The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 [Provisions]

June 2014

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Chapter 1

Introduction and background

The referral

1.1 On 5 March 2014, the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014 (the bill) was introduced into the House of Representatives by the Minister for Justice the Hon Michael Keenan MP.[1] On 6 March 2014, on the recommendation of the Selection of Bills Committee, the Senate referred the provisions of the bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 15 May 2014.[2] The reporting date was later extended by the Senate to 5 June 2014.[3]

Background

1.2 Unexplained wealth laws were added to the *Proceeds of Crime Act 2002* (POC Act) in February 2010[4] as part of 'a suite of reforms to more effectively prevent, investigate and litigate organised crime activity, and target the proceeds of organised crime'.[5] The unexplained wealth provisions in the POC Act 'allow the court to make orders with respect to the restraint and forfeiture of assets where the 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'.[6]

1.3 In July 2011 the Parliamentary Joint Committee on Law Enforcement (PJC-LE) undertook a review of those laws and released a report (which set out 18 recommendations for improvements) in March 2012. In November 2012, the then Labor government introduced the Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 (the 2012 bill) into the House of Representatives. Schedule 1 of the 2012 bill contained amendments to the POC Act that would have

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1 *House of Representatives Votes and Proceedings*, No. 25, 5 March 2014, p. 349.

2 *Journals of the Senate*, No. 18—6 March 2014, p. 575.

3 *Journals of the Senate*, No. 28—14 May 2014, p. 793.

4 The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* amended the POC Act to include unexplained wealth provisions. At the time of its introduction, the bill was the subject of inquiry by the Senate Legal and Constitutional Affairs Legislation Committee. In its report the committee recommended that the bill be passed subject to a number (12) of recommendations, some of which were implemented but which would be removed by the current bill.

5 Explanatory Memorandum (EM), p. 16.

6 EM, p. 18.

implemented some of the recommendations of the PJC-LE.[7] The 2012 bill lapsed at the end of the 43rd Parliament.[8]

The proposed amendments

1.4 The bill currently before the committee, the Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014, is comprised of two schedules.

Schedule 1—Unexplained wealth

1.5 Schedule 1 seeks to amend the POC Act to strengthen the operation of the unexplained wealth provisions and improve the investigation and litigation of unexplained wealth matters[9] by implementing the PJC-LE's recommendations to:

- include a statement in the objects clause of the POC Act about undermining the profitability of criminal enterprise;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant;
- streamline affidavit requirements for preliminary unexplained wealth orders;
- allow the time limit for serving notice of applications for certain unexplained wealth orders to be extended by a court in certain circumstances;
- harmonise legal expenses and legal aid provisions for unexplained wealth cases with those for other POC Act proceedings to prevent restrained assets being used to meet legal expenses;
- allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crime 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

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7 The Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 sought to implement recommendations 5, 9, 10, 11, 12 and 13 (in part) of the PJC-LE's 2012 report. Schedule 2 of the 2012 bill contained amendments to the *Criminal Code Act 1995* in relation to trafficking in firearms. Those provisions are not included in the bill currently before the committee.

8 The 2012 bill was the subject of an inquiry by this committee. In its report, which tabled in March 2013, the Senate Legal and Constitutional Affairs Legislation Committee recommended that the Senate pass the bill. The Australian Greens, while 'generally' agreeing with the majority report, made additional comments concerning the proposed amendments that would prevent restrained assets from being used to meet legal expenses. Source: Senate Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 [Provisions]*, March 2013, pp 19, 21–22.

9 EM, p. 2.

- require the Commissioner of the Australian Federal Police (AFP) to report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the PJC-LE to seek further information from federal agencies in relation to such a report.[10]

1.6 These amendments seek to implement recommendations 1, 5, 8, 10, 11, 12 and 13 (in part), of the PJC-LE's 2012 report.

