Australian Government
Department of Home Affairs

Submission to the Inquiry into the Unexplained Wealth Legislation Amendment Bill 2018 [Provisions]

Senate Legal and Constitutional Affairs Legislation Committee

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Unexplained Wealth Legislation Amendment Bill 2018

Introduction

The Department of Home Affairs (the Department) thanks the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission on the Unexplained Wealth Legislation Amendment Bill 2018 (the Bill).

This submission is provided in response to the submissions received by the Committee and provides responses to key concerns raised in those submissions. The Australian Federal Police and Australian Criminal Intelligence Commission were consulted in the preparation of this submission.

Points raised on the Bill

Retrospective application

The Law Council of Australia (the Law Council) has recommended that the measures in the Bill should only apply prospectively, noting that several of the Bill's amendments would apply retrospectively by virtue of Items 7 and 8 of Schedule 1 and item 10 of Schedule 3.

Retrospective application of these amendments is justified at pages 30-32 and 37-38 of the Explanatory Memorandum to the Bill. If these amendments are applied prospectively as the Law Council recommends, this would require law enforcement to prove the precise point in time that certain matters (including the acquisition of property) arose, creating an unnecessarily onerous requirement that would be contrary to the objects of the *Proceeds of Crime Act 2002* (the POC Act).

Satisfying this requirement would be almost impossible where a person has accumulated significant amounts of wealth and property over decades and has no apparent source of legitimate income, especially in relation to property that is portable and not subject to registration requirements or where relevant financial records have been destroyed or lost over time.

The Department refers the Committee to the Explanatory Memorandum to the Bill and submits that the Law Council's recommendation should not be adopted.

Privilege against self-incrimination – Justification for abrogation

The Department notes that the Law Council has raised concerns with the abrogation of the privilege against self-incrimination in subclause 5(1) of proposed Schedule 1 to the POC Act, and has requested that a more substantial justification for this be provided in the Explanatory Memorandum to the Bill.

Part 9.5.3 of the Guide to Framing Commonwealth Offences (the Guide) provides that it may be appropriate to override the privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence.[1]

In some unexplained wealth matters, relevant information on property may only be obtainable from persons who have had some connection to criminal conduct. This may be the individual who committed the original crime, a financial institution that dealt with property suspected of being proceeds of an offence or professional intermediaries responsible for laundering the property through legal structures.

[1] The Guide to Framing Commonwealth Offences can be found at: https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx.

Allowing these individuals to rely on the privilege against self-incrimination would frustrate the operation of production orders and, in many cases, would prevent law enforcement from gathering the information required to support the unexplained wealth action.

Combatting unexplained wealth and, as a result, serious and organised crime groups, provides a benefit that outweighs the loss to personal liberty produced through the abrogation of the privilege against self-incrimination.

Nevertheless, the proposed production orders are designed to minimise the impact on a person's privilege against self-incrimination.

Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 to the POC Act.

A production order under subclause 1(3) of proposed Schedule 1 to the POC Act can also only require the production of documents which are in the possession, or under the control, of a corporation or are used, or intended to be used, in the carrying on of a business. The narrow scope of these orders minimises the possibility that the privilege will be abrogated, as corporations do not benefit from the privilege and documents which do not relate to the carrying on of a business cannot be produced.

Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use immunity' will continue to apply to subsequent disclosures of the information contained in the documents under subclause 18(3).

It should also be noted that the abrogation of the privilege against self-incrimination in subclause 5(1) of proposed Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(a) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.

The Department submits that the abrogation of the privilege against self-incrimination at subclause 5(1) can therefore be justified on the basis that it is necessary to ensure the effectiveness of unexplained wealth laws, and provides a public benefit that outweighs the loss of the privilege against self-incrimination.

Production orders – Use and derivative use immunity

The Department notes that the Law Council has suggested that documents obtained through production orders should be subject to a use and derivative use immunity, which would prevent these documents from being used in civil and criminal investigations and proceedings. Where material obtained from production orders are passed to State or Territory agencies, the Law Council has recommended that a use and derivative use immunity should prevent this material being used in relation to criminal proceedings and investigations.

