Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*

Senate Committee on Legal and Constitutional Affairs

August 2009

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Acknowledgement

The Law Council acknowledges the assistance of the NSW Bar Association, the Queensland Bar Association, the Northern Territory Law Society, the Law Society of South Australia and the Law Council's National Criminal Law Liaison Committee in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to provide the following submission to the Senate Committee on Legal and Constitutional Affair's Inquiry into the provisions of the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (Cth) ('the Bill').

2. The purpose of the Bill is to give effect to the Commonwealth's commitment at the April 2009 Meeting of the Standing Committee of Attorneys General (SCAG) to help facilitate a national approach to tackling serious and organised crime. This involves extending the confiscation regime under the *Proceeds of Crime Act 2002* (Cth); extending the controlled operations, assumed identities and witness protection regime under the *Crimes Act 1914* (Cth); introducing a new joint commission offence into the *Criminal Code Act 1995* (Cth) and expanding the telecommunication interception powers under the *Telecommunication (Interception and Access) Act 1979* (Cth).

3. The Law Council has a number of specific concerns with the reforms proposed under the Bill. In particular, the Law Council opposes the introduction of proposed amendments which would:

   (a) introduce unexplained wealth provisions, which place the onus on the person subject to the order to demonstrate that his or her wealth was lawfully acquired;

   (b) introduce freezing orders directed at financial institutions which automatically suspend transfers or withdrawals from an account, when restraining orders against an individual, which will have the same effect, may already be made ex parte;

   (c) remove the restriction on non-conviction based confiscation orders that currently limits their application to offences occurring in the six years prior to the application for an order;

   (d) enable the restraint and forfeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction;

   (e) amend the existing controlled operation regime and recognise controlled operations that have been validly authorised under State and Territory laws as authorised under Commonwealth law without guaranteeing important procedural safeguards;

   (f) amend the existing witness identity protection regime by removing any oversight or discretionary role for the court in the authorisation process and replacing this with an internal authorisation procedure;

   (g) introduce a new form of extended liability into Chapter 2 of the *Criminal Code*, described as 'joint commission', without adequate consultation and in the absence of adequate review of the existing extended liability provisions in section 11.2; and

(h) expand the intrusive Commonwealth telecommunication interception regime to cover a range of new offences of a substantially different character to the existing definition of 'serious offence'.

4. In addition to these particular concerns, the Law Council also generally opposes the introduction of the Bill on the grounds that the Commonwealth Government has failed to provide detailed reasons or any relevant data as to why such expansive reforms are necessary. Although the Explanatory Memorandum and Second Reading Speech make it clear that the rationale of the Bill is to give effect to the Commonwealth's commitment at the April 2009 SCAG Meeting to tackle serious and organised crime, it has not been made clear why the existing Commonwealth investigation and confiscation measures are insufficient to achieve this end.

5. For example, there is already sufficient provision for extended liability under the Criminal Code to capture a wide range of players who are thought to facilitate or benefit from organised crime, including offences such as attempt; complicity and common purpose; innocent agency; incitement and conspiracy. In addition, Commonwealth law enforcement agencies have access to a wide range of extensive investigation powers to combat serious and organised crime, including coercive questioning powers, search and seizure powers, and existing assumed identities and telecommunications interception powers. There are also expansive criminal and civil forfeiture provisions which provide law enforcement agencies with ample scope for targeting the activities of those who finance, facilitate and/or profit from serious and organised crime.

6. The Law Council is not satisfied that the Explanatory Memorandum and Second Reading Speech accompanying the Bill adequately outline why existing measures are insufficient to tackle serious and organised crime at the Commonwealth level.

7. Further, the Law Council is concerned that laws enacted in South Australia and New South Wales, which have been strongly criticised by legal and other organisations,[1] are being used as models for the enactment of similar laws in other Australian jurisdictions and have led the Commonwealth to introduce the reforms proposed in the current Bill.

8. Legislation adopted at the State level to outlaw certain groups and create related offences contains features that run counter to established criminal law principles, infringes human rights and relies on broad and ambiguous terms that give rise to the risk of arbitrary application. As a result the Law Council is of the view that these provisions should not be replicated at the federal level, nor should the Commonwealth's extensive investigative powers be amended so as to make these powers generally available to State and Territory law enforcement agencies to utilise in the investigation and prosecution of these draconian laws.

9. Finally, the Law Council is concerned that despite the extensive efforts that have been employed by the Joint Parliamentary Committee on the Australian Crime Commission during its inquiry into legislative arrangements to outlaw serious and organised crime groups, the Commonwealth has sought to introduce the proposed reforms without receiving the Joint Committee's final report.

[1] For example see Nicholas Cowdery AM QC, Comments on Organisation/Association Legislation "Bikie Gangs", (May 2009); Joint Statement of Law Society of South Australia and South Australian Bar Association, *Serious and Organised Crime (Control) Bill 2007*(3 March 2008).

10. The Joint Committee's inquiry commenced in March 2008. It has received numerous submissions from academics, government departments, law enforcement and intelligence agencies, non-government organisations and other key stakeholders. It has also conducted oral hearings around the country and investigated overseas initiatives.

11. The Law Council actively participated in this Inquiry, which was asked to examine and evaluate the existing legislative arrangements to outlaw serious and organised crime groups and identify the need, if any, to introduce additional legislative mechanisms. In its submissions to this Inquiry, the Law Council expressed the view that further legislative mechanisms to outlaw serious and organised crime groups were unnecessary and undesirable, a view shared by many other submission makers. The Law Council strongly encourages this Committee to recommend that the current Bill not be passed until the Joint Committee has publicly released its findings in relation to this extensive Inquiry.

12. In the time available to examine this complex Bill, the Law Council has only been able to address the most obvious matters of concern. Deferral of the Bill until the Joint Committee has publicly released its findings would also allow further examination of details of the Bill, such as definitions and complex procedural requirements.

Background

13. Serious and organised crime is defined in the *Australian Crime Commission Act 2002* (Cth) as involving substantial planning, organisation, sophisticated methods and techniques by multiple offenders and including offences as diverse as tax evasion, money laundering, illegal drug dealing, violence, company violations and cybercrime.[2]

14. In recent times serious and organised crime has been closely associated with outlaw motorcycle gangs and 'bikie violence'. However, the Australian Crime Commission (ACC) has identified a number of serious and organised crime entities, of which Outlaw Motorcycle Gangs (OMCG) are just one.[3] In the 2005-06 ACC Annual Report, it was stated that initial intelligence indicated that there were 35 OMCGs operating in Australia with 3500 full members.[4] OMCGs have been referred to as constituting only 1 % of motorcycle clubs generally.[5]

15. Despite the definition of serious and organised crime in the ACC Act, the ACC itself has stated that it is difficult to define adequately.[6] It is also difficult to define the percentage of serious and organised crime attributable to OMCGs.[7]

16. In order to provide a context for the reforms proposed in the current Bill, the Law Council will briefly summarise the relevant developments occurring at the State, Territory and Commonwealth level designed to address serious and organised crime.

Relevant Developments at State and Territory Level

17. A number of significant developments have occurred at the State level that have resulted in the passage of laws designed to combat serious and organised crime by outlawing certain groups and organisations and criminalising association with these groups. Legislative developments at the State level have occurred primarily in response to a perceived escalation in violence and crime associated with outlaw motorcycle groups and 'bikies'. However, the legislative developments are not restricted to motorcycle groups and can be used more broadly against other groups.

<u>The South Australian Legislation</u>

18. In September 2008 the South Australian Government passed the *Serious and Organised Crime (Control) Act 2008* ('the SA Act'). The SA Act empowers the Attorney-General, on application of the Commissioner of Police, to declare an organisation to be a 'criminal organisation'.[8] Once a declaration is made, serious criminal liability flows for people who are members of, or associate with members of, the organisation. For example, it is an offence to associate, on not less than six occasions during a period of 12 months, with a person who is a member of a

[2] *Australian Crime Commission Act 2002* (Cth) s 4.
[3] Australian Crime Commission, Organised Crime in Australia, Feb 2009 available at http://www.crimecommission.gov.au/content/publications/Other_Publications/oca_2009_complete.pdf
[4] Available at http://www.crimecommission.gov.au/content/publications/annual_reports/2006/ACC_Annual_Report_2005-06.pdf
[5] See transcript of hearing of Joint Committee on Australian Crime Commission, 3 July 2008 at 47
[6] See Transcript of Joint Committee on the Australian Crime Commission Hearing, 6 November at 9
[7] See Transcript of Joint Committee on the Australian Crime Commission Hearing, 3 July 2008
[8] *Serious and Organised Crime (Control) Act 2008* (SA) ('the SA Act') Part 2.

declared organisation, or the subject of a control order. It is also an offence for a person with a criminal conviction of a kind prescribed by regulation to associate more than six times in 12 months with a person who also has a prescribed criminal conviction.[9] The penalty for this offence is five years imprisonment.

19. In addition, under the SA Act, a control order can be made against a person who has been a member of a declared criminal organisation, a person who engages or has engaged in serious criminal activity, a person who regularly associates with members of a declared organisation, or a person who engages in serious criminal activity and regularly associates with others who engage in serious criminal activity.[10]

20. The Law Society of SA and the SA Bar Association have expressed serious concerns about the SA Act, noting that the Act undermines the presumption of innocence by restricting a person's liberty on the basis of who they know rather than what they may have done, and removes a person's right to challenge unfounded or unreasonable decisions of the executive arm of government.[11]

The NSW Legislation

21. On 22 March 2009 a vicious brawl erupted at Sydney airport involving 'bikie gangs' and resulting in the death of Hells Angels associate Anthony Zervas. On 28 March 2009 his brother, Hells Angel Peter Zervas, was shot outside a Sydney flat.

22. In response to the violent incident at Sydney airport, the NSW Government vowed to protect the public from bikie violence and rushed the NSW *Crimes (Criminal Organisations) Control Act 2009* through Parliament with limited debate. The Act was passed on 2 April 2009. It is broadly based on the SA Act, however the proscription process is overseen by the courts rather than the Attorney General.

23. Under the NSW Act the Police Commissioner can apply to a Supreme Court judge to have an organisation declared as a criminal organisation under the Act.[12] The application must be made public and a member of the organisation may attend the hearing and make submissions in respect of the application.[13] However, the Police Commissioner may request that the hearing be conducted in private if it involves 'criminal intelligence'.[14]

24. Once an organisation has been declared, the Police Commissioner can apply for a control order in relation to a member of the organisation.[15] An interim control order can be made in the absence of the person concerned; however it must then be served on the person and confirmed by the Court at a hearing at which the person may attend.[16] Under the NSW Act, a person subject to a control order is prohibited from undertaking a range of activities, which can be added to by regulation, including selling or supplying liquor or carrying on the business of a bookmaker.[17]

[9] *Serious and Organised Crime (Control) Act 2008* (SA) ('SA Act') s35.
[10] SA Act Part 3.
[11] Joint Statement of Law Society of South Australia and South Australian Bar Association, *Serious and Organised Crime (Control) Bill 2007*(3 March 2008).
[12] *Crimes (Criminal Organisations) Control Act 2009* (NSW) ('NSW Act') s6.
[13] NSW Act ss7, 8.
[14] NSW Act ss13, 28.
[15] NSW Act Part 3 Division 1.
[16] NSW Act Part 3 Division 1.
[17] NSW Act Part 3 Division 3.

25. A person will be guilty of an offence under the NSW Act if he or she is subject to a control order and he or she associates with another controlled member of the declared organisation.[18] The penalty for this offence is two years imprisonment for the first offence and five years imprisonment for a subsequent offence.[19] The term 'association' is broadly defined and includes telephone or email communication.[20]

26. The NSW Law Society and the NSW Bar Association have both expressed 'shock' and 'serious concern' at the nature of the laws and the speed at which they passed through Parliament. Both bodies have also publicly expressed the view that the law is unlikely to be effective and is unlikely to withstand legal challenge.[21] The NSW Legislative Review Committee has also drawn attention to significant human rights issues raised by the Act, but was only in a position to do so once the Act had already passed through Parliament.[22]

Other Recent State and Territory Initiatives

27. On 31 March 2009 it was reported that Queensland Cabinet had approved the preparation of new laws not dissimilar to the SA Act.[23] It has been reported that the Northern Territory and Western Australia are also considering introducing serious and organised crime association laws based on those introduced in NSW and SA.

28. It has also been reported that similar laws could not be introduced in Victoria without raising serious compatibility concerns with the Victorian *Charter of Human Rights and Responsibilities 2006*. Similar concerns have been raised with respect to the introduction of serious and organised crime association laws in the ACT and compatibility issues with the territory's *Human Rights Act*.[24]

Relevant Developments at Commonwealth Level

29. The need for a national approach to tackling serious and organised crime has been an issue explored in some detail in recent years.

30. In November 2006 the ACC Board approved the establishment of the Outlaw Motorcycle Gangs National Intelligence Task Force (OMCG Taskforce). The OMCG Taskforce developed national intelligence on the membership and activities of OMCGs to better guide national investigative and policy action.

31. In June 2007 the Ministerial Council for Police and Emergency Management agreed to establish a working group to examine the issue of OMCGs. The Final Report of this Working Group was completed in October 2007 and provided to the Joint Parliamentary Committee on the ACC ('Joint Parliamentary Committee') on an in-confidence basis.

32. In September 2007 the Parliamentary Joint Committee conducted an Inquiry into **'**the future impact of serious and organised crime on Australian society'. After

[18] NSW Act s 26.
[19] NSW Act s 26.
[20] NSW Act s3.
[21] 'Controversial bikie laws pass NSW Parliament' *ABC Online* 2 April 2009.
[22] Legislation Review Committee, *Legislation Review Digest No 5 of 2009*, 4 May 2009. Amendments to the Act were introduced into Parliament on 6 May 2009 in the form of the *Criminal Organisations Legislation Amendment Bill 2009*, and were passed by the Legislative Assembly on 6 May, and by the Legislative Council on 13 May 2009. The Legislation Review Committee reported its concerns about the content of the amendment Bill on 12 May 2009: *Legislation Review Digest No 6 of 2009*, 12 May 2009.
[23] 'Dangers of taking draconian action' *Canberra Times* 31 March 2009 p. 16.
[24] 'Bikie laws rushed through Parliament' *Canberra Times* 3 April 2009 p. 7.

examining the trends and changes in organised criminal activities, practices and methods the Joint Parliamentary Committee made a number of recommendations, including that:

(a) the Parliamentary Joint Committee on the Australian Crime Commission in the next term of the Federal Parliament conduct an inquiry into all aspects of international legislative and administrative strategies to disrupt and dismantle serious and organised crime.[25]

(b) as a matter of priority, the Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime.[26]

33. On 17 March 2008 the Parliamentary Joint Committee initiated an inquiry into the legislative arrangements to outlaw serious and organised crime groups pursuant to Section 55(1)(b) of the *Australian Crime Commission Act 2002* ('the Joint Committee Inquiry'). The Law Council made a detailed written submission to this Inquiry and appeared to give evidence at one of its hearings, represented by the then President, Mr Ross Ray QC.[27] As noted above, this inquiry is yet to report on its findings.

34. In June 2008 the ACC Board elected to close the OMCG Taskforce and replace it with a new Serious and Organised Crime National Intelligence Task Force.

35. On 16-17 April 2009 SCAG met and discussed the need to take a comprehensive national approach to combat organised and gang related crime and to prevent gangs from simply moving their operations interstate. At the Meeting, the Commonwealth agreed to:[28]

(a) Develop an Organised Crime Strategic Framework, with mechanisms to engage the States and Territories, for agreement by the Commonwealth Government by mid 2009.

(b) Consider the introduction of a package of legislative reforms to combat organised crime including measures to:

(i) strengthen criminal asset confiscation, including unexplained wealth provisions;

(ii) prevent a person associating with another person who is involved in an organised criminal activity;

(iii) enhance police powers to investigate organised crime, including model cross-border investigative powers for controlled operations, assumed identities and witness identity protection;

(iv) facilitate greater access to telecommunication interception for criminal organisation offences; and

[25] 2007 Parliamentary Inquiry Recommendation 6.
[26] 2007 Parliamentary Inquiry Recommendation 8.
[27] See Law Council Submission to the Inquiry into the legislative arrangements to outlaw serious and organised crime groups, June 2008 and see Transcript of Joint Committee on the Australian Crime Commission Hearing, 6 November 2008 at 48.
[28] Standing Committee of Attorneys-General, *Communiqué* (16-17 April 2009) available at http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_SecondQuarter_17April2009-Communique-StandingCommitteeofAttorneys-General.

(v) address the joint commission of criminal offences.

(c) Consider the issue of director disqualification under the *Corporations Act 2001* (Cth) in relation to organised criminal activity.

