SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S DEPARTMENT

Crimes Legislation Amendment (Organised Crimes and Other Measures) Bill 2012
Questions on Notice taken on
7 February 2013

Question No. 1

Senator Wright asked the following question at the hearing:

Senator WRIGHT: Thank you. Can I clarify something there? Does that depend on the success, or otherwise, of the case? Is legal aid going to be reimbursed from the confiscated assets fund irrespective of whether the case has been successful or not?
Mr Anderson: I believe that is case. They simply render a bill to the official trustee.
Senator WRIGHT: Irrespective of whether they have found there to be unexplained wealth?
Mr Anderson: I believe that is the case.
Senator WRIGHT: Do we need to clarify that? You say you 'believe' it to be the case.

Mr Anderson: I am happy to say we will clarify that if it is not the case...

The answer to the honourable senator's question is as follows:

A legal aid commission will be reimbursed for legal costs incurred for representing suspects or other persons whose property was, at the time of this representation covered by a restraining order in proceedings under the *Proceeds of Crime Act 2002* (POCA 2002) regardless of the success of the proceedings.

The Official Trustee will be required to reimburse these costs from the Confiscated Assets Account *unless* the balance of the Confiscated Assets Account is insufficient to pay the legal costs. In these circumstances the Official Trustee is obliged to reimburse the legal costs, to the extent possible from the property covered by the restraining order. The person whose property is covered by the restraining order must then pay the Commonwealth the lesser of either the amount paid by the Official Trustee to the Confiscated Assets Account or the value of the person's property covered by the restraining order. This obligation is discharged if property equal or exceeding the amount of the legal costs is forfeited to the Commonwealth under POCA 2002.

Question No. 2

Senator Boyce asked the following question at the hearing:
On notice, could you provide for us what the criteria for the means test in each state are please?

The answer to the honourable senator's question is as follows:

Legal aid commissions set their own eligibility criteria and guidelines for a grant of legal aid. In general, the means tests are divided into an income test and an assets test. Since each jurisdiction sets its own income and assets thresholds to reflect local conditions, the means tests vary nationally.

Income test criteria generally include the income of the applicant and that of any financially associated person, assessing the ability of the applicant to make a contribution to their legal costs, and whether the applicant has any dependants. Assessable assets test criteria generally exclude a level of equity in a primary residence or car and to a certain extent, other items such as furniture and tools of trade.

Due to the large number of different factors that may apply to assess whether a person qualifies for legal aid in each jurisdiction, it is not possible to provide the Committee with a single threshold amount at which a person's weekly disposable income, and asset level that would qualify them for a grant of legal aid in each of the states.

For example, to determine whether a person will qualify for a grant of legal aid in Western Australia, a person must meet a series of income and the assets measures. Legal Aid Western Australia (Legal Aid WA) will consider whether a person qualifies for free legal assistance if they have an assessable income of less than or equal to the weekly income threshold of $264. However, this cannot be said to be the 'basic' criteria for qualifying for legal aid, as the threshold cut-off will be higher depending on the number of children (if any) the applicant may have and the applicant's housing conditions. The calculation of a person's weekly disposable income will also depend on a range of different factors being considered.

Legal Aid WA generally consider all income a person has received or have the benefit of, and all income from any other source, except the basic family allowance payments. Deductions may also be made relating to income tax, the Medicare levy, allowable weekly housing costs, allowable child care costs, allowable dependent allowance, and allowable child support payments. Different deductions are considered if the income being assessed is business income. Likewise under Legal Aid WA eligibility criteria, the assessable assets threshold that applies to an applicant depend on whether he or she holds equity in a house, farm or business (and the location of this property), the total equity in motor vehicles held by the person, the age of the applicant, access to other sources of funding and whether the applicant is single or with children, or other dependents.

