

CHAPTER 6

COMMITTEE VIEW

6.1 The committee strongly supports the underlying aim of the Bill to ensure that law enforcement and prosecuting agencies are provided with an appropriate suite of legislative tools to enable them to investigate and prosecute the perpetrators of serious and organised crime and, importantly, to deny them the proceeds of crime. While the committee is supportive of the provisions in the Bill, it received evidence suggesting a number of improvements could be made to the provisions.

Proceeds of Crimes Act 2002 amendments

Unexplained wealth

6.2 The committee wholeheartedly endorses the purpose of the unexplained wealth provisions: namely targeting the people at the head of criminal networks, who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences. It is clear that targeting the assets acquired through crime is an effective strategy not only to remove the prime motivation for involvement in crime but also to prevent the reinvestment of proceeds in further criminal enterprises. However, the committee has some concerns about the potential operation of the provisions which could be addressed through minor changes.

6.3 The threshold for obtaining both restraining orders and preliminary unexplained wealth orders is relatively low, requiring only that an authorised officer has 'reasonable grounds to suspect' that a person's wealth is illicit. Once the onus of showing that there are reasonable grounds to suspect a person has wealth that was not lawfully acquired is discharged, a respondent will bear the burden of demonstrating the source of his or her wealth and, if he or she is unable to do so, a court *must* order the forfeiture of any unexplained wealth.

6.4 The placing of the onus of proof on a respondent in proceedings where the respondent faces a penalty of forfeiting property is an exceptional step because it represents a departure from the axiomatic principle that those accused of criminal conduct ought to be presumed innocent until proven guilty. Despite this, the committee accepts that it would defeat purpose of the provisions if the onus was not on the respondent: the purpose of unexplained wealth orders is to require the respondent to explain the source of his or her wealth.

6.5 In most cases, a respondent whose wealth is not derived from illicit activities will be able to produce evidence that demonstrates this. Nevertheless, there are legitimate reasons why a person may not have access to such evidence. For example, records may have been accidentally destroyed or they may have been discarded after the period that they are required for tax purposes has expired.

6.6 The committee is also concerned about the potential for the provisions to be used where it has proved too difficult or time consuming to meet the exacting requirements of criminal prosecution of offences. In addition, there is nothing to

prevent use of the provisions where a prosecution has failed and thus the provisions could be used to pursue individuals who have been investigated, tried and found not guilty of an offence. It might be argued that this is currently the case under the provisions in the 2002 POC Act providing for non-conviction based forfeitures but in those proceedings the onus is on the DPP to make out a case on the balance of probabilities.

6.7 A further issue is that the provisions are not in any way limited to the targeting of major criminal figures and could be directed at relatively minor participants. The committee notes the evidence it received that the approach law enforcement agencies and the DPP adopt in practice when considering proceedings under the 2002 POC Act is to target senior organised crime figures. While the committee has every confidence in Commonwealth law enforcement and prosecuting authorities, it is poor practice for legislation to rely entirely on the appropriate exercise of discretion by government officials in all cases.

6.8 For all of the above reasons, the committee considers that the bills should be amended to provide a mechanism for ensuring no injustice arises from the application of the provisions. In particular, a court should have a discretion in relation to the revocation of preliminary unexplained wealth orders and the making of unexplained wealth orders. This would be consistent with the approach taken in relation to the proposed provisions dealing with the forfeiture of instruments of serious offences in non-conviction based proceedings. Under those provisions the court will have discretion not to order forfeiture if it would not be in the public interest to do so. The existing provisions under section 48 of the POC Act for forfeiture of instruments of indictable offences in conviction based proceedings also provide the court with a discretion as to whether to make a forfeiture order. Placing the onus of proof on the respondent in unexplained wealth proceedings means that there is a real risk of injustice unless the court has a similar discretion to revoke a preliminary order or to refuse a forfeiture order.

6.9 There is one further respect in which the drafting of the unexplained wealth provisions of the Bill could be improved. The requirements for an affidavit in support of a preliminary unexplained wealth order are set out under proposed subsection 179B(2) and require the authorised officer to state the grounds on which the officer suspects: that property is owned or under the effective control of a person, and that a proportion of that property was lawfully acquired. It seems inconsistent that the authorised officer is not required to also state the grounds on which he or she holds a reasonable suspicion that a person's wealth exceeds his or her lawfully acquired wealth. An authorised officer is already required to hold such a suspicion under proposed paragraph 179B(2)(b) so a requirement to state the basis of that suspicion should not place any additional burden on law enforcement agencies.