36. The States and Territories also agreed to consider the introduction of a range of measures to combat organised crime, such as coercive questing powers, proceeds of crime mechanisms and consorting offences, where they have not already done so.

37. On 24 June 2009 the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* was introduced into Commonwealth Parliament. This Bill introduces a range of reforms designed to give effect to the Commonwealth's commitment to enhance its legislation to combat organised crime, as agreed at the April SCAG Meeting.

38. The following submission outlines the Law Council's concerns with the amendments proposed in this Bill.

Expansion of Criminal Asset Confiscation Regime

Unexplained Wealth

Overview of proposed changes

39. Schedule 1 of the Bill amends Chapter 2 of the *Proceeds of Crime Act 2002* (Cth) ('the POC Act') by introducing unexplained wealth provisions to the suite of existing confiscation processes available under the Act.

40. The provisions proposed in Schedule 1 of the Bill are intended to target wealth that a person cannot demonstrate that he or she has lawfully acquired.

41. Once a court is satisfied that an 'authorised officer'[29] has reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, the proposed provisions would permit a court to compel the person to attend court and prove on the balance of probabilities that the wealth was lawfully acquired.[30] Where the person is unable to prove that his or her wealth was lawfully acquired, the provisions would require a court to effectively order confiscation of the 'unexplained wealth amount'.[31]

42. There are three key components to this process: restraining orders, orders requiring appearance before court and payment orders.

Unexplained Wealth Restraining Orders

43. The Bill seeks to introduce a new section 20A into the POC Act that would allow a court with proceeds jurisdiction to make a restraining order in relation to unexplained wealth if the court is satisfied that:

- the Director of Public Prosecutions ('the DPP') has applied for a restraining order and met the affidavit requirements in proposed subsection 20A(3);
- the authorising officer has demonstrated reasonable grounds to suspect that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired; and
- that the person subject to the order has either:
  - committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect, or
  - the whole or any part of the person's wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a state offence that has a federal aspect.

[29] 'Authorised officer' is defined in SOC Bill, Schedule 1 Part 1, proposed s338 of the POC Act and includes an AFP member authorised by the Commissioner of the AFP, the Chief Executive Officer of the Australian Crime Commission, or an officer of Customs authorised by the Chief Executive Officer of Customs.
[30] *Crimes Legislation Amendment (Serious and Organised Crime) Amendment Bill 2009* (Cth) ('the SOC Bill') *Schedule* 1 Part 1, proposed s179B of the *Proceeds of Crime Act 2002* (Cth) ('the POC Act').
[31] SOC Bill Schedule 1 Part 1, proposed s179E of the POC Act. 'Unexplained wealth amount' is defined in proposed s179G of the POC Act.

44. The restraining order may cover all of the property of the person or specified parts of that person's property. The DPP is not required at the time of applying for a restraining order for unexplained wealth to prove that the property is effectively controlled by the person or that the property is an unexplained wealth amount.

45. Pursuant to proposed subsection 20A(5), an order must be made even if there is no risk that the property will be disposed of or dealt with and the order can relate to property which is not yet in the possession of the suspect at the time of the order.

46. The effect of a restraining order is that the person is prohibited from dealing with certain property in the ways set out in the order. For example, a restraining order may prohibit a person from selling or mortgaging a house or business.

Preliminary Unexplained Wealth Orders – Requirement to Appear Before Court

47. Under the proposed section 179B, once a court is satisfied that:

    - the DPP has applied for an 'unexplained wealth order'[32] in respect of the person;
    - an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired; and
    - the affidavit requirements in proposed subsection 179B(2) have been met;

    the court must make an order requiring a person to appear, known as a preliminary unexplained wealth order.[33]

48. The affidavit requirements in proposed subsection 179B(2) require an authorised officer to state:

    - the identity of the person;
    - that the authorising officer suspects that the person's total wealth exceeds the value of the person's wealth that is lawfully acquired; and
    - the property the authorising officer knows or reasonably suspects was lawfully acquired by the person and the property the authorising officer knows or reasonably suspects is under the effective control of the person.

49. The person may apply to have this order revoked by giving written notice to the DPP within 28 days and setting out the grounds upon which the revocation is sought.[34] The DPP then has the right to adduce additional material to the court relating to the application.

Unexplained Wealth Orders – Payment to the Commonwealth

50. A court must make an order requiring a person to pay an unexplained wealth amount under proposed section 179E if the following two requirements have been met:

[32] "Unexplained wealth order is defined in proposed s338 of the POC as 'an order made under subsection 179E(1) that is in force'. It is distinct from an order made under proposed s20A.
[33] SOC Bill Schedule 1 Part 1, proposed s179B of the POC Act.
[34] SOC Bill Schedule 1 Part 1, proposed s179C of the POC Act.

- the court has made a preliminary unexplained wealth order under section 179B in relation to the person; and

- the court is not satisfied that the person's total wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

51. Under proposed subsection 179E(3), the person subject to the preliminary unexplained wealth order bears the legal burden of proving, on the balance of probabilities, that his or her wealth is not derived from one or more of the specified offences.

52. When considering whether to make an unexplained wealth order, the court may have regard to information not included in the application, including information that could not have been ascertained before the application was made.[35] This means, for example, that if the DPP discovers further property owned or under the effective control of the person after the application for an unexplained wealth order was lodged, the DPP can lead that evidence at a hearing for an unexplained wealth order.

53. Once an unexplained wealth order has been made, the person must pay to the Commonwealth his or her 'unexplained wealth amount' – that is, the amount that, in the court's opinion, is the difference between the person's total wealth and the sum of the values of the property that the court is not satisfied was not derived from a specific offence. [36] Pursuant to proposed section 179G, 'wealth' includes property owned, effectively controlled, consumed or disposed of by the person at any time. This can include property which is not yet in the possession of the person and property previously forfeited under another forfeiture order.

54. Proposed subsection 179R provides that an unexplained wealth order may be enforced by the Commonwealth as if it were an order made by a court to recover a debt due by the person to the Commonwealth.

Rationale for Proposed Changes

55. These provisions are similar to those currently in force in Western Australia and the Northern Territory.[37] They are said to be necessary to overcome the significant obstacles faced by authorities when seeking to achieve the objects of the POC Act. The Explanatory Memorandum to the Bill provides:

> *While the [POC] Act contains existing confiscation mechanisms, these are not always effective in relation to those who remain at arm's length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences.*[38]

56. In his second reading speech introducing the Bill, the Attorney General described the purpose of the unexplained wealth provisions as follows:

[35] SOC Bill Schedule 1 Part 1 proposed s179E(4) of the POC Act.
[36] SOC Bill Schedule 1 Part 1 proposed s179G of the POC Act.
[37] *Criminal Property Confiscation Act 2000* (WA) ('the WA Act') *Criminal Property Forfeiture Act* (NT)('the NT Act'). The WA and NT provisions require the court to make the order if the statutory requirements are met.
[38] Explanatory Memorandum to the *Crimes Legislation Amendment (Serious and Organised Crime) Amendment Bill 2009* (Cth) ('the Explanatory Memorandum') p. 5.

These provisions will target people who derive profit from crime and whose wealth exceeds the value of their lawful earnings.

In many cases, senior organised crime figures who organise and derive profit from crime are not linked directly to the commission of the offence. They may seek to distance themselves from the offence to avoid prosecution or confiscation action.

Unlike existing confiscation orders, unexplained wealth orders will not require proof of a link to the commission of a specific offence and in that sense they represent a quantum leap in terms of law enforcement strategy.

However, there must still be a connection between the unexplained wealth and criminal offences within the Commonwealth legislative power.

57. No data is given in either the Explanatory Memorandum or the Second Reading Speech about the number of cases where existing confiscation mechanisms have failed or in which organised crime figures cannot be linked directly to an offence.

Law Council's Concerns

58. The Law Council is opposed to the proposed unexplained wealth provisions on the grounds that they offend fundamental common law and human rights principles. The Law Council's key concerns with the provisions proposed in Schedule 1 Part 1 of the Bill are summarised below.

1. The provisions undermine the presumption of innocence, the right to silence and reverse the onus of proof

59. The existing regime under the POC Act already contains strong powers to confiscate the assets of those persons involved in criminal activity. Under the conviction based confiscation regime, a court must make an order for forfeiture of property upon application by the DPP if person has been convicted of one or more indictable offences and the court is satisfied that the property specified in the order is proceeds of one or more of the offences.[39] In such cases, there is a presumption that if evidence is given that the property was in the person's possession at the time of, or immediately after, the person committed the offence, then the property was used in, or in connection with, the commission of the offence.[40] The burden is on the person subject to the forfeiture order to adduce evidence that his or her property is not the proceeds of the indictable offence.

60. The POC Act also permits forfeiture of property without the need for a criminal conviction.[41] This occurs once a restraining order has been in force in respect of the property and the court is satisfied that the person's conduct or suspected conduct constituted a 'serous offence' or a specified indictable offence. Prosecuting authorities need only prove the commission of an offence or involvement in illegal activities to the balance of probabilities before confiscation is triggered.[42]

61. The proposed unexplained wealth provisions in Schedule 1 of the Bill take this already expansive confiscation scheme even further by requiring a person to prove that any or all of his or her wealth was lawfully acquired or risk having to make a payment to the Commonwealth. There is no requirement for the State to

[39] POC Act s48.
[40] POC Act s54.
[41] POC Act s47-49.
[42] POC Act ss47(3), 49(2).

demonstrate an evidence based link between the property in question and the commission of a criminal offence. Confiscation is effectively ordered once the court has made a preliminary unexplained wealth order and the court is not satisfied that total wealth of the person is not derived from a specified offence.[43]

62. There is no requirement in either proposed sections 179B (preliminary unexplained wealth order) or 179E (unexplained wealth order) for the authorising officer to establish, or for the court to be satisfied, that the person subject to the order is even suspected of committing a specified criminal offence or that his or her wealth was derived from such an offence.[44] Nor is there any requirement for the court to have made a restraining order pursuant to proposed section 20A prior to making a preliminary unexplained wealth order or an unexplained wealth order. Under proposed sections 179B and 179E, the burden is squarely placed on the person subject to the preliminary unexplained wealth order to adduce evidence that his or her total wealth was lawfully acquired.

63. This reverse onus is contrary to established common law principles and runs counter to the presumption of innocence. It means that the respondent may lose legitimately obtained assets if he or she cannot show that his or her total wealth has been lawfully obtained.

64. This burden is increased by the broad definitions used in the proposed provisions. For example under section 336 of the POC Act, the term 'derived' includes property directly or indirectly derived. This means that under the proposed unexplained wealth provisions, a person will be required to establish to the satisfaction of the court that his or her total wealth was not *indirectly* derived from unlawful means. This gives rise to the potential for the provisions to capture a wide range of property that cannot be directly connected to the commission of any criminal offence.

65. There is a risk, for example, that liberal use of these powers may result in those who have failed to keep receipts or records losing their lawfully acquired assets. For example, pursuant to proposed section 179B, a person could be required to expend significant resources and time attempting to prove the lawfulness of his or her activities, while there is no requirement on the State to collect evidence beyond that of reasonable suspicion that the person's total wealth exceeds the value of wealth lawfully acquired..

66. The experience in the Northern Territory, where similar unexplained wealth provisions are in force,[45] suggests that respondents to unexplained wealth applications are unwilling or unable to challenge such applications in court. In a written submission to the Parliamentary Joint Committee on the Australian Crime Commission's Inquiry into Serious and Organised Crime, the Northern Territory Department of Justice reported that in May 2009 the DPP concluded a number of significant proceedings reliant on the unexplained wealth provisions.[46] None of these proceedings were contested by the respondents and all resulted in 'consent forfeiture' by the Territory of the restrained assets. It was reported that as at June

[43] SOC Bill, proposed s178E of the POC Act.
[44] The Law Council notes that proposed s20A, authorising the making of a restraining order, includes a requirement that the authorising officer hold a reasonable grounds to suspect that the person committed a specified offence or that his or her wealth derived from the commission of a specified offence, however this requirement is not replicated or otherwise picked up in either proposed ss179B or 179E.
[45] See *Criminal Property Forfeiture Act* (NT) Part 6. .
[46] Northern Territory Department of Justice, Report to Parliamentary Joint Committee on the Australian Crime Commission, Hearing 2 March 2009, Supplementary Submission (June 2009) p. 2.

2009, the DPP is yet to have an unexplained wealth case determined by the Supreme Court. [47]

67. One explanation for the lack of judicial consideration of the unexplained wealth provisions in the NT is the significant burden placed on respondents seeking to resist such orders under the NT Act. Under the NT Act, an application for unexplained wealth is not dependent upon proof or even suspicion of criminality attaching to either the respondent personally or his or her wealth. The burden rests with the respondent to demonstrate that his or her wealth has been lawfully acquired (section 71(2)). The Act provides that where it is 'more likely than not' that the respondent has unexplained wealth, the court must make a declaration to that effect (section 71(1)). In such circumstances, it may be difficult for the person to resist an unexplained wealth order, even if his or her assets were lawfully acquired.

68. Under the proposed Commonwealth provisions, before an unexplained wealth restraining order can be made, the authorised officer must prepare an affidavit attesting to a suspicion that the person has committed any criminal offence related to a Commonwealth head of power, or that the whole or part of his or her wealth is derived from the commission of a such an offence.[48] However, when seeking to resist this order or the making of an order under proposed sections 179B or 179E, the onus is on the respondent to demonstrate that his or her wealth was not unlawfully acquired.

69. By reversing the onus of proof the proposed unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property.[49]

70. For example, assume a person under investigation for the possession of a prohibited substance. The police discover that the person owns considerable property. Even if the person has lawfully acquired the property, if a preliminary unexplained wealth order is made, the person must furnish documentary or other proof to establish the lawful source of each component of that property. If the person is unable to do so, he or she is placed in an invidious position. In contrast, the prosecution is not required to adduce evidence that the person engaged in any particular offence, other than to prepare an affidavit attesting that an authorised officer holds a suspicion that the person's total wealth exceeds the value of the wealth that was lawfully acquired. Once a preliminary unexplained wealth order has been made, the court must effectively confiscate the person's unexplained wealth, if not satisfied that the person subject to the order has discharged his or her burden to demonstrate that the wealth was not derived from any offence connected to a head of Commonwealth power.

71. The unexplained wealth provisions also have the potential to infringe the right to silence and exclude legal professional privilege, particularly when coupled with the use of examination orders. For example, family members, associates, colleagues and even legal representatives of suspected criminals could all be targeted for cross-examination in respect of an unexplained wealth order or related proceedings.[50] The mere suspicion that a person may have information about, or

[47] Northern Territory Department of Justice, Report to Parliamentary Joint Committee on the Australian Crime Commission, Hearing 2 March 2009, Supplementary Submission (June 2009) p. 2.
[48] See proposed s20A(3)(c) of the POC Act.
[49] For further discussion see Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p at 76.
[50] Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p 75.

assets derived from, the suspected criminal activities of others may be sufficient for the person to be compelled to answer questions on oath.

2. The provisions have the potential for arbitrary application

72. The reversal of the onus of proof coupled with the breadth of the proposed unexplained wealth provisions leaves open the real risk that they will be applied arbitrarily.

73. As noted above, once a preliminary unexplained wealth order is made, proposed section 179E means that the person's unexplained wealth must be confiscated unless the person is able to satisfy the court that their unexplained wealth is lawfully acquired.

74. Such broad, sweeping powers are open to misuse, overuse and arbitrary application particularly when they lack sufficient safeguards and have the potential to result in significant monetary gains to the state. For example, such provisions could be used as a method of harassing suspects who have been uncooperative with police or whom police have been unable to arrest due to lack of evidence.[51] Police may also be motivated to bring unexplained wealth applications in order to gather evidence as testimony given by a respondent as to how his or her property was obtained may be relevant to another line of enquiry. For example, it may provide the evidentiary basis for obtaining warrants to search and seize other property or items that may in turn be the subject of subsequent unexplained wealth orders.[52]

75. When asked to explain what safeguards exist to prevent against abuse of similar unexplained wealth provisions in the NT, the NT Police cited the affidavit accompanying the unexplained wealth order application as the primary safeguard against arbitrary application.[53] However, the Police noted that under the NT laws all that was needed to satisfy the requirements was a statement that a particular person's wealth was difficult to explain without suspecting him or her of committing a crime.[54]

76. There is a similar lack of effective safeguards to prevent against the arbitrary use of the unexplained wealth provisions proposed by the Commonwealth. For example, under proposed section 179B, a person will be required to appear in court and demonstrate that his or her total wealth is lawfully acquired if the court is satisfied that an authorised officer has reasonable grounds to suspect that the person's total wealth exceeds the value of the person's wealth that was lawfully acquired. There is nothing preventing the misuse of this power by the authorising officer, other than the court's power to strike out the affidavit, or parts of the affidavit, prepared by the authorising officer outlining the grounds for his or her suspicion or the court's power to revoke the order under s 179C, which requires a separate application by the person.

