Parliamentary Committees

Criminal Proceeds (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012

Report No. 26

Legal Affairs and Community Safety Committee

April 2013

Legal Affairs and Community Safety Committee

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Acknowledgements

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Contents

Abbreviations

ABA	Australian Bankers Association
AFP	Australian Federal Police
Attorney-General	The Hon Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012
Committee	Legal Affairs and Community Safety Committee
CPCA	*Criminal Proceeds Confiscation Act 2002*
CMC	Crime and Misconduct Commission
Department	Department of Justice and Attorney-General
DPP	Department of Public Prosecutions
LAQ	Legal Aid Queensland
NSW	New South Wales
NT	Northern Territory
PJCLE	Parliamentary Joint Committee on Law Enforcement (Cth)
QCCL	Queensland Council for Civil Liberties
QLS	Queensland Law Society
SA	South Australia
SCAG	Standing Committee of Attorneys-General
WA	Western Australia
UEW	Unexplained Wealth
UWO	Unexplained Wealth Order
SDOCO	Serious Drug Offender Confiscation Order

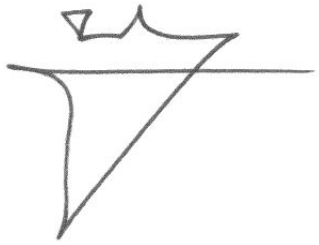
Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's (Committee) examination of the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Bill).

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat and the Department of Justice and Attorney-General.

I commend this Report to the House.



Mr Ian Berry MP

Chair

April 2013

Recommendations

The Committee recommends the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 be passed.

1. Introduction

1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

1.2 The Referral

The Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 (Bill) was introduced into the Legislative Assembly and referred to the Committee on 28 November 2012.

In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report to the Legislative Assembly by 8 April 2013.

1.3 Policy objectives of the Bill

The main objectives of the Bill are to:

- amend the *Criminal Proceeds Confiscation Act 2002* to introduce a scheme for recovering 'unexplained wealth';
- amend the *Criminal Proceeds Confiscation Act 2002* to provide innocent dependants of persons against whom proceeds assessment orders are made with the ability to apply to the Supreme Court for relief from hardship;
- amend the *Criminal Proceeds Confiscation Act 2002* and the *Penalties and Sentences Act 1992* to introduce serious drug offender confiscation orders;
- amend the *Crime and Misconduct Act 2001* and the Police Powers and Responsibilities Act 2000 to facilitate the investigation of evidence related to matters concerning the Criminal Proceeds Confiscation Act 2002; and
- amend the *Criminal Proceeds Confiscation Act 2002* to increase the general effectiveness of the criminal confiscation regime in Queensland.[2]

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.
[2] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 1.

The reasons for the Bill were further explained by the Honourable Mr Jarrod Bleijie MP, Attorney-General and Minister for Justice (Attorney-General) in his introductory speech:

> *I am pleased to introduce the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012. The bill represents the fulfilment of the Queensland government's pre-election pledge to introduce tough new unexplained wealth and drug trafficker declarations to target the ill-gotten gains of criminals. Serious criminal activity is often motivated by greed and an unwillingness to work hard and be liable for taxation on profits. Engagement in serious criminal activity allows these persons to fund lifestyles which are often beyond the reach of ordinary Queenslanders who earn their incomes and pay their taxes in accordance with the law. They also provide the funds that may underwrite other criminal enterprises in which criminal organisations engage.*
>
> *The ease with which vast sums of money can often be made from serious criminal activity is a 'hook' that can be used to convince people that it is worth the 'gamble' of becoming involved in such activity. This is why this bill seeks to increase the risk of involvement in serious criminal activity by increasing the chances that involvement may end up costing a criminal not only their illegally obtained assets but also their legally obtained assets. This bill also acknowledges that those who engage in the trade of illicit drugs are involved in criminal enterprises that carry a high and often tragic cost for the community.*[3]

1.4 Inquiry process

On 3 December 2012, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill. The inquiry was announced and advertised on the Committee's website. In addition stakeholders and subscribers were also invited to lodge written submissions.

The Committee received written advice from the Department on 11 December 2012 and received 5 submissions (see **Appendix A**).

A public hearing was held on 6 March 2013, where the Committee received a briefing from the Department and received further oral submissions from invited witnesses (see **Appendix B**). A copy of the transcript of the public hearing is available on the Committee's website.[4]

1.5 Consultation on the Bill

Prior to the introduction of the Bill, consultation by the Department is stated to have occurred with the following government departments and agencies:

- Department of Premier and Cabinet;
- Queensland Treasury and Trade; and
- Queensland Police Service.

It was further stated that consultation occurred by way of letter from the Attorney-General to the following key stakeholders advising of the framework for the amendments contained in the Bill. The Committee notes the letter did not contain a copy of a draft Bill:

- Chief Justice;
- President of Court of Appeal;

[3] *Transcript of Proceedings*, 28 November 2012, page 2854.
[4] www.parliament.qld.gov.au/work-of-committees/committees/LACSC

- Chief Justice of District Court;
- Chief Magistrate;
- Queensland Law Society (QLS);
- Bar Association of Queensland;
- Queensland Office of Department of Public Prosecution;
- Crime and Misconduct Commission (CMC);
- Queensland Council for Civil Liberties (QCCL);
- Office of Public Trustee;
- Australian Bankers Association; and
- Legal Aid Queensland (LAQ).[5]

Committee Comment

There have been varying degrees of consultation on bills that come before the Committee for consideration. It is noted for this Bill consultation occurred with a variety of stakeholders however the consultation occurred on the framework of the amendments to be contained in the Bill.

The Department stated in its initial briefing to the Committee that timeframes did not permit external consultation on a Bill.[6]

As set out later in this report, unexplained wealth laws are by their very nature intrusive and may severely impact on a person's rights and liberties. It is considered that laws containing provisions such as those contained in the Bill that set up a highly complex regime for the compulsory acquisition of property without compensation; and which are very likely to be the subject of appeal by those against whom they are used, need to be developed without haste and in as thorough a matter as possible.

1.5 Should the Bill be passed?

Standing Order 132(1) requires the Committee to determine whether to recommend the Bill be passed. After careful examination of the Bill including its policy objectives, the advice received from the Department, submissions received from stakeholders, and evidence taken at the public hearing – the Committee considers the Bill should be passed.

The Bill fulfils the Government's commitment to keeping the community safe and strengthening crime laws.

Recommendation 1

The Committee recommends the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012 be passed.

[5] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 8.

[6] Letter from the Department of Justice and Attorney General, 11 December 2012, page 1.

2. Examination of the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012

2.1 Introducing 'unexplained wealth' orders

The Bill amends the *Criminal Proceeds Confiscation Act 2002* (CPCA) to introduce a scheme for the State to recover 'unexplained wealth' from those persons engaged in serious criminal activities. The operation of the scheme is summarised by the Attorney-General as follows:

> *if the [State] can prove on the balance of probabilities that there is a reasonable suspicion that an individual has been involved in serious criminal activity or acquired serious crime derived property without providing sufficient consideration and any of the person's current or previous wealth was acquired unlawfully, then that individual must prove the legitimacy of all of their assets.*[7]

The Bill 'goes a step further' than the existing confiscation regimes by reversing the onus of proof for a defendant to explain lawful possession of their assets, regardless of a conviction, hence the expression 'unexplained wealth'. The amendments are consistent with the Government's pre-election commitment to '*introduce tough new unexplained wealth and drug trafficker declarations to target the ill-gotten gains of drug criminals*'.[8]

At present, the CPCA authorises the confiscation of the proceeds of crime under two regimes. Either through conviction based, or civil based. Through the conviction based regime, there must be a material link between the tainted property and the offence being convicted in order for confiscation. Conversely, the civil based regime does not possess the requirement of a conviction. There need only be reasonable suspicion the property was derived from a criminal enterprise. The onus to establish this is currently on the prosecution and at the balance of probabilities.[9]

Under the current scheme, $597,062 was forfeited to the State under the conviction regime and $7.01m under the civil regime in 2011-2012.[10] At the public hearing, the CMC provided an update of the total amount restrained under the existing laws:

> *As at 21 February 2013, we have restrained property to the net value of $160,370,000 and have returned $42,900,000 in proceeds of crime to consolidated revenue so that recovered proceeds of crime may be used for the benefit of the Queensland community.* [11]

The introduction of unexplained wealth laws is considered a priority among Australian law enforcement agencies and is mentioned in the Standing Committee of Attorneys-General (SCAG) resolutions to combat organised crime.[12] Furthermore, it was identified in the recent Commonwealth inquiry into unexplained wealth legislation by the Parliamentary Joint Committee on Law Enforcement (PJCLE) (PJCLE Report) that criminal enterprise will relocate to jurisdictions where unexplained wealth laws are lacking.[13]

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7 *Transcript of Proceedings*, 28 November 2012, page 2855.

8 Letter from the Department of Justice and Attorney General, 11 December 2012, page 1.

9 Queensland Parliamentary Library and Research Service, *Unexplained Wealth Laws*, Report No. 9 of 2012, page 2.

10 Office of the Director of Public Prosecutions (Qld) Annual Report 2011-2012, page 20.

11 See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 13.

12 Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (Cth), Explanatory Memorandum, page 1.

13 Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 2.

During the committee proceedings, the Australian Federal Police (AFP) announced:

> *… where there is a significant serious and organised crime target who has disassociated himself from the criminal activity, that is where the vulnerability is. If we know he is involved in criminal activity and we know the assets he has obtained are from criminal activity, without … robust unexplained wealth legislation that is a real vulnerability for us.*[14]

The Bill enhances the current provisions in the CPCA 'by providing an alternative, complementary process, by which the CMC can pursue unexplained wealth'.[15]

The key elements of the scheme are outlined below:

- *the scheme will be administered by the CMC with the Office of the Director of Public Prosecutions (ODPP) appearing as solicitor on the record;*
- *all questions of fact are decided on the civil standard of proof, i.e. the balance of probabilities;*
- *the CMC will be able to apply for assets of the offender to be frozen prior to determination of the order. This is consistent with other proceeding under chapter 2 of the CPCA;*
- *upon application by the CMC, the Supreme Court must make an unexplained wealth order against a person if the Court finds there is a reasonable suspicion (on the balance of probabilities) that:*
  - *the person has engaged in one or more serious crime related activities; or*
  - *that a person has acquired without providing sufficient consideration, serious crime derived property from any serious crime related activity of another person;*
  - *and any of the person's current or previous wealth was acquired unlawfully;*
- *the onus of proof is then reversed onto the person to show their wealth was lawfully acquired;*
- *the order made by the Supreme Court will specify the amount of 'unexplained wealth' that the Court is not satisfied was lawfully acquired. This is the amount that will become a debt to the State. All property under the effective control of the respondent can be used to pay the debt; and*
- *the Bill attempts wherever possible to provide for enforcement of the order in terms consistent with those already provided in Chapter 2.*[16]

[14] PJCLE Report, 2.13, quoting Commander Ian McCartney, AFP, *Committee Hansard*, 10 February 2012, page 2.

[15] Letter from the Department of Justice and Attorney General, 11 December 2012, page 2.

[16] Letter from the Department of Justice and Attorney General, 11 December 2012, pages 2, 3.

Overseas jurisdictions

Globally, many jurisdictions including Ireland, United Kingdom (UK) and Italy, have legislation aimed at the confiscation of tainted property. Some of these jurisdictions report the legislation has proved useful in reducing organized and transnational crime.[17] However, it was noted in the UK that the civil recovery process is 'extremely lengthy and can take up to three years to go to trial'.[18]

Each of the three listed international jurisdictions has legislation containing elements of reverse onus of proof and suspicion (rather than conviction) of criminal activity.