Recommendation 1

6.10 The committee recommends that the court should have a discretion under proposed section 179C of the *Proceeds of Crime Act 2002* to revoke a preliminary unexplained wealth order if it is in the public interest to do so.

Recommendation 2

6.11 The committee recommends that the court should have a discretion under proposed section 179E of the *Proceeds of Crime Act 2002* to refuse to make an unexplained wealth order if it is not in the public interest to do so.

Recommendation 3

6.12 The committee recommends that proposed subsection 179B(2) of the *Proceeds of Crime Act 2002* specify that an officer must state in the affidavit supporting an application for a preliminary unexplained wealth order the grounds on which he or she holds a reasonable suspicion that a person's total wealth exceeds his or her lawfully acquired wealth.

Other amendments

6.13 The committee acknowledges the concerns raised in relation to the new powers to obtain a freezing order over assets held in accounts with financial institutions. Such orders represent a short term means of preventing the dispersal of highly liquid assets. In addition, applications for a freezing order will be subject to scrutiny by a magistrate. On balance, the committee considers such powers are justified and subject to appropriate checks.

6.14 The committee accepts the evidence it received that the six year limitation period on non-conviction based confiscation causes significant difficulties where the DPP is pursuing confiscation in matters involving complex and ongoing offences. The committee therefore supports the removal of this limitation period.

6.15 The amendments to allow for the restraint and forfeiture of the instruments of serious offences in non-conviction based proceedings were opposed by civil liberties groups on the basis that they violate the rule against double jeopardy by, in effect, imposing a penalty for an offence even where a person has been acquitted of that offence. However, the committee considers that the court's discretion to refuse forfeiture where it would not be in the public interest provides sufficient assurance that these provisions will not result in any injustice.

6.16 The Office of the Privacy Commissioner raised concerns about the breadth of the provisions relating to the disclosure of information obtained under the 2002 POC Act. Given the extensive powers to compel the provision of information which are available under the 2002 POC Act, the committee agrees that disclosures to law enforcement and prosecuting agencies should be limited to disclosure for the purpose of investigation, prosecution or prevention of serious offences. The committee is also concerned about the possibility of disclosures being made to foreign law enforcement agencies where the conduct concerned would not constitute an offence in Australia and recommends that the Bill be amended to prevent such disclosures. However, the committee accepts that the definition of 'serious offence' under the 2002 POC Act is quite narrow. In particular, the definition requires both that the offence be an indictable offence punishable by imprisonment for three or more years, and that the offence involve specific types of unlawful conduct such as money laundering, human trafficking or acts of terrorism. As a result, the committee considers that disclosure of

information should be permitted in relation to any offence which meets the first limb of the definition of ‘serious offence’ under the 2002 POC Act.

Recommendation 4

6.17 The committee recommends that the disclosure of information acquired under the *Proceeds of Crime Act 2002* to law enforcement and prosecuting agencies should be limited to disclosure for the purpose of investigation, prosecution or prevention of an indictable offence punishable by imprisonment for three or more years.

Recommendation 5

6.18 The committee recommends that disclosure of information acquired under the *Proceeds of Crime Act 2002* to foreign law enforcement agencies should not be made unless the offence under investigation would be an indictable offence punishable by imprisonment for three or more years if it had occurred in Australia.

Amendments relating to investigative powers and witness protection

6.19 The committee is pleased to acknowledge that several of the recommendations of the Senate Legal and Constitutional Affairs Committee in relation to the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 have been reflected in the drafting of the provisions seeking to implement model laws with respect to investigative powers. In addition, the provisions relating to assumed identities represent a marked improvement on the existing regime under the Crimes Act.

Controlled operations

6.20 The committee notes the concerns expressed about the extension of civil and criminal immunity to informants participating in controlled operations. The committee accepts that this adds an additional element of risk to controlled operations. However, the committee is satisfied that there are adequate mechanisms within the Bill to ensure informants participate in controlled operations in limited and highly regulated circumstances. In particular, informants would only be permitted to participate in controlled operations where an authorised officer is satisfied that a law enforcement officer could not adequately perform the role the informant will perform; and the informant must be supervised by a law enforcement officer. The approval of extensions to operations by members of the AAT and the oversight of operations by the Ombudsman provide additional assurance that these provisions will be used appropriately.