77. The potential for unexplained wealth applications to be applied arbitrarily is exacerbated by the lack of discretion invested in the court under proposed sections

[51] For further discussion see Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p at 76.
[52] Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p 75.
[53] Committee Hansard, Joint Committee on the Australian Crime Commission's Inquiry into Legislative Arrangements to Outlaw Serious and Organised Crime Groups, Darwin, Monday 2 March 2009, p. 10.
[54] Committee Hansard, Joint Committee on the Australian Crime Commission's Inquiry into Legislative Arrangements to Outlaw Serious and Organised Crime Groups, Darwin, Monday 2 March 2009, p. 10.

179B and 179E. For example, under proposed section 179E, the court *must* make any unexplained wealth order once certain prescribed conditions are met: there is no discretion for the court to consider other relevant factors, such as the age, socio-economic or cultural background of the person which might explain why he or she is unable to satisfy the court that the wealth was not derived from an offence, or the economic hardship that such an order would impose.

78. The lack of any effective safeguards to protect against the arbitrary application of these provisions is particularly concerning given the grave impact of an unexplained wealth order on a person's livelihood. The gravity of such orders is increased by the broad meaning attributed to the term 'unexplained wealth' which includes property owned by the person at any time, property that has been under the 'effective control'[55] of the person at any time and property that the person has disposed of or consumed at any time (section 179G(1)).

79. The Law Council notes that proposed section 179L allows the court to make an order directing the Commonwealth to pay a specified amount to a dependent of the person in certain limited circumstances, however, given the broad meaning attributed to 'unexplained wealth', this provision appears to offer little protection from the potentially crippling effect of an unexplained wealth order on innocent third parties.

3. Experience in WA and NT

80. It is not at all clear that unexplained wealth provisions have proven to be an effective prosecutorial tool in the two jurisdictions where they are currently in force. This has been demonstrated by the uncertainty surrounding the use of the unexplained wealth provisions in WA.

81. The WA DPP has reported that the number of proceedings finalised in circumstances where a declaration of confiscation was made in respect of unexplained wealth appear to represent a very small proportion of the total number of confiscation declarations made.[56] For example, a table provided to a Parliamentary Committee by the WA DPP shows that only five out of total of 148 declarations for confiscation were made on the grounds of unexplained wealth, compared with 102 on the grounds that the person was a declared drug trafficker.[57]

82. In its 2007 Inquiry into the WA Corruption and Crime Commission, the WA Joint Parliamentary Standing Committee on the Corruption and Crime Commission queried both the WA Police and the DPP regarding whether minimal effort is exerted in relation to the pursuit of unexplained wealth. Mr Kim Porter, Detective Superintendent of the WA Police told the Committee:

[55] 'Effective control' of property includes property that is not yet in the possession of the person subject to the order (section 179S).

[56] These figures relate to declarations of confiscation made between 2000 and 2006. Office of the Director of Public Prosecutions, *Annual Report 2005-2006* (2006). See also Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC Under the *Criminal Property Confiscation Act 2002*' p. 110.

[57] These figures relate to declarations of confiscation made between 2000 and 2006. Office of the Director of Public Prosecutions, *Annual Report 2005-2006* (2006). See also Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 110.

Largely we deal with drug traffickers …. They take up considerable portion of the time of the squad. The unexplained wealth side of things is more complicated and difficult. There is a philosophical hiatus between us and the Director of Public Prosecutions when it comes to unexplained wealth issues. In our view, the Criminal Property Confiscation Act 2000 was rewritten for the purpose of catering for unexplained wealth investigations. We are working with the DPP to define the differences between our interpretation of that section of the Act. We are working through the process at the moment where we see the Act as being one in which we are in a position to investigate people who have unexplained wealth … We want to investigate people we come across during the course of organised crime investigations. Even though we may not have caught them hands on with drugs, they live a wonderful lifestyle and there is a lot of suspicion about how they acquire their wealth. We think those people should explain where they get it from because their associations are such [that] they are mixing with the criminal element. We are working our way through that. At the moment, I suspect there are a number of reasons that the DPP is still cautious about moving into that area.[58]

83. The DPP told the Committee that the majority of unexplained wealth applications occurred in situations where confiscation proceedings had commenced on other grounds and where the related investigation uncovered information indicative of unexplained wealth.[59] It said that although the agency was not reluctant to progress unexplained wealth matters, such a perception may arise because the DPP often informs the WA Police that an investigation needs to be completed prior to any action being progressed.[60] The DPP expressed the view that the unexplained wealth provisions are useful in relation to property owned, controlled or given away by drug traffickers and should be routine in drug trafficking confiscation cases.[61]

84. These comments suggest that, at least in WA:

- the broad scope of the unexplained wealth provisions gives rise to the potential for differences in views between the DPP and the Police as to their correct application;

- the unexplained wealth provisions have been used sparingly since their introduction, and almost exclusively in conjunction with other confiscation mechanisms in the context of drug trafficking related confiscation proceedings.

85. In the NT the unexplained wealth provisions have been utilised in a number of instances and have been described by the NT Police and the NT Department of Justice as 'a fantastic tool in disrupting and fighting criminal groups'.[62] However, the

[58] Mr Kim Porter, Detective Superintendent, WA Police, *Transcript of Evidence,* 1 August 2007, pp.3-4. Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 111.
[59] Mr Ian Jones, Practice Manager, Confiscations, Officer of the Director of Public Prosecutions, *Transcript of Evidence,* (26 September 2007), p. 8. Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 112.
[60] Mr Ian Jones, Practice Manager, Confiscations, Officer of the Director of Public Prosecutions, *Transcript of Evidence,* (26 September 2007), p. 3.
[61] Mr Robert Cock, Director of Public Prosecutions (WA), Office of the Director of Public Prosecutions (WA), *Transcript of Evidence*, 26 September 2007, p. 8.
[62] Committee Hansard, Joint Committee on the Australian Crime Commission's Inquiry into Legislative Arrangements to Outlaw Serious and Organised Crime Groups, Darwin, Monday 2 March 2009, p. 7.

provisions have not yet been subject to any judicial consideration as far as the Law Council is aware.[63].

86. As noted above, the NT experience suggests that when faced with an application under unexplained wealth provisions respondents have not contested such applications. For this reason, it is difficult to ascertain whether these provisions are operating effectively or fairly or to determine whether appropriate safeguards are in place to guard against their arbitrary application. It is also difficult to evaluate the necessity of such wide reaching unexplained wealth provisions in the absence of any judicial consideration as to their use. If, for example, the unexplained wealth applications have not been resisted due to the strong evidentiary case advanced by the prosecution, it may be that other confiscation powers under the proceeds of crime regime with stronger safeguards against arbitrary application could also have been available for the prosecution to utilse.

4. The provisions are unnecessary in light of other confiscation mechanisms

87. The Law Council is not satisfied that it is necessary to further expand the already considerable confiscation powers at the Commonwealth level by introducing unexplained wealth provisions. The current POC Act provides a wide range of expansive mechanisms to recover ill-gotten gains and proceeds of crime, including:

- restraining orders prohibiting disposal of or dealing with property (which do not rely on the owner of the particular property being convicted of an offence);[64]
- forfeiture orders under which property is forfeited to the Commonwealth (which apply when certain offences have been committed, however it is not always a requirement that a person has been convicted of such an offence);[65]
- forfeiture of property to the Commonwealth on conviction of a serious offence;[66]
- pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences; [67] and
- literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences.[68]

88. These processes provide a wide range of mechanisms to investigate and recover ill-gotten gains and proceeds of crime, without requiring the existence of a criminal conviction or the instigation of criminal proceedings.

89. The Law Council notes that its concern that the unexplained wealth provisions are a step too far was shared by the Sherman Report, an independent review of the operation of the POC Act commissioned by the Commonwealth Government in 2006.[69] In that review it was observed that to introduce the unexplained wealth provisions as recommended by the AFP:

[63] Information from the Law Society of the Northern Territory
[64] POC Act Part 2-1.
[65] POC Act Part 2-2.
[66] POC Act Part 2-3.
[67] POC Act Part 2-4.
[68] POC Act Part 2-5.
[69] Tom Sherman AO, *Report of the Independent Review of the Operation of the Proceeds of Crime Act 2002* (October 2006), ('the Sherman Report').

would represent a significant step beyond the national and international consensus in this area. The AFPA submission refers to a 1997 resolution of the Interpol General Assembly which "recognised that unexplained wealth is a legitimate subject of enquiry for law enforcement institutions in their efforts to detect criminal activity and that subject to the fundamental principles of each country's domestic law, legislators should reverse the burden of proof (use the concept of reverse onus) in respect of unexplained wealth."

While this resolution is an important expression of consensus in the international police community it falls short of the wider consensus I believe is necessary to support the introduction of unexplained wealth provisions.

Unexplained wealth provisions are no doubt effective but the question is, are they appropriate considering the current tension between the rights of the individual and the interests of the community? ….

On balance I believe it would be inappropriate at this stage to recommend the introduction of these provisions but the matter should be kept under review.[70]

90. For these reasons, the Law Council strongly opposes the introduction of the amendments proposed in Schedule 1 of the Bill.

Freezing Orders

Nature of Proposed Changes

91. Schedule 2 Part 1 of the Bill would introduce freezing orders into the POC Act, with the aim of 'freezing' criminal funds to prevent them from being dissipated.

92. The rationale for introducing these measures is explained in the Explanatory Memorandum as follows:

Law enforcement agencies have identified that the time between identifying criminal funds in an account and obtaining a restraining order can result in criminal funds being moved. Even where restraining orders are obtained ex parte, significant documentation and a court hearing are required, which can provide more than enough time for funds in an account to be transferred. South Australia and Victoria have provisions for interim freezing of suspected criminal proceeds held in bank accounts.

Freezing orders will enable the temporary restraint of liquid assets held in accounts with financial institutions. The application process for freezing orders will be simpler than for restraining orders and an expedited application process will be available in circumstances where the time take to obtain a formal restraining order increases the risk that suspected proceeds or instruments of crime will be transferred to frustrate confiscation proceedings.[71]

93. Under the Bill, a new Part 2-1A will be inserted into the POC Act. Proposed section 15B will require a freezing order to be made against a financial institution on application of an authorised officer where there are grounds to suspect the account balance reflects proceeds or an instrument of a serious offence and when a

[70] Sherman Report [4.64]-[4.67].
[71] Explanatory Memorandum p. 23.

magistrate is satisfied that, unless a freezing order is made, there is risk that the balance will be reduced.

94. An application for a freezing order must be accompanied by an affidavit which includes sufficient information to identify the account/s to be frozen and the financial institution in which the account is held.[72] It must also set out the grounds to suspect that the balance of the account is wholly or partly proceeds or an instrument of a serious offence. The affidavit must also include the grounds on which a person could be satisfied there is a risk that the balance of the account will be reduced if a freezing order is not made.

95. An application for a freezing order can be made by telephone, fax or other electronic means in an urgent case.[73]

96. Once a freezing order has been made, it must be served on the relevant financial institution and to each person whose account will be affected by the order before the end of the first working day after the order was made.[74]

97. A financial institution will then be prevented from making transfers or withdrawals from a specified account, except for making withdrawals from an account for the purpose of meeting a liability imposed by State, Territory or Commonwealth law.[75]

98. A freezing order will remain in force for a maximum duration of three working days, but can be extended if an application for a restraining order to cover the amount has been made or an order is made under section 15P extending the freezing order. [76]

99. Proposed section 15Q allows a magistrate to vary a freezing order on application by a person in whose name the account is held to meet the living expenses of the person or their dependents, the reasonable business expense of the person or a specified debt incurred in good faith by the person.

Law Council Concerns

100. The Law Council is opposed to the adoption of these proposed amendments.

101. The proposed freezing orders would be directed at financial institutions which automatically suspend transfers or withdrawals from an account. Such orders would extend the already expansive Commonwealth proceeds of crime regime into an area with great potential to undermine the presumption of innocence and infringe individual rights. For example, under the existing provisions of the POC Act, restraining orders against an individual, which can have the same effect as a freezing order, may already be made ex parte.[77]

102. The Law Council is also concerned that the proposed freezing orders can be made without the affected party being heard and without the court having any discretion to refuse to make such an order once the requirements of proposed section 15B have been met.

[72] SOC Bill, proposed s15C of the POC Act.
[73] SOC Bill, proposed s15D.
[74] SOC Bill, proposed ss15J and 15N.
[75] SOC Bill, proposed s15K and 15L of the POC Act.
[76] SOC Bill, proposed s15N.
[77] POC Act ss18-19.

103. Further, the proposed amendments would make it a criminal offence for a financial institution to disclose the existence of freezing orders except to specified persons (maximum penalty of 5 years imprisonment or 300 penalty units or both).[78]

104. The Law Council queries whether the proposed freezing power and related offences are necessary given the range of orders currently available under the Act to prevent the dissipation of proceeds of crime.

105. In particular the Law Council queries the necessity of the proposed freezing order regime in light of the already expansive powers to make restraining orders.

106. For example, section 18 of the POC Act provides that a restraining order must be made if the DPP applies for the order and there are reasonable grounds to suspect that a person has committed a serious offence. Once a restraining order is made, property must not be disposed of or otherwise dealt with by any person. Pursuant to subsection 26(4) an application for a restraining order can be made ex parte. Serious penalties flow from failing to comply with a restraining order, including imprisonment for up to five years.

107. This regime is designed to ensure that proceeds or instruments of crime are not dissipated prior to a confiscation order being made. The ability to make an application for a restraining order ex parte is specifically designed to ensure persons are not able to dissipate funds prior to a restraining order coming into effect.

108. The Law Council is of the view that unless this regime can be conclusively shown to be ineffective in preventing the dissipation of proceeds or instruments of crime, no further powers should be introduced to achieve this purpose.

109. In the Explanatory Memorandum to the Bill, the introduction of freezing orders is said to be necessary even where restraining orders are obtained ex parte, as the preparation of significant documentation and court hearing time provides opportunities for funds in an account to be transferred. No data is provided in relation to the number of cases where such difficulty has been experienced.

110. The Law Council also queries whether permitting a court to make freezing orders would adequately address this perceived difficulty. As observed in the Sherman Report, if freezing orders are required to be issued by a court, there would appear to be little difference in terms of the documentation required and the hearing time necessary in an application for a freezing order compared to that for a restraining order.[79] As Mr Sherman concluded, the provision for ex parte applications for the exercise of the other powers under the Act would appear to 'go a considerable distance towards providing quick action that would not put suspects on alert'. [80]

111. For these reasons the Law Council opposes the introduction of freezing orders into the POC Act.

[78] SOC Bill, proposed s15L of the POC Act.
[79] Sherman Report at [4.68].
[80] Sherman Report at [4.68].

Removal of time limitations for non-conviction based asset confiscation

Nature of the Proposed Amendments

112. Schedule 2 Part 2 of the Bill seeks to amend a number of sections of the POC Act dealing with restraining orders, forfeiture orders, pecuniary penalty orders and production orders so as to remove the requirement that applications for such non-conviction based orders must be made within six years of the commission of the criminal offence relied upon to ground the application. This will permit the recovery of the proceeds of crime, on a non-conviction basis, regardless of when the offence occurred.

113. These amendments were recommended by the CDPP in its submission to the Sherman Review. They are said to be necessary to address criminal activity stretching over more than six years, such as fraud and money laundering offences. The provisions placing time limits on non-conviction based confiscation is said to have prevented authorities pursuing cases involving tens of millions of dollars in criminal proceeds.

114. The Sherman Report recommended extending the time limitation to twelve years, however, the Explanatory Memorandum provides that 'it was considered appropriate to remove the time limit altogether.'[81] The Explanatory Memorandum to the Bill provides:

> *The removal of the six year time limitation for non-conviction based asset recovery will ensure that criminals are not able to benefit from their crimes, regardless of when they occurred. It also ensures that those who are able to successfully hide their criminal conduct for a sufficiently long period of time are not rewarded by being able to retain the proceeds*.[82]

Law Council's Concerns

115. The Law Council has a number of concerns with these proposed amendments.

116. The non-conviction based confiscation regime under the POC Act already represents a significant expansion on the traditional common law position that the power to confiscate unlawfully acquired property depends upon the existence of a criminal conviction.[83] The non-conviction based confiscation regime departs from the notion of the presumption of innocence by effectively imposing a punishment on a person for criminal conduct for which the person has yet to be convicted beyond reasonable doubt.