Ireland

In Ireland, the Criminal Assets Bureau (CAB) is the agency responsible for the carriage of investigations into suspected proceeds of crime. The CAB is part of the national police service but works together in an integrated approach with officers from the: national police service (An Garda Si'ocha'na), Revenue Commissioners, Department of Social Protection, Office of Attorney-General and the Office of Department of Public Prosecutions.[19]

Powers of the CAB include the ability to apply to the High Court seeking an interim order, which prohibits dealing with the property if the court is satisfied on a civil standard of proof, the property is the proceeds of crime and has a value over 13,000 Euro.[20] An interim order must be followed by an interlocutory order in order to maintain the freeze on the assets. The Interlocutory Order freezes the property until further notice, unless the court is satisfied that all or part of the property is not proceeds of crime.[21] The property must remain frozen for seven years. During this period the affected person can seek to prove the legitimacy of the property and any person may seek to vary or set aside the Interlocutory Order if that person can satisfy the court they have a legitimate right to the property and/or the property is not the proceeds of crime.[22]

In 2010, over 3.1 million and in 2011, approximately 2.7 million Euro was paid to the Minister of Finance.[23] The CAB makes use of tax powers to target the profits or gains derived from criminal activity and suspected criminal activity.[24]

United Kingdom

In the United Kingdom, the relevant legislation is the *Proceeds of Crime Act 2002* (UK) (UK-POCA).[25] The UK-POCA provides the following four regimes for the seizure, forfeiture and confiscation of the proceeds of crime:

(a) conviction based confiscation following the conviction of a defendant in criminal proceedings;

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17 Queensland Parliamentary Library and Research Service, *Unexplained Wealth Laws*, Report No. 9 of 2012, page 7.

18 PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 14; The Parliament of the Commonwealth of Australia, *Report of the Australian Parliamentary Delegation to Canada, the United States, Italy, Austria, the United Kingdom and the Netherlands,* June 2009, pages 86-87. http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/delegation_report/delegationfinal.pdf

19 Criminal Assets Bureau, Annual Report 2010, page 6; An Garda Siochana Annual Report 2011, page 3.

20 Criminal Assets Bureau, Annual Report 2010, page 14.

21 Criminal Assets Bureau, Annual Report 2010, page 14.

22 Criminal Assets Bureau, Annual Report 2010, page 14.

23 Criminal Assets Bureau, Annual Report 2010, page 5; An Garda Siochana Annual Report 2011, page 3.

24 Criminal Assets Bureau, Annual Report 2010, page 17.

25 For a summary of the situation in the United Kingdom prior to the POCA, see Booz Allen Hamilton, Comparative Evaluation of Unexplained Wealth Orders, October 2011, pages 41-42.

(b) non-conviction based forfeiture involving civil asset recovery in civil proceedings in the High Court;

(c) taxation of the profits derived from crime; and

(d) confiscation of cash suspected of being the proceeds of crime.[26]

As well as providing a traditional restraint and forfeiture of assets scheme, the UK-POCA allows for the confiscation of assets gained from a 'criminal lifestyle'. The UK-POCA contains provisions for assessing the benefit that a person derives from a 'criminal lifestyle'. Once assets are proven to be obtained through a 'criminal lifestyle', the defendant then has the onus of proving that the assets were not derived from a criminal lifestyle (*i.e.*, thereby reversing the onus of proof).[27]

The PJCLE was informed "*that the 'criminal lifestyle' provisions have been an effective tool for recovering criminal assets".*[28] However, the UK authorities have acknowledged that the civil recovery process is very lengthy sometimes taking as long as three years to go to trial.[29]

Australian jurisdictions

With reference to Australian jurisdictions, Western Australia (WA), South Australia (SA), New South Wales (NSW), the Northern Territory (NT) and the Commonwealth Governments all have provisions directly relating to the confiscation of criminal proceeds and 'unexplained wealth'.[30]

Western Australia and Northern Territory

The provisions in WA and the NT are similar in operation. The laws provide that the relevant DPP may apply to the court for an unexplained wealth declaration against a person.[31] There is no requirement under either law to show reasonable grounds to suspect that a person committed an offence.[32]

Key components of both jurisdictions' legislation include:

- limited judicial discretion as a court must make a declaration that a respondent has unexplained wealth if it is 'more likely than not' that their wealth is greater than their lawfully acquired wealth;[33]
- reverse onus of proof in favour of the Crown, providing that 'any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary';[34]
- provisions for how law enforcement agencies and prosecutors can obtain information about criminal assets;[35]
- provisions to ensure property remains available for forfeiture;[36]

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[26] Booz Allen Hamilton, Comparative Evaluation of Unexplained Wealth Orders, October 2011, page 42.
[27] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, pages 13-14.
[28] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 14.
[29] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 14.
[30] *Criminal Property Confiscation Act 2000* (WA); *Criminal Property Forfeiture Act 2002* (NT); *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA); *Proceeds of Crime Act 2002* (Cth); *Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010* (NSW).
[31] *Criminal Property Confiscation Act 2000* (WA), s 11; *Criminal Property Forfeiture Act 2002* (NT), section 67.
[32] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 65.
[33] *Criminal Property Forfeiture Act 2002* (NT), ss71(1); *Criminal Property Confiscation Act 2000* (WA), ss 12(1).
[34] *Criminal Property Forfeiture Act 2002* (NT), ss71(2); *Criminal Property Confiscation Act 2000* (WA), ss 12(2).
[35] *Criminal Property Forfeiture Act 2002* (NT), Part 3; *Criminal Property Confiscation Act 2000* (WA), Part 5.

- the right to object to property being restrained within 28 days of being served with an order to restrain property;[37] and
- orders may be made against 'declared drug traffickers'.

Differences between the WA and NT legislation include:

- court consideration of cooperation;
- process by which a person is declared a drug trafficker and have their assets confiscated; and
- Constitutional requirements arising in the Northern Territory.

South Australia

South Australia (SA) provides for a scheme broadly similar to WA and the NT. However, SA's unexplained wealth legislation is independent of other proceeds of crime legislation.[38] A key difference from the SA laws to the WA and NT legislation is the court has final discretion as to whether an order is made. There are also limitations on the investigative powers under the SA Act.

The powers can only be used:

- in relation to investigating or restraining wealth of a person who has been convicted of a serious offence (or declared liable to supervision in relation to a charge of a serious offence) or is (or has been) subject to a restraining order; or
- where the DPP reasonably suspects the person: engages or has engaged in serious criminal activity; associates/has regularly associated with such persons; is or has been a member of a declared organisation; or
- has acquired property or a benefit as a gift from a person who fits these categories.[39]

As a further safeguard, a court may exclude portions of an individual's wealth if satisfied it is not reasonably possible for a person to prove that part of their wealth was lawfully acquired.[40]

Additionally, the SA legislation provides for additional oversight of the use of the unexplained wealth laws by way of an annual statutory review by a retired judicial officer.[41]

New South Wales

The NSW legislation is administered by the New South Wales Crime Commission. The New South Wales Crime Commission may apply to the Supreme Court for an unexplained wealth order against an individual. A restraining order can be applied for on the basis that an authorised officer has a

[36] *Criminal Property Forfeiture Act 2002* (NT), Part 4, Division 3; *Criminal Property Confiscation Act 2000* (WA), section 50.

[37] *Criminal Property Forfeiture Act 2002* (NT), Part 5; *Criminal Confiscation Act 2000* (WA), Part 6.

[38] *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA).

[39] *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA), s 12; PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 67.

[40] *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA), s 9(11); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 67.

[41] *Serious and Organised Crime (Unexplained Wealth) Act 2009* (SA), s 34; Alan Moss, A review of the execution of the powers under the *Serious and Organised Crime (Unexplained Wealth) Act 2009* exercised during the period 1 July, 2010 to 30 June, 2011, conducted by Mr Alan Moss, retired Judge of the District Court of South Australia, House of Assembly South Australia, 10 November 2011; Alan Moss, A review of the execution of the powers under the *Serious and Organised Crime (Control) Act 2008* exercised during the period 1 July, 2011 to 30 June, 2012, conducted by Mr Alan Moss, retired Judge of the District Court of South Australia, House of Assembly South Australia, September 2012.

reasonable suspicion a person has engaged in serious crime related activities, has acquired serious crime related property, or that property is serious crime derived property or illegally acquired property.[42] However, the onus is on the person to prove that their current or previous wealth is not or was not illegally acquired or the proceeds of illegal activity.[43]

The court must make the order if there is a reasonable suspicion the person has, at any time, engaged in a serious crime related activity or acquired serious crime derived property from another person's serious crime related activity. Though the provisions require a finding that a person has engaged in, or acquired property from, serious crime-related activity, this does not need to be based on a reasonable suspicion of the commission of a specific offence.[44]

An additional safeguard provides that the court may refuse to make an unexplained wealth order if it finds that it is not in the public interest, or may reduce the amount otherwise payable.[45]

Commonwealth

Under the Commonwealth legislation, an unexplained wealth order is equal to the difference between a person's total wealth and their lawfully obtained wealth.[46] The onus is on the individual to satisfy, on the balance of probabilities, that the relevant wealth did not derive from the commission of a relevant offence.[47] The court has wider discretion under Commonwealth legislation compared to some of the laws of the various States.[48] An additional safeguard provides that a court may refuse to make an order if it considers it is in the public interest.[49]

Similar to the proposed Queensland legislation, the Commonwealth legislation contains a provision relieving certain dependants from hardship.[50]

Of particular note, the Commonwealth legislation contains a provision where the court may refuse to make a preliminary unexplained wealth order or an unexplained wealth order if the Commonwealth refuses or fails to give the court an appropriate undertaking with respect to payment of damages or costs, or both, for the making and operation of the order.[51]

Use of Existing Provisions

The AFP's submission to the PJCLE Inquiry revealed that in 2012, the Commonwealth unexplained wealth laws had not been used since they came into force two years prior.[52] The limited use of the provisions was reported to be multifactorial, with one of the issues relating to the operation of the provisions being resource intensive "in practice".[53] The ACC informed the PJCLE that one of the

[42] *Criminal Proceeds Recovery Act 1990* (NSW), s 28A(2); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 68.
[43] *Criminal Proceeds Recovery Act 1990*, (NSW), s 28B(3); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 68.
[44] *Criminal Proceeds Recovery Act 1990* (NSW), s 28A(3); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 68.
[45] *Criminal Proceeds Recovery Act 1990* (NSW), s 28A(4); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 68.
[46] *Proceeds of Crime Act 2002* (Cth), s 179E(2).
[47] *Proceeds of Crime Act 2002* (Cth), s 179E(3); PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 18.
[48] *Proceeds of Crime Act 2002* (Cth), s 179E(1).
[49] *Proceeds of Crime Act 2002* (Cth), s 179E(6).
[50] *Proceeds of Crime Act 2002* (Cth), s 179L.
[51] *Proceeds of Crime Act 2002* (Cth), s 179EA(1).
[52] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 20.
[53] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, chapter 3.

major drawbacks of the existing provisions was the requirement for the investigating agency to conduct a complete analysis of a person's financial circumstances over a long period.[54] While the provisions reverse the onus of proof, in practice, that onus is easily discharged and may be merely a credible denial on oath.[55]

> *Obtaining any unexplained wealth order, including the preliminary unexplained wealth order, inevitably requires investigators to build a comprehensive financial picture of all the property a person owns or has owned, effectively controls or has controlled and their sources of income. It is usually necessary to investigate the whole of the person's working life. This means that in many cases it is simply not practicable to embark on proceedings.*
>
> *As ACC predicted in 2009, the work required to satisfy the court and do the complex financial analysis to distinguish legitimate from co-mingled illegitimate funds has meant that other proceeds of crime recovery options are generally preferred (including traditional proceeds of crime action, taxation and debt recovery methods).*[56]

The CMC's submission to the PJCLE echoed these issues:

> *In the CMC's view, unexplained wealth investigations are likely to be resource intensive with uncertain outcomes. In an environment of scarce resources and competing priorities this circumstance is likely to impact on resource allocation such that the utility of the provisions will be limited.*
>
> *In the CMC's view, the taxation laws provide a more appropriate and effective mechanism to address the accumulation of unexplained wealth.*[57]

Western Australia has had equivalent provisions since 2000. However, the provisions in WA have also had limited use, with only six of 13 declarations leading to confiscation between July 2004 and June 2012.[58]

The Northern Territory has utilised their equivalent provisions on nine occasions with a tenth matter under way at the time of writing.[59] The Northern Territory has a 100% success rate with unexplained wealth orders leading to confiscation.[60] This has been partly attributed to the simple and effective design of the legislation as well as extensive investigation being undertaken prior to seeking an unexplained wealth order.[61]

As at 30 June 2012, equivalent provisions in South Australia are yet to be used. A number of potential issues were identified in the statutory review of the provisions in South Australia by retired judge Alan Moss. These issues include:

- significant legal impediment preventing utilisation of the South Australia Police holdings of criminal intelligence;

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54 PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 34-35.