Information about each of the individual means tests is publicly available on the following websites:

Legal aid commission	**Internet link**
Legal Aid Western Australia	http://www.legalaid.wa.gov.au/LegalAidServices/applyingforLegalAid/Pages/whatWeConsider.aspx
Legal Services Commission of South Australia	http://www.lsc.sa.gov.au/cb_pages/legal_aid_eligibility.php

Northern Territory Legal Aid Commission	http://www.ntlac.nt.gov.au/
Legal Aid Queensland	http://www.legalaid.qld.gov.au/publications/Factsheets-and-guides/Factsheets/Pages/Can-I-get-legal-aid.aspx
Legal Aid New South Wales	http://www.legalaid.nsw.gov.au/get-legal-help/applying-for-legal-aid/policy-easy-guide/legal-aid-tests
Legal Aid ACT	http://www.legalaidact.org.au/whatwedo/faq/legaladvice.php#1
Legal Aid Commission of Tasmania	http://www.legalaid.tas.gov.au/Guidelines/index.htm
Victoria Legal Aid	http://www.legalaid.vic.gov.au/handbook/232.htm

Question No. 3

Senator WRIGHT asked the following question at the hearing on 7 February 2013:

Senator WRIGHT: I am just interested in what evidence there would be as to how well that is currently working under the proceeds of crime regime. Maybe we need to ask legal aid commissions as to how satisfactory they find those arrangements to be.
Mr Anderson: We will see what we can provide, Senator.
Senator WRIGHT: That would be useful, because you are using that as an analogy consistently and it may be that that could set people's minds at rest—or not, depending on what information is available.
Mr Anderson: Yes. My only reservation there is how much will actually be within our hands.
Senator WRIGHT: Yes, I understand that. It may be something that the committee can consider.
Senator BOYCE: Do you have some basis for your comment that it is working well?
Mr Anderson: Yes, that is certainly our understanding based on the discussions we have with the Insolvency and Trustee Service that administers those arrangements, and also with the AFP in terms of the management of proceeds of crime matters—but we will take that on notice and see what we can provide to the committee.

Senator WRIGHT: That you very much.

The answer to the honourable senator's question is as follows:

The Department is not aware of any significant concerns held by Legal Aid Commissions about the current arrangements for providing for access to legal aid for proceeds of crime matters or regarding reimbursement of Legal Aid Commission expenses from the Confiscated Assets Account (CAA).

These arrangements were put in place with the support of Legal Aid Commissions (LACs) in 2002. Enhancements were made to the scheme in 2010 to address concerns raised by LACs about the practical operation of the scheme. These enhancements included amendments made to the *Proceeds of Crime Act* 2002 (POCA 2002) to simplify arrangements for LACs to recover costs incurred by people who have assets restrained under the POCA 2002.

Under this simplified process legal aid costs are paid directly from the CAA. The *Commonwealth Legal Aid Priorities and Guidelines* complements this process by awarding a high priority to legal aid in cases where persons have assets restrained under POCA 2002, and specifying that restrained assets are to be disregarded for the purposes of the means test. The Explanatory Memorandum accompanying the reforms indicated that the original policy intention was that LACs did not suffer detriment by taking on matters that may not usually pass the means and merits test; the amendments were directed at confirming that policy and overcoming problems that had arisen it the practical application of the scheme.

The enhanced arrangements have now been in place for two years. The 2011-2012 Parliamentary Joint Committee on Law Enforcement inquiry into Commonwealth unexplained wealth legislation and arrangements considered ways in which the efficiency of unexplained wealth proceedings could be improved, including preventing legal expenses being met from restrained property. None of the LACs made submissions to this Committee with respect to further efficiencies that could be made to the arrangements under which LACs recover costs.

The **Attachment** to this response outlines the policy history of the legal aid for proceeds of crime arrangements.

Question No. 4

Senator Crossin, Chair of the Committee, asked the following question at the hearing:

CHAIR: With the report from the Parliamentary Joint Committee on Law Enforcement in March of last year, and their inquiry into the unexplained wealth legislation arrangements, can you just tell me where the response to the full recommendations are up to? All of their recommendations, really, but how many of these have now been picked up or acted upon?
Mr Anderson: Six are picked up in this bill—
Ms Inverarity: Six are in this bill. A few have already been completed—they have already been done.
Mr Anderson: The balance are still to be dealt with as part of the government's response, and that response is currently still being considered by the government.
CHAIR: Can you just take on notice for me, then, where things are with these recommendations? There are 18 recommendations in all, so when you say that six have been taken up—
Ms Inverarity: Yes, we will be able to give you a list of which are addressed in this bill and which have already been completed.
CHAIR: Thanks very much.