117. While the Law Council recognises that the current proceeds of crime regime is based on the broader concept that no person should be entitled to be unjustly enriched from any unlawful conduct, criminal or otherwise, it maintains that great care should be taken when seeking to expand the scope of the non-conviction based confiscation regime.

[81] Explanatory Memorandum p. 33.
[82] Explanatory Memorandum p. 33
[83] For further discussion see Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p. 66.

118. The proposed amendments would considerably expand the scope of the non-conviction based regime by removing *any* time limit on the confiscation of proceeds of crime.

119. Removing any time limit on non-conviction based confiscation goes much further than the approach recommended by the Sherman Report, which suggested a doubling of the existing confiscation limitation period from six to 12 years, with the specific requirement that all relevant illegal conduct fall within the 12 year period.

120. In his report, Mr Sherman agreed with the submission advanced by the CDPP that extending the six year limitation to 12 years was reasonable. However, it was noted 'with the extended period the case for covering part of the relevant conduct occurring before the 12 year period is weakened'. [84] Mr Sherman stated that 'there have to be some limits on what is essentially a civil liability'.[85]

121. The Law Council does not support the Sherman Report's proposal to extend the limitation period beyond the existing six year period. However, the Law Council agrees with the observation that some time limit is necessary to protect against unlimited interference with individual rights. The Law Council notes that the ability to commence other civil proceedings is generally subject to time limits, with six years being a common time limit.

122. The risk for unjustified intrusion into the property rights of individuals is particularly acute given the mandatory nature of the civil confiscation regime under the Act. Pursuant to section 47 of the POC Act, for example, the court is *required* to make a forfeiture order in relation to all property which has not been subject to a successful application for exclusion, following a successful application by the DPP. In other words, provided the DPP could demonstrate reasonable grounds to suspect that the person engaged in criminal activity some thirty years ago, his or her property could be forfeited regardless of whether he or she was ever convicted, or even prosecuted for, the suspected criminal conduct.

123. Given the significance of the proposed amendments, the Law Council is not convinced that the Department or the CDPP has outlined sufficient grounds to justify a complete removal of any time limitation on the non-conviction based confiscation regime.

Non-conviction based confiscation of instruments of serious offences

Nature of the Proposed Amendments

124. Schedule 2 Part 3 of the Bill will amend the POC Act to enable the restraint and forfeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction.

125. The POC Act currently permits the proceeds of a wide variety of offences to be confiscated on a civil standard of proof, but instruments of indictable offences (other than terrorism offences) may only be confiscated where a person is convicted of the offence.

[84] Sherman Report Appendix D, p. D3.
[85] Sherman Report Appendix D, p. D3.

126. The proposed amendments will replace the references to instruments of terrorism offences in the provisions that provide for non-conviction based confiscation with references to instruments of 'serious offences' as defined in section 338 of the Act (offences punishable by more than three years imprisonment that fall within specified categories, such as serious drug offences, money laundering and certain people smuggling offences).

127. The proposed amendments will provide the court with the discretion to make or amend a civil forfeiture order to take into account potential hardship to any person, the use ordinarily made of the property and the gravity of the offences concerned.

128. The proposed amendment will apply to applications for restraining or forfeiture orders that are made on or after the commencement of the amendments, regardless of when the conduct constituting the relevant offence occurred.

Law Council's Concerns

129. The Law Council is opposed to the adoption of the proposed provisions which seek to deal with instruments of serious offences in the same way as proceeds of crime. The Law Council shares the view advanced by the Australian Law Reform Commission ('the ALRC') in its review of the *Proceeds of Crime Act 1987* that a distinction should properly be made between *profits* or proceeds of illegal activity and *instruments* of illegal activity.[86] As the ALRC observed:

> *[T]he broad principle justifying the recovery of the profits of unlawful conduct does not, …, go so far as to support, on the basis of a civil finding alone, the confiscation of property (not being itself profits) used in or in connection with the unlawful conduct in question.*
>
> *On the Commission's analysis, such confiscation has its foundation in the narrower principle that property used in or in connection with criminal activity should be able to be confiscated either for the purpose of denying the criminal the opportunity to use that property for the commission of further offences or as part of the punishment meted out in respect of the offence.* [87]

Thus, while the ALRC found that:

> *there is a clear basis in principle for extending the scope of the recovery of the proceeds (qua profits) of unlawful activity beyond the present POC Act boundaries of proven criminal conduct to include any conduct that is unlawful either under the criminal or civil law that results in the unjust enrichment of the perpetrator…*[88]

It also observed that:

> *… the concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the one time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are*

[86] Australian Law Reform Commission, *Confiscation that Counts – A Review of the Proceeds of Crime Act 1987* (1998) ALRC Report No 87 ('ALRC Report').
[87] ALRC Report [4.149]-[4.150].
[88] ALRC Report [2.76].

independent in principle from the right of the state to recover the unjust enrichment and vice-versa. [89]

130. This distinction is reflected in the current provisions of the POC Act, which permit the proceeds of a wide variety of offences to be confiscated on a civil standard of proof, but provide that instruments of indictable offences (other than terrorism offences) may only be confiscated where a person is convicted of the offence.

131. There is little in the Explanatory Memorandum to the Bill or the Second Reading Speech that demonstrates why such a significant expansion of the non-conviction based confiscation regime, and a shift away from the principles explored at length by the ALRC, is considered necessary.

132. The non-conviction based confiscation regime must be recognised as already representing a significant departure from the traditional common law position. Under non-conviction based schemes, assets can be confiscated without the need for a criminal conviction[90] and prosecuting authorities need only prove the commission of an offence or involvement in illegal activities to the civil standard (balance of probabilities) before confiscation is triggered.[91]

133. As a result, the expansion of this regime demands to be justified by sound evidence of necessity. The fact that the non-conviction based confiscation regime has proven to be an effective mechanism to remove the proceeds of unlawful activity does not of itself justify further expansion of this regime to permit the civil confiscation of instruments of illegal activity.

Information Sharing

Nature of the Proposed Amendments

134. Schedule 2 Part 4 of the Bill would amend the POC Act to permit information obtained under the Act to be shared with other government agencies.

135. The proposed information sharing provisions would permit any information acquired under the Act to be shared with an agency that has functions under the Act, an agency that has a lawful function to investigate or prosecute criminal conduct or for the protection of public revenue.

136. The proposed amendments would introduce a new subsection 8(2) into the POC Act which would authorise the disclosure, to certain authorities for certain purposes, of information obtained under Chapter 3 of the POC Act and certain other provisions.

137. The agencies to whom information could be shared are those agencies that have functions under the Act, or have a lawful function to investigate or prosecute criminal conduct (such as Commonwealth and State police forces) or for the protection of public revenue (such as the Australian Tax Office).[92]

138. The proposed amendments would also insert a table into Chapter 3 of the Act which would set out the authority to which disclosure may be made and the purposes for which disclosure may be made. For example, a disclosure to the Australian Tax Office may be made for the purpose of protecting public revenue.

[89] ALRC Report [2.78].
[90] POC Act s14.
[91] POC Act s47(3).
[92] SOC Bill, proposed s223(4) of the POC Act.

139. The proposed amendments to Chapter 3 would also provide that a disclosure of information that includes an answer or document given in response to an examination is not admissible in evidence in civil or criminal proceedings against the person who gave the answer or provided the document.[93]

Rationale for the Proposed Amendments

140. The Act currently contains a wide range of information-gathering powers, including:

- coercive examination powers;[94]
- document production powers; [95] and
- search and seizure mechanisms[96]

141. The Act provides no specified limit on the use and sharing of information obtained under the Act. However, the limit of information sharing under the Act has been subject to judicial consideration. For example, in the High Court decision of *Johns v Australian Securities Commission* Brennan J observed:

> *A statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed. The statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose. If it were otherwise, the definition of the particular purpose would impose no limit on the use or disclosure of the information. The person obtaining information in exercise of such a statutory power must therefore treat the information obtained as confidential whether or not the information is otherwise of a confidential nature. Where and so far as a duty of non-disclosure or non-use is imposed by the statute, the duty is closely analogous to a duty imposed by equity on a person who receives information of a confidential nature in circumstances importing a duty of confidence.*[97]

142. This decision was followed in *Director of Public Prosecutions v Hatfield,*[98] where Hulme J held that the Act did not permit the CDPP to disclose information obtained in the course of an examination under the Act otherwise than for the purposes of the Act.

143. As noted in the Sherman Report, these cases reflect the general principle that the use of compulsion powers can only be for the purposes for which the power was enacted. The courts have taken a very narrow approach to the dissemination of information acquired under compulsion.[99]

144. In his report, Mr Sherman observes that *Hatfield* has introduced considerable uncertainty to the use and dissemination of information obtained under the Act, even though the Act contains no general prohibition on the use of information. [100]

145. In order to resolve this state of uncertainty, the Sherman Report recommended that:

[93] SOC Bill, proposed s266A(3) of the POC Act.
[94] POC Act Part 3.1.
[95] POC Act Part 3.2.
[96] POC Act Part 3.5.
[97] (1992-3) 178 CLR 408 at 424.
[98] [2006] NSWSC 195.
[99] Sherman Report at [4.13].
[100] Sherman Report at [4.14].

The Act contain a clear mandate that information acquired in any way under the Act relating to any serious offence can be passed to any agency having a lawful function to investigate that offence, and to ITSA where it will assist in the discharge of its functions under the Act and to the ATO for the protection of the revenue. [101]

146. The proposed amendment is said to give effect to this recommendation, as noted in the Explanatory Memorandum:

The amendments ensure that information obtained under the regime can be disclosed when that information will assist in the prevention, investigation and prosecution of criminal conduct.

It was never the intention of the Act that information obtained in an examination could only be used for the purposes of confiscation proceedings under the Act and could not be shared for any other reason. It is desirable that, if during the course of an examination hearing, information about planned serious criminal activity is uncovered, such information is able to be passed on to relevant law enforcement agencies.[102]

Law Council's Concerns

147. The Law Council has a number of concerns with these proposed amendments.

148. The Law Council is of the view that given the coercive nature of the information gathering powers under the Act, strict controls should be placed on the sharing of this information between government agencies. Further, if an information sharing regime is introduced, specific safeguards should be in place to protect against undue intrusion into the individual rights of those persons in respect to whom information is gathered and shared.

149. The Law Council is also concerned that the proposed information sharing scheme appears much broader in nature to that proposed in the Sherman Report.

150. For example, rather than limiting the sharing of information to law enforcement agencies to that concerning a serious offence, the amendments permits *any* information lawfully obtained under the Act to be shared with the law enforcement agency for the purpose of preventing, investigating or prosecuting a crime against the law of the relevant jurisdiction.[103]

151. The range of agencies to which information can be shared also appears to be considerably broader, including agencies with specific functions under the Act as well as an agency that has a lawful function to investigate or prosecute criminal conduct or for the protection of public revenue.

152. The Law Council notes that there are some limits placed on this broad information sharing regime, namely:

- information may only be shared with investigative or prosecuting agencies where it is reasonably believed the information will assist the agency to fulfil its lawful functions; and

[101] Sherman Report Recommendation 1.
[102] Explanatory Memorandum p. 41.
[103] SOC Bill proposed s266A(2) of the POC Bill.

- information may only be shared with the Australian Taxation Office where it is reasonably believed the information will assist to fulfil this function.

153. However, these limits do not appear to provide the type of safeguards necessary to protect the privacy rights of individuals concerned or to guard against misuse of information by agencies. Additional safeguards could include:

    - limiting information sharing to information that concerns specific, serious offences;

    - introducing a system of regular review and independent oversight of information sharing between agencies; and

    - imposing requirements for information to be destroyed if it is no longer relevant to an allowable purpose.

154. The Law Council notes that in circumstances where the disclosure of examination material and production order material is permitted, the proposed amendments will preserve a limited form of direct use immunity, which apply to all examination material and production order material in cases where further disclosure is permitted.[104] However, this direct use immunity does not apply to the offences concerning giving false or misleading information or in proceedings on application under the POC Act.[105] Further, direct use immunity provides only limited protection against self-incrimination in respect of other criminal proceedings. This is because while direct use immunity provides that information obtained under the Act is not admissible in evidence against the person in other criminal proceedings, there is no such bar on the use of further information or evidence subsequently revealed as a result of the information obtained (known as 'derivative use immunity'). This means that information obtained under the Act 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

Legal Aid Payments

Nature of the Proposed Amendments

155. Schedule 2 Part 5 of the Bill will amend the arrangements under the POC Act for legal aid commissions to recover costs incurred by people who have assets restrained under the Act.

156. Under the current provisions, a court is prevented from making an order allowing legal costs to be met out of restrained property.[106]

157. Instead, the Commonwealth *Legal Aid Priorities and Guidelines* provide that a person whose assets are restrained under the 2002 Act may apply to the relevant state or territory Legal Aid Commissions for legal assistance for certain matters. He or she will be assessed under the Legal Aid Commission's means and merits test without the restrained assets being taken into account.

158. If legal aid is provided to a person whose assets are restrained under the POC Act, the Legal Aid Commissions may be reimbursed – first from the restrained assets of

[104] SOC Bill, Schedule 2, proposed s266A(3)-(5) POC Act.

[106] POC Act s24(2)(ca)

the person, and, to the extent of any shortfall, from the general Confiscated Assets Account. There is a complex certification procedure for payment from the Confiscated Assets Account if there is a shortfall.[107]

159. Under the new scheme,[108] legal aid commissions will be able to invoice the Official Trustee directly for costs incurred by a person with restrained assets. The Official trustee will then pay the costs from the Confiscated Assets Account and the Commonwealth will then recover the amount from the person who received the legal aid, up to the value of the restrained assets.

160. The new arrangements for paying a legal aid commission's costs apply where a legal aid commission incurs costs representing someone whose assets are or were subject to a restraining order at the time of representation, or representing a person who was a suspect at the time of the representation and whose property was at that time covered by a restraining order. [109] The legal aid commission must give a bill to the Official Trustee, who will then pay the costs to the commission from the Confiscated Assets Account.

161. Proposed subsection 292(2A) provides that if the Official Trustee is satisfied that the balance of the Confiscated Assets Account is insufficient to pay the legal costs, and there is a restraining order in place, the Official Trustee must, to the extent possible, pay the legal costs out of the property covered by the restraining order.

162. If the Official Trustee pays an amount to the commission out of the restrained assets, the person must pay to the Commonwealth an amount equal to the lesser of the amount paid to the legal aid commission or the value of the person's property covered by the restraining order.

163. The Explanatory Memorandum to the Bill states that these amendments respond to the recommendations in the Sherman Report that all claims for legal expenses which have been certified as fair, reasonable and duly expended by legal aid commissions on proceedings relating to property that has been restrained under the POC Act should be paid directly out of the Consolidated Assets Account.[110]

Law Council's Concerns

164. The Law Council shares the concerns of a number of legal aid commissions that the current procedure for recovering legal costs in respect of proceeds of crime matters is problematic and in need of reform.

165. When the current POC Act was introduced in 2002, it was said that the bill will enable 'all persons the subject of proceedings under the bill … to seek assistance from commissions without impacting adversely on other legal aid priorities.'[111] However, a number of submissions to the 2006 Sherman Review of the 2002 Act asserted that the Act had failed to achieve these aims For example, in its submission to the Sherman Review, the NSW Legal Aid Commission[112] said:

[107] Section 292 to 294 of the POC Act set out the procedures for Legal Aid Commission to recover costs expended on proceeds of crime matters.
[108] SOC Bill, Schedule 1 Part 5 proposed sections 292 and 293 of the POC Act.
[109] SOC Bill, proposed s69(1)(a) of the POC Act.
[110] Explanatory Memorandum p. 43.
[111] Second Reading Speech, *Proceeds of Crime Bill 2002* (Cth).
[112] The NSW Legal Aid Commission's submission was supported by National Legal Aid on behalf of the other State and Territory Legal Aid Commissions.

At the outset of the submission the Commission would like to raise some concerns it has with the requirement of making grants of legal aid for proceedings under the Act which are matters that would not normally form part of the Commission's legal practice. The Commission's core business is about providing legal services to the socially and economically disadvantaged, and under the Act and attendant Guideline the Commission has been asked to turn its resources to granting aid in matters which are about conviction and non-conviction based recovery of criminal assets. Not only are the matters complex and resource intensive at both a practice and administrative level, but they are matters which do not sit well with the philosophy underpinning the Commission's vision and mission statement. It is the Commission's considered view that these matters are an inappropriate use of the Commission's funds and resources. The resources expended on these matters have the potential (without full recovery) to impact negatively on the core business and priorities of the Commission, which is primarily about serving socially and economically disadvantaged clients.