1.7 Schedule 1 to the bill also contains amendments that would:

- clarify that an unexplained wealth order may be made where a person who is subject to the order fails to appear at an unexplained wealth proceeding;
- ensure that provisions in the POC Act that determine when restraining orders cease to have effect take account of the proposed new provisions allowing charges to be created and registered over restrained property to secure payment of unexplained wealth amounts and the fact that unexplained wealth restraining orders may sometimes be made after an unexplained wealth order;
- streamline the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place;
- remove affidavit requirements in support of applications for preliminary unexplained wealth orders;
- ensure that a copy of the affidavit relied upon when a preliminary unexplained wealth order was made must be provided to the person who is subject to the order in light of changes to the affidavit requirements for preliminary unexplained wealth orders; and
- extend the purposes under which information obtained under the coercive powers of the POC Act can be shared with State, Territory and foreign authorities.[11]

1.8 Schedule 2 to the bill contains amendments to correct minor drafting errors in the POC Act.[12]

Structure of the report

1.9 This report comprises two chapters. This chapter provides background to the inquiry and the bill. Chapter 2 addresses concerns raised by stakeholders in respect of the bill. Concerns raised related to items within Schedule 1 of the bill. Schedule 2 of the bill did not attract any comment during the committee's inquiry.

10 EM, pp 2–3.

11 EM, p. 3.

12 EM, p. 3.

Conduct of the inquiry

1.10 The committee advertised the inquiry in *The Australian* newspaper on 19 March 2014. Details of the inquiry, including links to the bill and associated documents, were published on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to over 80 organisations and individuals inviting submissions by 3 April 2014.

1.11 The committee received 10 submissions, which are listed at Appendix 1 and were published on the committee's website. A public hearing was held in Canberra on 15 May 2014. A list of witnesses who appeared at the hearing is at Appendix 2. The *Hansard* transcript from the hearing can be accessed on the committee's website.

Acknowledgment

1.12 The committee thanks those stakeholders who made submissions and gave evidence at the public hearing.

Note on references

1.13 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 This chapter examines the proposed amendments contained in the bill that attracted comment from stakeholders during the inquiry. The evidence received by the committee related to the proposed amendments contained in Schedule 1 of the bill. Specifically, the areas in Schedule 1 that attracted comment were the proposed amendments to:

- remove the discretion of the court to decide whether or not to make an unexplained wealth order where certain criteria are satisfied;
- prevent restrained assets from being used to meet legal expenses;
- streamline affidavit provisions;
- enable the making of an unexplained wealth order in the absence of the person who is the subject of the order;
- ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant; and
- extend the disclosure of information regime.

Removing the court's discretion to make an unexplained wealth order

2.2 Unexplained wealth provisions form one of five types of asset confiscation proceedings provided for in the *Proceeds of Crime Act 2002* (POC Act). There are three types of orders that can be sought in relation to unexplained wealth:

- unexplained wealth restraining orders (section 20A of the POC Act);
- preliminary unexplained wealth orders (section 179B of the POC Act); and
- unexplained wealth orders (section 179E of the POC Act).

2.3 Under the existing provisions, a court has discretion in deciding whether to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth order.

2.4 Items 2, 14 and 18 of Schedule 1 would remove this discretion. The bill would, however, ensure that discretion is retained in cases where the person's unexplained wealth is less than $100,000 (items 4, 17 and 20 of Schedule 1). The bill would provide for an additional safeguard in cases concerning unexplained wealth restraining orders[1] and final unexplained wealth orders[2] by providing that discretion can also be exercised where it would not be 'in the public interest to make the order'

1 Section 20A of the POC Act.

2 Section 179E of the POC Act.

(proposed new paragraph 20A(4)(b), item 4 of Schedule 1; and proposed new subsection 179E(6)(b), item 20 of Schedule 1).

2.5 Civil Liberties Australia (CLA) expressed concern in relation to the amendments proposed by items 2, 14 and 18 of Schedule 1 stating that:

> To remove this discretion is not in the interests of justice. Such a change is inappropriate until such time as repeated applications have found this discretion for judges is a problem.[3]

2.6 The Law Council of Australia (Law Council) was similarly concerned, arguing that unexplained wealth orders have the 'potential to significantly impact on a person's livelihood and accordingly, warrant judicial discretion in the making of such an order'.[4]

2.7 In response to these concerns the Australian Federal Police (AFP) explained that the:

> [C]urrent unexplained-wealth provisions…essentially give a court unfettered discretion to refuse any applications for an unexplained-wealth order, regardless of the fact that the proceeds-of-crime authority may have met all the prerequisites set out in the act for the making of such an order.[5]

2.8 Further, the Explanatory Memorandum (EM) identified that the existing provisions are:

> [I]n 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 [and that the current discretion] provides a disincentive for proceeds of crime authorities to bring unexplained wealth proceedings, as there is greater uncertainty of the outcome.[6]

2.9 Upon introducing the bill, the Minister for Justice the Hon Michael Keenan MP stated:

> Removing the general discretion will improve certainty for all parties, while also maintaining appropriate protections for those subject to unexplained wealth orders.[7]

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3 Civil Liberties Australia, *Submission 3*, p. 3.