The answer to the honourable senator's question is as follows:

On 21 February 2013, the Government tabled its response to the final report of the Parliamentary Joint Committee on Law Enforcement's inquiry into unexplained wealth legislation and arrangements. This response is publically available on the Attorney-General's Departmental website, and can be accessed via the following hyperlink.
http://www.ag.gov.au/Publications/Pages/GovresponsetotheParliamentaryJointCommitteeonLawEnforcementsInquiryintoCommonwealthunexplainedwealth.aspx

This response notes that the Government has accepted 15 recommendations, either wholly or in part.

The response also notes that:

- recommendation 6 and 18 has been implemented, and
- recommendations 5, 9, 10, 11 and 12 will be implemented on the passage of amendments of the Bill.

Question No. 5

Senator Boyce asked the following question at the hearing on 7 February 2013:

Senator BOYCE: The Law Council raised an issue outside of their submission with us when they were giving evidence earlier, saying that throughout the bill there are the terms 'the public interest' and 'the interests of justice' used in different places and that they had a concern that the distinction—if there is one—was unexplained. They also felt 'the interests of justice' was probably a broader term than 'the public interest'—but, whether it was or not, they were concerned that the way it was used in the legislation would provide a source of lovely litigation whilst people argued about whether they meant the same thing. They particularly mentioned section 179B, which talks initially about 'the public interest' and then talks about all the interests of justice. I do not have it in front of me at the moment, but it sets two tests: one is about the public interest and the next one is about the interests of justice, which would seem to beg that question of whether they are the same thing.
Mr Anderson: Senator, we may need to take that on notice. My recollection is that the existing Proceeds of Crimes Act already uses the different language in different places, so I suspect we are just reflecting the existing language in the act. But we will need to take that on notice.
Senator BOYCE: Their suggestion was that the 'interests of justice' should be the term that is used throughout, on the basis that 'the interests of justice' is a somewhat broader term than 'the public interest'. But, yes, if it has not been raised with you before now—
Mr Anderson: No, it has not.
Senator BOYCE: Then you may like to have a look at their comments in *Hansard* and respond. It seemed a valid point that they were making.
Mr Anderson: That has not been raised with us before, so we will take that on notice if we may.

Senator BOYCE: Thank you.

CHAIR: Thanks very much.

The answer to the honourable senator's question is as follows:

The *Proceeds of Crime Act* 2002 (POCA) currently contains references both to the 'public interest' and to the 'interests of justice'. The Department considers that is appropriate to retain references to both tests as they involve different considerations.

There are provisions in the Bill that enable a court to make decisions having regard to the 'public interest', which are consistent with existing provisions in the POCA. The Bill does not contain any amendments that refer to the 'interests of justice'.

Proposed subsection 20A(4) of the Bill provides that a court may refuse to make a restraining order if the court is satisfied that it is not in the public interest to make the order. Amendments in the Bill also ensure that the court's ability to refuse to make an unexplained wealth order under existing subsection 179E(6) of POCA is retained where the court is satisfied that it is not in the public interest to make the order. These amendments reflect existing safeguards in POCA that enable a court to refuse to make restraining orders (section 17) and forfeiture orders (subsection 48(4)) where it is the 'public interest'. 'Public interest' is a broad term that can include a range of interests such as public safety, the economic well-being of Australia and the protection of the rights and freedoms of citizens.

There are existing provisions in POCA that enable a court to revoke certain orders if satisfied it is in the interests of justice (for example, restraining orders (section 42) and unexplained wealth orders

(subsection 179C(5)). These provisions were inserted into POCA in 2010 in response to the High Court's decision in *International Finance Trust Company Limited v New South Wales Crime* (2009). In that case, a majority of the High Court found that provisions for the making of restraining orders in the *Criminal Asset Recovery Act 1990* (NSW) were invalid as they required a court to receive, hear and determine an application for a restraining order ex parte and did not allow a person affected by the order to apply to a court to have it generally set aside. The provisions in POCA that enable a court to revoke an order in the interests of justice ensure that a court that is hearing a revocation application can have regard to matters that are relevant to the administration of justice.

References to a court exercising a discretion in the 'public interest' in the Bill reflects the existing language of the *Proceeds of Crime Act* 2002 (POCA 2002).

