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

Senate Legal and Constitutional Affairs Committee

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Introduction

1. The Law Council is pleased to have this opportunity to comment on the provisions of the *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012* ("the Bill"). The Bill has two primary aims:
 - (a) To amend the *Proceeds of Crime Act 2002 (POCA)* to address perceived shortcomings with the process for obtaining and enforcing unexplained wealth orders;
 - (b) To amend the *Criminal Code Act 1995* to introduce a number of new and aggravated firearms offences directed at cross border and international firearms trafficking.
2. The Law Council's submission is only concerned with the proposed amendments to the POCA and is specifically focussed on two matters:
 - (a) The proposed repeal of subsections 20A(3A) to (3C) and section 179SA so as to remove the court's discretion to allow the legal expenses of a person who is subject to unexplained wealth proceedings to be paid out of their restrained assets; and
 - (b) The proposed amendments to subsections 227(1), 228(1) and 338 which would allow officers executing a search warrant under the POCA to seize things that are relevant to unexplained wealth proceedings.
3. The Law Council opposes the removal of the judicial discretion to allow legal expenses to be met from restrained assets. The relevant provisions were inserted into the POCA as a result of considerable parliamentary debate, negotiation and compromise. The provisions are just three years old and, to the Law Council's knowledge, have never been tested. Any suggestion that those provisions might work to frustrate the aims of the POCA are purely speculative and based on the same assertions that parliament considered and ultimately dismissed when the unexplained wealth regime was introduced into the POCA.
4. In the Law Council's view it is appropriate that people subject to unexplained wealth proceedings might have access to restrained property to meet their legal fees, even though people subject to other types of proceedings under the POCA do not. The unexplained wealth proceedings are unique in nature. First, the threshold that must be met before a person's assets may be restrained is lower in the case of unexplained wealth proceedings. Further, once a preliminary unexplained wealth order has been secured, the burden is placed on the respondent to demonstrate that their wealth and assets have been legitimately derived, rather than on the state to demonstrate otherwise. Therefore, to avoid being ordered to pay the Commonwealth a specified amount, the respondent must do more than meet or counter the state's case, but must prepare and present his or her own positive case, supported by evidence.
5. Finally, in the Law Council's view, it is incorrect to suggest that allowing a person access to legal aid sufficiently offsets any disadvantage incurred by him or her not having access to restrained assets to retain legal representation of his or her own choosing. The nature of the legal advice and representation available to a legally aided person is potentially more limited in nature than that available to a self funded litigant, even one who is necessarily prudent in deciding how and to what extent to contest the proceedings brought against him or her.

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6. With respect to the proposed amendments to the search warrant provisions of the POCA, the Law Council is concerned that allowing officers executing a search warrant to seize things that are relevant to unexplained wealth proceedings would remove any effective limitations on the scope of the search. This is because anything that is relevant to a person's income or expenditure is relevant to unexplained wealth proceedings.

Access to restrained funds to cover legal expenses

7. The Law Council opposes the repeal of subsections 20A(3A) to (3C) and section 179SA of the POCA. These provisions currently give the court the discretion to allow the legal expenses of a person who is subject to unexplained wealth proceedings to be paid out of their restrained assets.
8. It is asserted in the Explanatory Memorandum that this discretion weakens the effectiveness of the unexplained wealth provisions by allowing assets that would otherwise be available to meet an unexplained wealth order to be used to contest proceedings. It is alleged that this is likely to cause more protracted litigation.¹
9. In support of the amendments, the Explanatory Memorandum further contends that the repeal of subsections 20A(3A) to (3C) and section 179SA is necessary to harmonise provisions relating to the payment of legal expenses for unexplained wealth proceedings with those for other proceedings under the POCA.²
10. Finally, it is claimed in the Explanatory Memorandum that, because a person may seek legal representation through legal aid if their unrestrained assets are not sufficient to meet legal costs, people will not be disadvantaged by the proposed amendments and will continue to be appropriately represented.³
11. The Law Council takes issue with each of the assertions.

No evidence that the effectiveness of the POCA will be undermined by current discretion

12. The unexplained wealth provisions of the POCA were introduced into the Act in February 2010. The provisions as enacted were not in the precise form initially sought by the government because a number of amendments were made to the Bill during its passage through parliament. One of these amendments was the inclusion of a discretion to allow a person, subject to unexplained wealth proceedings, to meet their legal costs out of their restrained assets.
13. To the Law Council's knowledge, these provisions relating to legal costs have not been utilised and have therefore not been tested. Nonetheless, on the basis of the concerns of law enforcement agencies, there is now an attempt to remove certain safeguards introduced by parliament to the unexplained wealth regime because, it is asserted, they *may* undermine the effectiveness of the regime.
14. The question of how the legal costs of a person whose assets are restrained should be met enlivens competing public interests. On the one hand, a person, in relation to

¹ Explanatory Memorandum at p18 and 26

² *Ibid.*

³ *Ibid.* at p7

whom nothing has been established other than a reasonable suspicion of some form of illegality, should have access to their property to enable them to prepare and conduct, as they think appropriate, a response to punitive proceedings brought against them. On the other hand, a person should have no right to liberally employ illegally obtained assets to frustrate, delay or defeat proceedings which are actually designed to deny that person the profits of their criminality.

