

2.37 The NSW Government expressed concern about this formulation:

As the Bill is currently drafted, it appears possible for a person who commits a trafficking offence involving parts which combine to make up only a few whole firearms to face the same penalty as someone who commits the same offence involving 50 whole firearms.

...Subsection (ii) could...apply a much lower threshold than subsection (i) in terms of numbers of whole firearms. This inconsistency is undesirable and could result in outcomes which are disproportionate to the criminality involved.⁴²

2.38 A departmental representative provided the reason why the Bill has been drafted in this way:

It is drafted with an emphasis on parts of firearms being treated as parts that could constitute a firearm. For example, if someone sends through 50 barrels of firearms, that can actually constitute 50 firearms in itself.

[I]t is 50 firearms, 50 parts of firearms or a combination of parts and whole firearms that could constitute 50 or more firearms...[T]hat is drafted by the

40 *Submission 5*, p. 4.

41 The same formulation is used for all four aggravated offences. See: Item 7 of Schedule 2 of the Bill (proposed new paragraph 360.2(2)(d) of the Criminal Code); Item 15 of Schedule 2 of the Bill (proposed new paragraph 360.3(1A)(f) of the Criminal Code); and Item 21 of Schedule 2 of the Bill (proposed new paragraphs 361.2(2)(d) and 361.3(2)(d) of the Criminal Code).

42 *Submission 4*, p. 3.

Office of Parliamentary Counsel; we worked with them in the drafting and we believe that it is unambiguous.⁴³

Committee view

2.39 The committee considers that the Bill contains a reasonable set of measures to assist the fight against serious and organised crime in Australia. The committee's specific comments on the proposed amendments are as follows.

Amendments to the Proceeds of Crime Act 2002 (POC Act)

2.40 The committee supports the proposed amendments to the POC Act in relation to unexplained wealth proceedings. The committee notes that these legislative amendments implement the recommendations of the Parliamentary Joint Committee on Law Enforcement (PJC-LE), which examined these issues at length in its report into the Commonwealth's unexplained wealth legislation and arrangements.

2.41 In relation to removing the courts' discretion to make orders in cases where the unexplained amount is over \$100,000, the committee considers that the safeguards retained in the Bill are sufficient to warrant this measure's inclusion in the POC Act. These safeguards include the court's initial function in determining whether the relevant criteria have been satisfied to make an order, as well as the ability of a court to refuse to make an unexplained wealth order or restraining order where it is not in the public interest, and to revoke a restraining order or preliminary unexplained wealth order if it is in the interests of justice to do so.

2.42 The committee is also satisfied with the approach proposed in the Bill to remove the ability for legal fees to be paid out of restrained assets, which will make the treatment of legal fees consistent across the POC Act. The committee has not received any evidence from Legal Aid Commissions that the existing arrangements in relation to other proceeds of crimes matters are unsatisfactory, and considers that the potential for the dissipation of restrained funds in unexplained wealth proceedings, as occurred in similar types of proceedings under the POC Act 1987, should be removed.

2.43 The committee agrees with the policy decision to enable the seizure of things relevant to unexplained wealth proceedings in the execution of a search warrant, where this has been approved by a magistrate. While this may enable a range of materials to be seized in some circumstances, the committee is of the view that this is appropriate due to the serious nature of the activity unexplained wealth measures are designed to target.

2.44 Having stated its support for these proposed changes, the committee acknowledges that unexplained wealth provisions are still new in Commonwealth law, and hence require close monitoring in the coming years to ensure that they are operating effectively. Under the changes proposed in the Bill, the PJC-LE will have ongoing oversight of the operation of unexplained wealth provisions in the POC Act. The committee considers that this oversight should ensure that any issues that arise in

43 Mr Iain Anderson, Attorney-General's Department, *Committee Hansard*, 7 February 2013, p. 11.

relation to the operation of the legislation are swiftly brought to the attention of the parliament.

Amendments to the Criminal Code

2.45 The committee is supportive of the measures included in the Bill to create stronger penalties for trafficking in large numbers of firearms or firearm parts. The committee agrees that, given the severity of the penalties associated with the new proposed aggravated offences, a high threshold needs to be set in order to trigger these offences. As such, the committee considers that 50 firearms or firearm parts over a six-month period seems reasonable.

2.46 The committee is satisfied with the Department's evidence that the drafting relating to the number of firearms or firearm parts has been carefully considered, and agrees with the approach taken in the Bill.

Recommendation 1

2.47 The committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 The Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the Bill) has two main functions: Schedule 1 relates to unexplained wealth proceedings and Schedule 2 addresses firearms trafficking.

1.2 The Australian Greens generally agree with the report on the Bill from the majority of the Legal and Constitutional Affairs Committee.

1.3 However, we have some concerns about Schedule 1 of the Bill, insofar as it purports to harmonise provisions relating to the payment of legal expenses for unexplained wealth.