6.21 The committee welcomes the amendments in the Bill which strengthen the powers of the Ombudsman in relation to his inspections and reporting on controlled operations. The committee considers that the two proposals made by the Ombudsman for further strengthening reporting requirements in relation to controlled operations should be adopted. The committee therefore recommends that:

- the principal law officer with respect to a controlled operation should be required to make a report to the chief officer of the law enforcement agency within two months of the completion of the operation; and
- the general register maintained by authorising agencies should include information regarding the handling of narcotic goods.

Recommendation 6

6.22 The committee recommends that that the principal law enforcement officer with respect to a controlled operation should be required to make a report to the chief officer of the law enforcement agency within two months of the completion of the operation and the report should include:

- **the nature of the controlled conduct engaged in;**
- **details of the outcome of the operation; and**
- **if the operation involved illicit goods, the nature and quantity of any illicit goods and the route through which the illicit goods passed during the operation.**

Recommendation 7

6.23 The committee recommends that the Bill be amended to require that information relating to the handling of narcotic goods, and people who had possession of narcotic goods, is recorded in the general register that authorising agencies will be required to maintain under proposed section 15HQ of the Crimes Act.

Witness identity protection

6.24 The committee accepts that the rationale of the model laws in relation to witness protection certificates is to ensure the safety of undercover operatives and the integrity of law enforcement and intelligence operations. However, placing the decision about whether it is necessary to protect a witness' identity in the hands of law enforcement and intelligence agencies, instead of the courts, represents a fundamental shift and it does place the right of every accused person to a fair trial in some jeopardy.

6.25 The power of the court under proposed section 15MM of the Crimes Act to allow evidence or statements which would reveal a witness' identity despite a certificate provides some comfort that the right of the accused to test the credibility of his or her accuser will be protected. However, proposed subsection 15MM(5) of the Crimes Act is currently drafted too narrowly to ensure this. In particular, under paragraph 15MM(5)(a) a court will only be permitted to make such orders if there is evidence which, if accepted, would substantially call into question the operative's credibility. It seems improbable to the committee that an accused would ever be in possession of evidence that would substantially call into question the credibility of an operative when he or she does not know the identity of the operative. In the committee's view, this requirement should be deleted so that a court may make orders to allow evidence that may disclose the operative's identity: if it is impractical to test

the credibility of the operative without allowing the risk of disclosure; and it is in interests of justice for the operative's credibility to be tested.

Drafting issue

6.26 The definition of 'chief officer' in relation to assumed identities in proposed section 15K of the Crimes Act provides that, where regulations specify an agency as a 'law enforcement agency', the 'chief officer' of that agency is the officer specified in those regulations. However, the definition of 'chief officer' in proposed section 15M of the Crimes Act, which relates to the witness identity protection provisions, does not define the 'chief officer' of an agency specified as a 'law enforcement agency' by regulation. Similarly, the definition of 'senior officer' in proposed subsection 15MX(3) of the Crimes Act does not provide that, where regulations specify an agency as a 'law enforcement agency', senior officers of that agency are the officers specified in those regulations.

6.27 Clearly, proposed section 15M and proposed subsection 15MX(3) should provide definitions of the terms 'chief officer' and 'senior officer' where regulations specify an agency as a 'law enforcement agency'.

Recommendation 8

6.28 The committee recommends that proposed subsection 15MM(5) of the Crimes Act be amended by deleting paragraph (a).

Recommendation 9

6.29 The committee recommends that proposed section 15M and proposed subsection 15MX(3) of the Crimes Act provide definitions of the terms 'chief officer' and 'senior officer' in relation to agencies which are prescribed as a 'law enforcement agency' by regulation.

Joint commission of offences

6.30 Some evidence to the inquiry suggested that the joint commission of offences provisions are drafted too broadly and, in particular, that the provisions should require an element of participation in the criminal venture by the accused before liability arises. One difficulty with this proposal is that it would dilute the operation of the provisions in relation to senior organised crime figures who are in the best position to distance themselves from any evidence of participation. The committee also received evidence suggesting that these provisions would be a useful tool for law enforcement agencies to employ in relation to organised crime groups. On balance, the committee considers the introduction of the joint commission of offences provisions a proportionate response to the difficulties involved in combating organised crime.