The Commission does not believe that it should have a role in the recovery of assets in proceedings pursuant to the Act. The Commission is of the view that it is being used in a defacto way to regulate and police how private legal practitioners use restrained assets in proceedings under the Act. Such regulation seems to have been included in the Act as a result of perceived misuse of restrained assets. There are other methods which could be adopted to achieve such an aim and it is the Commission's submission that these should be pursued.

166. The Law Council endorses these views.

167. People who seek legal aid because their funds are restrained under the 2002 Act are in a different position to other legal aid recipients. This is because the funds expended on their legal costs will ultimately be recovered, wherever possible, from their restrained assets. If found to be the proceeds of crime, such assets will be forfeited to the Commonwealth and thus lost to the person at any rate. However, such assets may equally be found to have been legitimately derived, and thus will, in time, be released to the legal aid recipient *minus legal costs*.

168. Therefore, it is not clear at the time the legal aid is provided, to what extent it is really self funded. Despite this, people who seek legal aid because their funds are restrained under the POC Act are afforded no greater control over the conduct of their claim or defence than any other legal aid recipient. They are afforded no greater choice with respect to the legal representation appointed to them and, like other legal aid recipients, are limited to legal counsel prepared to accept legal aid rates of remuneration. This consequence of the current and proposed scheme is particularly stark where a defendant has sought and secured legal representation in respect of criminal proceedings, and following the commencement of that representation, a restraining order is issued preventing the defendant from continuing to meet his or her legal costs. In such circumstances the defendant may be forced to seek legal aid assistance and, as a direct result, to change his or her legal practitioner if the practitioner does not undertake legal aid work or is not approved by the Legal Aid Commission for any reason.

169. For these reasons, the Law Council is not convinced that the proposed amendments in the current Bill will remedy the fundamental shortcomings of the current regime, although they may relieve some of the administrative and technical burdens currently placed on legal aid commissions.

170. Rather than substituting the current system for one that enables legal aid commissions to recover costs more directly through the Confiscated Assets Account, the Law Council submits that persons involved in proceedings under the 2002 Act or related criminal proceedings should be able to make an application to the court to have restrained assets released to meet legal costs, as is the case in NSW.[113] This approach would ensure that persons whose assets are restrained retain an appropriate degree of control over their choice of legal representatives and relieve the burden for legal aid commissions of dealing with such matters, which are often outside of their core functions.

171. Any concerns regarding the inappropriate or excessive dissipation of funds through expenditure on legal fees should be addressed through a court supervised scale of costs regime.[114]

[113] In New South Wales when making a restraining order or freezing notice, the court may make provision for meeting a person's reasonable expenses in defending a criminal charge: *Confiscation of Proceeds of Crime Act 1989* (NSW) s 46.

[114] For example, in NSW the court may make an order for taxation of legal expenses to be met out of restrained or frozen property.

Amendments to Controlled Operations, Assumed Identities and Witness Protection Regime

172. Schedule 3 of the Bill replaces the existing controlled operations, assumed identities and witnesses protection regimes currently found in the *Crimes Act 1914* (Cth).

173. These amendments are said to implement national model legislation developed by the Joint Working Group of the Standing Committee of Attorneys-General (SCAG) and the then Australian Police Ministers Council in 2003. This model legislation was endorsed by SCAG at the November 2003 SCAG Meeting. [115]

174. The Explanatory Memorandum provides that the intent of the model legislation is to:

> *harmonise, as closely as possible, the controlled operations, assumed identities and protection of witness identity across Australia and enable authorisations issued under a regime in one jurisdiction to be recognised in other jurisdictions.* [116]

175. Once adopted in each Australian jurisdiction, the model laws will:

- allow an authority for cross-border controlled operations issued in one jurisdiction to be recognised in other participating jurisdictions, without the need to make a separate application for a controlled operation in the second jurisdiction;
- enable a person authorised to acquire and use an assumed identity in one jurisdiction to lawfully acquire evidence of that assumed identity in another jurisdiction; and
- enable a witness identity protection certificate that is issued in one jurisdiction to be recognised in proceedings held in another jurisdiction. [117]

Controlled Operations

Nature of Proposed Amendments

176. Schedule 3 of the Bill will insert a new controlled operation regime as Part 1AB of the *Crimes Act*. This new Part will:

- authorise controlled operations to be carried out to obtain evidence that may lead to the prosecution of a person for a 'serious Commonwealth offence' or a serious State offence that has a federal aspect';[118]
- provide protection against criminal and civil liability for law enforcement officers who participate in operations that have been validly authorised under this Part;[119]

[115] See Joint Working Group Report, *Cross Border Investigative Powers for Law Enforcement* (November 2003). This report was endorsed by endorsed by SCAG members at the November 2003 Meeting. Ministers committed to amending their legislation as a priority. See Standing Committee on Attorney's General, *Annual Report 2003/2004*, available at http://www.scag.gov.au/lawlink/scag/ll_scag.nsf/pages/scag_annual_reports
[116] Explanatory Memorandum p. 46.
[117] Explanatory Memorandum p. 46.
[118] 'Serious offence' is defined in SOC Bill, Schedule 3 proposed s15GI of the *Crimes Act* as an offence carrying a maximum penalty of imprisonment for three or more years that falls within the categories of offences specified in proposed subsection 15GE(2) and (3) of the *Crimes Act.*

- provide protection against criminal and civil liability for civilian informants who participate in a controlled operation in circumstances where a law enforcement officer could not perform the function to be performed by the informant; [120]

- provide protection against liability for Commonwealth offences for participants in operations that have been validly authorised under State and Territory laws, purportedly without requiring a separate Commonwealth authority to be sought for the controlled operation; [121]

- ensure that evidence obtained through a properly authorised State or Territory controlled operation can be used in Commonwealth prosecutions without being subject to challenge on the ground that it was obtained through the commission of an offence; [122]

- extend the allowable time frame for controlled operations; [123]

- streamline reporting requirements; [124] and

- prescribe offences for the unauthorised disclosure of information relating to controlled operations, including aggravated offences, where the disclosure endangers the safety of others.[125]

177. The amendments will also:

- allow foreign law enforcement officers, under the control and supervision of an Australian law enforcement agency, to participate in controlled operations;

- increase the Ombudsman's inspection powers and include a requirement for the Ombudsman to report on its own monitoring of controlled operations; [126] and

- require approval by an AAT member for extension of operations beyond three months and provide that the maximum duration for a controlled operation is 24 months; [127]

178. Under the proposed controlled operations regime, 'authorising agencies' are the Australian Federal Police, the Australian Crime Commission and the Australian Commission for Law Enforcement Integrity. [128]

Law Council's Key Concerns

179. The Law Council is pleased that these proposed reforms of the controlled operations regime address a number of the concerns raised by the Law Council when similar reforms were proposed in the *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* ('the NIP Bill'). In particular, the Law Council is pleased that the proposed 2009 amendments include:

[119] SOC Bill Schedule 3 proposed ss15HA, 15HB of the *Crimes Act.*
[120] SOC Bill Schedule 3 proposed ss15HA, 15HB of the *Crimes Act.*
[121] SOC Bill Schedule 3 proposed s15HH of the *Crimes Act.*
[122] SOC Bill Schedule 3 proposed ss15HH, 15GA of the *Crimes Act.*
[123] SOC Bill Schedule 3 proposed s15GT of the *Crimes Act.*
[124] SOC Bill Schedule 3 proposed ss15HM, 15HN of the *Crimes Act.*
[125] SOC Bill Schedule 3 proposed s15HK of the *Crimes Act*
[126] SOC Bill Schedule 3 proposed ss15HS-15HY of the *Crimes Act*
[127] SOC Bill Schedule 3 proposed ss15GT-15GU of the *Crimes Act*
[128] SOC Bill Schedule 3 proposed s15GC of the *Crimes Act*

- a requirement that an authorisation for a controlled operation specify the nature of the criminal activities covered by the authorisation, the identity of each participant in the controlled operation and the nature of the controlled conduct in which authorised participant may engage ; [129]

- the inclusion of a maximum duration for controlled operations,[130] although as will be discussed below, the Law Council is concerned by the proposed length of this maximum duration;

- enhanced reporting requirements; [131] and

- a continued role for Administrative Appeal Tribunal (AAT) members in approving extensions of controlled operations for more than three months. [132]

180. Despite these improvements, the Law Council continues to have the following concerns with the proposed controlled operation regime.

1. *Absence of an independent and external approval processes for controlled operations*

181. Under the proposed amendments, as under the existing provisions of the *Crimes Act*, an 'authorising officer' can hear and grant an application to conduct a controlled operation. 'Authorising officers' include certain high ranking officers of the Australian Federal Police (AFP), the Australian Crime Commission (ACC), and the Australian Commission for Law Enforcement Integrity (ACLEI).[133]

182. Under the proposed provisions, the authorising officer will be responsible for authorising the controlled operation, determining its scope and time frame, authorising the participants in the operation (which can include civilian participants and foreign law enforcement officers) and imposing any conditions on the operation. The authorising officer is also responsible for authorising any variations to the controlled operation.

183. The Explanatory Memorandum states that this form of internal authorisation procedure is:

> *appropriate, as the conduct of controlled operations is essentially an operational matter and internal authorisation provides operational efficiency and protects the security of the investigation.* [134]

184. It says that the reporting role of the Ombudsman will ensure appropriate oversight and monitoring of this process. [135]

185. The Law Council challenges the view underpinning both the model laws and the existing Commonwealth provisions that internal authorisation procedures provide appropriate safeguards against the misuse of the power to license and confer impunity for unlawful conduct.

[129] SOC Bill Schedule 3 proposed s15GK of the *Crimes Act*
[130] SOC Bill Schedule 3 proposed s15GU(2) of the *Crimes Act*
[131] SOC Bill Schedule 3 proposed ss15HM-15HQ of the *Crimes Act*
[132] SOC Bill Schedule 3 proposed s15GX of the *Crimes Act*
[133] 'Authorising officer' is defined in SOC Bill, proposed s15GF of the *Crimes Act*.
[134] Explanatory Memorandum p. 60.
[135] Explanatory Memorandum p. 60.

186. The Law Council submits that it is inappropriate for a law enforcement officer of whatever rank to be responsible for authorising the participation of civilians and other law enforcement officers in unlawful conduct. What is needed is external, independent oversight of the authorisation of such operations.

187. The Explanatory Memorandum states that it is appropriate that the authorisation process for controlled operation remains internal as the conduct of controlled operations is 'essentially an operational matter' and internal authorisation provides 'operational efficiency and protects the security of the investigation.'[136]

188. The Law Council submits that the security of the investigation would also be protected, if the authority is an external authority such as a retired judge. As to operational efficiency, the Law Council is of the view that public confidence in the process of authorising the very extraordinary tool of a controlled operation would be significantly enhanced by the scrutiny and authorisation being independent of operations within the law enforcement agency. A retired judge with substantial experience in the criminal jurisdiction will have no difficulty in understanding and evaluating operational aspects put to him or her by the law enforcement applicant.[137] This view was also held by the Criminal Bar Association in its submission to the SCAG Working Group on the model laws in 2003,[138] which was endorsed by both the Law Society of New South Wales and the Law Council.

189. The Law Council also challenges the claim in the Explanatory Memorandum that review by the Ombudsman provides sufficient oversight in respect of these provisions. [139] In particular, six monthly and annual review of compliance with application procedures by the Ombudsman is insufficient to ensure that controlled operations are only authorised and conducted in circumstance where:

- there is a real likelihood that a serious Commonwealth offence has been or is being committed;
- the nature and extent of the offence justifies a controlled operation;
- any unlawful activity involved in conducting the operation will be limited to the maximum extent consistent with conducting an effective controlled operation; and
- the operation will not involve conduct that will serious endanger the health or safety or a person.

190. The Law Council considers these minimum considerations should be taken into account by an external oversight body at the time the application to authorise a controlled operation is made.

191. For these reasons, the Law Council submits that the model laws in respect of controlled operations should be reviewed, and that the existing Commonwealth provisions be amended to include authorisation of controlled operations by an external oversight body.

[136] Explanatory Memorandum p. 60.
[137].
[138] Criminal Bar Association, Victoria, Submission to *Leaders Summit on Cross Border Powers for Law Enforcement*, SCAG Working Group, (2003) p. 14
[139] Explanatory Memorandum p. 60.

2. Maximum duration for controlled operations

192. Under the proposed amendments, the duration for a formal authority for a controlled operation is limited to three months.[140] However, the duration of the controlled operation can be subsequently extended up to a total of 24 months.[141]

193. As noted above, the Law Council is pleased that unlike the NIP Bill, the proposed amendments include a maximum duration for all controlled operations. However, the Law Council queries the necessity of fixing this period at 24 months.

194. Under the current provisions of the *Crimes Act,* a controlled operation can only be extended until a maximum period of six months. When it reviewed the provisions of the NIP Bill, the Senate Committee on Legal and Constitutional Affairs recommended that the NIP Bill be amended to impose an absolute limit of 12 months on each authorised controlled operation.

195. The Explanatory Memorandum to the 2009 Bill states that the period of 24 months:

> *recognises that some controlled operations, particularly those investigating organised crime, may extend for a long period of time and would cause significant disruption to the investigation, and possible risk to participants, if the operation was interrupted at a sensitive stage.*[142]

196. The Law Council does not accept that this explanation justifies the introduction of an extension of the current six month time limit to 24 months. No substantive evidence as to the impractically of the existing six month limit has been identified and no consideration appears to have been given to the imposition of the 12 month maximum limit recommended by the Senate Committee.

3. Extension of immunity from criminal and civil liability to informants

197. Under the existing provisions of the *Crimes Act*, 'informants' who participate in controlled operations are not granted protection from criminal or civil liability.[143] Under the proposed amendments, informants and other civilian participants in a controlled operation are protected from both criminal and civil liability.

198. The Law Council believes that this extension of indemnity is cause for concern, particularly in the absence of an external, independent authorisation process for controlled operations. The Law Council supports the observations of the Criminal Bar Association of Victoria in its submission on the national model laws on which the current proposed reforms are based, wherein the following view was expressed:

> *It is the view of the CBA that proposals to allow police to authorise criminals to continue or undertake criminal activity is a recipe for disaster. It will inevitably lead to police favouring one criminal or group of criminals whom they prefer not to prosecute against another group of criminal or suspected criminals who are the focus of a current investigation. The processes will always be subject to manipulation by criminal elements and will facilitate corruption. Should the process get to the point where the protected criminals are giving evidence against the*

[140] The maximum duration for an urgent authority will be seven days (proposed s15GH).
[141] SOC Bill Schedule 3 proposed s15GU(2) of the *Crimes Act.*
[142] Explanatory Memorandum p. 63.
[143] *Crimes Act* ss15I and 15IA.

targeted criminals, experience shows that the value of such evidence is often minimal.[144]

199. Further the Law Council believes that, if obtaining admissible evidence from informants requires empowering police to confer immunity on known criminals, then such evidence comes at too high a price and is unlikely to be in the interest of justice in the long-term.

200. The Law Council notes that proposed section 15GI(2)(h) operates to limit the use of informants in controlled operations by providing that the authorising officer must be satisfied that the role intended for the civilian participant could not be adequately performed by a law enforcement officer. However, the Law Council believes that if informants who participate in a controlled operation are to be granted protection from liability, an external, independent authorisation process is required.

201. Although the Explanatory Memorandum states that the use of informants is pivotal to the effectiveness of controlled operations, it does not provide any explanation as to why an external, independent authorisation process should not be required when using civilian informants in controlled operations. If adopted, such a process may go some way to allaying the Law Council's concerns in this area.

4. Provision of information before extension of time granted

202. The Law Council is pleased to observe that the proposed amendments preserve a role for an AAT member to authorise an extension of a controlled operation beyond three months. However, the Law Council recommends that the proposed provisions should be more prescriptive about the type of information that must be provided and considered before an extension is granted.

203. Proposed section 15GV provides that when determining whether to grant an extension, the AAT member is required to be satisfied on reasonable grounds of the same matters required in the original authorisation process.

204. The Law Council does not believe this is sufficient, particularly in circumstances where controlled operations may be extended several times.

205. The Law Council is of the view that when considering whether to grant an extension, the AAT member should not only be required to give consideration to the continuing appropriateness and necessity of the controlled operation going forward, he or she should also be required to:

- assess how effective the operation has been to date in gathering evidence in relation to the offence and targeted person specified in the original authority;
- assess whether any unlawful conduct authorised and/or carried out in the course of the controlled operation up until that point was outside the scope of the initial authority or went beyond what was necessary to conduct an effective controlled operation;
- assess whether any conduct up until that point by a participant in the controlled operation: seriously endangered the health or safety of any person; caused the death of, or serious injury to, any person; involved the commission

[144] Criminal Bar Association -Victoria, Submission 4 to the *Leaders Summit on Cross Border Powers for Law Enforcement*, SCAG Working Group, (2003) p., 14; See also Victorian Bar; Submission 5; the Law Society of New South Wales, Submission 19; Law Council of Australia, Submission 15.

of a sexual offence against any person; or resulted in loss of, or serious damage to, property; and

- assess the participation up until that point of any civilians in the controlled operation, particularly any authorised unlawful conduct engaged in by civilian participants, and whether the role played by any civilian participant could have been adequately performed by law enforcement officers.