1.4 Item 2 of Schedule 1 repeals subsections 20A(3A)-(3C), and section 179SA, of the *Proceeds of Crime Act 2002* (POC Act) in order to remove the court's discretion to allow a person who is subject to unexplained wealth proceedings to pay his or her legal expenses using the restrained assets.

1.5 A substantial number of those who made submissions to the inquiry, including the Law Council of Australia, the Queensland Council for Civil Liberties, Liberty Victoria and the Law Society of South Australia, raised concerns about this issue.

1.6 Although the Explanatory Memorandum (EM) to the Bill states that this amendment 'will harmonise provisions relating to the payment of legal expenses for unexplained wealth cases with those for other proceedings under the POC Act', the Australian Greens are not convinced that this is necessary and are concerned that it will unduly compromise an individual's ability to defend an unexplained wealth action.

1.7 As argued by the Law Council, unexplained wealth proceedings have a number of unique features, which would justify a different approach to other proceedings in the POC Act:

In the Law Council's view it is appropriate that people subject to unexplained wealth proceedings might have access to restrained property to meet their legal fees, even though people subject to other types of proceedings under the [POC Act] do not. The unexplained wealth proceedings are unique in nature. First, the threshold that must be met before a person's assets may be restrained is lower in the case of unexplained wealth proceedings. Further, once a preliminary unexplained wealth order has been secured, the burden is placed on the respondent to demonstrate that their wealth and assets have been legitimately derived, rather than on the state to demonstrate otherwise. Therefore, to avoid being ordered to pay the Commonwealth a specified amount, the respondent must

do more than meet or counter the state's case, but must prepare and present his or her own positive case, supported by evidence.¹

1.8 Should these sections be repealed, an individual subject to unexplained wealth proceedings will be unable to use their restrained assets to pay for legal representation. However, unexplained wealth proceedings are complex matters, likely to require legal counsel as well as instructing solicitors and forensic accounting experts.

1.9 Because of strict eligibility criteria, and restrictions on how legal aid funding can be used, concerns were raised by submitters that legal aid is likely to be inadequate in such a situation.

1.10 The Law Council of Australia's submissions argued that legal aid funding is inadequate for those subject to unexplained wealth proceedings, in terms of meeting eligibility requirements and accessing the kind of legal costs needed to defend such an action. It concluded that no reliable assurance can be given that a person facing unexplained wealth litigation will be able to access a level of legal representation which enables them to fairly contest the proceedings.

1.11 These concerns would be addressed by preserving the court's discretion to allow access to restrained funds for the purposes of legal representation.

1.12 In our view, the Bill does not establish cogent grounds for removing the court's discretion. There is no evidence that the current discretion undermines the effectiveness of the POC Act's unexplained wealth provisions. As acknowledged by the Attorney General's Department, the current provisions have not been tested:

To date, no unexplained wealth proceedings have been commenced. As such, it is not possible to point to cases in which respondents have sought to dissipate restrained assets to meet the costs of legal expenses related to [POC Act] proceedings.²

1.13 In any event, the Law Council pointed out that the right to use restrained funds for legal costs is not automatic, as the court must exercise discretion to allow this. This includes the ability for a court to order that a costs assessor must certify how legal expenses were incurred, before permitting payment from restrained funds.

1.14 The Australian Greens recommend that the Bill preserve the sections of the POC Act that provide the court with discretion to allow a person who is subject to unexplained wealth proceedings to pay his or her legal expenses using the restrained assets.

Senator Penny Wright
Australian Greens

1 Law Council of Australia, *Submission 3*, p.3.

2 Responses to questions on notice provided by the Attorney-General's Department on 27 February 2013, Attachment A, p.1.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Australian Crime Commission
2	Australian Federal Police Association and Police Federation of Australia
3	Law Council of Australia
4	New South Wales Government
5	Australian Customs and Border Protection Service
6	Queensland Council for Civil Liberties
7	Liberty Victoria
8	The Law Society of South Australia

ADDITIONAL INFORMATION RECEIVED

1	Responses to questions on notice provided by the Attorney-General's Department on 27 February 2013
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APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 7 February 2013

ANDERSON, Mr Iain, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department

DONOVAN, Ms Helen, Co-Director Criminal Law and Human Rights, Law Council of Australia

INVERARITY, Ms Tara, Principal Legal Officer, Criminal Law and Law Enforcement Branch, Attorney-General's Department

McCARTNEY, Commander Ian, Manager Criminal Assets, Australian Federal Police

MILLER, Ms Andrea, Acting Assistant Director, Border Management and Crime Prevention Branch, Attorney-General's Department

NEAL, Dr David, SC, Member of Criminal Law Committee, Law Council of Australia

SENGSTOCK, Mrs Elsa, Coordinator, Legislation Program, Australian Federal Police

VILES, Mr Ross, Director Operations, Investigations Branch, Australian Customs and Border Protection Service

WOODFORD-SMITH, Mr Kingsley, National Manager, Investigations Branch, Australian Customs and Border Protection Service