Proposed subsection 20A(4) of the Bill provides that a court may refuse to make a restraining order if the court is satisfied that it is not in the public interest to make the order. Amendments to the Bill also ensure that the court's ability to refuse to make an unexplained wealth order under existing subsection 179E(6) of *Proceeds of Crime Act* 2002 (POCA 2002) are retained where the court is satisfied that it is not in the public interest to make the order. The purpose of the amendments in the Bill to 20A(4) and 179E(6) is to give the court additional discretion to refuse to make an unexplained wealth restraining order or an unexplained wealth order where there are not reasonable grounds to suspect that the person's unexplained wealth is more than $100,000 (in the case of an unexplained wealth restraining order) or where the person's unexplained wealth amount is less than $100,000 (in the case of an unexplained wealth order). These amendments reflect similar safeguards included in POCA 2002 that provide that the court can refuse to make restraining orders (section 17) and forfeiture orders (subsection 48(4)) where it is the 'public interest'.

There are no amendments made by the Bill that refer to court's exercising their discretion to act 'in the interests of justice'. References to the 'interests of justice' in the Bill's explanatory material refer to existing provisions on POCA 2002 in which the court is able to consider the interests of justice when applications are made by proceeds of crime authorities in relation to the revocation of restraining orders (section 42) and unexplained wealth orders (subsection 179C(5)).

The use of the term 'interests of justice' in these provisions respond specifically to concerns raised in the High Court's decision in *International Finance Trust Company Limited v New South Wales Crime* (2009). In this case, a majority of the High Court, on different grounds, that the provisions for the making of restraining orders in the *Criminal Asset Recovery Act 1990* (NSW) were invalid. The majority of the High Court expressed concerns about the statutory limitations imposed on the court as to the manner in which it exercises its jurisdiction in making these restraining orders, and the absence of a proper means of curial supervision of the making of *ex parte* applications for restraining order. The POCA 2002 provisions that govern restraining, freezing and unexplained wealth orders are made are materially different to those which were subject to the High Court's decision in *IFTC v NSW Crime* (2009). However, it was considered appropriate and desirable to amend the POCA 2002 at that time to give the court a broad discretion in certain instances to consider the interests of justice to avoid the issues raised with respect to restraining orders in that case.

Attachment A

Use of restrained assets to fund legal representation

Background

Currently, subsection 20A(3A) – (3C) of the *Proceeds of the Crime Act 2002* (POCA 2002), gives the court the discretion to order that certain property be disposed of (or otherwise dealt with) for the purpose of meeting a person's reasonable legal expenses. A judge also has the discretion to appoint a costs assessor to certify that legal expenses have been property occurred to assist in this process. The Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012 proposes to repeal subsections 20A(3A) – (3C) of POCA 2002.

2. Under the original *Proceeds of Crime Act 1987* (POCA 1987), restrained assets could be accessed for the purposes of meeting legal expenses. However, this position changed with the commencement of POCA 2002. The underlying policy reason for the 2002 changes was that the use of restrained assets in this way was contrary to the objectives of the proceeds of crime scheme. This issue was compounded by the real risk of the unreasonable dissipation of assets. In essence, defendants would actively frustrate POCA 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).

3. The unexplained wealth regime was introduced into POCA 2002 by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (SOC Act). Subsections 20A(3A) – (3C) were incorporated following committee consideration of the SOC Act. The Bill would ensure the position on the use of restrained assets for legal expenses is harmonised with other proceedings under POCA 2002. However, the policy rationale for the amendments contained in the Bill is not harmonisation for 'harmonisation's sake'. Rather, the amendments 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.

4. 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 POCA 2002 proceedings. However, there is clear evidence that similar provisions were abused under POCA 1987 and there is nothing to suggest that similar dissipation of assets will not occur under the unexplained wealth provisions.

5. One of the factors that is taken into account when deciding whether to commence proceeds of crime proceedings is the total value of assets potentially subject to confiscation action. As such, the 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. Further, access to restrained assets for legal expenses provides an incentive for respondents to engage in protracted and expensive litigation rather than see the restrained assets forfeited to the Commonwealth.

ALRC consideration

6. The issue of using restrained assets for legal expenses was comprehensively considered by the Australian Law Reform Commission (ALRC) in 1999.[1]

7. The ALRC concluded that the availability of restrained assets to meet legal expenses was inconsistent with the underlying principles of POCA 1987 as set out in the objects clause of that Act. Such principles, and the way in which they are undermined, are summarised below.