206. The Law Council believes that after assessing these matters, the AAT member should only grant the extension if he or she is satisfied that the benefits of the operation to date, with respect to gathering evidence which may lead to prosecution of a person for a specified serious offence, substantially outweigh the degree and scope of the unlawful conduct required to obtain that benefit, particularly where civilian participants are involved.

5. Preservation of procedural safeguards under a mutual recognition regime

207. The Bill seeks to introduce mutual recognition provisions into the Commonwealth controlled operation regime to address concerns that purportedly arise from the High Court case of *Gedeon v Commissioner for New South Wales Crime Commission*.[145]

208. The Explanatory Memorandum suggests that the decision in *Gedeon* gives rise to a real risk that evidence obtained during a State authorised controlled operation which involves the commission of a Commonwealth offence could be challenged on the basis that no Commonwealth approval was sought for the operation, and as a result participants in the operation were not be protected from liability under Commonwealth law. [146]

209. Under the new regime, controlled operation authorities which are issued under State and Territory laws would be recognised under Commonwealth law. It is said that this would have the effect of protecting the admissibility of evidence obtained by participants in an operation authorised under a corresponding State law that may involve the commission of a Commonwealth offence. A separate authorisation under Commonwealth legislation would not be required.[147]

210. The Law Council does not oppose *per se* the mutual recognition of state and territory controlled operation laws. However, such recognition must be contingent on each State and Territory having in place an authorisation regime which is at least as stringent as that which is in place at the Commonwealth level. (As discussed above the Law Council believes that the existing and proposed Commonwealth regime itself requires improvement.)

211. As the Law Council has previously stressed in a number of forums,[148] controlled operations provisions confer extraordinary powers on authorising officers to licence police and in some cases civilian informants to commit otherwise unlawful acts with impunity. In order for the community to accept such extraordinary powers, they must be circumscribed by law, subject to strict authorisation and review procedures and their use limited to the investigation of the most serious crimes.

[145] [2008] HCA 43.
[146] Explanatory Memorandum p. 48.
[147] Explanatory Memorandum p. 48.
[148] For example, see Law Council of Australia submission to Senate Committee on Legal and Constitutional Affairs *Submission on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006* (19 January 2007).

212. The current Commonwealth laws – while not free from criticism – impose certain procedural obligations on investigation authorities which aim to ensure these extraordinary powers are subject to reasonable limitation and are exercised according to law. The Commonwealth provisions regulating the conduct and authorisation of controlled operations were enacted following considered debate by Parliament and were thought necessary to provide the types of procedural safeguards to protect against misuse or overuse of these extraordinary investigative powers.

213. If enacted the current Bill will mean that a controlled operation authorised in a State or Territory may no longer have to meet the procedural requirements of controlled operations under Part 1AB of the *Crimes Act*. In other words, the proposed amendments effectively dispense with the requirement for controlled operations to comply with Commonwealth law, provided that the relevant State or Territory requirements are met.

214. In this way, the amendments have the potential to undermine the safeguards contained in the Commonwealth law. The amendments will allow the Executive to give recognition to particular State and Territory controlled operation regimes without requiring that those relevant state and territory laws must incorporate safeguards which at least mirror those at the Commonwealth level.

215. While some State and Territory regimes may currently be as rigorous if not more rigorous than the Commonwealth regime,[149] the amendments do not guarantee that this will be the case either now or in the future.

216. For these reasons, the Law Council does not accept that the High Court's finding in *Gedeon* justifies the expedited introduction of the proposed amendments to the controlled operations provisions in the *Crimes Act 1914 (*Cth).

Assumed Identities and Witness Protection

Nature of Proposed Reforms

Assumed Identities

217. An assumed identity is a false identity that is used by law enforcement officers, intelligence officers and authorised civilians for the purposes of investigating an offence, gathering intelligence or for other security activities. Part 1AC of the *Crimes Act 1914* already contains provisions which regulate the authorisation, creation and use of assumed identities. Schedule 3 of the Bill seeks to replace the existing Part 1AC with a new Part.

[149] In response to the decision in *Ridgeway v R* (1995) 184 CLR 19 many jurisdictions have introduced statutory provisions to authorise and regulate controlled operations, providing immunity for authorised persons involved in illegal conduct and providing for the admission of evidence procured during the commission of illegal conduct. For example, see *Crimes Act 1914* (Cth) Part 1AB; *Law Enforcement (Controlled Operations) Act* 1997 (NSW), *Police Powers and Responsibilities Act 2000* (Qld) s 163; (SA) *Criminal Law (Undercover Operations) Act 1995* (SA); *Crimes (Controlled Operations) Act 2004* (Vic). Other jurisdictions have limited statutory provisions dealing with the investigation of drug offences. For example, in the Northern Territory, there is legislation authorising and regulating undercover operations in relation to certain drug offences. A member of the police force of or above the rank of Commander may authorise a member of the police force below that rank, or a person not a member of the police force, to acquire, supply or have in their possession a dangerous drug for the purpose of detecting the commission of a drug offence. See *Misuse of Drugs Act 1990* (NT) s 32.

218. The new assumed identities regime will recognise corresponding State and Territory laws and enable a person authorised to acquire and use an assumed identity in one jurisdiction to lawfully acquire evidence of that assumed identity in another jurisdiction. The new provisions will also ensure that officers who are authorised under a corresponding State or Territory law to use an assumed identity will be protected from criminal liability under the Commonwealth law when using that identity.

219. Proposed new Part 1AC will also expand the existing assumed identity scheme beyond law enforcement officers to include intelligence officers and other authorised people, such as foreign law enforcement officers. Under the new provisions, the control of an authority for an assumed identity can be transferred between agencies. For example, proposed sections 15KV and 15KW will provide that the powers, responsibilities and obligations that attach to the chief officer who granted the authority in one law enforcement agency can transfer to a chief officer of another law enforcement agency who may now have responsibility for the particular investigation. As a result of this transfer, the chief officer of the receiving agency will have the power to vary or cancel the authority, and the power to request evidence of an assumed identity. Part 1AC will also allow AFP officers to obtain assumed identities for the purpose of witness protection.

Witness Identity Protection

220. Witness identity protection refers to the measures which are employed to protect disclosure of the true identity of a participant in a controlled operation or a person provided with an assumed identity when he or she gives evidence in court. This matter is currently regulated by section 15XT of the *Crimes Act,* which provides a broad discretion for the court to protect the real identity of a witness who is or was using an assumed identity. Schedule 3 of the Bill seeks to replace section 15XT and introduce Part 1ACA in the *Crimes Act*.

221. Under proposed section 15ME the court process currently contained in section 15XT will be replaced by a process whereby a chief officer (the head of a law enforcement or intelligence agency) will be authorised to issue a witness identity protection certificate (WIPC).

222. The WIPC must be filed in court at least 14 days (or less if leave is granted) before an operative gives evidence, and a copy must given to each party to the proceedings.[150] Proposed subsection 15MG(1) sets out the information that is required to be included in WIPC, which includes the following information:

- matters going to the operative's credibility;
- if the operative:
  - is known to a party to the proceedings or a party's lawyer by a name other than the operative's real name—that name (the *assumed name*); or
  - is not known to any party to the proceedings or any party's lawyer by a name—the operative's court name for the proceeding;

[150] SOC Bill Schedule 3 proposed s15MH of the *Crimes Act.*

- details about the length of time the operative was involved in the investigation to which the proceeding relates and the name of the agency giving the WIPC;
- the date on which the certificate is given; and
- the grounds for issuing the certificate.

223. Before a WIPC is issued, proposed section 15MF requires a witness to submit a statutory declaration to the chief officer which addresses issues of credibility, including:

- whether the operative has been convicted of or found guilty of an offence and, if so, particulars of each offence;
- whether any charges against the operative for an offence are pending or outstanding and, if so, particulars of each charge;
- if the operative is or was either a law enforcement officer or an intelligence officer:
  - whether the operative has been found guilty of professional misconduct and, if so, particulars of each finding; and
  - whether any allegations of professional misconduct against the operative are outstanding and, if so, particulars of each allegation;
- whether, to the operative's knowledge , a court has made any adverse comment about the operative's credibility and, if so, particulars of the comment;
- whether, to the operative's knowledge, the operative has made a false representation when the truth was required and, if so, particulars of the representation;
- if there is anything else known to the operative that may be relevant to the operative's credibility—particulars of the thing.

224. Once a WIPC has been filed, the operative protected by the certificate will be permitted to give evidence under the assumed name or court name provided for in the certificate.[151] A decision to issue a WIPC is final and cannot be appealed against, reviewed, called into question, quashed or invalidated in any court. [152]

225. The new witness identity protection regime also enables certificates issued in one jurisdiction to be recognised in proceedings held in another jurisdiction.[153] These amendments are designed to ensure that undercover operatives who work across jurisdictions will be protected by a certificate issued by their home agency, regardless of where proceedings are held.

[151] SOC Bill Schedule 3 proposed s15MJ of the *Crimes Act.*
[152] SOC Bill Schedule 3 proposed s15ME(4) of the *Crimes Act.*
[153] SOC Bill Schedule 3 proposed s15MW of the *Crimes Act.* This section provides that the proposed provisions 15MH-MT apply to 'corresponding witness identity certificates', which is defined in proposed s15M to mean a witness identity protection certificate that corresponds to a certificate issued under s15ME and that was issued under a corresponding witness identity protection law of a State or Territory, as prescribed by regulation.

226. As in the case of controlled operation, the impetus for the proposed amendments is the need to bring Commonwealth legislation into line with national model legislation developed by the Joint Working Group of the Standing Committee of the Attorneys-General and the Australasian Police Ministers Council and published in 2003 in the Cross-*Border Investigative Powers for Law Enforcement Report*.

Law Council's Concerns

227. The Law Council is concerned about the removal of procedural safeguards designed to protect the individual rights of the accused. In the context of assumed identities and witness protection, this has taken the form of removing any oversight or discretionary role for the court and replacing this with an internal authorisation procedure, whereby law enforcement and intelligence agencies are invested with almost exclusive control over the protection of covert operatives and their identities.

228. Although the Law Council has some concerns about the regime for authorising assumed identities, both as currently formulated in the *Crimes Act* and as proposed by the Bill, the focus of the current submission is the proposed introduction of Part 1ACA, which introduces a new process for determining when and how the true identity of a witness in court proceedings may be concealed.

Witness Protection

229. The Law Council is opposed to the rationale behind the proposed new Part 1ACA, which denies courts any role in evaluating whether there is a need to protect the true identity of a witness and in balancing that need against other competing interests.

230. The proposed regime has the potential to impact substantially on the rights of an accused. This is because an accused person's ability to defend himself or herself may be significantly prejudiced if he or she is not permitted to discover the role and character of those giving or providing evidence against him or her.

231. As with the controlled operation provisions of the Bill, the proposed amendments grant extraordinary and unsupervised powers to law enforcement agencies, on the assumption that limited, periodic reporting requirements offer sufficient safeguards against corruption and misuse. As with the other provisions of the Bill, the proposed amendments fail to properly mitigate against the risk that individuals' rights will be infringed.

232. Section 15XT of the *Crimes Act* currently provides as follows:

> *1. If the real identity of an approved officer or approved person who is or was covered by an authorisation, might be disclosed in proceedings before a court, tribunal or a Royal Commission or other commission of inquiry, then the court, tribunal or commission must:*
>
> *a) ensure that the parts of the proceedings that relate to the real identity of the officer or person are held in private; and*
>
> *b) make such orders relating to the suppression of the publication of evidence given by the court, tribunal or commission as will, in its opinion, ensure that the real identity of the officer or person is not disclosed.*

2. However, this section does not apply to the extent that the court, tribunal or commission considers that the interests of justice require otherwise.

233. A key feature of this provision is that the Court retains control over the method by which evidence is given and, ultimately, all other considerations are subordinate to the interests of justice. In contrast, the proposed amendments place control over the protection of the identity of covert operatives almost entirely in the hands of law enforcement and intelligence agencies.

234. Under the new Part 1ACA it is proposed that, if an operative (that is a participant in a controlled operation or a person granted an assumed identity) is required to give evidence in a proceedings, he or she may be issued a witness identity protection certificate (WIPC) by the chief officer of the relevant law enforcement or intelligence agency. [154]

235. A wide range of agencies are authorised under the proposed provisions to issue a WIPC including the AFP, the Australian Customs Service, the ACC, the ACLEI, the Australian Taxation Office, the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service and any other Commonwealth agency specified in the regulations. [155] Under the proposed provisions, these officers have the power to: give a WIPC; make all reasonable enquiries to make sure that all required information is included in the WIPC; cancel the certificate if it is no longer required; give permission to disclose information about the operative's true identity and report to the Minister or the Inspector General of Intelligence and Security on the use of the WIPC.

236. The list of persons authorised to issue a WIPC is further extended by the ability under the proposed provisions for a chief officer to delegate his or her power to issue a WIPC to a 'senior officer' of the relevant agency. [156] This includes a Deputy Commissioner of the AFP, an Assistant Commissioner of the ATO, or a Deputy Director-General of Security. [157]

237. The effect of a WIPC is that the operative is able to give evidence under a false identity without disclosing his or her true identity, including to the defence. Pursuant to proposed subsection 15ME(4), a decision to issue a WIPC is final and cannot be appealed against, reviewed, called into question, quashed or invalidated in any court.

238. Once a WIPC has been issued and filed in respect of particular proceedings, no evidence may be given which discloses or may disclose the operative's identity or address, unless the leave of the court is given following an application in relation to such evidence or information.

239. The Law Council notes that under proposed section 15MM, the Court may grant leave to ask questions or for a statement to be made which discloses the operative's true identity and/or address if satisfied that:

- there is evidence that if accepted would substantially call into question the operative's credibility;

[154] SOC Bill Schedule 3 proposed s15ME of the *Crimes Act.*
[155] SOC Bill Schedule 3 proposed s15M of the *Crimes Act.*
[156] SOC Bill Schedule 3 proposed s15MX of the *Crimes Act.*
[157] SOC Bill Schedule 3 proposed s15MX(3) of the *Crimes Act.*

- it would be impractical to test properly the credibility of the operative without allowing the risk of disclosure of the operative's identity or address; and

- it is in the interests of justice for the operative's credibility to be tested.

240. However, this provision offers only limited practical protection for accused persons. This is because in the absence of information about the operative's true identity, defence counsel is unlikely to be able to adduce evidence that if accepted would substantially call into question the operative's credibility. No challenge can be made as to the legitimacy of the basis on which a WIPC was issued and defence counsel is not permitted to know who the person is. Further, defence counsel might commit a criminal offence if they conduct the sort of pre-trial investigations and cross-examination that might alert them to raise relevant issues of credit or make any inquiries to inform him or her as to the person's true identity or seek instructions as to such matters. Under proposed section 15HK it is an offence to disclose information relating to a controlled operation.

241. The Law Council is concerned that this limitation on a defendant's ability to cross examine a prosecution witness has the potential to seriously undermine the fair trial rights of the accused.

