



2 April 2014

Ms Sophie Dunstone
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs\
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Parliament House
CANBERRA ACT 2600

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Dear Ms Dunstone

Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014

The Law Council of Australia is pleased to provide the following submission to the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee') inquiry into the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014* (the Bill).

The Law Council recognises the need for the Commonwealth to develop measures to effectively combat serious and organised crime. However the Law Council is not satisfied that adequate safeguards have been included to protect individual rights, or clear limits prescribed around the proposed powers. For these reasons, the Law Council opposes the passage of the Bill in its current form.

The Law Council does not wish to repeat its past advocacy on the general issues raised by this legislation. Rather, in this brief submission, the Law Council seeks to draw the Committee's attention to particular aspects of the Bill that do not relate to specific recommendations of the PJC-LE and are of concern.

Expansion of the circumstances for disclosure of information

The POC Act currently enables proceeds of crime authorities to disclose information obtained using coercive powers under the POC Act with State, Territory and foreign authorities for the purpose of assisting in the prevention, investigation and prosecution of serious and indictable offences. Existing table items 2 and 2A include a requirement that the relevant offence 'is punishable on conviction by imprisonment for at least 3 years or for life'. There is no such requirement for the proposed new provisions.

The Bill¹ amends the existing disclosure rules to clarify that disclosures can be made to a State, Territory or foreign authority, that has a role in identifying, locating, tracing, investigating or confiscating proceeds of crime under the law of the State, Territory or foreign country, in order to assist in identification, location, tracing, investigation or confiscation of proceeds of crime. The material that is able to be shared is that obtained

¹ Item 31 of the Bill inserts new table item 2C, which will extend the circumstances in which authorities are able to share information with a State, Territory and foreign authority for the purpose of identifying, locating, tracing, investigation or confiscating proceeds or instruments of crime under a law of the State, Territory or foreign country where the proceeds of crime concerned 'would be capable of being confiscated under Australian laws'.

from a person who is compelled to provide the information under relevant POC Act provisions.

This proposed expansion of the circumstances for which information can be shared is that proceeds of crime proceedings and litigation is said to be necessary to 'ensure that proceeds of crime authorities are in a position to pursue proceeds of crime interstate and offshore and assist State, Territory and foreign counterparts in doing so'.²

However, the Law Council is concerned that this proposed amendment significantly broadens the purposes for which information can be shared with other agencies and jurisdictions, without ensuring that each of the agencies authorised to receive such information have appropriate safeguards to protect against unjustified intrusion into personal privacy, and without imposing clear limits on the ability for foreign or State or Territory authorities to further disclose information to other agencies and jurisdictions.

The Law Council notes that the Senate Standing Committee for the Scrutiny of Bills appears to share the Law Council's concerns on this issue,³ as has the Parliamentary Joint Committee on Human Rights (the PJCHR).⁴ The PJCHR specifically notes that while the statement of compatibility explains the legitimate objective to be achieved by the proposed amendments it does not address how the provisions are proportionate to that objective.⁵

The Law Council notes that appropriate safeguards could include: limiting any disclosure to foreign, State or Territory agencies based on whether they are subject to legal obligations not to make further disclosure of the material; limiting information sharing to information that concerns specific, serious offences; introducing a system of regular review and independent oversight of information sharing between agencies; imposing requirements for information to be destroyed if it is no longer relevant to an allowable purpose; and the preservation of the privilege against self-incrimination and derivative use immunity.

This is particularly important as the Bill also amends existing search and seizure powers in the POC Act to allow authorised officers to seize material they find in the course of executing a search warrant that they believe on reasonable grounds are relevant to unexplained wealth proceedings.⁶ Such material may include items such as bank statements, financial records and payslips. Further, such material may be seized from for instance a family home where it is not only the potential interference with the rights of the defendant that must be considered; it includes material from third parties who are themselves not under any suspicion.

There may also be implications for the privilege against self-incrimination. For example, information obtained under the proposed amendments may be used to inform further inquiries and information obtained in the course of these inquiries could in turn be used in future criminal proceedings.

² Explanatory Memorandum to the *Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014*, p 12.

³ Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2014*, 19 March 2014, p 8.

⁴ Parliamentary Joint Committee on Human Rights, *Fourth Report of the 44th Parliament*, March 2014, p 1.

⁵ *Ibid*, p 7.

⁶ Items 27 and 28 of the Bill insert new paragraphs into subsections 227(1) and 228(1) of the POC Act respectively. These items will enable the seizure of all things and evidence that are relevant to an unexplained wealth investigation or proceeding.