4 Law Council of Australia, *Submission 5*, p. 5.

5 Mr David Gray, Manager, Proceeds of Crime Litigation, Australian Federal Police (AFP), *Proof Committee Hansard*, 15 May 2014, p. 2.

6 EM, pp 19, 24, 28, 29.

7 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 5 March 2014, p. 1642.

Streamlining the affidavit requirements for preliminary unexplained wealth orders

2.10 Unexplained wealth order proceedings can commence either with an application for a restraining order followed by an application for a preliminary unexplained wealth order, or with an application for a preliminary unexplained wealth order.[8] Where an unexplained wealth restraining order is obtained prior to, or at the same time as a preliminary unexplained wealth order, and remains in force or has been revoked (under section 44[9] of the POC Act) at the time of applying for the preliminary unexplained wealth order, authorised officers are required at two stages to provide affidavits stating their reasonable grounds for the suspicions upon which the applications are made (subsections 20A(3) and 179B(2) respectively).[10] Similarly, the court is required at both stages to be satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired (paragraphs 20A(1)(f) and 179B(1)(b) respectively).[11]

2.11 In its 2012 report, the PJC-LE identified that removing the requirement to meet this evidence threshold twice could help improve the efficiency of the unexplained wealth provisions and recommended that 'the duplication of the evidence threshold test be eliminated'.[12]

2.12 Item 15 of Schedule 1 seeks to implement this recommendation[13] by repealing existing subsection 179B(2) and replacing it with three new subsections – 179B(1A), 179B(1B) and 179B(2).[14]

2.13 In its submission to the inquiry the Law Council was concerned that this proposed amendment would 'reduce the amount of information required to be included in an affidavit for a preliminary unexplained wealth order to that of what appears to be a lower standard for an interim restraining order'.[15] The Law Council explained:

> [G]iven the impact of the preliminary order on the individual, a higher standard of affidavit requirements for this stage of proceedings seems entirely reasonable. Without clear evidence of the nature of the

8 EM, p. 26.

9 Section 44 of the POC Act provides that a restraining order can be revoked, or certain property excluded from a restraining order, on the giving of satisfactory security by the suspect.

10 EM, p. 26.

11 EM, p. 26.

12 PJC-LE, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp 50–52.

13 Recommendation 8 of the PJC-LE's report.

14 EM, p. 25.

15 Law Council of Australia, *Submission 5*, p. 3.

> administrative burden the existing requirements place on agencies, the provisions designed to provide a degree of specificity, transparency and oversight to the use of these orders should be retained.[16]

2.14 The Australian Customs and Border Protection Service (Customs) had a contrary view and voiced its support for the amendments which are 'designed to streamline processes and facilitate the obtaining of orders, particularly where relevant criteria are met'.[17]

2.15 The minister explained that the amendments proposed in item 15 of Schedule 1 were necessary as they would:

> [R]educe unnecessary duplication in affidavit requirements by repealing certain requirements where police have already presented the same affidavit material to support an earlier related application.[18]

Extending the purposes for which information obtained under the coercive powers of POC Act can be shared

2.16 Part 3-6 of the POC Act governs the disclosure of information obtained under the coercive powers of the POC Act and identifies the authorities to whom disclosure can be made in the table in section 266A.[19]

2.17 Under the existing provisions, information can only be disclosed to Commonwealth, state or territory authorities 'for the purpose of assisting in the prevention, investigation or prosecution of offences punishable by at least three years imprisonment'.[20] Currently, information cannot be disclosed to an authority for the 'purposes of deciding whether to institute proceeds of crime proceedings under State and Territory proceeds of crime laws'.[21]

2.18 Item 31 of Schedule 1 proposes amendments to the POC Act that would extend the purposes for which information obtained under the coercive powers of the POC Act can be shared with a state, territory or foreign authority to include a proceeds of crime purpose.[22]

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16 *Submission 5*, p. 3.

17 Australian Customs and Border Protection Service (Customs), *Submission 4*, p. 2.

18 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 5 March 2014, p. 1642.