6.31 However, the committee is concerned that proposed subsection 11.2A(6) of the Criminal Code which relates to a person terminating his or her involvement in a criminal venture is drafted too narrowly. It would be very difficult for an accused to satisfy this provision because it requires a person to take *all* reasonable steps to prevent the commission of the offence. In the committee's view, the provision should simply require that an accused terminated his or her involvement in the agreement and took reasonable steps to prevent the offence.

6.32 The committee has considered the arguments for more expansive provisions targeting criminal organisations than those proposed by the Bill. However the committee has not received evidence that would justify such provisions. In reaching this view, the committee was assisted by the detailed and careful consideration of laws directed at criminal organisations by the PJC in its report on legislative arrangements to outlaw serious and organised crime groups. In particular, the committee notes the PJC's comments that, while the enactment of such laws at the state level has primarily been a response to concerns about the criminal activities of outlaw motorcycle gangs:

...the groups committing some of the most serious and lucrative crimes, and driving the lower-level criminal groups, do not have such a public face. Moreover, witnesses emphasised the changing nature of organised crime groups from tightly structured and enduring groups to loosely affiliated and transitory networks.¹

6.33 The committee shares the view of the PJC that confiscation of criminal assets is an effective way of tackling serious and organised crime which shares many of the benefits of laws targeting criminal organisations without some of the attendant difficulties, complexities and costs of those laws.²

Recommendation 10

6.34 The committee recommends that the word 'all' be deleted from proposed paragraph 11.2A(6)(b) of the Criminal Code so that a person will not be liable under the joint commission provisions if he or she terminated his or her involvement in the agreement and took reasonable steps to prevent the commission of the offence.

Telecommunications interception

6.35 The New South Wales Government raised concerns about the manner in which telecommunications interception powers have been extended in relation to criminal organisation offences. The committee accepts that there will often be material which has already been collected under telecommunications interception warrants which would support proceedings under the *Crimes (Criminal Organisations Control) Act 2009 (NSW)*. Most commonly this would occur where telecommunications interception has been used by police to investigate serious offences committed by members of criminal groups. There would appear to be minimal impact on civil liberties of allowing the use of such material in proceedings under legislation directed at criminal organisations and clearly it would assist law enforcement officials in their efforts to disrupt such organisations. The committee therefore recommends that the TIA Act be amended to allow the use of lawfully acquired intercept material in proceedings to obtain declarations that an organisation is a criminal organisation or to obtain control orders over members of that organisation.

1 PJC, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p. 158.

2 PJC, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, p. 158.

6.36 The committee is also concerned that the definition of ‘prescribed offence’ under the TIA Act would not capture a first offence of controlled members of a declared organisation associating with each other under the New South Wales legislation. Given the evidence from the New South Wales Government about the difficulties this would create in relation to the investigation of such offences, the committee is persuaded that this offence should be included in the definition of ‘prescribed offence’.

Recommendation 11

6.37 The committee recommends amending the definition of ‘exempt proceeding’ in section 5B of the *Telecommunications (Interception and Access) Act 1979* to allow the use of lawfully acquired telecommunications interception material in proceedings, under state criminal organisation legislation, to obtain criminal organisation declarations as well as proceedings to obtain interim control orders, or control orders, over members of those organisations.

Recommendation 12

6.38 The committee recommends including first time offences of association under section 26 of the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* within the definition of ‘prescribed offence’ in section 5 of the *Telecommunications (Interception and Access) Act 1979*.

Conclusion

6.39 The committee notes that it received proposals both that the provisions in the Bill should go much further in terms of the powers and offences created as well as submissions arguing that the provisions in the Bill intrude on fundamental legal principles such as the presumption of innocence and the right to silence. The diversity of the views presented to the committee demonstrates the difficulty in appropriately balancing the need to provide law enforcement agencies with the tools to disrupt organised crime whilst not intruding unnecessarily on the rights of individuals. The committee has sought through its recommendations to balance these competing imperatives. In overall terms, the committee views the Bill as a measured and appropriate response to the challenges posed by organised crime.

Recommendation 13

6.40 Subject to the preceding recommendations, the committee recommends that the Bill be passed.

Senator Patricia Crossin

Chair