242. In 2008 the House of Lords held that granting anonymity to witnesses threatened with intimidation in a murder trial could render a trial unfair.[158] In *R v Davies,* the House of Lords found that the ability of defence counsel to cross examine key witnesses was 'gravely impeded' by 'ignorance of and inability to explore who the witnesses were, where they lived and the nature of their contact with the appellant'. Lord Bingham held that in these circumstances, '[a] trial so conducted cannot be regarded as meeting ordinary standards of fairness.'[159]

243. When making this finding, Lord Bingham re-affirmed the long established principle of English common law that 'subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence'.[160] Lord Bingham also quoted the following passage from the Court of Appeal of New Zealand in *R v Hughes* where Richardson J observed:

> *We would be on a slippery slope as a society if on a supposed balancing of the interests of the State against those of the individual accused the Courts were by judicial rule to allow limitations on the defence in raising matters properly relevant to an issue in the trial. Today the claim is that the name of the witness need not be given: tomorrow, and by the same logic, it will be that the risk of physical identification of the witness must be eliminated in the interests of justice in the detection and prosecution of crime, either by allowing the witness to testify with anonymity, for example from behind a screen, in which case his demeanour could not be observed, or by removing the accused from the Court, or both. The right to confront an adverse witness is basic to any civilised notion of a fair trial. That must*

[158] *R v Davies (Appellant)* (On appeal from the Court of Appeal (Criminal Division)) [2008] UKHL 36
[159] [2008] UKHL 36 at [32].
[160] *R v Davies (Appellant)* (On appeal from the Court of Appeal (Criminal Division)) [2008] UKHL 36 at [5]. This principle originated in ancient Rome: see generally *Coy v Iowa* 487 US 1012, 1015 (1988); *Crawford v Washington* 124 S Ct 1354, 1359 (2004); David Lusty, "Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Trials", 24 *Sydney Law Rev* (2002) 361, 363-364

include the right for the defence to ascertain the true identity of an accuser where questions of credibility are in issue.[161]

244. Although much is made in the Explanatory Memorandum and in the Second Reading Speech in particular about the need to ensure operatives and their families are not placed at risk, potential danger to an operative is only one of three grounds in the Bill for issuing a WIPC. A WIPC may also be issued if the relevant chief officer or his or her delegate is satisfied that disclosing the operative's true identity is likely to prejudice any current or future investigation or is likely to prejudice any current or future activity relating to security.

245. These grounds are both very broad and very subjective. As noted, the Bill envisages that the decision as to whether these grounds are satisfied will be taken by the chief officer of the relevant law enforcement agency or his delegate. That decision would not be open to any form of review, and any person who engages in conduct which results in the disclosure of the true identity of a person covered by a WIPC commits an offence.

246. The Law Council is concerned that that the proposed amendments remove the court's existing role under section 15XT of the *Crimes Act* and replace this process with one that invests considerable authority in the hands of government agencies to protect a covert operative, without including appropriate safeguards to protect the fair trial rights of the accused.

247. The Law Council's concerns with respect to the removal of the existing discretionary role of the court were shared by the Senate Committee on Legal and Constitutional Affairs when it inquired into similar provisions contained in the NIP Bill. The Committee observed:

> *[T]he decision to issue a witness protection certificate is not appealable. While the court will have the power to give leave or make an order which leads to the disclosure of the operative's true identity, it will not be required to 'balance' the competing public interests in a fair and open trial against the protection of the identity of a witness. The court may only make such an order if it is satisfied that the evidence in question would substantially call into question the operative's credibility, and it would be impractical to test that credibility without disclosing the details of the operative's identity. It must also be in the interests of justice for the operative's credibility to be tested.*
>
> *...*
>
> *The committee can see no justification for the court to be denied the opportunity to consider the matter of witness identity on its merits, and in conjunction with other relevant considerations. It is the role of the court to adjudicate on disputes which, by their nature, involve more than one party. The rights of each party must be respected for justice to be done and seen to be done, and any provision which limits the right of the defendant to question the credibility of his or her accuser, as this one does, deserves careful implementation by a court. The committee considers that this is best achieved through leaving intact the court's discretion to balance the various interests at stake in individual cases.*[162]

[161] [1986] 2 NZLR 129 at 249.
[162] Senate Committee on Legal and Constitutional Affairs, *Report on Crimes Legislation (National Investigative Powers) Bill 2006* (7 February 2007) [3.23], [3.25].

248. As is emphasised throughout the Explanatory Memorandum, the proposed new Part 1ACA is an attempt to implement the model laws as agreed by SCAG in 2003. However, there have been other approaches to witness protection developed by independent bodies that in the view of the Law Council strike a better balance between the need to ensure protection of witness identity and the need to protect the fair trial rights of the accused.

249. In the context of considering laws for the protection of classified and security sensitive information, the Australian Law Reform Commission (ALRC) considered the national model legislation, together with information about methods used in court to protect sources of information in other jurisdictions, including Canada, the UK, Germany and the European Court of Human Rights. The ALRC concluded that any proposal relating to a court or tribunal's power to permit evidence from an anonymous witness should be subject to the following safeguards:

- The court or tribunal should undertake an independent assessment of the asserted need for witness anonymity and satisfy itself that the need is genuine and well-founded in the interests of national security.

- The court or tribunal should only permit witnesses to testify anonymously if all other less restrictive protective measures have been considered and found to be inadequate in the circumstances.

- The court or tribunal may make orders to conceal the physical appearance or identity of a witness from the public while allowing only the parties, their lawyers and the judge, magistrate or tribunal members to observe the witness. However, other than in exceptional circumstances, the court in criminal proceedings should not sanction methods which would conceal the physical appearance of a witness from an accused person (and his or her lawyers).

- The court or tribunal should be reluctant to convict (or enter a judgment against a party) based either solely or to a decisive extent on the testimony of any anonymous witness.[163]

250. The Law Council supports the principles advanced by the Australian Law Reform Commission, which are the product of both public consultation and thorough research. The proposed regime appears to be at odds with these principles. It prioritises law enforcement agencies' internal, un-scrutinised assessments of their operational and security needs above all other concerns, including a defendant's right to a fair trial.

251. For these reasons, the Law Council opposes the introduction of proposed Part 1ACA into the *Crimes Act.*

[163] *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98, 2004) recommendation 11-11.

Introduction of Joint Commission Offence

252. Schedule 4, Part 1 of the Bill introduces a new section into Chapter 2 of the Criminal Code, which deals with the general principles of criminal responsibility for Commonwealth offences.

253. The new section 11.2A is headed "Joint commission" and is targeted at offenders who commit crimes in organised groups.

254. The Second Reading Speech provides the following rationale for the introduction of this offence:

> *This provision builds upon the common law principle of 'joint criminal enterprise'. If a group of two or more offenders agree to commit an offence together, the effect of joint commission is that responsibility for criminal activity engaged in under the agreement by one member of the group is extended to all other members of the group.*
>
> *Joint commission targets members of organised groups who divide criminal activity between them.*
>
> *If, for example, three offenders agree to import heroin into Australia and two of the offenders each bring in 750 grams of heroin, all three offenders can be charged with importing a commercial quantity under the joint enterprise provisions.*[164]

255. The Law Council has a number of significant concerns with this proposed offence and opposes its enactment.

Nature of Proposed Amendments

256. The Bill would insert a new section 11.2A into the *Criminal Code*. The new section would provide:

Joint Commission

> *(1) If:*
> *(a) a person and at least one other party enter into an agreement to commit an offence; and*
> *(b) either:*
> *(i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or*
> *(ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));*
>
> *the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.*

257. In substance, this provision will make a defendant ("D") criminally responsible for an offence (offence "A") where D agreed with another person ("X") to commit a different

[164] Attorney General, the Hon Robert McClelland MP, Second Reading Speech, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, 24 June 2009 at p. 5.

offence (offence "B") if offence A is committed in the course of carrying out the agreement to commit offence B and

(a) offence A is "of the same type" as offence B; or

(b) D was "reckless about the commission of" offence A.

258. Under the proposed section 11.2A, the agreement between the parties can be non-verbal and may be entered into before or at the same time as the conduct constituting any of the physical elements of the joint offence was engaged in.[165]

259. A person cannot be found guilty of an offence of joint commission if, before the conduct constituting any of the physical elements of the joint offence was engaged in, the person terminated his or her involvement and took all reasonable steps to prevent that conduct from being engaged in.[166]

260. However, a person may be found guilty of a joint commission offence even if another party to the agreement has not been prosecuted or has not been found guilty or the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.[167]

Existing provisions in Chapter 2

261. In substance, the current section 11.2 "Complicity and common purpose" makes D criminally responsible for an offence (offence "A") committed by another person ("X") where D's conduct in fact assisted or encouraged the commission of that offence by X if D intended that his or her conduct would assist or encourage the commission of

(a) any offence "of the type" that X committed (ie of the same type as offence B); or

(b) any offence AND D was "reckless about the commission of" offence A ("including its fault elements").

262. The Law Council notes that the substantive difference between the current section 11.2 and the proposed section 11.2A is that, in respect of the former, D must have in fact assisted or encouraged the commission of offence A. Instead of that requirement, section 11.2A only requires that there was an agreement to commit some other offence B and that offence A was committed in the course of X carrying out the agreement to commit offence B. For example, under section 11.2A, where D agrees with X that a Commonwealth official be assaulted and X proceeds to murder the Commonwealth official, D will be made criminally responsible for that murder if murder is regarded as an offence "of the same type" as assault or D was "reckless" about the commission of murder by X – even if D has not agreed to the commission of murder and has not assisted or encouraged the commission of that crime in any way.

263. Section 11.5 deals with conspiracy to commit an offence. It provides that criminal responsibility requires that D must have "entered into an agreement with one or more persons" and "intended that an offence would be committed pursuant to the

[165] Proposed s11.2A(5)
[166] Proposed s11.2A(6)
[167] Proposed s11.2A(7).

agreement". An "overt act" must also have been committed pursuant to the agreement (see section 11.5(2)).

Law Council's Key Concerns

264. The Law Council has the following concerns in respect of proposed section 11.2A:

1. Inadequate process of consultation and review

265. Chapter 2 of the Criminal Code codifies the general principles of criminal responsibility for Commonwealth offences. It is the fundamental core of Commonwealth criminal law. It was enacted after an extensive process of consultation and review over many years, primarily conducted by a committee established by the Standing Committee of Attorneys-General (the Model Criminal Code Officers' Committee). It was intended to provide the basis for a uniform criminal code for all Australian jurisdictions. It has been adopted in the ACT and, for some offences, in the Northern Territory. While the adoption of the Model Criminal Code has not yet been complete around Australia, any significant amendment of the provisions of Chapter 2 requires careful consideration, extensive consultation and review. The Law Council is not aware that such consultation has occurred prior to the introduction of the proposed section 11.2A.

2. Amendments are premature

266. As noted above, section 11.5 of the Criminal Code already contains a provision designed to deal with offenders who commit crimes in organised groups. It provides that where a person has "entered into an agreement with one or more persons" and "intended that an offence would be committed pursuant to the agreement", he or she will be criminally responsible for the offence, provided an "overt act" has also been committed pursuant to the agreement.

267. The nature of the conspiracy offence has been considered by the NSW Court of Criminal Appeal in *Ansari v The Queen*[168] and *R v RK and LK.*[169] On 19 June 2009, the High Court granted special leave to appeal to consider the meaning of section 11.5 (and particularly the words "must have intended that an offence would be committed") in *The Queen v LK; The Queen v RK*.[170]

268. It can be expected that the High Court will use this opportunity to clarify the scope of section 11.5. This will, in turn, have significant implications for the proper interpretation of similar concepts in the proposed section 11.2A. For this reason, the Law Council cautions against the introduction of the proposed offence, at least until the High Court has delivered its decision in *LK; RK.*

3. Uncertainty of key concepts

269. No guidance is provided in the new section or the current Chapter 2 as to when an offence is to be regarded as "of the same type" as another offence. While it is true that a similar concept appears in the current complicity provision in section 11.2(3)(a), there have been no decisions on this aspect of section 11.2 and, until that occurs, considerable uncertainty must exist as to the scope of the concept.

[168] (2007) 173 A Crim R 112.
[169] [2008] NSWCCA 338.
[170] [2009] HCATrans 146.

270. Further, there is no definition in the new section or the current Chapter 2 of the term "reckless about the commission of an offence".

271. The Law Council notes that the Explanatory Memorandum provides the following explanation of how the concept of 'recklessness' applies to the joint commission offence:

> *In accordance with section 5.4, the person will be reckless with respect to the commission of a collateral offence by another party to the agreement, if he or she is aware of a substantial risk that the offence will be committed, and having regard to the circumstances known to him or her, it is unjustifiable to take that risk.*
>
> *...*
>
> *For example, persons A and B commit the Commonwealth offence of people smuggling by bringing two non-citizens into Australia (section 73.1 Criminal Code). In the course of transporting the non-citizens to Australia, person B conceals 500 grams of heroin and imports it into Australia. Here the collateral offence would be importing a marketable quantity of drugs (section 307.2 Criminal Code).*
>
> *If the prosecution can prove that person A was aware of a substantial risk that person B would import drugs into Australia and it was unjustifiable to take that risk, then this subsection will apply to extend criminal responsibility to the collateral offence to person A.*
>
> *This subsection slightly modifies the common law principle of extended common purpose to ensure consistency with the Criminal Code*. *The common law principle provides that if a party to an agreement to commit an offence foresees the possibility that a collateral offence will be committed, and, despite that foresight, continues to participate in the agreement, that party will be held criminally responsible for the collateral offence:* McAuliffe v The Queen *[1995] HCA 37; (1995) 183 CLR 108 at 118;* Gillard v The Queen [2003] HCA 64; (2003) 219 CLR 1 at 36[112]. *In this subsection, the possible foreseeability test is replaced with a test of recklessness, as recklessness is the appropriate fault element in the Criminal Code and is most consistent with the common law.*

272. Despite this explanation, it remains unclear how the courts will approach the meaning of the term "reckless about the commission of an offence" in the proposed section 11.2A. Section 5.4 does provide a definition of the concepts "reckless with respect to a circumstance" and "reckless with respect to a result", but it cannot be assumed that those definitions will be adapted to this completely different concept. The courts may turn to the common law to give content to the term "reckless", particularly bearing in mind a demonstrated preparedness to import common law principles in respect of the interpretation of section 11.5. While it is true that the same term appears in the current complicity provision in section 11.2(3)(b), it is not clear that it will be given the same meaning as under that provision bearing in mind the subsequent words "(including the fault elements") that do not appear in this provision.

4. Uncertainty of authority to support extension of criminal responsibility

273. There can be no doubt that pre-existing common law authority supported the approach taken to principles of complicity in section 11.2 of the *Criminal Code*. In contrast, the Law Council is unaware of common law authority (or statutory precedents in other jurisdictions) that would support the proposed section 11.2A.

The Law Council notes that there is common law authority that, where D agrees with X to commit a particular offence and X commits that offence, D will be criminally responsible for that offence.[171] It has also been held under the doctrine of "extended common purpose" that, where D and X agree to commit offence A, and D foresees the possibility that crime B will be committed, D will be criminally responsible for that crime committed by X if D "continues to participate in the venture".[172] Liability turns on that continued "participation" in the criminal enterprise by D. However, the Law Council is unaware of any authority extending this principle to make D liable in the absence of such participation in the criminal enterprise by D.

5. Fundamental policy concern

274. The Law Council is particularly opposed to the proposed section 11.2A(3) because it makes D liable for an offence which he or she has not agreed should be committed and has not assisted or encouraged in any way. There is not even a requirement that D have participated in a criminal venture in which that crime was committed. All that is required for criminal responsibility is agreement that some other offence be committed and, apparently, foresight that the charged offence might be committed in the course of carrying out the agreed criminal venture.

275. The Law Council opposes enactment of the proposed section 11.2A. It has no confidence that proper consideration has been given to the basis upon which a person may be made liable under the principles relating to extended joint criminal enterprise. Given the fundamental importance of the issue, it is clear that a more substantive process of consultation and review is required.

[171] *Osland v The Queen* (1998) 197 CLR 316, McHugh J at 342, citing *R v Lowery and King [No 2]* [1972] VR 560 and *R v Tangye* (1997) 92 A Crim R 545.
[172] *Clayton v R* [2006] HCA 58; (2006) 231 ALR 500; *McAuliffe v The Queen* [1995] HCA 37; (1995) 183 CLR 108.

Expansion of the Telecommunications Interception Regime

Nature of the Current Telecommunications Interception Regime

276. Under the *Telecommunications (Interception and Access) Act 1979* (Cth) ('the TIA Act), telecommunication interception warrants are currently available for the investigation of serious offences of a certain type, the majority of which carry a penalty of more than seven years imprisonment.[173] These offences include: murder, kidnapping, conduct involving an act of terrorism, conduct resulting in serious personal injury or serious risk of serious personal injury, serious arson, serious fraud, money laundering, serious drug offences and offences involving child pornography.

277. The telecommunication interception powers available to law enforcement and intelligence agencies for the investigation of these offences under the TIA Act include:

- named person warrants - which authorise the interception of telecommunications from a particular person;[174]
- telecommunication service warrants – which authorise the interception of communications from a particular telecommunications service;[175]
- telecommunication device warrants – which authorise the interception of communications from a particular telecommunications device;
- b-party warrants – which authorise the interception of telecommunications made to or from a person who is not a suspect and has no knowledge or involvement in a crime, but who may be in contact with someone who does;[176] and
- stored communication warrants – which authorise access to stored communications such as emails, voicemail messages and text messages. [177]

278. The Law Council has previously expressed concern at the breadth of these interception powers and the lack of appropriate safeguards within the warrant authorisation process to protect against unjustified intrusions into personal privacy.