15. These competing interests must be weighed against each other and some form of legislative balance achieved. This is what occurred in 2010. There is no evidence that this should now be revisited. The current provisions do not allow a person unlimited access to their restrained assets to deplete in pursuit of frivolous legal proceedings. On the contrary:
- (a) A person will only have access to their restrained assets to meet legal costs where the court so orders. Such an order is highly unlikely to be made where it can be demonstrated a person has the ability to meet their expenses from unrestrained assets;
 - (b) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from restrained funds and may make any further or ancillary orders it considers appropriate; and
 - (c) Where an unexplained wealth order is made against a person which can not be completely met from restrained assets because some of those assets have been released to meet legal expenses, the Commonwealth can still pursue the person the subject of the order for any remaining amount.
16. The balance currently reflected in the unexplained wealth provisions of the POCA may not be the model preferred by law enforcement agencies but it is not, and has not been shown to be, flawed or unworkable. It is possible, although it is yet to be seen, that it may result in more protracted litigation. However, even if this does occur it will not in itself be evidence that that the model is unworkable. The unexplained wealth regime is new and unprecedented at the Commonwealth level. It provides the state with extraordinary powers to nominate a person and their assets as suspicious and to place that person in a position where they bear the burden of comprehensively accounting for their acquired wealth or risking confiscation. Such a process may initially generate litigation as questions are asked and answered about the precise scope and nature of the police and courts' power. However, litigation of this type should not automatically be labelled as frivolous.
17. Further, it should be noted, that the alternative model pursued by law enforcement agencies, whereby a person is denied access to their restrained assets to fund their legal expenses and instead must rely on legal aid, is not itself without cost. Money expended by Legal Aid Commissions to provide advice and representation to a person facing proceedings under the POCA is still ultimately recovered from the confiscated assets account. Under both models, a proportion of the illegal assets recovered for the state is still lost to legal expenses. It is likely too that under the legal aid model some additional administrative costs are incurred in assessing a person for legal aid, creating systems and procedures to deal with this distinct, non-core type of work within the Legal Aid Commissions, and preparing and assessing costs bill for the Official Trustee of the confiscated assets account.

Harmonisation arguments ignore the unique nature of unexplained wealth proceedings

18. In the Law Council's view the harmonisation of provisions relating to the payment of legal expenses for unexplained wealth proceedings with those for other proceedings under the POCA is not a necessary or legitimate objective.
19. The unexplained wealth regime is unique in nature. First, the threshold that must be met before a person's assets may be restrained is lower in the case of unexplained wealth proceedings. Further, once a preliminary unexplained wealth order has been secured, the burden is placed on the respondent to demonstrate that their wealth and assets have been legitimately derived, rather than on the state to demonstrate otherwise. Therefore, to avoid being ordered to pay the Commonwealth a specified amount, the respondent must do more than meet or counter the state's case, but must prepare and present his or her own positive case, supported by evidence.
20. There is no move to harmonise the thresholds that must be met before assets may be restrained for different types of proceedings under the POCA or to harmonise the matters of which the court must be satisfied before different types of final orders are made. Such a move towards harmonisation within the POCA would be illogical because the different types of proceedings are directed towards different circumstances and scenarios. So too, it is also misguided to suggest that the provisions relating to the payment of legal expenses should be harmonised when they relate to different types of proceedings, which place respondents in different positions.

Access to Legal Aid is no substitute

21. In the Law Council's view, it is incorrect to suggest that allowing a person access to legal aid sufficiently offsets any disadvantage incurred by him or her not having access to restrained assets to retain legal representation of his or her own choosing. The nature of the legal advice and representation available to a legally aided person is potentially more limited in nature than that available to a self funded litigant, even one who is necessarily prudent in deciding how and to what extent to contest the proceedings brought against him or her.
22. The National Commonwealth Legal Aid Guidelines provide that a person whose assets are restrained under the POCA may apply to the relevant state or territory Legal Aid Commission for legal assistance. He or she will be assessed under the Legal Aid Commission's means test without the restrained assets being taken into account.
23. In addition to meeting the means test, he or she must also satisfy the first two limbs of the merits test set out in the National Commonwealth Legal Aid Guidelines.⁴ In practice, this means that:
 - (a) the Legal Aid Commission must be satisfied that, on the legal and factual merits, the proposed action, application, defence or response for which a Grant of Legal Assistance is sought is more likely than not to succeed; and
 - (b) the Legal Aid Commission must consider that a prudent self-funding litigant would risk his or her own financial resources in funding the proposed action,

⁴ The third limb of the test is not applied. The third limb is described as "the appropriateness of spending limited public legal aid funds test".

application, defence or response for which a Grant of Legal Assistance is sought.