19 EM, p. 36.

20 EM, p. 36.

21 EM, p. 36.

22 EM, p. 3.

2.19 Some submitters expressed support for the amendments proposed in item 31 of Schedule 1;[23] the Law Council, however, raised concerns suggesting that the amendment:

> …significantly broadens the purposes for which information can be shared with other agencies and jurisdictions, without ensuring that each of the agencies authorised to receive such information have appropriate safeguards to protect against unjustified intrusion into personal privacy, and without imposing clear limits on the ability for foreign or State or Territory authorities to further disclose information to other agencies and jurisdictions.[24]

2.20 The Law Council pointed to the recent reports of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) and the Parliamentary Joint Committee on Human Rights (PJCHR) which both commented on the amendments proposed by item 31 of Schedule 1.

2.21 In its Alert Digest No. 3 of 2014, the Scrutiny of Bills Committee explained that there was an 'apparent absence of adequate safeguards for the process' and sought the minister's advice.[25]

2.22 In his response to the Scrutiny of Bills Committee's request, the minister asserted:

> All disclosures of information between foreign law enforcement authorities and Australian law enforcement authorities involve undertaking a broad assessment of whether the requesting country will treat information for the limited purposes for which it is shared and how the requesting country has previously dealt with information that has been disclosed for similar purposes. It is open to Australia to reject the request to provide specific assistance to the requesting foreign authority.
>
> Given the increasingly international nature of many crimes, including money laundering, drug trafficking and fraud, increased cooperation between Australia and foreign counterparts to target the criminal economy is required. To impose a requirement to undertake a detailed and specific assessment in all circumstances about whether the requesting country's laws

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23 The Uniting Church's Justice and International Mission Unit, Synod of Victoria and Tasmania (the Unit), supported the amendments proposed by item 31 of Schedule 1 stating: 'We particularly support Schedule 1 of the bill that will amend the [POC Act] to extend the purposes under section 266A for which information obtained under the coercive powers of the [POC Act] can be shared with a State, Territory or foreign authority to include a proceeds of crime purpose'. Uniting Church in Australia, Synod of Victoria and Tasmania, Justice and International Mission Unit, *Submission 8*, p. 2. Similarly, Western Australia Police and South Australia Police expressed support for item 31 of Schedule 1. See: Western Australia Police, *Submission 9*, p. 1; South Australia Police, *Submission 10*, p. 1.

24 Law Council of Australia, *Submission 5*, p. 2.

25 Senate Standing Committee on Scrutiny of Bills (Scrutiny of Bills Committee), *Alert Digest 3 of 2014*, 19 March 2014, p. 8.

> prevent further disclosure of shared information and to put in place processes to audit such an arrangement with respect to all requesting authorities is not feasible.[26]

2.23 In its evidence to the committee, the AFP also responded to the concerns of the Scrutiny of Bills Committee and the Law Council explaining:

> …certainly we do not share information without actually having established arrangements in place. Those arrangements actually talk about making sure that information that we share is used appropriately. That is just a procedural thing that we do regardless of what the legislation is. The legislation may allow us to share, but we will not necessarily do that unless we are satisfied that it is appropriate in the case to do so.
>
> I think with the sorts of agencies that we are sharing with generally, either domestically or internationally, the amendments actually set out the purposes for which we can share the information…The reality is that the types of agencies that we are sharing with are subject to their own strict accountability regimes and requirements. So certainly, if they are doing the wrong thing with their own information or information we have given to them, that will have them come under scrutiny for that. Also, if they try to use it in a court proceeding when it is not appropriate to do so, the judge has discretion not to admit that evidence.[27]

Preventing restrained assets from being used to meet legal expenses

2.24 The existing unexplained wealth provisions under the POC Act enable a court to order that 'specified property may be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses'.[28] Item 3 of Schedule 1 would repeal these provisions to 'harmonise the provisions relating to the payment of legal expenses for unexplained wealth cases with those for other proceedings under the POC Act' and implement recommendation 10 of the PJC-LE.[29] The EM explained the rationale for the proposed amendments:

> The ability of a person to dispose of restrained property [or property subject to an order under subsection 179S(1)] 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

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26 Scrutiny of Bills Committee, *Fifth Report of 2014*, 14 May 2014, pp 191–192.

27 Mrs Elsa Sengstock, Coordinator, Legislation Program, Australian Federal Police (AFP), *Proof Committee Hansard*, 15 May 2014, p. 3.