It should be noted that these documents are already subject to a use immunity under proposed subclause 5(2) which prevents these documents from being used directly in criminal proceedings. This immunity continues to apply where information is handed on to State and Territory agencies under subclause 18(3).

Applying a use and derivative use immunity to civil investigations and proceedings, however, would defeat the central purpose of production orders under subclause 1(6) of proposed Schedule 1 to the POC Act, which is to gain information for the purposes of:

- determining whether to take further civil action, including investigative action, under State and Territory *'unexplained wealth legislation'*, or
- proceedings under the unexplained wealth legislation of the State or Territory.

Applying a derivative use immunity to criminal proceedings, on the other hand, would have the potential to severely undermine the existing ability of authorities to investigate and prosecute serious criminal conduct.

For example, if a derivative use immunity was included, where an investigator in a criminal matter could potentially have access to privileged material, the prosecution may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.

The Law Council's recommendations would also be contrary to the aims of the existing production order regime, the proposed production order regime and the associated information sharing provisions under existing section 266A of the POC Act and clause 18 of proposed Schedule 1 to the POC Act.

These provisions only allow for the derivative use and sharing of produced documents where the documents are shared with a specific authority for a legitimate purpose. For example, a document obtained under a production order may be given to an investigative authority of a State under item 3 of subclause 18(2) only if the person giving this document believes on reasonable grounds that the document will assist in the prevention, investigation or prosecution of an offence punishable by at least 3 years or life imprisonment.

It is also pertinent to note that production orders do not affect the inherent power of the court to manage criminal prosecutions and civil proceedings that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the defence of an accused.

The Department submits that the Law Council's recommendations regarding use and derivative use immunity should not be adopted, as these would undermine the central purpose of production orders, and sufficient protections are provided to ensure that material is used appropriately.

Legal professional privilege

The Department notes that the Law Council does not support the abrogation of legal professional privilege at paragraph 5(1)(c) of proposed Schedule 1 to the POC Act.

The Department submits, however, that the exceptional nature of the conduct which the Bill is seeking to address justifies the abrogation of this privilege. Legal professional privilege can obstruct the investigation of serious and organised criminal activity and can undermine the central purpose of the proposed production orders, namely the identification, location and quantification of property relevant to State and Territory unexplained wealth matters.

Serious and organised crime groups frequently set up elaborate financial and legal structures to conceal or disguise their wealth. Lawyers can become unwittingly caught up in this process if they provide advice to a client on matters such as setting up a trust structure, incorporating a business or selling property.

However, in other circumstances, lawyers may become professional facilitators. The use of legal practitioners to launder illicit funds is an internationally established money laundering method, and law enforcement have reported that it can be difficult in many cases to distinguish legitimate legal advice from advice given to intentionally frustrate the operation of future investigations.

As production orders can be issued prior to restraint action or during a covert investigation, if legal professional privilege was not removed tension could also arise between a lawyer's professional obligations to their client and the fact that they could not take instructions to clarify or waive legal professional privilege from their client due to the non-disclosure requirements under clause 16 of proposed Schedule 1. The abrogation of legal professional privilege prevents this tension from arising.

The Department also submits that there are sufficient protections for defendants affected by this abrogation of legal professional privilege.

Production orders must be made by the courts, and a magistrate retains the discretion not to make a production order under subclause 1(1) of proposed Schedule 1 to the POC Act.

Documents gained through production orders that would otherwise attract a claim of privilege also cannot be used against the person who produced them in criminal proceedings under subclause 5(2). This 'use

immunity' will continue to apply to subsequent disclosures of the information contained in the documents under subclause 18(3).

It should also be noted that the abrogation of legal professional privilege in paragraph 5(1)(c) of proposed Schedule 1 to the POC Act already exists for production orders under existing paragraph 206(1)(c) of the Act. These aspects of Commonwealth law have not been changed, but have merely been extended to States and Territories that participate in the Scheme.