Streamlining affidavit requirements

In addition to 'removing duplication' for affidavit requirements, in an amendment that addresses a recommendation made by the PJC-LE, the Bill⁷ also seeks to streamline the making of preliminary unexplained wealth orders where an unexplained wealth restraining order is in place (or has been revoked under section 44 of the POC Act). This may arise, for example through the elimination of the requirement in existing paragraph 179B(2)(c) for the affidavit to state that the property the authorised officer knows or reasonably suspects was lawfully acquired by the person and/or the property known or suspected to be owned or under the effective control of the person.

This amendment is said to be needed to address concerns that, rather than limiting the amount of information that an authorised officer must include in their affidavit, they could be interpreted to create separate (and additional) stand-alone criteria that an authorised officer must meet when making an unexplained wealth order. The repeal of subparagraphs 179B(2)(c)(i) and (ii) aims to remove this risk.

However, the Law Council is concerned that this amendment will reduce the amount of information required to be included in an affidavit for a preliminary unexplained wealth order to that of what appears to be a lower standard for an interim restraining order. In the Law Council's view, given the impact of the preliminary order on the individual, a higher standard of affidavit requirements for this stage of proceedings seems entirely reasonable. Without clear evidence of the nature of the administrative burden the existing requirements place on agencies, the provisions designed to provide a degree of specificity, transparency and oversight to the use of these orders should be retained.

Relevance of *Lee v New South Wales Crime Commission*

In addition to the above concerns, the Law Council draws the Committee's attention to the High Court's decision in *Lee v New South Wales Crime Commission* [2013] HCA 39, which was delivered subsequent to the PJC-LE's recommendations.

The case concerned concurrent civil proceedings against Lee and another appellant brought by the NSW Crime Commission, and criminal proceedings against them alleging money laundering.⁸ The appellants submitted that the exposure of an accused person to a compulsory examination touching the subject matter of the criminal charge which the person was facing, could give rise to unfair disadvantage in the criminal proceedings. That is, there was a risk that the prosecution would have foreknowledge of the defence's case in the criminal proceedings for money laundering. They argued that this would undermine some of the fundamental protections conferred by the accusatorial system of criminal justice. By a narrow majority of 4:3, the High Court dismissed the appeal against the decision of the NSW Court of Appeal, which ordered that the appellants be compulsorily examined under oath by a registrar of the NSW Supreme Court in relation to money laundering offences, on the application of the NSW Crime Commission.

⁷ Item 15 of the Bill repeals subparagraphs 179B(2)(c)(i) and (ii) so that the affidavit requirements for a preliminary unexplained wealth order are the same as the current affidavit requirements for an interim unexplained wealth restraining order.

⁸ In the Crime Commission civil proceedings, the Commission had applied for orders in the Supreme Court allowing Lee to be examined about his financial affairs with a view to making a confiscation order of his assets. Under the *Criminal Assets Recovery Act 1990* (NSW) (the CAR Act), the rule of law protections available in criminal proceedings to safeguard the presumption of innocence, including the privilege against self-incrimination, are not fully protected under civil confiscation proceedings. While a direct use immunity applies under the CAR Act in relation to the abrogation of the privilege against self-incrimination (under section 13A of the CAR Act), this does not extend to derivative use immunity. This means that further information obtained as a result of an answer given or document produced may be admissible in subsequent criminal proceedings.

The *Lee* decision helps to illustrate the stark and difficult choices which may present themselves to individuals who may be the subject of confiscation orders, including Commonwealth unexplained wealth orders. For example, individuals who have been charged with criminal offences may find themselves choosing between:

- (a) making a case in the confiscation proceedings which may disclose in advance their defence in the criminal proceedings, and in so doing possibly providing an unfair advantage to the prosecution; or
- (b) if they decide not to make arguments which may disclose their defence, losing a substantial asset - such as their home - prior to any conviction being determined.

In this context, the Law Council emphasises the need for the legislature to respect and preserve principles which underpin the administration of criminal justice, such as the presumption of innocence, and the privilege against self-incrimination. The Law Council submits that great caution be taken by the legislature in enacting provisions which may operate to further undermine these principles, particularly without strong evidence which indicates that such changes are necessary and proportionate.