279. The proposed amendments in Schedule 4 Part 2 of the Bill seek to expand this regime even further, by enabling these telecommunication interception powers to be utilised in the investigation of State and Territory offences designed to target serious and organised crime, including offences relating to associations with certain individuals, organisations or groups.[178]

---

[173] *Telecommunications (Interception and Access) Act 1979* (Cth) ('the TIA Act') s 5D.
[174] TIA Act ss 9A and 46A.
[175] TIA Act ss 9 and 46.
[176] TIA Act ss 9(1)(a)(i)(ia), 46(1)(d)(ii).
[177] TIA Act s116.
[178] See *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious and Organised Crime (Control) Act 2008* (SA) ('the SA Act').

Nature of Proposed Amendments

280. Schedule 4 Part 2 of the Bill amends the definition of 'serious offence' within section 5D of the *Telecommunications (Interception and Access) Act 1979* (Cth) ('the TIA Act').

281. New subsection 5D(9) would provide that an offence is also a serious offence if:

> *(a) the particular conduct constituting the offence involved, involves or would involve, as the case requires:*
>
> *(i) associating with a criminal organisation, or a member of a criminal organisation; or*
>
> *(ii) contributing to the activities of a criminal organisation; or*
>
> *(iii) aiding, abetting, counselling or procuring the commission of a prescribed offence for a criminal organisation; or*
>
> *(iv) being, by act or omission, in any way directly or indirectly, knowingly concerned in, or party to, the commission of a prescribed offence for a criminal organisation; or*
>
> *(v) conspiring to commit a prescribed offence for a criminal organisation; and*
>
> *(b) if the offence is covered by subparagraph (a)(i) – the conduct constituting the offence was engaged in, or is reasonably suspected of having been engaged in, for the purpose of supporting the commission of one or more prescribed offences by the organisation or its members; and*
>
> *(c) if the offence is covered by subparagraph (a)(ii)- the conduct constituting the offence was engaged in, or is reasonably suspected of having been engaged in, for the purpose of enhancing the ability of the organisation or its members to commit or facilitate the commission of one or more prescribed offences.* [179]

282. This amended definition refers to the commission and facilitation of 'prescribed offences'. 'Prescribed offence' is defined in section 5 of TIA Act as either a serious offence or an offence which carries a maximum penalty of at least three years' imprisonment.

283. Schedule 4 Part 2 of the Bill also seeks to introduce new definitions of 'associates', 'member' and 'criminal organisation' into the TIA Act that relate to the new offences included in proposed section 5D. These new definitions draw upon the corresponding definitions of 'associates' and 'member' in the *Crimes (Criminal Organisations Control) Act 2009* (NSW) ('the NSW Act') and the *Serious and Organised Crime (Control) Act 2008* (SA) ('the SA Act').

284. The proposed definition of 'criminal organisation' includes organisations declared under the SA Act and the NSW Act or 'an organisation of a kind specified by or under, or described or mentioned in, a prescribed provision of a law of a State or Territory'. [180] This definition will allow the Attorney General to prescribe certain State

[179] SOC Bill Schedule 4, Part 2, Item 17.
[180] SOC Bill Schedule 4, Part 2, Item 15.

and Territory laws which define a criminal organisation to ensure that the TIA encompasses any new laws enacted by States and Territories.

285. In his second reading speech, the Attorney General explained the purpose of the proposed amendments as follows:

> *The penalties for organised crime association and facilitation offences that have been introduced in State legislatures, in particular at this stage New South Wales and South Australia, are generally lower [than seven years imprisonment] and therefore telecommunication interception cannot currently be used to investigate them.*
>
> *However, in order to fight organised crime we must be able to target those who support the activities of criminal groups.*
>
> *The Bill will make telecommunications interception available for the investigation of offences relating to an individual's involvement in serious and organised crime in those states that have that legislation in place currently and those that in turn subsequently introduce such legislation on a similar basis or to a similar effect.*
>
> *This will be limited to the individual's involvement in criminal organisations committing offences that are punishable by at least three years imprisonment.*
>
> *The amendments will allow law enforcement agencies to access stored communications such as emails and text messages, as well as real-time interception of targets' communications.*
>
> *... These amendments will ensure that law enforcement agencies are equipped with the necessary tools to effectively combat organised crime.*[181]

Law Council's Key Concerns

286. The powers in the TIA Act are wide ranging and intrusive to personal privacy. They have been drafted as an exception to the general principle that telecommunications should *not* be intercepted.[182] When the TIA Act was first introduced the public was assured that the extensive interception powers authorised under the act would only be used to investigate the most serious of criminal offences. Although the regime has since been expanded, the current definition of serious offence generally remains limited to offences attracting a maximum penalty of seven years imprisonment[183] and falling within categories such as offenses involving loss of life, serious injury, serious arson, drug trafficking, serious fraud and child pornography.

287. The Law Council's primary concern with the reforms proposed in Schedule 4 Part 2 of the Bill is that they seek to expand the intrusive Commonwealth telecommunication interception regime to cover a range of new offences of a substantially different character to the existing definition of 'serious offence'.

---

[181] Attorney General, the Hon Robert McClelland MP, Second Reading Speech, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, 24 June 2009 at p. 5.

[182] For example, the TIA Act makes it an offence to intercept a communication passing over a telecommunications system without the knowledge of the maker of the communication, or to access a 'stored communication' without the knowledge of a sender or intended recipient of the communication (ss6 and 7). The interception powers in Chapter 2 of the Act constitute exceptions to this general principle.

[183] The Law Council notes that subsections 5D(3a)-(8) do not require the offences listed in these subsection to attract a penalty of at least seven years imprisonment, however many of these types of offences (such as offences involving child pornography or serious drug offences) attract maximum penalties far in excess of seven years imprisonment.

288. First, the proposed provisions would allow the use of telecommunications interception powers for a range of less serious offences than that currently provided for in the TIA Act. The proposed addition to the definition of serious offence incorporates a reference to a 'prescribed offence', which is defined in section 5 of the TIA to include any offence punishable by at least three years imprisonment. This is a substantial decrease in seriousness of penalty from the existing general requirement of seven years imprisonment. It suggests a significant departure from the original rationale of the telecommunication interception regime, which included an in-principle protection against telecommunication interception other than for the purposes of investigating the most serious of criminal offences or offences relating to national security.

289. Secondly, the proposed provisions would allow the use of telecommunications interception powers for what can be described as secondary or extended liability offences. The type of conduct captured by proposed section 5D includes associating with a criminal organisation, contributing to the activities of a criminal organisation, conspiring to commit an offence for a criminal organisation or aiding, abetting, counselling or procuring the commission of an offence for a criminal organisation. These types of offences extend the reach of criminal liability beyond the person who commits a prohibited act with the requisite criminal intention, to include persons who assist, plan, promote or contribute to the commission of an offence. The offences also extend to persons who merely associate with an organisation which is classed as a criminal organisation through a process which the Law Council and others have significant concerns about. This clearly distinguishes the type of conduct described in proposed section 5D from the majority of existing offences included under the TIA Act, such as murder or kidnapping.

290. Thirdly, the Law Council is concerned by the extension of the telecommunication interception regime to cover offences that are themselves highly problematic. As noted in the Explanatory Memorandum, the proposed amendments are intended to respond to recent legislative action in NSW and SA which has seen the introduction of new serious and organised crime offences. These offences include

- association between controlled members of a declared organisation;[184]
- recruitment by a controlled member of a declared organisation of another person to become a member of the organisation; [185]
- association between a person and a member of a declared organisation; [186] and
- association between persons with particular criminal convictions. [187]

291. The SA and NSW laws introducing these offences have been subject to much criticism by the civil liberties and religious groups and the legal profession in those jurisdictions. The primary objections to the offence provisions in those laws are that they seek to criminalise mere association, undermine the presumption of innocence,

[184] NSW Act s26.
[185] NSW Act s26A.
[186] SA Act s35(1)
[187] SA Act s35(3)

restrict or remove the right of silence, lack adequate protections for procedural fairness and provide wide executive discretion to outlaw particular groups.[188]

292. The Law Council shares these concerns, which it has previously expressed in the context of the Commonwealth's anti-terrorism laws which also seek to criminalise association and membership with particular groups.[189] The key concerns raised by the Law Council regarding the terrorist association offences relate to:

- the use of broad, imprecise definitions which inevitably lead to wide Executive discretion as to which groups or organisations ought to be proscribed and thus unduly infringe freedom of association;
- the problematic use of concepts such 'membership' and 'association' in the offence provisions, which afford police too much latitude to intrude upon people's privacy and liberty, without due cause; and
- the failure to demonstrate the necessity for such offences when existing extended liability offences such as conspiracy and incitement already cover a wide range of conduct sought to be addressed.

293. These concerns apply equally to the type of association offences being introduced and contemplated in various Australian jurisdictions to combat serious and organised crime.

294. In order to capture these and similar offences anticipated to be introduced in other Australian jurisdictions, the Commonwealth has sought to cover association based offences in proposed section 5D of the Bill. It has also adopted broad definitions of key terms such as 'associates', 'criminal organisation' and 'member' in order to ensure the telecommunication interception regime will be available for the investigation of these types of offences. For example, the proposed definition of 'membership' in the Bill includes an associate or prospective member, a person who identifies him or herself as a member and a person who is treated by the organisation as a member. Given that formal membership structures may not exist in many criminal organisations, the potential class of persons that fall within this type of definition of 'membership' is indeterminately wide. This gives rise to the risk that offences incorporating such a definition will be arbitrarily applied.

295. Further, by including within the definition of 'criminal organisation' any organisation prescribed under a law of a State or Territory, the proposed amendments are effectively opening up the telecommunication interception regime to an unknown range of association offence provisions, should such offences be subsequently enacted by a State or Territory.

296. By incorporating these problematic offences and definitions into the TIA Act, the Commonwealth is changing the character of a regime designed to be limited to the most serious of crimes. It is also providing the States and Territories with a broad scope to access the Commonwealth telecommunication interception powers when enacting laws designed to outlaw certain groups and criminalise association,

[188] See for example Law Society of South Australia and the South Australian Bar Association, *Joint Statement on the Serious and Organised Crime (Control) Bill 2007*.
[189] See for example Law Council's Submission to the PJCIS, Inquiry *into the Australia Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (16 April 2002). See also Law Council's Submission to the Joint Committee on the Australian Crime Commission's *Inquiry into Legislative Arrangements to Outlaw Serious and Organised Crime* (June 2008).

regardless of the risk that such laws could be arbitrarily applied or subject to misuse by the executive.

297. Finally, the Law Council queries the necessity to expand the telecommunications interception regime in the way proposed in Schedule 4 of the Bill.

298. The Law Council understands that the Commonwealth Government is keen to ensure that its telecommunication interception regime is available to the States and Territories to utilise when investigating serious and organised criminal activity. However, the existing provisions of the TIA Act already permit the use of the telecommunication interception powers for the purpose of investigating offences that fit within the category of serious and organised crime.

299. For example, subsection 5D(3) currently provides that a 'serious offence' includes an offence punishable by at least seven years imprisonment that involves:

- two or more offenders;
- substantial planning and organisation;
- the use of sophisticated methods and techniques; and
- consists of theft, handling of stolen goods, tax evasion, bankruptcy violations, company violations, harbouring criminals or dealings in firearms or armaments.

300. The telecommunication interception powers under the TIA are also available for the investigation of serious drug offences, serious fraud and offences relating to trafficking in prescribed substances.

301. This would appear to cover a wide range of conduct generally understood to constitute serious and organised crime.

302. There is nothing in the Explanatory Memorandum or Second Reading speech that explains why these existing provisions are inadequate to 'ensure that law enforcement agencies can obtain the most effective evidence of an individual's involvement with serious and organised crime.'[190]

303. The fact that some States and Territories have adopted measures outlawing certain groups and criminalising association with such groups in an effort to combat serious and organised crime does not of itself justify the expansion of the telecommunication interception regime.

304. The Law Council is of the view that increasing the range of offences for which these powers can be utilised to investigate offences with maximum penalties of three years imprisonment seriously underestimates the intrusive and exceptional character of the interception powers contained within the Act.

305. For these reasons, the Law Council opposes the introduction of the amendments in Schedule 4 Part 2 of the Bill.

[190] Explanatory Memorandum p. 144.

Conclusion

306. The Law Council recognises the need for the various jurisdictions around Australia to develop measures to effectively combat serious and organised crime. Such measures are likely to include mechanisms designed to: prevent the dissipation of proceeds of crime; confiscate the proceeds of crime; enable police to conduct covert investigations; provide witnesses with identity protection and enable the interception of telecommunications.

307. The Law Council is of the view that the current mechanisms existing at the Commonwealth level are sufficient to effectively address each of these aspects of investigating and prosecuting serious and organised crime and has made this view known to the Joint Committee on the Australian Crime Commission's inquiry into legislative arrangements to outlaw serious and organised crime groups.

308. Given the extraordinary nature of the powers sought to be expanded under the Bill and the intrusive impact such powers have on individual rights, the Law Council is not satisfied that the Commonwealth Government has justified why each of the proposed amendments are necessary. Nor have adequate safeguards been included to protect against misuse or overuse of these powers by law enforcement or intelligence agencies. For these reasons, the Law Council opposes the passage of the Bill in its current form.

Key Recommendations

Proceeds of Crime

309. The Law Council opposes the introduction of the proposed amendments to the *Proceeds of Crime Act 2002* (Cth) in Schedules 1 and 2 of the Bill which would:

    (a) introduce unexplained wealth restraining orders and confiscation orders, which place the onus on the person subject to the order to demonstrate that his or her wealth was lawfully acquired;

    (b) introduce freezing orders directed at financial institutions which automatically suspend transfers or withdrawals from an account, when restraining orders against an individual, which will have the same effect, may already be made ex parte;

    (c) remove the restriction on non-conviction based confiscation orders that currently limits their application to offences occurring in the six years prior to the application for an order; and

    (d) enable the restraint and forfeiture of instruments of serious offences without conviction, similar to the way proceeds of crime can be confiscated without conviction.

310. If the existing proceeds of crime regime is to be amended to facilitate greater information sharing between agencies, the Law Council recommends that such provisions be accompanied by safeguards:

    - limiting information sharing to information that concerns specific, serious offences;

- introducing a system of regular review and independent oversight of information sharing between agencies; and

- imposing requirements for information to be destroyed if it is no longer relevant to an allowable purpose.

311. The Law Council supports reform to the current arrangements under the proceeds of crime regime for legal aid commissions to recover costs incurred by people who have assets restrained under the POC Act. However, the Law Council recommends that the court be invested with the discretion to make an order to have restrained assets released to meet legal costs, rather than the procedure proposed in Schedule 2 Part 5 of the Bill.

Controlled Operations

312. The Law Council supports the following amendments to the controlled operations regime in Schedule 3 of the Bill which would amend Part 1AB of the *Crimes Act* to include:

    (a) a requirement that an authorisation for a controlled operation specify the nature of the criminal activities covered by the authorisation, the identity of each participant in the controlled operation and the nature of the controlled conduct in which an authorised participant may engage;

    (b) a maximum duration for controlled operations, although as discussed above, the Law Council is concerned by the proposed length of this maximum duration;

    (c) enhanced reporting requirements; and

    (d) a continued role for Administrative Appeal Tribunal members in approving extensions of controlled operations for more than three months.

313. However, the Law Council opposes the introduction of the proposed amendments to Part 1AB of the *Crimes Act 1914* (Cth) which would:

    (a) allow Commonwealth controlled operations to be authorised by an internal authorisation process;

    (b) allow law enforcement officers to provide protection against criminal and civil liability for civilian participants in operations; and

    (c) extend the time frame for controlled operations.

314. The Law Council recommends that the controlled operations regime in Part 1AB of the *Crimes Act* be subject to an independent, external authorisation process, for example, authorisation by a retired judge.

Witness Identity Protection

315. The Law Council opposes the introduction of the proposed amendments to Part 1AC of the *Crimes Act 1914* (Cth) which would amend the existing witness identity protection regime by removing the existing oversight or discretionary role for the court in the authorisation process.

316. If the witness identity protection regime is to be amended, the Law Council supports the adoption of the principles advanced by the Australian Law Reform Commission, which are the product of both public consultation and thorough research.

Joint Commission Offence

317. The Law Council opposes enactment of the proposed section 11.2A. It has no confidence that proper consideration has been given to the basis upon which a person may be made liable under the principles relating to extended joint criminal enterprise. Given the fundamental importance of the issue, it is clear that a more substantive process of consultation and review is required.

Telecommunications Interception

318. The Law Council opposes the introduction of the proposed amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) which would expand the intrusive Commonwealth telecommunication interception regime to cover a range of new offences of a substantially different character to those currently covered by the existing definition of 'serious offence'.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.