55 PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 35.

56 PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, page 34, citing: ACC, *Commonwealth Inquiry Submission* 8, page 2.

57 PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, *Submission 1*, page 2.

58 Western Australia Director of Public Prosecutions, *Annual Report: 2010-11*, p.30 (statistics to June 2011); Western Australia Director of Public Prosecutions, *Annual Report: 2011-12*, p.32 (NB different reporting method but no declarations made during 2011-12).

59 Personal communication, Rob Jobson, Solicitor for Northern Territory, February 2013.

60 Personal communication, Rob Jobson, Solicitor for Northern Territory, February 2013.

61 Personal communication, Rob Jobson, Solicitor for Northern Territory, February 2013.

- compulsorily acquired information not able to be used for any other purpose (such as unexplained wealth orders);
- the above resulting in a large amount of investigative and legal work without any powers being exercised;
- 21 day time limit for applying for an order deemed insufficient given the depth of investigation required; and
- test cases may prove to be expensive and agencies may be unwilling to risk scarce resources in this way.[62]

New South Wales has obtained unexplained wealth orders on two occasions, with both leading to confiscation.[63] However, the Annual Report indicates this figure may be misleading as more than 95% of the Commission's confiscation matters are settled rather than fully litigated.[64] In most cases this has meant that when a settlement has been negotiated about matters that were commenced through an UWO final consent orders have been made that dismiss the application for an UWO and instead make either an assets forfeiture order or proceeds assessment order.[65]

2.2 Policy issues raised with the Bill

During its examination of the Bill, the Committee considered a number of policy issues (most of which were raised in submissions) which were integral to the operation of the proposed unexplained wealth scheme. This Part of the report sets out the Committee's examination of those broad policy issues. In Part 3 of the Report – Fundamental Legislative Principles (FLPs), the Committee takes a closer look at the specific provisions of the Bill with respect to their consistency with the FLPs.

Reverse onus of proof & link to offence

Both the QLS and QCCL do not support the reversal of the onus of proof and the lack of requirement for proposed confiscated assets to be linked to the commission of a specific offence.[66]

At the public hearing, the QLS stated:

> *The onus of proof being touted in the current bill is consistent with the current CPCA legislation. In saying that, the state is the model litigant and the state is required to put up a case to the court for them to make a determination. I do not personally believe that the onus of proof that is in the new provisions is any more onerous than what is currently there.*[67]

The Department noted in it response to submissions that the QLS submission concedes the reverse onus of proof and lack of connection with criminal activity and specific assets are core aspects of the

[62] Alan Moss, A review of the execution of the powers under the Serious and Organised Crime (Unexplained Wealth) Act 2009 exercised during the period 1 July, 2010 to 30 June, 2011, conducted by Mr Alan Moss, retired Judge of the District Court of South Australia, House of Assembly South Australia, 10 November 2011; Alan Moss, A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2011 to 30 June, 2012, conducted by Mr Alan Moss, retired Judge of the District Court of South Australia, House of Assembly South Australia, September 2012.

[63] New South Wales Crime Commission, Annual Report 2010-2011, page 13; Annual Report 2011-2012, page 64.

[64] New South Wales Crime Commission, Annual Report 2011-2012, pages 64-65.

[65] New South Wales Crime Commission, Annual Report 2011-2012, pages 64-65.

[66] Submission No. 2, Queensland Law Society; Submission No. 3 – Qld Council of Civil Liberties.

[67] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 20.

operation of UEW schemes and that these aspects are already contained within the CPCA with respect to Proceeds Assessment Orders.[68]

The Department also stated in support of the reversal of onus of proof that these aspects are present in all Australian versions of UEW laws.[69] The QLS acknowledged this at the public hearing but disputed that it should automatically flow that the provisions are contained in the Queensland Bill:

> *I understand that the Law Society took a position with respect to the original legislation in that it did not agree, because we agreed with friends from Civil Liberties that it was draconian, and the reversal of the onus of proof and presumption of innocence and those legal principles we submitted were breached. However, just because other states are doing it does not mean that this state cannot consider the various aspects of it and take our own view.*[70]

Committee comment

The Committee notes the Government's pre-election commitment to introduce UEW laws and the fact that these two elements are core aspects of the proposed UEW laws. Although these two elements currently exist within the CPCA with respect to Proceeds Assessment Orders, the introduction of UEW laws will significantly broaden the application of these elements. For example, unlike a Proceeds Assessment Order, UWO have no time limitation and the reverse onus can extend as far back as the Crown chooses.

The Committee has considered comment from the CMC and submissions in relation to the PJCLE inquiry that indicate, in practice, the onus is actually on the Crown. It has been reported the respondent may discharge their onus of proof with a credible denial under oath.[71] Research into all other Australian jurisdictions with existing UEW laws, indicate that considerable research is conducted into the financial history of a target prior to an application for an UWO.

The Committee also notes the concerns of the QLS about the lack of a link to the commission of a specific offence. However, the difficulty in using UEW provisions when a specific link is required is also noted, as it may defeat the purpose of introducing the laws.

The Committee considers the requirement in the Bill for a general link to an offence falls somewhere between the NT and WA laws which require no link, and the impracticability of laws that require a specific link. Further aspects of the Bill that provide some balance to the reversal of the onus of proof, include:

- requiring the State to prove a connection (based on a reasonable suspicion) between a respondent and serious crime activity; and
- providing the Court with a public interest discretion to refuse to make an order or reduce the amount that may be payable under an UWO.[72]

The Committee considers the Bill provides an appropriate balance, in the circumstances, between the tensions of individual rights and the protection of the community.

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[68] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 2.

[69] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 2.

[70] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 27.

[71] PJCLE, Inquiry into Commonwealth unexplained wealth legislation and arrangements, March 2012, pages 34-35.

[72] See new section 89H(3).

Reasonable suspicion

The QLS submits the statutory test of 'reasonable suspicion' for making an UWO is too low and '*risks injustices occurring'*. The QLS submits the words 'reasonable suspicion' should be removed from section 89G(1).[73]

The QCCL submit that 'reasonable suspicion' should be replaced with 'reasonable belief' as a higher threshold test. The QCCL submits such a test should require an explanation from the State as to why a criminal prosecution has not been brought, or if it has, why it has failed.[74]

In response, the Department stated the Explanatory Notes to the Bill highlight evidence from law enforcement professionals cited in the PJCLE report who suggest that criminals will move their operation to jurisdictions where they believe there is legislative weakness. The Department believes submissions received on the threshold test must be put in cross-jurisdictional context.

The Department further explained that UEW schemes in WA, SA and the NT contain no requirement for the State to prove a 'reasonable suspicion' that a person has been involved in serious criminal activity before making an UWO. In those jurisdictions the Court needs only be satisfied a person's wealth is greater than the value of the person's lawfully acquired wealth. The Commonwealth does not require a connection with criminal activity before a preliminary UWO is made. However, a final UWO can only be made if the Court is satisfied at least part of a person's wealth was derived from a criminal offence. NSW adopts the 'reasonable suspicion' of involvement in serious criminal activity test similar to that which is used in the Bill.

The Department stated the requirement for a connection to a criminal organisation would exclude UEW of those engaged in serious crime related activity if they were not involved in a criminal organisation. The Department cites the existence of *Criminal Organisation Act 2009* designed to target the disruption of organised criminal activity.

Committee comment

The Committee is satisfied the threshold test of 'reasonable suspicion' together with other additional safeguards provides an appropriate balance between individual rights and the protection of the public through workable legislation. One safeguard contained in the CPCA is the requirement for a Supreme Court Order. This involves application to the Supreme Court through an appropriate affidavit in order to obtain a Restraining Order. In practice, a restraining order is sought prior to an application for an UWO to prevent dissipation of assets.[75] This strengthens judicial discretion and enhances accountability. The Committee notes some jurisdictions, such as WA, merely require approval via Justice of the Peace and on limited material.[76] The Committee considers the CPCA safeguard to be an important check and balance on the power of the State under the new provisions in relation to an UWO.

Public Interest

There are a number of provisions in the Bill which enable the Supreme Court to exercise its discretion where it is in the "public interest" to do so.

[73] Submission No. 2, Queensland Law Society. page 3.

[74] Submission No. 3, Qld Council of Civil Liberties, page 6.

[75] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 15; see also clause 42 of the Bill which amends the CPCA to include Part 3 of new chapter 2A dealing with restraining orders.

[76] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 15.

For example:

(a) the court may refuse to make an UWO if the court is satisfied it is not in the public interest to make the order;[77]

(b) the court may refuse to make a restraining order if the court is satisfied in the particular circumstances it is not in the public interest to make the order;[78]

(c) the court may exclude the prescribed respondent's property from the restraining order if it is satisfied it is in the public interest to amend the order in the particular circumstances;[79] and

(d) the court may refuse to make a SDOCO if the court is satisfied it is not in the public interest to make the order.[80]

While discussing the relevant SDOCO provisions specifically, the Department advised:

> *The provision of the public interest discretion in these sections allows the Supreme Court to take into account specific factual matters in each case whilst achieving the policy objectives for the serious drug offender confiscation order scheme as set out in the explanatory notes.*[81]

Further, during the public hearing, when asked by the Committee whether the "*Supreme Court will make the rules as they go in terms of the public interest*",[82] the Department advised as follows in the context of proposed new section 93ZZB of the CPCA:

> *There has been, I suppose, a number of centuries where the court has had to decide what is in the public interest and I would not be so presumptuous as to indicate what they would do.*
>
> *….*
>
> *The provision of a public interest discretion to the Supreme Court is used consistently throughout the Criminal Proceeds Confiscation Act 2002 currently and in this bill. It allows the Supreme Court to make value judgements based on specific factual scenarios presented to them in individual cases guided by the subject matter, scope and purpose of the act.*[83]

Some submissions raised concerns about the "public interest" discretion. For example, the QCCL made the following comments in this regard:

> *The Court has no power to refuse an Order except where the Court finds that it is in the public interest not to make an Order. The amorphous concept of the 'public interest', however, is not defined. It is unclear, therefore, whether the 'public interest' proviso includes, for instance, the public interest that a person is entitled to a fair trial by being given legal aid and adequate legal representation. Nor is it clear whether there can be various competing public interests whereby the Court must decide upon a dominant public interest. So far, it has been held that the lack of proportionality between the property*

[77] See proposed new section 89G(2) of the CPCA (clause 40 of the Bill).
[78] See proposed new section 93M(2)(a) of the CPCA (clause 42 of the Bill).
[79] See proposed new section 93ZL(1) of the CPCA (clause 42 of the Bill).
[80] See proposed new section 93ZZB(2) of the CPCA (clause 42 of the Bill).
[81] Letter from the Department dated 18 February 2013, page 28.
[82] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 4.
[83] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 4.

> *sought to be restrained and the alleged offences was not a 'public interest' basis to forestall the making of a restraining order.*[84][85]

The proscriptive wording of new section 89G, in relation to "the Supreme Court *must*" was thought to be balanced by judicial discretion in relation to determining what is in the "public interest".

However, in response to a question about the operation of the public interest discretion, the Department advised:

> *The public interest discretion has not so long ago been considered by the High Court. I can refer the committee to the decision of* Hogan v Hinch *in 2011. What the High Court said in that decision is that the court is not free to apply an idiosyncratic notion of what the public interest is. What they would look at is the public interest-and it is a multidimensional concept-but within the objects, the scope and the purpose of the act. That is where the limits on the discretion are. They look at what the legislation is trying to achieve, what the purpose is behind it and they apply the public interest to that.*[86]

The Department has envisaged the public interest discretion may be taken into account by the Supreme Court to balance the power of the provisions in relation to time limitations:

> *That is another issue the Supreme Court could take into account when exercising its public interest discretion, whether it was actually reasonable for someone to be able to produce records from that period. If they had a good explanation about why there were no records, that is something the Supreme Court could take into account in those circumstances.*

The CMC also highlighted the role of the public interest discretion in assisting judicial discretion and accountability.