28 Subsection 20A(3A) and section 179SA, POC Act. Refer to PJC-LE *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp 56–57 for more information about the development of the provisions in the POC Act concerning the use of restrained assets to meet legal expenses.

29 EM, p. 20. It is also noted that the amendments proposed in item 24 would implement recommendation 11 of the PJC-LE's report and allow charges to be created over restrained property to secure payment of an unexplained wealth order, as can occur with other types of proceeds of crimes orders. See: EM, pp 32–33.

> 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.[30]

2.25 The committee received evidence both in support of and in opposition to this proposed change.[31]

2.26 Victoria Legal Aid (VLA) suggested that this proposed change would 'see an increase in applications for aid for proceedings that are usually strongly contested and involve protracted litigation with sizeable payments to legal representatives and forensic experts'.[32] In response, the department stated that when an order to restrain assets is made for unexplained wealth purposes, that order may not affect all of a person's assets:

> … it is not always going to be the case that all of a person's assets will be restrained. It is open to a person to use their unrestrained assets to meet their legal costs. In a situation where the entirety of a person's assets are restrained then there is a channel to seek legal aid and there is also the provision that when legal aid is assessing an application from a person the restrained assets are not taken into account in the process. Then at the end of the process to ensure that legal aid commissions are not out of pocket there is a mechanism for legal aid commissions to be reimbursed from the confiscated assets account for the costs they have incurred in the work that they do in the context of unexplained wealth proceedings or, in fact, any proceedings under the Proceeds of Crime Act.[33]

2.27 The AFP, which has been responsible for managing unexplained wealth litigation for the past two years, further explained that it is 'not expecting a huge volume of unexplained wealth cases' and that 'if a person does need to resort to legal aid there are ways for them to do that and for the legal aid commission to recoup those costs'.[34]

2.28 In expressing its opposition to the proposed amendments the Law Council stated that:

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30 EM, pp 20, 31.

31 These amendments were welcomed by the Uniting Church's Justice and International Mission Unit, Synod of Victoria and Tasmania (the Unit), the Australian Customs and Border Protection Service (Customs) and the Australian Crime Commission (ACC) which identified that the amendments will 'enhance law enforcement's ability to counter money laundering by…preventing the use of restrained assets by defendants to meet legal expenses'. See: Uniting Church of Australia, Synod of Victoria and Tasmania, Justice and International Mission Unit, *Submission 8*, p. 7; Australian Customs and Border Protection Service, *Submission 4*, p. 2; and Australian Crime Commission, *Submission 6*, p. 2.

32 Victoria Legal Aid, *Submission 2*, p. 1.

33 Mr Anthony Coles, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department, *Proof Committee Hansard*, 15 May 2014, p. 4.

34 Mrs Elsa Sengstock, AFP, *Proof Committee Hansard*, 15 May 2014, p. 4.

> [T]here are adequate safeguards against dissipation of restrained assets through the respondent's conduct of proceedings due to: the court's discretion in relation to the release of restrained assets…; and the court's ability to require certification of costs by a costs assessor and to make any further orders it considers appropriate…'[35]

2.29 In response, the AFP explained that current safeguards identified by the Law Council were unlikely to 'operate as a concrete safeguard':

> One of the current safeguards that the Law Council may be referring to is the fact that the court can appoint a cost assessor to make sure that what the lawyer is charging is fair and reasonable. We had some concerns around that ourselves, mainly the point that the judges are not themselves trained to be cost assessors and it is not something that is their bread and butter. They might be reluctant to award lesser costs to one person knowing that it could mean that they have to make up the difference from the assets. If someone is intent on frustrating the whole process, the cost assessor will not necessarily be able to fight that because they will just keep fighting the cost assessor's claims back and forth and that will use up even more expenses. The accuracy of the whole picture is going to depend on the quality of information that they get. It is a bit like saying that there is a safeguard that someone can say that those costs are okay and those costs are not, but it is not as black and white as that. We do not think that that in fact will operate as a concrete safeguard in this case.[36]

2.30 The AFP added that the existing provisions, which provide for a person to access restrained assets for the purpose of legal expenses, have been found to be the 'type of provision [that] undermined the entire object of the act because…people would rather spend their money on their lawyers than see the money going to be confiscated by law enforcement'.[37]

Making an unexplained wealth order in the absence of the person subject to the order