- A person should not be allowed to become unjustly enriched as a result of criminal conduct – the use of proceeds to fund a defence was inconsistent with the principles that criminals should not profit from their crimes.
- Confiscation of property should be available as a punitive sanction for engaging in criminal conduct - this is put at risk by the dissipation of assets to meet legal expenses.

Further, the ALRC considered that an additional policy objective was also compromised by the dissipation of assets for legal expenses, namely that property liable for forfeiture should be preserved for that purpose.

8. The real risk of unreasonable dissipation of assets is demonstrated by several case studies, which were included in the ALRC's final report, and are summarised below.

- *Operation Tableau* involved the restraint of over $1 million following the arrest of 12 people for various drug importation offences. Access to the restrained funds was granted for the payment of legal fees. Despite the defendant pleading guilty to the charges (and being sentenced to 22 years imprisonment) the $1.2 million originally restrained by the Commonwealth was consumed by the defendant's legal team during the course of over 15 committal pre-trial hearings.

- In *DPP v Saxon*, the trial judge noted the absence of a mechanism for protecting against wholesale dissipation of restrained funds; in that case, over $1 million in legal expenses was incurred at the committal stage alone.

9. The reluctance of the judiciary to allow access to restrained funds to meet legal expenses demonstrates the real risk of the unreasonable dissipation of assets. The following examples have been drawn from a 1993 speech given by the then Director of Public Prosecutions, Mr Michael Rozenes QC.[2]

- *Commonwealth of Australia v Jansenburger* is an early, pre-POCA 1987 case which demonstrates that judges were reluctant to allow access to restrained funds (such as those restrained through Mareva injunctions) for legal expenses in criminal proceedings. Although decided on a case by case basis, courts considered that it was important that a strong prima facie case has been established and the lack of legal or moral right to the restrained funds.

- *DPP v Ward* was a Western Australian case in which Kennedy J rejected the defendant's application for access to restrained assets for payment of legal fees. An

[1] ALRC (1991), *Confiscation that counts: A review of the Proceeds of Crime Act 1987.* Consideration of the control of restrained assets, and the prevention of unreasonable dissipation of restrained assets on legal expenses, formed part of the formal Terms of Reference for the ALRC's inquiry.

[2] The speech, *Payment of legal costs from restrained assets*, is available online from: http://www.cdpp.gov.au/Director/Speeches/199306mr.aspx

important factor in his decision was that the funds for which the application was made were mainly as the result of a fraud against the Commonwealth and secondly, the likely shortfall of restrained assets and the amount owed to the Commonwealth.

- In *Commissioner of AFP v Malkoun and Others*, Ryan J was not prepared to allow access to restrained funds to allow the funding of "hopeless or extravagant" defences and restricted the amount of funding available for legal purposes.

10. The ALRC ultimately recommended that the relevant provisions should be discontinued (ALRC Recommendation 65). However, the ALRC was also cognisant of the need to ensure that defendants were not disadvantaged by being unable to afford adequate legal counsel, and that the limited resources of legal aid commissions were not diverted from cases that did not involve restrained assets. Accordingly, the ALRC recommended that a new scheme be developed that would, among other things, ensure access to legal aid, with the costs of representation being met from the then Confiscated Assets Reserve (ALRC Recommendation 66).

11. The ALRC considered several alternative approaches to address the problem of dissipation of assets. These included:

- removing consideration of access to restrained funds, including quantifying amounts, from courts and involving third party bodies, such as a commonwealth agency, an independent board, tribunal or the Administrative Appeals Tribunal or giving the role to legal aid commissions;

- the adoption of legislatively prescribed criteria to decide how funds could be used and relatedly, a prescription of fees or the adoption of legal aid rates;

- placing a limit on the nature and length of defence proceedings available through restrained assets; and

- related monitoring powers to ensure correct and timely payment of legal defence fees.

12. The ultimate decision of the ALRC in relation to ensuring access to legal aid was felt to be the best alternative comprising the least restrictive means.

2002 Reforms

13. The ALRC Recommendations were largely implemented though significant reforms to proceeds of crime legislation in 2001-02. The Proceeds of Crime Bill 2001 was introduced but did not progress due to the dissolution of the Parliament prior to the election. The reforms were reintroduced through the Proceeds of Crime Bill 2002 (the 2002 Bill). While both Bills did not allow restrained assets to be accessed to meet the costs of legal expenses, their approach to ensuring access to appropriate access differed. Ultimately, POCA 2002 introduced provisions by which defendants did not have access to restrained funds for POCA matters (except unexplained wealth proceedings). Defendants were free to use unrestrained assets to retain legal counsel and such assets were included in merit testing if the defendant applied for legal aid. Any costs incurred by legal aid were then directly recoverable from the Confiscated Assets Account.