> *So the scheme not only provides for a high level of judicial oversight but a greater level of judicial discretion as to whether or not an order should be issued in the public interest. This judicial discretion does not exist in the Western Australian model, and this is why the materials that they prepare in furtherance of such freezing notices are quite limited in nature.*

Committee comment

The Committee fully supports the inclusion of the public interest discretion and the jurisdiction of the Supreme Court.

Higher accountability

The QLS opposed the proposed amendment to section 28(4) which removes the requirement for the State to prove that property belonging to a person who has engaged in external serious crime related activity was 'derived' from serious crime related activity. The QLS submitted:

> *In circumstances where the actual crime related activity does not take place in Queensland, the State should be held to a higher standard of accountability in terms of investigating the source of the property.*[87]

The Department stated in its response to submissions, that the Bill aims to bring the treatment of external serious criminal activity into closer alignment with the treatment of serious criminal activity

[84] *Queensland v Kupfer* [2003] QSC 458.
[85] Submission No. 3, QCCL, pages 5-6.
[86] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 7.
[87] Submission No. 2, Queensland Law Society, page 3.

that occurs in Queensland. The Department referred to the explanatory notes which state the amendments reflect '*the reality that serious criminal activity often crosses borders'.*[88]

The Department listed the safeguards contained in the CPCA designed to ensure the State is '*held to higher standards of accountability*' with respect to external serious crime related activity:

- an application for a restraining order with respect to a person who has engaged in external serious criminal activity can only be made if the person whose property it is lives in Queensland or the property is situated in Queensland; and
- an application for a restraining order with respect to a person who has engaged in external serious criminal activity can only be made if the application is supported by an affidavit of an officer which states that due enquiry has been made and there is satisfaction that no action has been taken in another jurisdiction against the property as a result of the serious crime related activity.

Committee comment

The Committee notes the views of the QLS on this matter, however considers the response from the Department provides sufficient safeguards. This matter is discussed further in Part 3 of the Report.

Time limit and monetary threshold

The QCCL submitted a time limit of six years or 12 years should apply to the period that can be examined by the Court when assessing the value of an unexplained wealth order. The provisions in the Bill, as drafted, have an unlimited time period.[89]

The Department responded that the provisions are consistent with other Australian jurisdictions with UEW schemes. However, the Department add that the proposed new section uses the phrase '*of which the State has given evidence*' which effectively limits the State to a period of time of which it has provided evidence to the Court.[90]

Committee Comment

The Committee considers the use of the phrase '*of which the State has given evidence*' provides an appropriate limitation on the State's power to compel an individual to provide proof of their wealth.

The Committee also considers the public interest discretion test available to the Court may be used to limit the power of the State to compel an individual to provide records for wealth obtained a long time ago. For example, if the State is able to access records that an individual would not be expected to have kept themselves or the individual does not have access to, the Court may in certain circumstances refuse or amend an UWO through the public interest discretion.

Resourcing

The Committee noted numerous submissions to the Commonwealth PJCLE citing the UEW laws as being particularly resource intensive.[91]

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88 Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 5.

89 Submission No. 3, QCCL, page 7.

90 Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 23.

91 PJCLE, Karen Harfield at page 35; PJCLE Public Hearing on Friday 4 November 2011, Commander Ian McCartney, Manager, Criminal Assets, Australian Federal Police, Hansard at page 2; see also the Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, pages 15-16.

In some jurisdictions the cost of using the laws has been stated to be a potential barrier to their effectiveness.[92]

> *Unexplained wealth investigations are conducted in a much vaguer and opaque zone. Suspects will often be outwardly respectable people with little, or no, criminal history. Part of their wealth may come from employment, or a business and it can be very difficult to demonstrate that a particular component of their wealth has not been lawfully acquired. Often wealth not lawfully acquired will not be translated into assets, but will be used to fund a lifestyle.*
>
> *Such investigations may have to go back years and involve not only police, but also lawyers and forensic accountants. These investigations are time consuming, resource intensive and legally difficult.*

The CMC provided a detailed response about the specific resourcing required to effectively carry out their role under the new provisions.[93]

Under the new provisions it appears the CMC will bear the cost of:

- hire and retention of specialist investigators;
- extensive financial investigations;
- training and development of staff; and
- damages claims in relation to a successful legal challenge to an UWO.

In relation to resourcing, the explanatory notes to the Bill indicate:

> *any costs in relation to the amendments will be met from existing agency resources. The future allocation of resources will be determined through the normal budgetary processes.*

Committee comment

The Committee notes the significance of ensuring the new provisions deliver on the Government's pre-election commitment to get tough on crime

The Committee notes the recent media interview published in *The Australian* on 6 March 2013. The Attorney-General was quoted in relation to working through the funding issues with the CMC in this particular area:

> *Once the new laws are in place, we'll make sure the CMC is sufficiently resourced*.[94]

The Committee supports the CMC working with the Attorney-General to ensure it is sufficiently resourced.

Legal representation in proceedings

In relation to legal representation in proceedings, the QLS raised the following points in its submission:

> *The Society maintains the view that the court should have a discretion to allow, on application by the defendant, legal costs to be met from the assets the subject of the application. Sufficient safeguards can be built in to the legislation to ensure concerns do*

[92] Alan Moss, A review of the execution of the powers under the Serious and Organised Crime (Control) Act 2008 exercised during the period 1 July, 2011 to 30 June, 2012, conducted by Mr Alan Moss, retired Judge of the District Court of South Australia, House of Assembly South Australia, September 2012, page 5.

[93] Correspondence from the CMC to the Committee responding to Questions on Notice from the Public Hearing on the Bill dated 11 March 2013, pages 1-2.

[94] Kym Aguis, 'New Qld laws unfair on criminals: hearing', *The Australian,* 6 March 2013.

> *not arise that the asset pool is improperly drained. That would protect the integrity of the proceedings and yet allow for the defendant to be properly represented. In our experience, the Crown appreciates the involvement of legal representatives for the defendant to ensure matters are progressed professionally and efficiently.*[95]

In the alternative, the QLS submits that applications contained in the Bill should fall within the operation of Chapter 6, part 2 of the CPCA which sets out special provisions relating to Legal Aid under the CPCA.[96]

The key points raised by the QCCL can be summarised as follows:

- the CPCA and the Bill preclude the Court from setting aside money from the assets of the respondent to enable the respondent to defend the proceedings;
- the availability of legal aid and a defendant's predicament generally is at the whim of the State from the outset when a restraining order is sought;
- Legal Aid Queensland does not have a specialist 'in-house' confiscation team to adequately represent respondents in CPCA proceeding;
- if external private legal representative is required, it is unlikely that such lawyers would be prepared to take on such matters at legal aid rates; and
- the non-availability of adequate representation could potentially lead to difficulties as UK courts have set aside confiscation orders on the basis of a lack of adequate legal representation.[97]

The Department responded as follows to these points raised in the submissions of the QLS and the QCCL:

> *The Bill provides for access to funds for legal representation in a manner consistent with the current provisions of the CPCA.*
>
> *It was beyond the scope of this Bill to provide for broad reform of the manner in which access to legal representation for proceedings under the CPCA can be obtained.*
>
> *Any changes relating to legal representations need to be consistent across the whole of the CPCA. DJAG has brought this issue to the attention of the Attorney-General. The Attorney-General has approved DJAG commencing a further review of the CPCA in 2013-2014 and this issue will be examined as part of that review.*
>
> *With respect to the alternative submission from the QLS, chapter 6, part 2 of the CPCA provisions of the CPCA applies to all proceedings under the Act and will therefore apply to the two new schemes introduced by the Bill.*
>
> *As the QCCL submission does not provide a case name or legal citation for the English Court decision to which they refer, DJAG is unable to make any comment on its applicability to the law in Queensland.*[98]

The Department indicated at the Public Hearing that funding of legal representation would be privately met by the individual in relation to both UWOs and SDOCOs. In the event that all of the individual's assets are restrained, the individual may apply for legal aid funding.[99]

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95 Submission No. 2, Queensland Law Society, page 4.
96 Submission No. 2, Queensland Law Society, page 4.
97 Submission No. 3, Queensland Council for Civil Liberties, pages 4-5.
98 Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, pages 30-31.

Committee Comment

The Committee considers the public interest discretion of the court may need to be relied upon if the circumstance above were to arise. The Committee welcomes the Department's advice that a review of the whole of the CPCA is intended for 2013-14.

Conviction quashed

The QLS submit that if a criminal conviction is the basis of the 'serious criminal activity' relevant to the making of an UWO, then the quashing of that conviction should result in the order being revoked or should trigger an automatic review.

The Department stated that to amend the Bill in this way, would result in a major inconsistency between the treatment of UWO and proceeds assessment orders within Chapter 2 of the CPCA. The Department submits that the existence of these provisions in chapter 2, reinforces the objects clause of the CPCA which make it clear the Chapter 2 scheme 'does not depend on a charge or conviction'.

The Department argues that a quashing of a conviction will not alter the fact that a respondent has not been able to satisfy the Supreme Court that their assets where obtained lawfully.

Committee Comment

The Committee understands the position of the QLS and the Department's commitment to drafting clauses that reinforce the objects of the CPCA. The interpretation of section 89G indicates that a conviction is not required to trigger the reasonable suspicion in 1(a). Accordingly, the subsequent quashing of a conviction would not prevent section 89G from remaining enlivened, even if the conviction was the only link. The evidence that led the matter to be tried in the first place may be enough to trigger 'reasonable suspicion of serious criminal activity'.

The Committee considered an alternative would be to amend section 89G to require a specific criminal offence in order to trigger an application for an UWO. However, research indicates the addition of this safeguard would likely render the UEW provisions unworkable in practice. This would hinder the policy objective for introducing the laws and would be counterintuitive.

Oversight & reporting

The QLS and QCCL highlighted the potential for misuse with respect to the far reaching powers of these provisions. Both the QLS and QCCL raised strong concerns about the provision's abrogation of fundamental legislative principles.

To balance these serious concerns, the QLS submit the UEW scheme should be supervised by a Parliamentary Committee and the Public Interest Monitor should be able to examine 'all investigations and processes'. The Department responded by indicating the UEW scheme does not operate in closed court and the judicial discretion is preserved through the public interest provision. The Department also stated the Parliamentary Crime and Misconduct Committee has the power to monitor the functions and exercise of powers of the CMC under the general monitor and review provisions in the *Crime and Misconduct Act 2001.*

Committee Comment

The Committee considers the powers under the proposed legislation are by their nature intrusive and encroach on individual rights and freedoms, particularly a person's right to property. The Committee notes the provisions extend the powers of the State well beyond what is currently available and the potential for misuse of the provisions.

[99] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, pages 3 and 9.

Accurate reporting of the use of UEW provisions is also essential to effective monitoring and oversight. Oral submissions provided at the hearing indicated the CMC would be responsible for reporting on the use of UEW provisions.[100]

In addition to the increased oversight role recommended above, the Committee considers it would not be inappropriate for the specific provision to be made in the Bill requiring the CMC to report on the use of UEW provisions annually in its Annual Report.

The Committee considers this would also facilitate research and cross-jurisdictional comparisons of the operation and use of the UEW provisions.

2.3 Applications for hardship orders

With reference to the protection of individual's rights and innocent victims of crime, the Bill provides for the application of hardship orders. If the Supreme Court can be satisfied that it is not in the public interest to make an 'unexplained wealth' order or that it would be unjust to do so, with respect to innocent dependants, it has the discretion to reduce or refuse the order. This is summarised below:

> *innocent dependents will be able to make hardship applications for the exclusion of testamentary gifts and principal places of residence (in the same terms as innocent dependents under the prescribed serious drug offender scheme);*
>
> *the Supreme Court has the discretion to refuse to make the order if it is satisfied it is not in the public interest to do so; and the court may reduce the amount that would otherwise be payable under an unexplained wealth order if it is satisfied it is in the public interest to do so.*[101]

The Committee notes the following two specific issues in relation to the proposed new hardship order application which may be made by dependants.