The abrogation of legal professional privilege can therefore be justified in these circumstances on the basis that it is necessary to address the exceptional conduct of organised crime groups, which frequently use this privilege to hide the origins of unexplained wealth.

Disallowance exception

The Department notes that the Law Council has raised concerns about exempting declarations made under proposed subsection 14F(4) of the POC Act from disallowance under the *Legislation Act 2003*. This subsection allows the Minister to declare by legislative instrument that a State is not a *'cooperating State'*, preventing this State from gaining particular benefits under the new equitable sharing arrangements at Schedule 5 to the Bill.

The exemption from disallowance at proposed subsection 14F(5) is justifiable as an instrument made under proposed subsection 14F(4) is intended to facilitate the operation of the National Cooperative Scheme on Unexplained Wealth (the Scheme), which would involve the Commonwealth and one or more States. It is vital that the Commonwealth Parliament should not, as part of a legislative instruments regime, be permitted to unilaterally disallow instruments that are part of a multilateral scheme. This principle is enshrined in subsection 44(1) of the *Legislation Act 2003*.

A State's ongoing participation in the Scheme as a *'cooperating State'* is intended to facilitate continued good faith negotiations with the Commonwealth and encourage the State to fully commit to the Scheme at a later date. The Minister's ability to remove this status by legislative instrument is vital in ensuring that a State cannot continue to indefinitely benefit from the equitable sharing arrangements where it has demonstrated it has no intention of re-engaging with the Scheme.

If there is a risk that such an instrument would be disallowed, this would jeopardise the ongoing effectiveness of the Scheme. The exemption from disallowance therefore supports the Scheme and should be preserved.

Significant matters in delegated legislation

The Department notes that the Law Council has recommended that the criteria of class of persons who may exercise coercive evidence-gathering powers under paragraph 12(3)(d) of proposed Schedule 1 to the POC Act should be defined in primary legislation.

The regulation-making power at paragraph 12(3)(d) arose out of negotiations with the States and Territories and was created to ensure that the Scheme was sufficiently flexible to allow appropriate officials in the Territories to issue notices to financial institutions in unexplained wealth cases.

Defining a specific class of officials for the Australian Capital Territory (ACT) under paragraph 12(3)(d), however, was not possible as the ACT does not currently have an unexplained wealth scheme, and it is therefore not possible to define, with sufficient certainty, the characteristics of a potential future official who would be appropriately vested with this power.

The operation of this regulation-making power will also be subject to the disallowance mechanism under section 42 of the *Legislation Act 2003* and the oversight of the Parliamentary Joint Committee on Law Enforcement under clause 19 of proposed Schedule 1 to the POC Act.

These oversight mechanisms will be informed by the Territories' obligation to provide annual reports to the Commonwealth on the operation of proposed Schedule 1 to the POC Act under clause 20 of this Schedule. These reports are required to be tabled in Parliament under subclause 20(2) of the Schedule.

The Department does not support the Law Council's recommendation and proposes that paragraph 12(3)(d) be maintained in its current form in light of the considerable safeguards and need for flexibility in the operation of the regulation-making power.

Immunity from liability

The Department notes that the Law Council has raised concerns with clause 14 of proposed Schedule 1 to the POC Act, which confers immunity from civil and criminal liability in relation to certain actions taken under a notice to a financial institution or under the mistaken belief that the action was required under the notice.

Subclause 14(1) replicates existing subsection 215(1) of the POC Act, which was introduced at the recommendation of the Australian Law Reform Commission.[2] The Commission found that financial institutions and their employees could expose themselves to civil and criminal liability for the mere act of providing financial information or documents to an authorised officer, even where they were compelled to do so.

On this basis, the Commission recommended that financial institutions and their employees should be protected from any action, suit or proceedings in relation to its or their response to a notice.

The Law Council has also noted that this immunity will apply even if the relevant action was not taken in good faith. The breadth of the immunity, however, only extends to actions carried out under the notice or under the mistaken belief that the action was required under the notice.