14. In considering the 2002 Bill, the Senate Standing Committee on Legal and Constitutional Affairs revisited the policy rationale for the changes. The Senate Committee noted evidence that assets had been unreasonably dissipated under POCA 1987. The

Committee focussed on the new scheme, under which legal expenses could be recovered by Legal Aid Commissions (LACs) from funds ultimately forfeited, with provision made for top up funding that that amount of insufficient. The Committee noted that this approach had been agreed to by all LACs. The Committee concluded that under the revised approach, neither defendants nor LACs would be disadvantaged, and that the dissipation risk would be minimised by the public accountability provisions under which LACs operate.

2010 Reforms

15. The operation of the POCA 2002 was subject to a comprehensive review by Mr Tom Sherman AO in 2006 (the Sherman Review).[3] The Sherman Review considered the changes that had been made under POCA 2002 in relation to legal expenses, with particular focus on the submission of the NSW Legal Aid Commission's experience with the new scheme. The NSW Legal Aid Commission identified a range of problems with administering the scheme. In response, the Sherman Review recommended a more simplified scheme be enacted, which would ensure that LACs were paid directly out of the Confiscated Assets Account (CAA), and that applications for legal aid in relation to POCA proceedings should be subject to the usual merits and means tests (Sherman Review Recommendation 14).

16. The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* implemented Recommendation 14 of the Sherman Review. In particular, amendments were made to POCA 2002 which simplified arrangements for LACs to recover costs incurred by people who have assets restrained under the Act. The simplified process includes legal aid costs being paid directly from the CAA. The *Commonwealth Legal Aid Priorities and Guidelines* complements this process by awarding a high priority to legal aid in cases where persons have assets restrained under POCA 2002, and that restrained assets are to be disregarded for the purposes of the means test. The Explanatory Memorandum accompanying the reforms indicated that the original policy intention was that LACs did not suffer detriment by taking on matters that may not usually pass the means and merits test; the amendments were directed at confirming that policy and overcoming problems that had arisen it the practical application of the scheme.

Parliamentary Joint Committee on Law Enforcement inquiry

17. During 2011-12, the Parliamentary Joint Committee on Law Enforcement (PJCLE) conducted an inquiry into Commonwealth unexplained wealth legislation and arrangements. As part of that inquiry, the PJCLE considered ways in which the efficiency of unexplained wealth proceedings could be improved, including preventing legal expenses being met from restrained property.

18. The PJCLE heard evidence from the Australian Federal Police (AFP) and the Australian Crime Commission who were concerned about the potential use of restrained assets to be dissipated, based on experience with proceeds of crime proceedings between 1987 and 2002. The PJCLE ultimately recommended that the provisions relating to legal expenses should be harmonised across POCA 2002 (PJCLE Recommendation 10). However, this was not before considering other ways to prevent the dissipation of assets, including the use of independent assessors, and imposing a monetary cap on legal expenses.

<u>Use of independent assessors</u>

[3] See the *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002 (Cth)*.

19. Under the current regime, POCA 2002 provides for a judge to oversee the process for allowing a respondent's legal costs to be paid from restrained assets, and to engage a costs assessor to certify that legal expenses in defending unexplained wealth proceedings have been properly incurred. The PJCLE queried whether this acted as a sufficient safeguard against abuse. The AFP indicated that it was not.

20. Judges are not generally trained as costs assessors. As such, judges can be reluctant to look behind the information that is presented to them in relation to whether costs have been validly incurred by a respondent in a matter. A judge may also be reluctant to award a lesser amount of costs than that claimed by the respondent, in the knowledge that to do so is likely to mean that the defendant is required to make up the difference in the amount, thus placing the respondent in a position of hardship or increasing the likelihood that they will become self-represented. Further, requiring the courts to conduct detailed assessments of the costs incurred by respondents is likely to tie up significant amounts of judicial resources.