(1) Simultaneous consideration of a hardship order

This issue relates to whether a hardship order should be able to be commenced simultaneously with, rather than being brought within 3 months of, an unexplained wealth proceeds assessment order (or any such related order specifically referred to under the Bill).

This issue was first raised by the CMC in its submission:

> *At present, generally, all applications in relation to a respondent are heard simultaneously at trial - the State's forfeiture application and/or proceeds assessment order application, the respondent's exclusion application, any interested parties' exclusion application and any hardship application.*
>
> *The proposed new section 89A contemplates the filing of another application up to 3 months after the proceeds assessment order has been made. This may result in another trial after the determination of the proceeds assessment order application, resulting in further court time and all parties incurring further costs.*
>
> *Pursuant to the amended section 77 at clause 32, the State is required to give notice of the proceeds assessment order application to the respondent and anyone else reasonably suspected of being affected by the making of the order. The CMC contends by providing the required notice of the application to all known affected parties, those parties are able to file an application for hardship during the course of the proceeding and that application*

[100] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, pages 7-8, 20.
[101] Letter from the Department of Justice and Attorney General, 11 December 2012, page 3.

can then be heard at trial with all other applications relevant to the proceeding. This will save court time and costs.

The CMC submits the provision for the filing of a hardship application within 3 months after the determination of the order should be removed. Reference to the 3 month period should therefore also be removed from proposed new section 80A(2)(b).[102]

The CMC raised this issue again at the Public Hearing, commenting as follows:

The CMC supports the inclusion of the hardship provisions throughout the Act to safeguard and protect the interests of innocent dependents. As presently cast, these provisions provide for a hardship application to be made within three months after an unexplained wealth proceeds assessment order or serious drug offender confiscation order has been made. The CMC is of the view that these provisions as they are presently cast are workable. Our experience in administering the current civil confiscation scheme, however, is that interested parties and/or dependents who have a claim on restrained property are almost without exception very keen to state their claim and to achieve some financial certainty at an early stage.

…

Unfortunately, of course, it can take some months or even years between the grant of a restraining order and the settlement of a matter. Under the current civil scheme, we notify affected parties at the time of filing an application for a restraining order. This means that interested parties can state their claim at an early stage and it allows the state, in turn, to make an assessment of their claims and in many cases to enter into settlement negotiations with those parties and release property from restraint before the confiscation matter as against the main party is finalised. Indeed, 93.7 per cent of our current confiscation matters are settled with all relevant parties without need to go to a civil trial. So in short, the CMC is of the view that if an appropriate and fair way to engage dependents from the point of restraint can be determined in the proposed bill then this would benefit dependents by providing financial certainty and/or earlier access to restrained property, if that is appropriate, and it will benefit the state by reducing the cost and the time that might otherwise be involved in bringing a matter to resolution.[103]

(2) Lack of provision for "hardship orders" in Chapter 3 of the CPCA

There appears to be no hardship order provisions contemplated for Chapter 3 (Confiscation after conviction) of the CPCA, whereas hardship order provisions have been included in other similar parts of the Bill, for example, in Chapter 2 (Confiscation without conviction) and in the new Chapter 2A (Serious drug offender confiscation order scheme) of the CPCA.

Committee comment

In relation to the first issue of the appropriate timing for the commencement of a hardship application, the Committee notes the CMC's preference that this be conducted simultaneously with the assessment order rather than within three months as currently proposed in the Bill.

After taking into account the comments of the CMC in its submission and at the public hearing, the Committee is satisfied that the proposed language in the Bill gives the dependants a wider range of possible options. The Committee envisages the dependants could bring a "hardship order" either at the same time as the underlying assessment order or within 3 months after such an order. Accordingly, the Committee considers that no amendment to the Bill is required.

[102] Submission No. 1, Crime and Misconduct Commission, pages 3 and 4.
[103] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 13.

The Bill also proposes to introduce a serious drug offender confiscation order (SDOCO) scheme into the CPCA. The introduction of the scheme is in line with a LNP Government's pre-election commitment. The SDOCO scheme, to be administered by the CMC, is inserted into the CPCA as new chapter 2A.

During the Public Hearing, the SDOCO scheme to be introduced as new chapter 2A was described as follows:

> *The serious drug offender confiscation scheme provides that the state can apply to the Supreme Court of Queensland for the forfeiture of all property under the effective control of a person who is convicted of a prescribed serious drug offence or offences. This can include property that was gifted by the offender in the six years prior to the offender being charged with the relevant offence.*[104]

The proposed new amendments to the CPCA provide for the Supreme Court, as a preliminary step, to make restraining orders over property belonging to people who have been charged or are about to be charged with a qualifying offence or have been convicted of a qualifying offence.[105] A list of "qualifying offences" is set out in the proposed new Schedule 1B of the *Penalties and Sentences Act 1992 (Qld)*. In summary, an order can be made for either (1) a Category A Offence (*Trafficking a Dangerous Drug);*[106] or (2) a Category B (*Possession, Supply, Producing, Receiving*) or Category C Offence (*Producing, Possessing*)[107] if the Category B or C offence was committed within seven years of committing two separate category B or C offences. This aspect was described in more detail in the Explanatory Notes as follows:

> *The new chapter 2A in the CPCA provides that a serious drug offence for which a serious drug offence certificate is issued is a 'qualifying offence' if;*
>
> - *it is a category A offence; or*
> - *a category B or category C offence if;*
>   - the offence is committed within seven years after committing the following offences:
>   - *two category B offences;*
>   - *two category C offences;*
>   - *one category B offence and one category C offence.*
>
> *The Bill provides that the Supreme Court must make a serious drug offender confiscation order against a person if it is satisfied that the person:*
>
> - *has been convicted of a qualifying offence for which a serious drug offence certificate has been issued and has not been cancelled; and*
> - *the application for the order was made within six months after issue of the certificate.*[108]

There are a number of proposed qualifications to the strict operation of the Bill.

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[104] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 2.
[105] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, section 93G.
[106] Drugs Misuse Act 1986 (Qld) section 5.
[107] *Drugs Misuse Act 1986* (Qld) sections 6(1), 7, 8, 9 and 10B.
[108] Explanatory Notes, page 4.

For example:

(a) the Bill provides that the person may retain "protected property" which is property identified in certain sections of the *Bankruptcy Act 1966* (Cth) which would not be divisible amongst a person's creditors in the event of bankruptcy;[109]

(b) the Bill also provides the Supreme Court with a discretion to refuse to make the order if it is satisfied it is not in the public interest to do so;[110]

(c) the Bill provides for the ability of dependants against whom a serious drug offender confiscation order is made to make an application to the Supreme Court for a hardship order with respect to 'special property'.[111]

Issues raised in the submissions

The Committee noted some issues were raised in the submissions in respect of the new SDOCO scheme.

Definition of "Protected Property"

The Bill introduces the concept of "protected property" which is defined in proposed new section 93E as meaning:

> *Property of the person of a kind mentioned in a relevant provision that would not, if the person became a bankrupt under the* Bankruptcy Act 1966 *(Cwlth), be divisible amongst the person's creditors.*

The QLS submitted that the definition of 'protected property' in proposed new section 93E should be extended to include all property that a person can establish was lawfully acquired. The QLS also submitted that this proposed extension would be consistent with the object of the CPCA described in section 4(2)(a).[112]

The current section 4(2)(a) of the CPCA provides:

> *4(2) It is also an important object of this Act—*
>
> *(a) to ensure that property rights are affected by orders under this Act, including orders limiting a person's ability to deal with the property, only through procedures ensuring persons who may be affected by the orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights;*

In responding to this concern, the Department noted as follows:

> *The QLS submission runs contrary to the policy objectives for the serious drug offender confiscation order scheme as described in the explanatory notes i.e. increasing the risk of involvement in illicit drug markets and obtaining compensation for the community for the burden of illicit drug trade places on the health and justice systems.*

[109] See proposed new sections 93E and 93ZZB of the CPCA (Clause 42 of the Bill).
[110] See proposed new section 93ZZB(2) of the CPCA (Clause 42 of the Bill).
[111] See proposed new sections 93ZZO-R of the CPCA (Clause 42 of the Bill).
[112] Submission No. 2, Queensland Law Society, page 5.

> *Clause 15 of the Bill takes account of these new policy objectives by substantially amending the objects of the CPCA. Clause 15 proposes to remove the current section 4(2)(a) referred to in the QLS submission.*[113]

Committee Comment

The Committee notes the concern raised by the QLS against the backdrop of the current object of the CPCA which set out in section 4(2)(a) (see above). The Committee notes section 4(2)(a) is proposed to be deleted under the Bill and further notes that the replacement provision includes a reference which would still concern the QLS.

Specifically, new proposed section 4(2)(a)(iii) provides that an important object of the CPCA is "*to deprive persons of … wealth that persons cannot satisfy a court was lawfully acquired*".[114] The Committee is satisfied the Department's response set out above adequately addresses the concerns of the QLS.

The Committee does not recommend that any changes be made to the definition of "protected property".

Replacement of 'must' with 'may' in proposed section 93ZZB

The QLS also submitted that the 'must' in proposed new section 93ZZB(1) be omitted and be replaced with a 'may' on the basis that 'the court is best placed to determine whether the making of the order is appropriate in the particular circumstances of each case'.[115]

In responding to this concern, the Department noted as follows:

> *Whilst proposed new 93ZZB subsection (1) does require the Court to make the serious drug offender confiscation order if the criteria is met, subsection (2) provides that the Court may refuse to make the order if the Court is satisfied it is not in the public interest to do so.*
>
> *Further, proposed new section 93ZZF provides that the Court may exclude property that would otherwise be forfeited if the Court is satisfied it is not in the public interest to include the property in the order. The provision of the public interest discretion in these sections allows the Supreme Court to take into account specific factual matters in each case whilst achieving the policy objectives for the serious drug offender confiscation order scheme as set out in the explanatory notes.*[116]

Committee Comment

The Committee notes the concerns that the QLS raised about the apparent mandatory nature of proposed new section 93ZZB(1). The Committee is satisfied that the mandatory nature of this provision is mitigated by the wording in proposed new section 93ZZB(2) as described by the Department in its response to this issue referred to above.

Threshold Amount

The QLS proposed that a 'threshold amount' of assets that must be held by a person before a serious drug offender confiscation order application can be made should be included in the legislation.

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[113] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 25.

[114] Proposed new section 4(2)(a)(iii) of the CPCA (clause 15 of the Bill).

[115] Submission No. 2, Queensland Law Society, page 5.

[116] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, pages 27-8.

The QLS submits that not to do so risks *'significant cost consequences for the State'.*[117] The QLS also noted at the Public Hearing:

> *If there is no threshold on the amount of money then it may be the case that there are no records regarding the obtaining of that property.*[118]

In this regard, the QCCL commented in its submission that "*[a]n asset threshold should be introduced as is found in Ireland and the UK*".[119] The QCCL followed up with the following additional information at the Public Hearing:

> *given that the legislation is said to be about catching big fish, there should be a threshold. There are, as I understand it, thresholds in this legislation in the UK and Ireland. I cannot quite figure out what the threshold is in the UK, but in Ireland it is €13,000.*[120]

In its response to the QCCL submission on this point, the Department commented as follows:

> *QCCL's submission that an 'asset threshold' should be introduced is difficult to respond to specifically as the QCCL provides no reference to any specific asset test or legislation used in the United Kingdom or Ireland and provides no detail as to why they believe such an asset test would improve the Bill. As a general comment, DJAG would draw the Committee's attention to the fact that the Bill does not provide for any compulsion on the Crime and Misconduct Commission (CMC) to bring an application for an unexplained wealth order. Whether an application is brought is entirely at the discretion of the CMC. The CMC are subject to scrutiny from the Parliamentary Crime and Misconduct Committee and must report annually on its use of resources.*[121]

Committee Comment

The Committee notes the suggestion by the QLS and the QCCL regarding amending the Bill to include a threshold amount before a SDOCO application can be made. While the Committee is appreciative of this suggestion and understands the rationale behind the suggestion, the Committee's view is that a specific monetary threshold amount is not required to be set out in the legislation. The Committee further believes that the CMC should not be fettered in its ability to track down the assets of a serious drug offender.