Under clauses 12 and 13 of proposed Schedule 1 to the POC Act, a notice must state the documents or information to be provided, the form and manner in which these are to be provided and may only permit documents or information to be provided to a specific authorised State/Territory officer.

A person receiving this written notice will be clearly informed of their specific obligations. Given the narrow nature of these obligations, the immunity will not protect an employee from civil or criminal liability if they deliberately engage in conduct that clearly falls outside of the parameters of the notice.

Therefore it is appropriate that financial institutions and their employees should retain immunity from civil and criminal liability under subclause 14(1) as the immunity is appropriately restricted to actions taken under a particular notice and the immunity is necessary to ensure that these notices function as intended.

Equitable sharing arrangements

The Bill establishes new equitable sharing arrangements. The Department notes that Civil Liberties Australia has suggested in its submission that these new arrangements will serve as a financial incentive for law enforcement to pursue petty criminals.

The new equitable sharing arrangements do not remove or alter the protections referred to above that exist to ensure that unexplained wealth orders are only made in appropriate circumstances. Rather, the equitable sharing arrangements will incentivise cooperation between Commonwealth, State and foreign law enforcement agencies by expanding existing sharing arrangements. Currently, the Minister can only make a payment under the equitable sharing regime where a jurisdiction makes a 'significant contribution' to a proceeds of crime matter or associated criminal investigation. The new arrangements will see the recognition of broader cooperation.

[2] *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (ALRC Report 87) pp. 308-319.

Privacy implications

The Law Council has recommended that the views of the Privacy Commissioner be obtained on the privacy impacts of the Bill, specifically the notice to produce provisions and provisions amending the *Telecommunications (Interception and Access) Act 1979* (TIA Act), to ensure that these provisions are necessary and proportionate.

As outlined in the Explanatory Memorandum to the Bill, the proposed measures are compliant with the right to privacy and, where they impact on this right, they are reasonable, necessary and proportionate to achieving the purpose of combating criminal activity and ensuring that property or wealth acquired unlawfully is not retained by criminals.

In particular, information gained from notices can only be disclosed to specific authorities where a person believes on reasonable grounds that the disclosure will serve a purpose provided in Part 3 of proposed Schedule 1 to the POC Act. Disclosure can be made, for example, to the Australian Tax Office only for the purpose of protecting public revenue.

The use of the notice to produce power will also be supervised by the Parliamentary Joint Committee on Law Enforcement, which may require an authority to provide further particulars on any information disclosed under a production order or notice to financial institutions, and the use of these powers will be outlined in a yearly report to the Minister.

The TIA Act, on the other hand, contains a range of protections to protect a person's privacy, strictly limiting the circumstances in which lawfully intercepted or stored information can be disclosed to others, being confined to disclosures to particular agencies in particular circumstances and for particular purposes. Australian law enforcement, anti-corruption, and national security agencies also may only access communications and telecommunications data except for proper purposes under warrant or authorisation.

Limitations on amending the Bill

The Committee should be aware that, while the Bill is before Parliament, amendments cannot be made to Schedules 1, 2 and 4 to the Bill. This is because Schedules 1, 2 and 4 to the Bill in their present form are currently being referred to the Commonwealth by the New South Wales Parliament in accordance with paragraph 51(xxxvii) of the Constitution (see Schedules 1, 2 and 3 of the Unexplained Wealth (Commonwealth Powers) Bill 2018 (NSW)).

To preserve the constitutional basis of these Schedules, any amendments to their provisions would need to be made after the NSW referral and enactment of the Bill.

Once enacted, the provisions in the Bill could be amended pursuant to the amendment reference power at proposed section 14C of the POC Act, which will allow the Commonwealth Parliament to amend these provisions and still have them apply as a law of national application. Under the intergovernmental agreement, however, these amendments would also require the unanimous approval of the parties.

General issues

Applicability of the presumption of innocence to unexplained wealth proceedings

The presumption of innocence is a long-standing and fundamental principle of the Commonwealth criminal justice system and continues to be supported strongly by the Australian Government. This protection however does not extend to civil proceedings.