2.31 A preliminary unexplained wealth order 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'.[38] The amendments proposed in item 19 of Schedule 1 would amend subsection 179E(4) of the POC Act to add an additional subparagraph 179E(4)(b) to provide that the court is not prevented from making an unexplained wealth order under section 179E in relation to a person in

35 Law Council of Australia, *Submission 5*, p. 4.

36 Mrs Elsa Sengstock, AFP, *Proof Committee Hansard*, 15 May 2014, pp 3–4.

37 Mr David Gray, AFP, *Proof Committee Hansard*, 15 May 2014, p. 2.

38 EM, p. 29.

circumstances where the person fails to appear as required by a preliminary unexplained wealth order.[39]

2.32 The EM explained that the amendments proposed in item 19 of Schedule 1 'give effect to the original policy intent of unexplained wealth proceedings…It [was] not intended that a person might frustrate unexplained wealth proceedings by simply refusing to appear'.[40]

2.33 In its Fourth Report of the 44th Parliament, the Parliamentary Joint Committee on Human Rights commented on this proposed amendment raising concern 'regarding the compatibility of this measure with the right to a fair hearing'.[41] The Law Council shared this concern and suggested that:

> [A] comprehensive review of this proposed amendment be conducted as to whether it is necessary and proportionate when considered in light of the impact on the right to a fair hearing, and what safeguards and other provisions should be included in the POC Act to ensure that it does not unduly burden individual rights, including the right to a fair hearing.[42]

2.34 The AFP explained the problem with the current provisions:

> [I]f a person who is ordered by a court to appear before it for the purposes of a preliminary unexplained wealth order refuses or fails to appear, then the court cannot do anything more and neither can the proceeds of crime authority. In other words, a person who is the subject of an application can thwart the entire proceedings just by refusing to turn up.[43]

2.35 The AFP further advised the committee that the amendments would give the court a choice as to whether or not it proceeds in the absence of the person:

> At the moment, the court has no choice if the person does not show up—that is it; that is the end of it. This [the proposed amendment] will give them a specific basis to choose whether they feel comfortable proceeding in the absence of the person having turned up or not.
>
> …the way the amendments will work is they will give the court an option. So the court can say: 'I ordered them to appear. The AFP served notice on them. They have not appeared. There is evidence that they are not trying to deliberately frustrate this. They are not lying in hospital or something like that. I am convinced by the AFP's evidence that this person has unlawful property.' The court will now have a choice to proceed and make the final

39 Section 225 of the POC Act.

40 EM, p. 29.

41 Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, 18 March 2014, p. 6.

42 Law Council of Australia, *Submission 5*, p. 6.

43 Mr David Gray, AFP, *Proof Committee Hansard*, 15 May 2014, p. 5.

> order, but the court is not required to; it just leaves it open for them to actually have that discretion to keep going forward with the action.[44]

2.36 The minister stated that this amendment was necessary to close loopholes in the POC Act which had been identified by the PJC-LE and to 'clarify that a person whose property is subject to a preliminary unexplained wealth order is prevented from frustrating unexplained wealth proceedings by simply failing to appear when ordered to do so'.[45]

Ensuring evidence relevant to unexplained wealth proceedings can be seized under a search warrant

2.37 Under the existing provisions of the POC Act, a magistrate may issue a warrant to search premises if they are satisfied by information on oath that there are reasonable grounds for suspecting there is 'tainted property' or 'evidential material' at the premises (or will be within 72 hours).[46] Section 227 of the POC Act sets out the requirements for the 'content of warrants' and section 228 sets out 'the things that are authorised by a search warrant'.[47] Although the current provisions allow for the collection of some evidence in relation to property relevant to unexplained wealth proceedings, under the current provisions it is not possible to seize all evidence that would be relevant to an unexplained wealth investigation or proceeding.[48]

2.38 Items 27 and 28 of Schedule 1 propose amendments that would:

- authorise the seizure of other things found at the premises in the course of the search that the executing officer or a person assisting believes on reasonable grounds to be things relevant to unexplained wealth proceedings;[49] and
- authorise the authorised officer or a person assisting to seize other things found at the premise in the course of the search that he or she believes on reasonable grounds to be things relevant to unexplained wealth proceedings.[50]

2.39 The EM outlined that these amendments would ensure that material relevant to unexplained wealth proceedings could be seized when searching premises under a

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44 Mrs Elsa Sengstock, AFP, *Proof Committee Hansard*, 15 May 2014, p. 5.