Precursor Drugs

The Bill provides that a serious drug offence certificate can be issued in relation to 'qualifying offences'. The qualifying offences have been further designated as either a Category A, B or C offences and cover most of the drug offences in the *Drug Misuse Act 1986 (Qld).* It was noted however during the Public Hearing by the Committee that "*the precursor drugs and substances that might be used to manufacture illegal drugs are not necessarily captured in the serious drug offenders confiscation orders*".[122]

In this regard, the Department responded:

> *'Precursor substances' are called 'controlled substances' in the Drugs Misuse Act and are listed in schedule 6 of the Regulation. The Drugs Misuse Act contains offences of*

[117] Submission No. 2, Queensland Law Society, page 6.
[118] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 25.
[119] Submission No. 3, Queensland Council for Civil Liberties, page 7.
[120] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 22.
[121] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, pages 21-22.
[122] See Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 11.

possessing, supplying and producing precursor substances (see sections 9A, 9B and 9C). The Committee will note that these offences are not listed in proposed new schedule 1B of the Penalties and Sentences Act 1992.

However, Category B contains two offences that are not specific to 'dangerous drugs':

- *receiving or possessing property obtained from trafficking or supply (section 7 of the Drugs Misuse Act); and*
- *possessing a prohibited combination of items (sections 10B of the Drugs Misuse Act).*

With respect to the latter offence, what constitutes a 'prohibited combination of items' is set out in schedule 8C of the Regulation. The Committee will see listed in schedule 8C combinations of pseudoephedrine, hypophosphorous acid, iodine, hydriodic acid, phosphorous (red or white) and lithium metal. These substances are 'controlled substances' under schedule 6 of the Regulation.

Further, it is relevant to note that possession of 'controlled substances' may be relevant to the offence of producing dangerous drugs (section 8 of the Drugs Misuse Act 1986) which is listed in both Category B and Category C.

The SDOCOS will represent one of the toughest schemes in Queensland's confiscation laws. Therefore, the serious drug offences targeted by the SDOCOS (as proposed by the Bill) are designed only to capture the most serious offences and offenders.[123]

Committee comment

The Committee is satisfied with the response from the Department in relation to the situation concerning precursor drugs under the Bill.

Six Year Period

Proposed new section 93ZY(1)(b) provides that an SDOCO applies to:

> *all property that was a gift given by the prescribed respondent to someone else within **6 years** before the prescribed respondent was charged with the qualifying offence on which the order is based. (emphasis added)*

This six year period being the length of time that the SDOCO provisions can reach back to capture property gifted to others was discussed in the submissions and during the Public Hearing.

The QCCL indicated in its submission and during the Public Hearing that six years is appropriate although it was noted that Mr Tom Sherman had indicated in his report that 12 years might be appropriate.[124]

The QLS also concurred with the six year period for the SDOCO provisions.[125]

[123] Letter from the Department of Justice and Attorney-General to the Committee dated 14 March 2013.

[124] Submission No. 3, Queensland Council for Civil Liberties, page 6 and see also the Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 26; Mr Tom Sherman AO – Review of Proceeds of Crime Act 2002, Independent Reviewer appointed by Minister for Justice and Customs, May 2006.

[125] Response to Question on Notice from the QLS to the Committee, 11 March 2013, page 1 and see also Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 26.

Committee comment

In view of the various submissions and comments made during the Public Hearing, the Committee considers that the six year time frame is appropriate to ensure consistency within the legislation.

Legal Representation in Proceedings and Resourcing

The issues of legal representation of defendants and resourcing in SDOCOs are similar to those that arise in relation to unexplained wealth orders which were discussed earlier in this Report.

2.4 Enlarging investigation powers and improvements to increase effectiveness

A number of other general issues arose in the submissions in relation to the investigation powers and improvements to increase effectiveness. These will be dealt with in turn.

Sale of property

The CMC submitted that new section 93ZP currently provides for an application to be made for the sale of restrained property once an application has been filed for a serious drug offender confiscation order. However, the State can only apply for a SDOCO once a SCO certificate has been issued. The proposed new section 161G(1) of the *Penalties and Sentences Act 1992* states that a SDO certificate is to be issued by the court at the time of imposing the sentence for a serious drug offence.

Accordingly, the effect of section 93ZP is an application to sell restrained property is unable to be filed until after a person has been sentenced for a serious drug offence. The time period between restraint and sentencing may be quite lengthy. During this time property may be deteriorating and/or storage fees accumulating. The CMC submits that new section 93ZP be amended to allow an application for the sale of restrained property any time after it has been restrained. The CMC submits this suggested amendment would provide consistency with the current section 46 of the CPCA. The sale of proceeds would be held in trust pending finalisation of proceedings.

The Department submits that in any event, proposed section 93T in the Bill provides the Supreme Court with very broad powers to 'make orders in relation to a restraining order the court considers appropriate'.

> *Such orders can be made on application of the State, the respondent, other interested parties or the public trustee.*
>
> *…*
>
> *If property is rapidly deteriorating during the restraint period an application could be made under 93T or the Court could appoint the public trustee to take control of the property to preserve it under proposed new section 93R.*
>
> *Finally, in the case of rapidly deteriorating property a respondent may consent to the sale of the asset with the proceeds held in trust. Clause 54 in the Bill specifically contemplates the use of consent orders for the proposed new chapter 2A.*[126]

Definition of applicant

The CMC submits the definition of applicant should be removed:

> *The definition does not define applicant and may confuse.*[127]

[126] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 27.

[127] Submission No. 1, Crime and Misconduct Commission, page 5.

The Department's advice states:

> *The Schedule 6 dictionary of the CPCA currently contains a definition of applicant and the Bill in clause 60 adds two new limbs to this definition.*
>
> *All three limbs of the definition in the dictionary merely redirect the reader to a specific definition of 'applicant' in the CPCA.*
>
> *The decision about whether there should be additional references in a dictionary to key terms in legislation is a drafting issue determined by the Office of the Queensland Parliamentary Counsel.*[128]

Privilege

The QLS raised concern that a person subject to an examination order is not excused from answering a question or from producing a document or other thing on the ground that it would disclose information subject to legal professional privilege.

> *The QLS acknowledge this provision mirrors those already available in other parts of the CPCA but still notes concern at the abrogation of this fundamental principle.*

The QCCL submit that examination orders infringe on the right to silence and exclude legal professional privilege.

The Department submits:

> *The explanatory notes to the Bill explain that examination orders assist in the identification and location of assets. The explanatory notes also point out the Bill places limits on the admissibility of information gathered during examination orders in other civil or criminal proceedings.*[129]

Consistency – "DPP" and "appropriate officer"

The CMC submits that amendment is required to section 37A(2) to omit "the DPP" and insert *"appropriate officer'.* This proposed amendment is consistent with the proposed amendment to section 30A at clause 22 of the Bill and new the provision at section 93L(2).[130]

The Department advised:

> *During the development of the Bill, DJAG became aware that there were issues throughout the CPCA with respect to the inconsistent use of the terms "appropriate officer' and "DPP" ('appropriate officer' is defined in section 12 of the CPCA). With respect to the amendment to section 30A and the proposed new section 93L, provision was specifically made for an 'appropriate officer' as there was a real concern that restraining orders may not be able to be made as efficiently for the new unexplained wealth orders and serious drug offences without it. The making of a restraining order itself is an essential element in both the new schemes in the Bill.*
>
> *It was outside the scope of this Bill to analyse every other occasion where the term 'DPP' or 'appropriate officer' is used on the CPCA and determine consistent usage. Whether the Government of the day intends that authority must be provided directly by the Director of*

[128] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, pages 28-29.

[129] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 25.

[130] Submission No. 1, Crime and Misconduct Commission, page 3.

Public Prosecutions or can be delegated to an 'appropriate officer' is an important issue and needs to be considered in proper detail. DJAG is of the view that this exercise should be undertaken as a whole of Act exercise (separate to this Bill) to ensure consistent interpretation across the CPCA.

DJAG has brought this issue to the attention of the Attorney-General. The Attorney-General has approved DJAG commencing a further review of the CPCA in 2013-2014 and this issue will be examined as part of that review.[131]

Committee Comment

The Committee considers that the consistency of the use of "DPP" and "appropriate officer" throughout the Act should be included in the Department's 2013-14 review of the CPCA.

[131] Letter from the Department of Justice and Attorney General, 18 February 2013 containing Response to submissions, page 6.

3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.

The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

Under the Standing Orders, the Committee is required to consider the application of the fundamental legislative principles to the Bill.

Unexplained wealth laws are by their very nature intrusive laws that will impinge on the fundamental legislative principles. At the public hearing on 6 March 2013, in relation to the matters being addressed in the Bill, the QLS stated:

> *I think we are talking about some fundamental rights being breached here. We are talking about the presumption of innocence, the right to silence, reversal of onus of proof. These have been in our law system for a long time—and for good reasons.*[132]

It is therefore imperative that when accepted fundamental rights are being breached that there is appropriate justification to do so. The Explanatory Notes identified a number of FLP issues in the Bill and provided justification for the encroachment of the FLPs. In its examination of the Bill, the Committee considered the FLP issues and brings the following specific matters to the attention of the Legislative Assembly.

The issues are addressed in the order that the relevant fundamental legislative principle appears in the *Legislative Standards Act 1992*.

3.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the rights and liberties of individuals.

Notice requirements and Hardship orders

Clause 39 of the Bill inserts proposed new section 89A into the CPCA to allow a dependant of a person against whom a proceeds assessment order was made to apply to the Supreme Court for a hardship order. For each application for a section 89A order, the applicant must give the State and *anyone else who has an interest in the property* [emphasis added] written notice of the making of the application, the grounds for the application and the facts relied on.

Notice must be given at least 28 days before the date set for hearing the application.

As a practical step in completing the application it could prove particularly difficult for a dependant applicant to identify and locate 'anyone else who has an interest in the property' to give them the required written notice, because the dependant, unlike the State (as represented by the CMC, the Queensland Police Service or the Office of the Director of Public Prosecutions), may not have access to information about third parties with a financial or other interest in the property at the time they make their application.

[132] Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 26.

Any delay that may be occasioned in obtaining the required information may require the applicant to seek from the court, a postponement of the hearing of their application to allow the minimum 28 days' notice to be given. A delay in the hearing of a hardship application would increase the period of uncertainty for a dependant in respect of whether their principal place of residence will remain charged in favour of the State or not.

Clause 40 of the Bill inserts section 89Q into the CPCA to allow dependants of person against whom an unexplained wealth order has been made to apply to the Supreme Court for a hardship order. Similar to section 89A above, the applicant must give the State and anyone else who has an interest in the property written notice of the making of the application, the grounds for the application and the facts relied on.

Notice must similarly be given at least 28 days before the date set for hearing the application.

The concerns expressed above for section 89A applicants apply equally in respect of section 89Q.[133]

Committee comment

While on the surface, the provisions could be onerous on a dependant applicant, the Committee is satisfied that the provisions are required in their current form, to strike a balance between allowing an applicant to make the relevant application for a hardship order; and also provide appropriate notice to other parties who may have an interest in the property.

Use of examination information

Clause 42 of the Bill inserts proposed section 93ZE into the CPCA. Section 93ZE authorises the DPP or CMC to give examination information obtained under subsection 93ZC(2) to a corresponding entity to help that entity obtain evidence or other information that may be relevant to enforcement of a corresponding law, or to an entity of the State, another State or the Commonwealth that has a function of investigating or prosecuting offences to help the entity to obtain other evidence or information (derived evidence) that may be relevant to the investigation or prosecution of an offence.

The giving, use or admission of such evidence in a proceeding, including a prosecution, is unaffected by any duty of confidentiality owed to the person from whom the examination information was obtained (subsection 93ZE(3)). There are obvious privacy implications for the person whose information may be distributed.

Committee Comment

The Committee is satisfied the sharing of examination information is required to enable to the efficient and effective operation of the power contained in the Bill to conduct examinations. The Committee considers the provision is a necessary requirement for the scheme and notes that it is consistent with the provisions in the existing confiscation regimes in the CPCA.

[133] Notice requirements also apply for an application for a hardship order under proposed section 93ZZO.

