

The Committee asked the CDDP about potential amendments that could be made to the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*.

Proposed section 179C - Application to revoke a preliminary unexplained wealth order

Proposed subsection 179C(6) enables a court that made a preliminary unexplained wealth order to revoke the order if it is satisfied that there were no grounds to make the order at the time it was made. It would be more appropriate and consistent with the scheme of the Act, if the time for assessing whether there were grounds for the preliminary unexplained wealth order was at the time at which the application for revocation of the order is heard before the court rather than at the time the order was made.

The equivalent provision in subsection 42(5) of the current Proceeds of Crime Act 2002 (the POC Act 2002) enables a court to revoke a restraining order if it is satisfied "that there are no grounds on which to make the order at the time of considering the application to revoke the order". Subsection 179C(5) which allows additional material to be adduced to the court, would seem to have more application if the test was at the time of hearing the revocation application rather than at the time the order was originally made.

Procedure for obtaining preliminary unexplained wealth order

Proposed section 179B states that a court must make an order "requiring" a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order in relation to the person. The preliminary unexplained wealth order seems to be the mechanism for bringing the person to court to decide whether or not to make an unexplained wealth order. Therefore it should be made clear in section 179B that an application for a preliminary unexplained wealth order may be made without notice of the application having been given to the person.

Proposed section 179E - Making an unexplained wealth order

Proposed paragraph 179 E(1)(b)

Proposed subsection 179E(1) states that a court with proceeds jurisdiction must make an unexplained wealth order requiring a person to pay a specified amount if the court has made a preliminary unexplained wealth order and:

- “(b) the court is not satisfied that the *total wealth of the person was not derived from one or more of the following:
 - (i) an offence against a law of the Commonwealth;
 - (ii) an *foreign indictable offence;
 - (iii) a *State offence that has a federal aspect.”

The test focuses on a person's total wealth. On a literal reading, if the court is not satisfied that all of a person's wealth was derived from the offences then it would not make an unexplained wealth order even if satisfied that some of the person's wealth was derived from the offences. The test in paragraph 179E(1)(b) would be clearer if amended to state "the court is not satisfied that the **wealth** of the person **or any part of it** was not derived from one or more of the following...".

Total wealth is a formula for ascribing a value to a person's wealth. It is all the property of a person which constitutes a person's wealth that may be derived from one of the offences specified in paragraph 179E(1)(b) and not the value of it. Therefore the provisions should expressly state that an order must be made where a court has failed to be satisfied that the wealth of the person either in total or in part (ie any or all of the person's property), has not been derived from one or more of the specified offences. This change would avoid confusion about what a person is required to prove to the court.

Proposed subsection 179E(2)

Proposed subsection 179E(2) provides a formula for calculating a person's unexplained wealth which is in essence "total wealth minus explained wealth". This formula requires a court to make a finding, at least on the balance of probabilities, regarding a person's "total wealth". In many cases this will be difficult to ascertain, particularly given that "wealth" is defined in subsection 179G(1) to include all property a person has ever owned. A more flexible approach would be to permit a court to make an unexplained wealth order if/to the extent that it is satisfied that any part of a person's wealth is unexplained along the lines of the South Australian *Serious and Organised Crime (Unexplained Wealth) Bill 2009* (the SA SOC (UW) Bill).

Proposed subsection 179G(1) - Meaning of wealth

Proposed subsection 179G(1) states that wealth is constituted by:

- (a) the property owned by a person at any time
- (b) the property under the effective control of the person at any time;
- (c) the property that the person has consumed or disposed of any time.

This definition is exclusive and does not include items such as expenses met by a person or services used by a person. The provision would also seem to encompass double counting of property that has been sold and replaced by other property.

Proposed subsection 179G(1) could be amended to an inclusive definition of wealth which would allow for flexibility in assessing a person's wealth and the inclusion of expenses and services.

Proposed section 336A - Meaning of property or wealth being *lawfully acquired*

Proposed subsection 336A states that property is lawfully acquired "if ... any consideration given for the property ... was lawfully acquired." In a case where property was partly acquired with legitimate funds and partly acquired with illegitimate funds, this proposed provision would appear to render the whole of the property "lawfully acquired". It would be preferable to allow the court to assess the portion of the property not lawfully acquired in arriving at an unexplained wealth order.