45 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 5 March 2014, p. 1643. Customs also noted its support for the measure. See: Australian Customs and Border Protection Service, *Submission 4*, p. 2.

46 EM, p. 35.

47 Sections 227, 228 of the POC Act.

48 EM, p. 35.

49 Proposed paragraph 227(1)(h), item 27 of Schedule 1.

50 Proposed paragraph 228(1)(d), item 28 of Schedule 1.

warrant, enhancing the investigation of unexplained wealth matters and implementing recommendation 5 of the PJC-LE's report.[51]

2.40 In its submission to the committee, the Law Council commented on these proposed amendments stating that they 'seek to expand the scope of intrusive search and seizure powers that are already broad in scope, without clearly demonstrating why such an expansion is necessary'.[52]

2.41 In response, the AFP explained that the proposed amendments were previously recommended by the PJC-LE to close a gap in the unexplained wealth provisions:

> This is one of the matters that was explored with the Parliamentary Joint Committee on Law Enforcement…it has already been tested in terms of its need. We can only get a search warrant for particular reasons and on particular grounds and those have not changed at all. But, like other search warrants, once you are on premises you are authorised, if you have reached certain threshold tests, to seize other material that may be relevant. One of those categories of material—which is things that are relevant to unexplained wealth proceeding—was not available to us. So we could seize things that were relevant to other proceeds, other actions, we could seize things relevant to indictable crimes; but if there was evidence that would be quite useful in an unexplained wealth case we would not be able seize it, even though it was right there in front of us and we had entered lawfully. Our sense was that that was a gap in the law and it meant that we were there for legitimate reasons and we would not be able to pick up that particular information.[53]

2.42 In his second reading speech, the minister argued that the amendments would address uncertainty:

> This amendment will address some uncertainty that exists under current arrangements and ensure that material relevant to unexplained wealth proceedings can be seized when searching premises under a warrant.[54]

Committee view

2.43 The committee takes the view that serious and organised crime pose a significant threat to Australian communities. The committee supports the

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51 EM, pp 35–36.

52 Law Council of Australia, *Submission 5,* p. 5. The Law Council raised similar concerns during the committee's 2012-2013 inquiry into the 2012 bill which also contained this amendment. See for example, Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 [Provisions]*, March 2013, p. 15.

53 Mrs Elsa Sengstock, AFP, *Proof Committee Hansard*, 15 May 2014, p. 4.

54 The Hon Michael Keenan MP, Minister for Justice, *House of Representatives Hansard*, 5 March 2014, p. 1642.

strengthening of the existing unexplained wealth provisions under the POC Act through the amendments proposed by the bill.

2.44 The committee acknowledges that the amendments set out in the bill would implement a number of the recommendations of the PJC-LE which examined these issues at length in its report in 2012 on the Commonwealth unexplained wealth legislation and arrangements.

2.45 In relation to concerns raised in respect of removing the court's discretion to make an unexplained wealth order, the committee considers that the safeguards provided by the bill to retain the discretion where the unexplained wealth is less than $100,000 or where it is not in the public interest to make the order are adequate and will reinforce the purpose of the unexplained wealth provisions to target the "Mr and Mrs Big's" of organised crime.

2.46 The committee acknowledges the Law Council's concern that the proposed amendments to streamline the affidavit requirements would 'reduce the amount of information required to be included in an affidavit for a preliminary unexplained wealth order to that of what appears to be a lower standard for an interim restraining order'.[55] However, the committee agrees with recommendation 8 of the PJC-LE's 2012 report, that 'the duplication of the evidence threshold test be eliminated' to improve the efficiency of the unexplained wealth provisions.[56]

2.47 A number of submitters were concerned about item 31 of Schedule 1 that would extend the disclosure of information. The committee is reassured by the minister's response to the Scrutiny of Bills Committee's concerns (see paragraph 2.22) and takes the view that the amendment is necessary given the increasing transnational nature of organised crime and that it will improve the effectiveness of investigations.

2.48 The committee supports the amendments that would prevent restrained assets from being used to meet legal expenses. The committee notes that following a review by the ALRC, the POC Act was amended in 2002 to 'preclude the use of restrained property to meet legal expenses incurred in connection with the [POC Act] or criminal proceedings'.[57] The committee recognises that these provisions were not extended to the unexplained wealth regime when it was introduced in 2010; however, the committee considers that the provisions should be harmonised with those in relation to other proceedings under the POC Act.