Notices to Financial Institutions

Clause 52 of the Bill amends the existing section 249B of the CPCA in relation to notices requiring information from financial institutions. The identification of the account number and the detail that the information is being sought under the authority of the CPCA has obvious privacy implications for the account holder whose records are being examined.

The Explanatory Notes acknowledge the proposed widening of information that can be obtained without warrant represents a further breach of an individual's right to privacy with respect to their financial records.[134]

The QLS raised concerns with both the scope of information that may be obtained and the time frame for the financial institution to produce the requested data.

> *The Bill will propose to widen the scope of information that may be obtained to include information that confirms the existence of an account in a certain name or names, the account number and the current account balance. We consider that the expansion of access to private financial records should be treated with sufficient regard to individual liberties and the protection of a person's information.*
>
> *These proposed amendments will also include the ability for investigators to request immediate production of information in urgent circumstances where there is an imminent risk of funds being dissipated. We consider that there should be a minimum time frame in which the officer cannot ask for the information to be provided in, for example, three days after the giving of the notice.*

The Explanatory Notes and the Department's advice at the public hearing state that the financial institution provisions are broadly consistent with provisions contained in the other States.[135] The Explanatory Notes also detail the widening of the provisions is balanced with the requirement that an officer producing a notice must formally record their reasons for using the notice provisions.[136]

Committee comment

The Committee notes the widening of these provisions could represent a clear breach of privacy, however is satisfied with the reasoning provided in the Explanatory Notes relating to today's modern society.

> *The provisions reflect the modern reality that large sums of money can be transferred quickly by electronic means and therefore failure to identify and restrain bank accounts quickly puts funds at risk of dissipation by those seeking to avoid the consequences of criminal confiscation.*[137]

The Committee considers that the provisions are required to remain in their current form, to enable the UEW scheme to operate effectively.

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[134] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 7.

[135] Transcript of Proceedings of the Public Hearing on the Bill, Wednesday, 6 March 2013, page 9.

[136] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 7.

[137] Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012, *Explanatory Notes*, page 7.

3.2 Natural justice

Section 4(3)(b) of the *Legislative Standards Act 1992* requires legislation to be consistent with principles of natural justice.

External serious criminal activities

Clause 20 of the Bill will amend section 28(4) of the CPCA to reflect the broadened policy reach of restraining orders. Under the current section 28(4), an application for a restraining order that relates to property *derived from external serious crime related activity* may be made only if the person whose property it is lives in Queensland or the property is situated in Queensland. The proposed amendment will allow an application to be made for a restraining order to restrain property *of a person suspected of having engaged in 1 or more external serious crime related activities,* where that person lives in Queensland or the property is situated in Queensland.

Therefore, rather than the property to be restrained needing to itself be property 'derived from external serious crime related activity' (e.g. property purchased directly with the proceeds of crime), it will be sufficient under the proposed new regime if the property to be restrained is property of a person who is suspected of having engaged in 1 or more external serious crime related activities.

Clause 29 of the Bill amends subsection 58A(1) of the CPCA to similarly shift the legislative focus (on making an application for a forfeiture order) from property (with a nexus to Queensland) *derived from external serious crime related activity* to property *of a prescribed respondent suspected of having engaged in 1 or more external serious crime related activities.* The natural justice concerns above apply equally for clause 29.

Committee Comment

This amendment reflects the change of focus inherent in the UEW confiscation regime, being a shift from property that can be established to have itself been acquired from unlawful proceeds, to allowing initial restraint of any or all property (whether lawfully or unlawfully acquired) of a person in Queensland where that person is believed to have engaged in serious crime related activities within or external to Queensland. It also reflects a shift in the evidential burden from *property derived from* (with the implication that an evidential nexus exist showing the property's derivation from the proceeds of crime) to allowing the restraint of a person's property when that person is merely suspected of having engaged in serious crime related activity.

The capacity to restrain a person's use of their 'own' property when they are suspected of having engaged in serious criminal activity is a significant impost on that person's right to exercise dominion over their possessions and is a significant move away from the principle of natural justice that a person is entitled to be heard and found to be culpable before any judicial action is taken against them.

The Committee supports the Department's suggestion that the provisions are required to reflect '*the reality that serious criminal activity often crosses borders'* and accepts the safeguards contained in the CPCA designed to ensure the State is held to higher standards of accountability with respect to external serious crime related activities. (see page 16 of this Report)

Consideration of application without notice

Clause 42 of the Bill inserts new section 93L into the CPCA which provides that the Supreme Court must not hear an application for a restraining order unless satisfied the person whose property is the subject of the application has received reasonable notice of it (93L(1)). The Court may however consider the application without notice having been given if an appropriate officer asks the court to do so (93L(2)). A similar provision exists in section 93U in relation to orders ancillary to a restraining order that are made under section 93T.

Clause 42 also creates a new section 93H which allows the State to apply to the Supreme Court for a restraining order to prohibit a person from dealing with the (restrained) property stated in the order (other than as permitted). Where an application is made in urgent circumstances or the respondent is about to be charged with a qualifying offence (within the next 48 hours), the application may be made without notice to the respondent or anyone else to whom it relates (see new section 93H(2)). The application may relate to the property of the prescribed respondent or to stated property or a stated class of property of another stated person (section 93H(4)(b)) provided that the property is suspected of being either under the prescribed respondent's effective control, or a gift from the prescribed respondent given within 6 years before the respondent was charged with the qualifying offence (see section 93J(3)).

The apparent intention behind not giving the usual notice is to enable the application for the restraining order to be heard ex parte (in the absence of a party) so that the order may be granted and the property lawfully restrained and protected from dissipation pending the respondent's anticipated arrest. If the respondent became aware that they were about to be arrested, they could begin hiding or dissipating their assets which would defeat the purpose of the restraining order.

A serious drug offender confiscation order may also be made in the absence of a person required to be given notice of the application for the order (see section 93ZZ(7)).

Committee comment

While the absence of notice is prima facie a breach of natural justice as there is no opportunity for the respondent to be heard and oppose the order before it is made, the Committee considers this is a justifiable breach for the reasons outlined above. If notice was given to the respondent prior to the restraining order being issued, the respondent would have an opportunity to remove or dissipate their assets prior to the hearing of the application which would be contrary to the legislative purpose of the restraint provisions.

The Committee also notes a significant safeguard exists for the respondent in proposed section 93S(1) which limits to a maximum of 7 days (or lesser period as stated in the order) the duration of a restraining order made on an application without notice to the person to whom it relates. Further, an additional protection is found in subsection 93S(2) which states that a restraining order made on the basis that the prescribed respondent is about to be charged with a qualifying offence lapses if the person is not charged with the offence or a related offence within 48 hours after the order is made.

3.3 Reversal of the Onus of proof

Section 4(3)(d) *Legislative Standards Act 1992* requires legislation not to reverse the onus of proof in criminal proceedings without adequate justification.

Clause 40 of the Bill inserts proposed new section 89L into the CPCA to prescribe the calculation of a person's unexplained wealth. Under subsection 89L(2) a person's unexplained wealth is their current or previous wealth of which the State has given evidence less any of that wealth that the person proves was lawfully acquired. In the alternative a person's unexplained wealth can also be as

calculated under subsection 89L(3), being the person's expenditure for a period (of which the State has given evidence) less the income for that period that the person proves was lawfully acquired.

In either case there is some evidential burden put on the person to prove that part of their unexplained wealth was lawfully acquired. In so far as they fail to do so, the amount of their unexplained wealth that they cannot prove was lawfully acquired remains calculated in the aggregate of their unexplained wealth and therefore liable to forfeiture.

In general, legislation should not reverse the onus of proof in criminal proceedings without adequate justification (*Legislative Standards Act 1992*, section 4(3)(d)). This means that, for example, legislation should not provide that it is the responsibility of an alleged offender in court proceedings to prove their innocence by disproving a fact the prosecution is otherwise obliged to prove, unless there is adequate justification.

Committee comment

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and where the defendant is particularly well positioned to disprove their guilt. The Committee is satisfied that a justification would apply here as the defendant would be in the best position to prove (if it is the case) that something in their ownership/possession was lawfully acquired.

Further, as set out earlier in this Report, the Committee notes that the reversal of the onus of proof exists in the current CPCA for Proceeds Assessment Orders and that the provisions in the Bill are extensions of the already existing scheme.

3.4 Protection against self-incrimination

Section 4(3)(f) *Legislative Standards Act 1992* requires legislation to provide appropriate protection against self-incrimination.

Clause 42 of the Bill inserts section 93ZC into the CPCA to specifically declare that a person examined under an examination order is not excused from answering a question, or from producing a document, or other thing, on the ground that answering the question or producing the document may tend to incriminate the person or make the person liable to a forfeiture or penalty.

Proposed section 93ZC(2) provides that a statement or disclosure made by a person in answer to a question asked in an examination under an examination order, or a document or other thing produced in the examination, is not admissible against the person in any civil or criminal proceeding, other than a proceeding about the false or misleading nature of the statement or disclosure, a proceeding on an application under this Act, a proceeding for the enforcement of a confiscation order, or for a document or other thing a proceeding about a right or liability it confers.

Similarly, section 93ZF (also inserted by clause 42) provides that a person directed under a property particulars order to give a statement to the CMC is not excused from giving the statement or including particulars in the statement on the ground that the statement or particulars may tend to incriminate the person or make them liable to a forfeiture or penalty (93ZF(1)). By way of protection, if a person gives a statement to the CMC under a property particulars order, the statement is not admissible against the person in any criminal proceeding other than a proceeding about the false or misleading nature of the statement (93ZF(2)).

Proposed section 93ZG (also inserted by clause 42) makes it an offence for a person who has been directed under a property particulars order to give a statement to the CMC, to fail to give the statement within a stated period of time, unless they have a reasonable excuse, or to make a statement that is false or misleading in a material particular. Due to the operation of section 93ZF, fear of self-incrimination or pain of a forfeiture or penalty is not a reasonable excuse that would excuse a failure to respond to a property particulars order under section 93ZG.

Committee Comment

The Committee is satisfied that the provisions in the Bill denying protection against self-incrimination are warranted for the effective operation of the UEW scheme.

The Committee notes the Bill provides the self-incriminating evidence is not admissible in evidence against the person in any proceeding other than proceedings where the admission of the evidence is justifiable, for example, a proceeding on a charge that the evidence provided was false.

The Committee considers the provisions used in the context that is proposed are justifiable as in the operation of the UEW scheme, it appears to be more important to know the facts leading to the contravention than to prosecute the contravention itself.

The Committee notes the views of the former Scrutiny of Legislation Committee where that committee commented that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if—

(a) the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means; and

(b) the legislation prohibits use of the information obtained in prosecutions against the person; and

(c) in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).[138]

The Committee is satisfied in the circumstances that the relevant provisions fall within the above category and are therefore appropriately included in the Bill.

3.5 Retrospectivity

Section 4(3)(g) Legislative Standards Act 1992 requires legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The operative effect of clause 40 of the Bill is to insert the whole new chapter 2 part 5A into the CPCA to provide for the UWO scheme.

New section 89E in chapter 2 defines 'current or previous wealth' of a person as the amount that is the total value of all of their property (including property that they have, at any time, disposed of, whether by gift, sale or by any other means) and all benefits provided to and derived by the person, whether acquired, disposed of, provided or derived before or after the commencement of this section and whether within or outside Queensland.

Section 89E has retrospective (property acquired, disposed of, provided or derived before the commencement) application in calculating a person's current or previous wealth.

In respect of unjust enrichment laws such as those contained in the Bill, the former Scrutiny of Legislation Committee determined in 2002 that reliance on pre-enactment illegal activity as a trigger for confiscation proceedings was arguably justified by the general principle that people should not be allowed to unjustly enrich themselves at the expense of other individuals, or the community generally, from their unlawful conduct.[139]

[138] See for example - *Alert Digest 1/2000*, p.7; *Alert Digest 13/1999*, p.31; *Alert Digest 4/1999*, page 9.
[139] *Alert Digest 2002/10,* Scrutiny of Legislation Committee, p. 11.

Clause 42 inserts section 93B into the CPCA. Section 93B(1) provides that Chapter 2A applies in relation to a qualifying offence, or a pre-qualifying offence, for which a person is charged after the commencement, whether the offence was committed before or after the commencement.