21. Under the current regime, a court also has discretion to refer the matter to a costs assessor to certify that legal expenses have been properly incurred. The process for appointing costs assessors is governed by the State or Territory court rules and directions applicable to appointing a costs assessor. Costs which are not allowed by a costs assessor would become a matter between the defendant and his or her legal representatives. This may cause a number of difficulties.

22. Firstly, the respondent may not have the means to be able to meet the costs that he or she owes to his or her legal representatives. This may lead to legal representatives withdrawing part way through proceedings, leaving the respondent self-represented.

23. Secondly, while costs assessors are able to assess whether the expenses that the respondent claims for certain work are reasonable, they are not trained to assess whether it was necessary for the legal work to be carried out in the first place. For example, a costs assessor would not necessarily be in a position to determine whether it was necessary to obtain legal advice in relation to a particular issue or whether certain court action was frivolous or vexatious. This is compounded by the fact that costs would be assessed after they have already incurred, which means that there is no evaluation in the early stages of a case to ensure that the legal actions being taken are reasonable and proportionate.

24. The PJCLE explored this issue further with AGD, seeking advice on precedents for independent assessors to determine, in a staged process, the 'reasonableness' of proposed legal steps. In its response to Question on Notice from Senator Wright, AGD indicated that the *Federal Court of Australia Act 1976* allows the Court to employ case management decisions, including limiting the number of witnesses that may be called, the setting of deadlines, amend, dismiss or strike out a party's claims or defences or disallow certain evidence. The High Court, Federal Court and courts of the States and Territories also have rules relating to vexatious litigants which may be applicable.

25. Thirdly, the accuracy of any costs determination is dependent on the quality of the information put before the costs assessor. There is the potential that respondents and/or their legal representatives may exploit this, particularly given that the respondent may not otherwise be able to meet the legal representative's costs.

26. Finally, the process of calculating legal costs will require further time and expense to be expended by both the applicant and the respondent (especially where costs may be disputed), which will only add to the expenses claimed from the restrained assets and cause further dissipation of those assets. Further, the process of preparing claims and/or disputing

claims for costs can be an unwarranted distraction from the unexplained wealth litigation itself.

Imposing a cap on legal expenses

27. The AFP's evidence to the PJCLE indicated that imposing a cap on the amount of legal costs that can be paid out of restrained assets also raises practical difficulties. For example, at the outset of litigation, it will often be difficult to ascertain how much the respondent is likely to incur in legal costs. This amount will differ in each case. Further, if the cap is reached, a person's legal representative is likely to withdraw from the matter, thus leaving the respondent self-represented and causing additional delays in the hearing of the respondent's matter.

Other issues

28. Other issues have been raised in the context of considering whether restrained assets should be available to meet legal expenses. These are discussed further below.

Scale of fees

29. During the Sherman Review, the Law Council of Australia (LCA) proposed that the dissipation of assets be managed through a court appointed scheme, with a scale of fees attached. The Sherman Review considered that its own proposed scheme (set out in Recommendation 14 of the Sherman Review) would go a considerable way to addressing the Law Council's concerns.

30. This proposal has also been raised by the LCA in the context of the Senate Legal and Constitutional Affairs Committee inquiry into the Bill. Under the current arrangements, lawyers who are willing to act in POCA matters do so under the Legal Aid Commission's fee scale for Commonwealth civil and criminal matters. Although not opposed to the use of the fee scale per se, the LCA did object to the normal fee scale being applied for POCA matters, as the competing interests in POCA proceedings and normal proceedings are quite different, and as such, the fee scale should represent this.

31. In the course of ordinary legal aid matters, the two competing interests are the need to assist as many as people as possible from a small amount of resources compared to each individual's right to comprehensive legal representation in each case. In POCA matters, the competing interests is the right of the person to expend their own assets on legal representation versus the communities right for restrained assets not to be dissipated and ultimately provided to the Commonwealth if found to be illegitimately gained.

Choice of legal representative

32. During the PJCLE inquiry, the LCA raised concerns that the inability to access restrained funds, and corresponding scheme through which legal aid might be provided, prevented persons being able to exercise choice in relation to legal counsel. The LCA argued that this was an infringement on the right to a fair trial. AGD provided evidence to the PJCLE (through response to a Question on Notice) that the right to a fair trial under Article 14 of the *International Convention on Civil and Political Rights* (ICCPR) only applies to criminal proceedings, and that proceedings under POCA 2002 are civil proceedings.