Law Council's Further Recommendations

The Law Council suggests that a number of other issues need to be addressed. The highest priority issues in this regard are:

- *removal of Items 3 and 24 of the Bill* – which if enacted would prevent restrained assets being used to meet legal expenses:
 - The Law Council believes that there are adequate safeguards against possible dissipation of restrained assets through the respondent's conduct of the proceedings due to: the court's discretion in relation to the release of restrained assets (subsection 20A(3A)); and the court's ability to require certification of costs by a costs assessor and to make any further orders it considers appropriate (subsection 20A(3C)).⁹
 - Feedback received by the Law Council also suggests there is generally a need for specialist commercial expertise in responding to unexplained wealth orders and that there are often restrictions on using legal aid funding to obtain expert reports, and that legal aid rates do not in any way appropriate the rates of barristers with the required level of commercial law expertise. For example, a legal aid criminal lawyer is estimated to be paid approximately \$148 an hour, compared to a commercial barrister of mid-range experience who may be paid, for example, approximately \$350-385 an hour. These estimates help to illustrate the inequality of arms that is likely to arise from reliance on legal aid for the respondent concerned, compared to the substantial Commonwealth resources which are available in instituting unexplained wealth proceedings.

⁹ Similar safeguards are contained in the *Criminal Assets Recovery Act 1990* (NSW) in relation to the payment of legal expenses from property subject to restraining orders (sections 16A, 16B, 17).

- *removal of Items 27 and 28 of the Bill* – which seek to seek to expand the scope of intrusive search and seizure powers that are already broad in scope, without clearly demonstrating why such an expansion is necessary. If, contrary to the Law Council's view, the Committee is satisfied that the current scope of the powers in Part 3-5 of the POC Act is insufficient, then amendments should be made that respond to these particular deficiencies, rather than the approach adopted in Items 27 and 28 of the Bill which incorporates a broad new definition of 'things that might be relevant to an unexplained wealth proceeding';
- *removal of Items 2-5, 14, 17, 18 and 20 of the Bill* – which remove a court's discretion to make unexplained wealth orders where wealth is over \$100,000.
 - While the Law Council acknowledges that the Bill retains judicial discretion in matters where the amount of unexplained wealth is less than \$100,000, it remains concerned about the possibility for people to automatically have an order made against them in matters where their unexplained wealth exceeds \$100,000. The making of unexplained wealth orders in matters where unexplained wealth exceeds \$100,000 has the potential to significantly impact on a person's livelihood and accordingly, warrants judicial discretion in the making of such an order. The Law Council does not believe that judicial discretion and oversight in unexplained wealth matters should be constrained in any way.
 - The Law Council also has concerns about the manner in which two different tests, that is the 'public interest' test and the 'interests of justice' tests are used to define the scope of judicial discretion in relation to unexplained wealth orders in the POC Act.¹⁰ The Law Council notes that the inconsistent use of these tests may become more significant if the Bill is passed and the court's general discretion to refuse to make an order is removed.
 - For these reasons, if this feature of the Bill is retained, the Law Council recommends that the relevant provisions be amended so that an 'interests of justice' or a combined 'interests of justice' and 'public interest' test is used consistently throughout the POC Act;
- *expand Item 26 of the Bill*. This Item inserts a new section 179U into the POC Act to require the AFP Commissioner to provide a report to the PJC-LE annually on unexplained wealth matters and litigation, and to empower the Committee to seek further information from federal agencies in relation to such a report.
- The Law Council supports the insertion of a new section 179U as an important safeguard. However, it notes that the PJC-LE also recommended that the following additional statutory oversight arrangements be made: law enforcement agencies must notify the Integrity Commissioner of unexplained wealth investigations; the Ombudsman must review and report to Parliament the use of unexplained wealth laws in the same way that the Ombudsman

¹⁰ The Law Council first expressed these concerns in evidence before the Senate Legal and Constitutional Affairs Committee on 7 February 2013. In its supplementary submission on the *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012*, in March 2013, the Law Council also noted that the inconsistent use of the 'public interest' test and the 'interests of justice' test may become more significant if the Bill was passed.

does for controlled operations; and the oversight by the PJC-LE be enhanced so that in addition to appearing when required, that the Australian Crime Commission, AFP, DPP and any other federal agency or authority must brief the PJC-LE on their use of unexplained wealth provisions as part of the PJC-LE's annual reports of the ACC and AFP.

- *conduct a review of Item 19 of the Bill* – which seeks to allow consideration of applications ex parte in certain circumstances. The Law Council is concerned that this amendment may infringe a person's right to a fair hearing. On this basis, the Law Council suggests that a comprehensive review of this proposed amendment be conducted as to whether it is necessary and proportionate when considered in light of the impact on the right to a fair hearing, and what safeguards and other provisions should be included in the POC Act to ensure that it does not unduly burden individual rights, including the right to a fair hearing; and

Finally, the Law Council suggests that any of the Bill's provisions which are passed should be subject to a three year sunset clause. This would require a parliamentary or independent review to be conducted, and a report provided to Parliament within a defined period, which addresses the key principles and concerns which have been identified in this submission.

Yours sincerely

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President