Unexplained wealth proceedings and other proceedings under the POC Act are civil proceedings only and are not criminal in nature. Unexplained wealth orders imposed via unexplained wealth proceedings cannot create any criminal liability, do not result in any finding of criminal guilt and do not expose people to criminal sanctions. Proceedings on an application for a restraining order, preliminary unexplained wealth order or an

unexplained wealth order are also explicitly characterised as civil in section 315 of the POC Act. Nothing in the Bill changes this position.

Unexplained wealth orders being used to target serious and organised crime

Unexplained wealth orders are designed to target those involved in serious criminal activity. Serious and organised crime groups are increasingly operating in a more coordinated and organised manner and are frequently controlling activities that span national and international borders. The use of multiple jurisdictions to register corporate entities, open bank accounts and hold assets can make investigation and disruption by law enforcement and regulatory agencies difficult, time consuming and expensive.

Whilst the current Commonwealth, State and Territory laws provide a partial solution to crime within those borders, it is clear that dismantling major criminal syndicates is a task that cannot be handled by any one jurisdiction acting in isolation. As the activities of criminal syndicates are primarily driven by profit, it is also clear that measures which target criminal proceeds will be key weapons in the fight against serious and organised crime in Australia. Therefore a National Cooperative Scheme on Unexplained Wealth is crucial.

The POC Act contains a number of protections which ensure that unexplained wealth orders do not unfairly impact upon petty offenders. These protections include the following:

- The court may refuse to make an unexplained wealth restraining order, a preliminary unexplained wealth order or an unexplained wealth order if satisfied that there are not reasonable grounds to suspect that the person's total wealth exceeds by $100,000 or more the value of the person's wealth that was lawfully acquired (see ss 20A(4)(a), 179B(4) and 179E(6)(a) of the POC Act).
- The court may refuse to make an unexplained wealth restraining order or unexplained wealth order if satisfied that doing so is not in the public interest (ss 20A(4)(b) and 179E(6)(b) of the POC Act).
- The court may exclude property from the scope of some of these orders or revoke these orders in a range of situations, including (for some orders) where it is in the public interest or the interests of justice to do so (ss 24A, 29A, 42 and 179C).

These limitations and protections provide the court with the discretion to ensure that unexplained wealth orders made under the POC Act are only used in appropriate circumstances.

Review of unexplained wealth laws

The Department notes that Civil Liberties Australia has suggested in its submission that a national review of unexplained wealth laws should be conducted.

On 19 March 2012, the Parliamentary Joint Committee on Law Enforcement handed down the final report on its Inquiry into Commonwealth unexplained wealth legislation and arrangements. This Bill partially implements Recommendations 15 and 17 of that report. This Bill also implements recommendations made in the February 2014 Independent Report of the Panel on Unexplained Wealth (the Report) by former police commissioners, Mr Ken Moroney AO APM and Mr Mick Palmer AO APM.

Further, the Bill provides that the Minister must cause an independent review be undertaken of the national unexplained wealth provisions, and any other matter specified by the supporting Intergovernmental Agreement. There is a statutory requirement to undertake this review, in consultation with the relevant States and Territories, as soon as practicable after the fourth anniversary of the commencement of this Bill. The review is required to be tabled in Parliament within 15 days of receipt by the Minister.

Given that this Bill implements the recommendations of existing reports into the operation of the Commonwealth's unexplained wealth provisions and that there is a mandated review of the new scheme provided for by the Bill, the Government does not intend to undertake a further review of the Commonwealth's unexplained wealth regime at this time.

Hearing of applications

The Department notes the Legal Services Commission of South Australia's concerns about respondents to unexplained wealth applications being present at relevant hearings. The Bill does not change the manner in which applications are heard. Proceeds of crime actions can be brought in the jurisdiction in which the conduct occurred in accordance with section 335 of the POC Act. In the majority of cases the action is taken in the State or Territory that the suspect is a resident or located (except where the suspect has left Australia). Further, all final applications under the POC Act are done on notice, with affected parties having a right to appear or be legally represented in those proceedings.