Reverse onus of proof in unexplained wealth proceedings

33. Concern has also been raised, both during the PJCLE inquiry and the current Senate Committee inquiry, about whether the particular nature of unexplained wealth proceedings justifies a different approach in relation to the use of restrained assets for legal expenses. In particular, it has been queried whether the reverse burden of proof in unexplained wealth proceedings makes those proceedings fundamentally different from other proceedings under POCA 2002.

34. Firstly, it is important to clarify how the reverse onus of proof operates in unexplained wealth proceedings. The onus on the respondent in unexplained wealth proceedings is to establish a negative, that is, that the wealth was not derived from a relevant offence. It is not an onus to establish a positive; the respondent does not have to prove that the wealth was lawfully acquired. Any evidence provided by the respondent must then be refuted by the applicant in order to satisfy the Court that the person's wealth was not derived lawfully.

35. The onus of proof is also reversed in other proceedings under POCA 2002 in the following circumstances.

36. For example, where a person is convicted of a serious offence the onus of proof in relation to restrained assets is reversed. Property is restrained on the basis that it is reasonably suspected of being owned or effectively controlled by the person will be forfeited six months after conviction unless the owner of the property shows that it has been lawfully obtained. Although the offence is to be proven beyond reasonable doubt, the onus of proof is reversed in relation to the person's assets.

37. Further, where a person is suspected of committing a serious offence (civil person directed forfeiture) the onus of proof in relation to restrained assets is reversed. Property is restrained under section 18 of POCA 2002 on the basis that it is reasonably suspected of being owned or effectively controlled by the person will be forfeited when the person is proven on the balance of probabilities to have committed a serious offence. The applicant has the onus of proof to the civil standard in relation to the offence. However, the onus of proof in relation to the assets is reversed. The owner of the assets will have to prove on the balance of probabilities that the property is not the proceeds of unlawful activity or the instrument of any serious offence to have it excluded from forfeiture or restraint.

38. Another example is where property is restrained under section 19 of POCA 2002 on the basis that is suspected of being the proceeds of an indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern, or the instrument of a serious offence it can be forfeited if no application is made to exclude it from forfeiture within six months.

39. The AFP will have the onus of proving that the property has been restrained for at least six months, that notice has been given to everyone who has an interest in the property, and that no exclusion application has been filed. The onus of proof is reversed on the exclusion application (ie the applicant for the exclusion order is required to show that their interest is not the proceeds of certain offences or the instrument of a serious offence). If an application for exclusion has been made and not withdrawn, then the AFP bears the onus of proving on the balance of probabilities that the property is the proceeds of one or more relevant offences or the instrument of a serious offence.

Further similarities between unexplained wealth and other proceedings

40. There are further similarities between unexplained wealth proceedings and other types of proceedings under POCA 2002. Examples of this are provided below.

41. In practice, an unexplained wealth suspect would only ever be identified through criminal intelligence or a criminal investigation. This is the same as how other proceeds of crime suspects are identified. All matters under POCA 2002 are civil proceedings and are heard before the same courts. While unexplained wealth proceedings reverse onus of proof, there are a number of other orders under POCA 2002 that also reverse the onus of proof. In almost all instances a suspect's property will be restrained prior to an application for an unexplained wealth order being made. This means that there will be a reasonable suspicion that the unexplained wealth suspect has either committed certain offences or has derived at least some of their wealth from certain offences.

42. A court can refuse to make a restraining order (including an unexplained wealth restraining order), if the Commonwealth refuses or fails to give the court an appropriate undertaking with respect to the payment of damages or costs. If a person is successful in preventing an application for a restraining order (including an unexplained wealth restraining order) or having property excluded from a restraining order, the court may order the Commonwealth to pay the person's costs provided that it is satisfied that the person was not involved in the commission of the offence in respect of which the restraining order was sought or made (section 323 of POCA 2002).

43. Where a court has made a forfeiture order or unexplained wealth order, it must make an order that a certain amount be paid to a dependant of the person, where it is satisfied that the relevant amount would relieve any hardship caused by the forfeiture order or unexplained wealth order.

44. Finally, legal aid commissions are entitled to be reimbursed out of the CAA in relation to legal costs for representing people whose property is covered by a restraining order (including unexplained wealth restraining orders).