Clause 59 similarly inserts section 294, a transitional provision for unexplained wealth orders, that allows them to be applied for, and made, in relation to serious crime related activity engaged in by a person whether before or after the commencement, or serious crime derived property acquired by a person from someone else, whether before or after the commencement.

Clause 65 inserts new section 226 into the *Penalties and Sentences Act 1992* to provide that Part 9C of that Act will have retrospective application in certain circumstances, being that Part 9C will apply in relation to a serious drug offence if the offender is charged with the offence on or after the commencement, regardless of whether the offence was committed before or after the commencement.

Committee comment

Consistent with the views of the former Scrutiny of Legislation Committee, the Committee considers that the retrospective application of the UEW laws is justified as offenders should not be allowed to unjustly enrich themselves at the expense of other individuals, or the community generally, from their prior unlawful conduct.

Further, to not provide for retrospective application of the scheme, it would inappropriately restrict the ability to confiscate property to only such property that has been unlawfully acquired after the commencement date of the Bill. The Committee considers the commencement date of the Bill should not be a determinant of whether the property can or cannot be confiscated, where the lawfulness of the acquisition of the property is in question.

3.6 Compulsory acquisition of property

Section 4(3)(i) *Legislative Standards Act 1992* requires legislation to provide for the compulsory acquisition of property only with fair compensation.

Clause 42 of the Bill inserts section 93ZP to allow the State to apply to the Supreme Court (when applying for a serious drug offender confiscation order, or at a later time) for an order directing the Public Trustee to see all or part of property restrained under a restraining order. The State must give notice of the application to each person who has an interest in the property.

The Court may make the order where it is satisfied that the property may deteriorate or lose value before the application for the serious drug offender confiscation order is decided, or where the cost of controlling the property would be more than the value of the property if it were not disposed of until after the making of the serious drug offender confiscation order. The proceeds of sale under such an order are restrained under the restraining order applying to the property.

Clause 42 also inserts section 93ZY to define a serious drug offender confiscation order as an order that forfeits to the State, all property (other than protected property) of the prescribed respondent; and all property that was a gift by that person to someone else within 6 years before the prescribed respondent was charged with the qualifying offence on which the order is based. Property is not however forfeited if it was acquired by a bona fide purchaser, without notice of illegal activity, for sufficient consideration (93ZY(2)).

Section 93ZZC provides that property of a person other than the prescribed respondent, but that is under the effective control of the prescribed respondent and is listed in a serious drug offender confiscation order, as well as property in section 93ZY(1)(b) that is mentioned in the order, is forfeited. Section 93ZZF states, on the making of a serious drug offender confiscation order, the property the subject of the order, is forfeited to the State and vests absolutely in the State (although the Court can exclude property from the order when it is in the public interest to do so).

Committee comment

As noted in the OQPC Handbook,[140] a legislatively authorised act of interference with a person's property must be accompanied by a right of compensation, unless there is a good reason (for example, the power to confiscate the profits of crime).

The Committee considers that in this instance, it is clear that the public policy considerations being implemented by the Bill excuse the restraint, seizure and forfeiture of personal property without fair compensation when that property was purchased with ill-gotten gains or otherwise acquired through unlawful means.

[140] *Fundamental Legislative Principles: The OQPC Notebook,* Office of the Queensland Parliamentary Counsel, January 2008, page 73.

Appendices

Appendix A – List of Submissions

Sub #	Submitter
001	Crime and Misconduct Commission
002	Queensland Law Society
003	Queensland Council for Civil Liberties
004	The Public Trustee
005	Rob Jobson – Solicitor for the Northern Territory

Appendices

Appendix B – List of Witnesses at Public Hearing

Organisation	Witnesses
Department of Justice and Attorney-General	1. Mr John Sosso, Director-General 2. Ms Jenny Lang, Assistant Director-General, Strategic Policy, Legal and Executive Services 3. Ms Louise Shephard, Director, Strategic Policy 4. Ms Sarah Kay, Senior Legal Officer, Strategic Policy
Crime and Misconduct Commission	1. Ms Kathleen Florian, Assistant Commissioner, Crime 2. Ms Angela Pyke, Acting Director, Financial Investigations
Queensland Law Society	1. Ms Catherine Burchill, Member of the QLS Criminal Law Committee; and Partner of Burchill & Horsey Lawyers 2. Ms Jennifer Roan, Graduate Policy Solicitor 3. Ms Raylene D'Cruz, Policy Solicitor
Queensland Council for Civil Liberties	1. Mr Michael Cope, Executive Member

BILL BYRNE MP

SHADOW MINISTER FOR POLICE, EMERGENCY AND CORRECTIVE SERVICES, PUBLIC WORKS AND NATIONAL PARKS

MEMBER FOR ROCKHAMPTON

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

CRIMINAL PROCEEDS CONFISCATION (UNEXPLAINED WEALTH AND SERIOUS DRUG OFFENDER CONFISCATION ORDER) AMENDMENT BILL 2012

5 April 2013

Statement of Reservation

I wish to submit the following Statement of Reservation to Report No. 26 of the Legal Affairs and Community Safety Committee on the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012.

Consultation on the Bill

Consultation on this Bill was undertaken with key stakeholders by way of correspondence advising of the 'framework for the amendments contained in the Bill'. Stakeholders did not receive a copy of the draft Bill.

The Queensland Law Society noted in their submission they were pleased have the opportunity to input into the framework of the proposed amendments. However, they (and other key stakeholders) were not provided with the draft legislation prior to it being introduced to the House. The QLS stated:

> *We are grateful to the Government for the opportunity to have contributed our views, but consider that early consultation on draft legislation is the key to developing good law.*

I note that the Department has stated that in its initial briefing to the Committee, that timeframes did not permit external consultation on a Bill. In this Bill especially, where there are a large number of issues relating to consistency with fundamental legislative principles, early consultation on a draft bill would have been preferable. Consultation on a 'framework' only cannot provide opportunity for comprehensive and critical analysis of the manner in which the 'framework' is to be implemented and therefore wide consultation on a draft bill would have been desirable.

While it is understood that the Government had made a pre-election commitment to introduce unexplained wealth orders and drug trafficking declarations, it has not been established that there is any need for urgent passage of these laws sufficient to warrant the approach taken.

Resourcing

I note the complexity of unexplained wealth investigations, which may go back over many years and involve complex analysis of evidence by not only police, but also expert witnesses such as lawyers and forensic accountants. This can mean a real strain on the resources of the body charged with implementation of the laws, in this case the CMC.

The CMC's 2011-12 Annual Report states the targets for number of Restraining Orders were not met and that performance was affected by the need to divert resources elsewhere. As was also stated at the public hearing,

> '*the demand for confiscation action under our current civil confiscation scheme currently exceeds the resources that are allocated to it'.*

Also in the Committee's hearings the CMC stated they did require additional funding in order to properly utilise the new provisions. In their answer to a question taken on notice at the hearing, the CMC stated:

> *[T]he CMC experiences difficulty in attracting and retaining suitably skilled staff, at the salary levels on offer. The Proceeds of Crime Team currently has 115 active matters and the demand for confiscation action continues to exceed the resources allocated to the function.*

The CMC, at both the public hearing and in correspondence submitted to the Committee, anticipated that the new provisions, as detailed in the Bill, will exacerbate the current resource situation. In its estimation, by way of comparison, under the new provisions the demand on the CMC may be approximately double that required of their WA counterparts but with approximately the same number of FTE staff.

In response to my questions at the public hearing in relation to the consideration given to resource implications for the CMC in the development of this Bill, the CMC replied:

> *'there have been no discussions about the resourcing commitment. I guess those discussions can take place in a number of ways. They can occur in the course of the bill's development, and it was made clear that funding implications were not going to be considered as part of the development of the bill.'*

If the CMC are not adequately resourced to use these provisions, the proposed legislation may be akin to providing high powered weaponry without any ammunition. Serious and dangerous offenders may continue to evade accountability, not through a lack of adequate laws but through the lack of funding to effectively use them.

The Parliamentary Crime and Misconduct Committee, in its recent three yearly review of the CMC, noted the important work of the CMC's Proceeds of Crime unit and the need for the Government to allocate greater recourses to that area.

The Government did not support the PCMC's recommendation to allocate greater funding to the CMC in this area. The Government's response stated:

> *In the current fiscal environment, any requirement for a greater allocation of resources will need to be funded from within existing agency resources; including possible reallocation of resources.*

The CMC, like other budget-funded agencies, will continue to have the opportunity to make submissions through the Attorney-General and Minister for Justice to the Cabinet Budget Review Committee to seek approval for additional resources. Those requests will be considered as part of the usual budget processes.

I am concerned at the potential inability for the CMC to operate effectively in this area without appropriate funding. I note the Attorney-General's commitment to ensure the CMC is adequately resourced, once the laws are in place. I would therefore call upon the Attorney-General to explain to the Legislative Assembly how he will fulfill the public commitment he made to provide adequate resources to the CMC, and how 'adequate' will be determined.

Reporting

Oral submissions provided at the hearing indicated the CMC would be responsible for reporting on the use of Unexplained Wealth provisions through its annual report. However, as I pointed out, there is no requirement contained in the Bill for the CMC to report on the use of the unexplained wealth provisions.

While I recognize that the CMC is required to lodge an annual report every year, there is no prescription as to what must be contained in that Report. While I do not oppose the Bill, as the powers contained in this legislation are wide-reaching and out of the ordinary, it is important that the CMC be accountable to the Parliament and more widely to the people of Queensland for the manner in which it uses the extraordinary powers being given to it.

As the Department pointed out at the Public Hearing, accurate reporting of the use of Unexplained Wealth provisions is essential to effective monitoring and oversight.

It would not be inappropriate, therefore, for specific provision to be made in the Bill requiring the CMC to report on the use of unexplained wealth provisions annually in its Annual Report.

This would also facilitate research and cross-jurisdictional comparisons of the operation and use of the Unexplained Wealth provisions.

Oversight

I have already commented on the far reaching powers and extraordinary nature of these provisions. The possibility of any misuse of these powers, and the commensurate loss of public confidence in the Bill may be balanced in part by carefully considered statutory oversight.

The equivalent provisions in South Australia provide for statutory oversight where the Attorney-General must appoint a retired judicial officer to conduct a review to determine whether the powers under the Act were exercised appropriately in the preceding 12 months.

Adequate oversight of the powers would ensure continued community confidence in schemes such as the unexplained wealth scheme proposed by this legislation.

Hardship Orders

As the Explanatory Notes point out, the Bill provides for the ability of innocent dependants against whom certain unexplained wealth or serious drug offender confiscation orders is made to make an application to the Supreme Court for a hardship order with respect to 'special property'.

These provisions are contained in Chapter 2 (Confiscation Without Conviction) and in the new Chapter 2A (Serious Drug Offender Confiscation Order Scheme) of the Criminal Proceeds Confiscation Act. There is no similar provision in relation to Chapter 3, which relates to Confiscation after conviction.

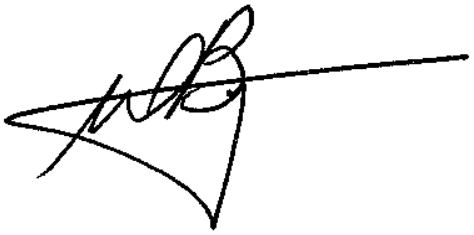
I would therefore ask the Attorney-General to explain why a similar hardship order provision is not proposed for Chapter 3 of the Act.

Conclusion

The introduction of unexplained wealth laws is considered a priority among Australian law enforcement agencies and is mentioned in the Standing Committee of Attorneys-General (SCAG) resolutions to combat organised crime. Any such laws will necessarily breach fundamental legislative principles to some degree. The need for protection of the community from serious offenders must therefore be weighed against the abrogation of the rights of those citizens.

It is therefore important to ensure that the laws we introduce in Queensland maintain the confidence of the community by providing sufficient safeguards to ensure the extraordinary powers proposed by those laws are exercised in a proper manner. This statement of reservation reflects my concerns and suggestions in respect thereof.

Yours sincerely



Bill Byrne MP
Member for Rockhampton