2.49 The committee agrees with the policy decision to enable the making of an unexplained wealth order in the absence of the person who is the subject of the order

55 Law Council of Australia, *Submission 5*, p. 3.

56 PJC-LE, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp 51–52.

57 PJC-LE, *Inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, p. 57.

so that such proceedings cannot be deliberately frustrated by that person. The new provisions would allow the court to choose whether or not it proceeds with making an order in the absence of the person and this is preferable to the status quo.

2.50 The committee supports the amendments that would ensure evidence relevant to unexplained wealth proceedings can be seized under a search warrant. The committee is pleased that this is balanced by the consequential amendments (item 30 of Schedule 1) that require the authorised officer responsible for executing the warrant to 'take reasonable steps to return these things where the reason that the thing was seized no longer exists or if it is decided that the thing is not to be used in evidence'.[58]

Recommendation 1

2.51 The committee recommends that the Senate pass the bill.

Senator the Hon Ian Macdonald

Chair

58 EM, p. 36.

Additional comments – Australian Greens

The Australian Greens believe that it is not appropriate to remove the discretion of courts to allow legal expenses to be paid out of restrained assets, in unexplained wealth proceedings.

In preventing a person's restrained assets from being used to cover their legal expenses, this Bill will force parties to look to legal aid for assistance, compounding pressure on the legal assistance sector, which is already overloaded.

Legal Aid Victoria's submission to this inquiry has made it clear that diverting people who wish to contest unexplained wealth proceedings into the legal aid scheme will see an increase in applications requiring funding for protracted litigation, with sizeable payments to legal representatives and forensic experts. At a time when there is clear evidence of significant existing levels of unmet need in the legal assistance sector, with serious consequences such as an increase in self-represented litigants in the family court, this is of serious concern.

There is also doubt as to the capacity of any legal aid grant to meet the costs required in an unexplained wealth matter. As discussed in the Law Council's submission, there is generally a need for specialist commercial expertise in responding to unexplained wealth orders, and there are often restrictions on using legal aid funding to obtain expert reports.

Unexplained wealth proceedings are complex matters, likely to require counsel as well as instructing solicitors and forensic accounting experts.

Because of strict eligibility criteria, and restrictions on how legal aid funding can be used, legal aid is likely to be inadequate in such a situation.

The Law Council states there are already adequate safeguards against the possible dissipation of restrained assets because:

1. the court has discretion in relation to releasing restrained assets, in subsection 20A(3A); and

2. the court is able to require certification of costs by a costs assessor, and able to make any further orders it considers appropriate, under subsection 20A(3C).

The Law Council of Australia recommends the removal of items 3 and 24 of the Bill. It is these items whose enactment would remove judicial discretion to allow restrained assets being used to meet legal expenses.

The Australian Greens further note that item 24 also inserts two new, unrelated, sections, and we propose that those sections be created in an alternative item.

The Law Council also suggests that any of the Bill's provisions which are passed should be subject to a three-year sunset clause, involving a parliamentary or independent review.

The Australian Greens are of the view that the Explanatory Memorandum to 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.

Recommendation 1

1.1 The Australian Greens recommend that items 3 and 24 of the Bill be removed, in order to preserve judicial discretion about accessing restrained funds for legal costs. This will protect Australians' legal resources with no impact on the Bill's integrity.

Senator Penny Wright
Australian Greens

Appendix 1

Public submissions

1	Director of Public Prosecutions Northern Territory
2	Victoria Legal Aid
3	Civil Liberties Australia
4	Australian Customs and Boarder Protection Service
5	Law Council of Australia
6	Australian Crime Commission - Melbourne
7	Police Federation of Australia
8	Uniting Church in Australia
9	Western Australian Police
10	South Australian Police

Appendix 2

Public hearings and witnesses

Thursday 15 May 2014—Canberra

COLES, Mr Anthony, Assistant Secretary, Criminal Law and Law Enforcement Branch, Attorney-General's Department

GRAY, Mr David, Manager, Proceeds of Crime Litigation, Australian Federal Police

HARTIGAN, Ms Brooke, Principal Legal Officer, Criminal Law Section, Attorney-General's Department

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

WINTER, Ms Josephine, Senior Legal Officer, Criminal Law Section, Attorney-General's Department