Proposed section 179N - Notice of application

We suggest that proposed subsections 179N(2)- (5) should be amended to read:

- "(2) If a court with *proceeds jurisdiction makes a *preliminary unexplained wealth order in relation to the person, the *DPP must, as soon as practicable:

- (a) give written notice of the order to person who would be subject of the unexplained wealth order if it were made;
 - (b) provide to the person a copy of any affidavit supporting the application for a preliminary wealth order; and
 - (c) provide to the person a copy of the application for the unexplained wealth order.
- (3) the DPP must provide a copy of an affidavit in supporting an application for an unexplained wealth order within a reasonable time prior to the hearing of the application for an unexplained wealth order.
- (4) However, the *DPP may delay giving a copy of an affidavit referred to a paragraph (2)(b) or subsection (3) to the person if the court to which the application for a preliminary wealth order was made so orders.
- (5) The court must not make an order under subsection(4) unless it is satisfied that:
- (a) providing a copy of the affidavit would prejudice the investigation of, or the prosecution of a person, for an offence; or
 - (b) it is for any other reason appropriate to make the order.”

Proposed subsection 179N(2) requires the CDPP to given written notice to the person of the preliminary unexplained wealth order along with a copy of the application for an unexplained wealth order and supporting affidavit within 7 days of the preliminary unexplained wealth order being made. This may be difficult to comply with if the person is overseas for example. The time limit should be amended to “as soon as practicable”.

The proposed subsection 179N(2) arguably requires the CDPP to provide any affidavit in support of an unexplained wealth order seven days after preliminary unexplained wealth order. The draft amendment above would allow for all affidavits in support of the unexplained wealth order to be provided to the person at an appropriate time before the hearing to which the affidavits relate.

Proposed section 179Q – Procedure on application

Proposed section 179B states that a court must make an order “requiring” a person to appear before the court for the purpose of enabling the court to decide whether or not to make an unexplained wealth order in relation to the person. There are no provisions for enforcing the order for a person to appear nor any guidance on how the court proceeds if the person doesn’t appear. An amendment should be made to give the court a discretion to conduct the hearing of an application for an unexplained wealth order in the absence of the person if the person fails to attend. This would seem to be consistent with proposed section 179Q which states “the person who would be subject to an unexplained wealth order if it would be made may appear and adduce evidence...”. This seems to envisage that a person may choose not to appear and/or not adduce evidence.

The current POC Act 2002 requires a person, who as an applicant bears the onus of proving the matters required for the application, to give written notice to the CDPP of both the application and grounds on which it sought (for example, subsection 31(4)). Under proposed subsection 179E(3) the person who would be subject to an unexplained wealth order bears the onus of proving that his or her wealth is not derived from one of more of the specified

offences. If a person intends to adduce evidence at the hearing on the application for an unexplained wealth order to show that his or her wealth is not derived from one of more of the specified offences, then it would be consistent with the rest of the Act to require the person to give written notice to the CDPP of:

- (a) the person's intention to adduce evidence at the hearing; and
- (b) the grounds on which the person claims that his or her wealth is not derived from one or more of the offences specified in paragraph 179(1)(b).

Section 179L – Relieving certain dependants from hardship

Proposed section 179L provides that a court making an unexplained wealth order must make an order for the Commonwealth to pay a specified amount to a dependant if certain conditions are met. This section mirrors section 72 of the POC Act 2002 which provides for hardship orders to be made where property is being forfeited (there is no equivalent provision for pecuniary penalty orders). Unlike forfeiture orders, an unexplained wealth order creates an amount to be paid rather than forfeiting items of property. The unexplained wealth order becomes a debt to the Commonwealth (proposed section 179R).

Proposed section 179L should be amended to enable the court to reduce the unexplained wealth order by the specified amount that would relieve hardship. The requirement for the Commonwealth to make a payment to a dependant should be deleted. Otherwise if an unexplained wealth order was never paid, the Commonwealth would be required to make a payment to a dependant in circumstances where the Commonwealth hasn't made any recovery from the order.

Use of evidence given by a person at the hearing of an application for an unexplained wealth order

A new section should be included in the Bill which states that evidence given by a person the hearing of an application for an unexplained wealth order to be made against the person is not admissible against the person except:

- (a) in criminal proceedings for giving false and misleading information; or
- (b) in proceedings on an application under the POC Act 2002; or
- (c) in proceedings ancillary to an application under the POC Act 2002; or
- (d) in proceedings for enforcement of a *confiscation order.

A person might well refuse to give any evidence at the unexplained wealth order hearing on the basis that their evidence may incriminate them. A new section would enable the person to discharge the burden of proof as set on in subsection 179E (3) of showing that his or her wealth is not derived from one of more of the specified offences. The existing section 198 of the POC Act 2002 contains such a section in respect of evidence given at an examination.