24. This alone demonstrates the disadvantage a person may suffer in having to rely on legal aid rather than their own self funded legal representation. Before funding is approved for any particular action, application, defence or response to be pursued in the course of litigation it must be demonstrated, not only that a prudent self-funded litigant would expend their funds on that legal course but, further, that it is more likely than not to succeed. There may be many occasions where, because of the significance of a particular action, application, defence or response to the broader litigation, a prudent self funded litigant would be prepared to risk a particular course of action, notwithstanding that the odds of success are unknowable or at best even.
25. Proceeds of crime litigation can be complex, and significant resources are expended by the law enforcement agencies in identifying targets, gathering evidence and preparing a matter for court. To contest such proceedings, respondents must also expend resources, including potentially on their own expert witnesses. However, respondents reliant on legal aid may find themselves unduly restricted in this regard.
26. Another significant disadvantage that a legally aided person may suffer is that they have less control over their choice of legal representative.
27. This lack of choice can prove particularly problematic where a person has retained a legal practitioner to represent them in proceedings under the POCA and, following the commencement of proceedings, a restraining order is issued preventing the person from continuing to meet his or her legal costs. In such circumstances, respondents may be forced to seek legal aid assistance and, as a direct result, to change legal practitioner.
28. While Legal Aid Commissions make some provision for legal aid recipients to approach and retain the legal practitioner of their choice, the terms on which funding is provided in any particular matter are ultimately determined by the Legal Aid Commission and in many cases this may result in a lack of individual choice with respect to legal representation.
29. Even in circumstances where a legally aided person is able to retain a private legal practitioner to represent him or her, in practice the choice is limited to those practitioners who are willing to accept payment in accordance with the Legal Aid Commission's fee scale for Commonwealth criminal and civil matters. (This is confirmed by Guideline 7 of Part 4 of the National Commonwealth Legal Aid Guidelines which clarifies that, in proceeds of crime matters, Legal Aid Commissions must ensure that any legal costs incurred are "fair and reasonable" and "in accordance with the Commission's usual fee scales for civil law matters.")
30. The Law Council does not object to a fee scale being imposed in relation to proceeds of crime matters in order to protect restrained assets from being frivolously expended. However, the Law Council's objects to the ordinary legal aid fee scale being used, by default, for this purpose. This is because the competing considerations in ordinary legal aid matters are different to those in proceeds of crime matters.
31. In the case of ordinary legal aid matters the two competing concerns are: the need to deploy a limited pool of public funds to assist as many people in need as possible versus each individual's right to comprehensive, competent legal representation in their particular case.

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32. In the case of the proceeds of crime litigation, the two competing concerns are: a person's right to access and expend their own assets in preparing for and conducting their response to the proceedings as they consider appropriate versus the community's right to protect restrained assets from dissipation and to ultimately claim them, if the assets are found to have been illegitimately derived.
 33. In both cases the balancing acts is quite different and the method by which any fee scale is arrived at ought to take account of this, particularly where the imposition of a fee scale may impact on a person's ability to retain the legal representative of their choice.
 34. In making these observations, the Law Council does not intend to be critical of the nature of legal assistance ordinarily provided by Legal Aid Commissions. The Law Council's purpose is to challenge the flawed assumptions that:
 - (a) the rules and principles which govern the allocation of limited legal aid funds should automatically be the same as the rules and principles which govern the use of restrained and/or confiscated assets for legal costs;
 - (b) the rules and principles which govern the allocation of limited legal aid funds will guarantee the provision of an appropriate and comprehensive scheme of legal assistance for people who are unable to fund their own defence to proceedings under the POCA because their assets are restrained.

Amendments to search warrant provisions

35. The Bill seeks to amend subsections 227(1), 228(1) and 338 of the POCA to allow officers executing a search warrant under the Act to seize things that are relevant to unexplained wealth proceedings.
36. The Law Council's concern with this amendment is that unexplained wealth proceedings essentially concern the entirety of a person's financial affairs over their lifetime. There is no aspect of a person's income, expenditure, investments and business dealings (and potentially that of their family and close associate) which is not of possible relevance.
37. For that reason the Law Council is concerned that the amendments in their current form, will mean that there are no practical limits placed on the type of information that may be seized in the course of executing a search warrant under the POCA.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.