The Senate

Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions]

September 2009

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ABBREVIATIONS

the 1987 POC Act	*Proceeds of Crime Act 1987*
the 2002 POC Act	*Proceeds of Crime Act 2002*
AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
ALRC	Australian Law Reform Commission
ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATO	Australian Taxation Office
the Bill	Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
Customs	Australian Customs and Border Protection Service
DPP	Commonwealth Director of Public Prosecutions
Gedeon	*Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43
Hatfield	*Director of Public Prosecutions v Hatfield* [2006] NSWSC 195
ITSA	Insolvency and Trustee Service Australia
Law Council	Law Council of Australia
NWPP	National Witness Protection Program

PJC	Parliamentary Joint Committee on the Australian Crime Commission
Police Associations	Australian Federal Police Association and the Police Federation of Australia
SCAG	Standing Committee of Attorneys-General
the Sherman report	*Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*
TIA Act	*Telecommunications (Interception and Access) Act 1979*

RECOMMENDATIONS

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.

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.

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.

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.

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.

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.*

Recommendation 13

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

CHAPTER 1
INTRODUCTION

Summary of key amendments

1.1 On 25 June 2009, the Senate referred the provisions of the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 (the Bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 17 September 2009.

1.2 The Standing Committee of Attorneys-General (SCAG) agreed in April 2009 to a comprehensive national response to combat organised crime.[1] The Bill seeks to amend a number of acts to implement the Commonwealth's commitment to this SCAG agreement. In particular, the Bill contains provisions:

(a) to amend the *Proceeds of Crime Act 2002* (the 2002 POC Act) by introducing unexplained wealth provisions (Schedule 1);

(b) to make other changes to the 2002 POC Act (Schedule 2);

(c) to enact model laws with respect to investigative powers, specifically:

  (i) controlled operations;

  (ii) assumed identities; and

  (iii) witness identity protection (Schedule 3);

(d) to extend criminal liability to persons who jointly commit an offence (Schedule 4, Part 1); and

(e) to increase access to telecommunications interception for criminal organisation offences (Schedule 4, Part 2).[2]

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 30 June 2009, and invited submissions by 31 July 2009. Details of the inquiry, the Bill, and associated documents were placed on the committee's website. The committee also wrote to over 80 organisations and individuals inviting submissions.

1.4 The committee received 13 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.5 The committee held a public hearing in Melbourne on 28 August 2009. A list of witnesses who appeared at the hearing is at Appendix 2 and copies of the Hansard transcript are available through the Internet at http://www.aph.gov.au/hansard.

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1 Standing Committee of Attorneys-General, *Communiqué*, 17 April 2009 available at: http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes (accessed 20 July 2009).

2 Explanatory Memorandum, pp 2 and 132.

Acknowledgement

1.6 The committee thanks the organisations and individuals who made submissions and gave evidence at the public hearing.

Structure of the report

1.7 The structure of the report is as follows:

- Chapter 2 examines the criminal asset confiscation provisions of the Bill;
- Chapter 3 reviews the provisions which would introduce the model laws in relation to investigative powers and witness identity protection;
- Chapter 4 looks at the joint commission of offences provisions;
- Chapter 5 considers the proposed changes to telecommunications interception powers; and
- Chapter 6 contains a summary of the views of the committee and its recommendations.

Note on references

1.8 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

CRIMINAL ASSET CONFISCATION

Related inquiries and reviews

2.1 Schedules 1 and 2 of the Bill would amend the 2002 POC Act by introducing unexplained wealth provisions and by making various other changes to the federal criminal asset confiscation regime. This section outlines some previous inquiries and reviews which are relevant to these asset confiscation provisions of the Bill.

Australian Law Reform Commission review of the Proceeds of Crime Act 1987

2.2 The 2002 POC Act was enacted following an inquiry by the Australian Law Reform Commission (ALRC) into the *Proceeds of Crime Act 1987* (the 1987 POC Act).[1] The 1987 POC Act provides for the forfeiture of property derived from or used in connection with the commission of indictable offences. ALRC found that a significant limitation of the 1987 POC Act was that it does not allow for the confiscation of property, the acquisition of which could only be explained as the profits of continuing or serial criminal conduct, where there is insufficient evidence to prove the commission of a criminal offence beyond a reasonable doubt. Further, ALRC noted that under the 1987 POC Act it is necessary to prove a link between a particular offence and property to be confiscated. This means that, even where the offence is demonstrably part of a course of continuing or serial unlawful conduct, recovery is limited to property able to be linked to the commission of that particular offence.[2]

2.3 ALRC recommended that:

> A non-conviction based regime should be incorporated into the [Proceeds of Crime] Act to enable confiscation, on the basis of proof to the civil standard, of profits derived from engagement in prescribed unlawful conduct.[3]

2.4 The 2002 POC Act implemented this recommendation by providing for confiscations based upon independent civil action as well as confiscations linked to a criminal prosecution. The Commonwealth Director of Public Prosecutions (DPP) explained that under the 2002 POC Act:

> Conviction based action depends upon a person being convicted by a court of a Commonwealth indictable offence, which in turn involves proof of all elements of the offence beyond reasonable doubt. Civil action may be taken whether or not a person has been charged with or convicted of an offence, and involves proof of the offence to a lower standard, "the balance

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1 ALRC, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987*, ALRC 87, 1999 at: http://www.austlii.edu.au/au/other/alrc/publications/reports/87/ (accessed 22 July 2009).

2 ALRC, p. 81.

3 ALRC, recommendation 9, p. 84.

of probabilities". Civil action is available in relation to a narrower range of cases.[4]

2.5 Some recovery of criminal assets continues to occur under the 1987 POC Act where the confiscation action was begun prior to the commencement of the 2002 POC Act on 1 January 2003. For example, in 2007-08, $5.19 million was recovered under the 1987 POC Act compared to $19.56 million under the 2002 POC Act.[5]

Sherman review of the Proceeds of Crime Act 2002

2.6 In 2006, Mr Tom Sherman AO conducted the independent review of the 2002 POC Act required by section 327 of that Act. The Sherman report found that the 2002 POC Act had been more effective than the 1987 POC Act but recommended several changes to the 2002 POC Act aimed at strengthening the federal regime for seizing the proceeds and instruments of crime.[6] Notably, Mr Sherman AO recommended that:

- the 2002 POC Act should contain a clear mandate for agencies to pass on information acquired under the Act to other agencies for purposes such as the investigation of offences and the protection of revenue;[7]
- the processing of legal aid claims under the Act should be made more flexible and efficient;[8]
- the limitation period for non-conviction based confiscation of the proceeds or instruments of crime be extended from six to twelve years from the date of the relevant offence;[9] and
- the 2002 POC Act provide for non-conviction based restraint and forfeiture of the instruments (as distinct from the proceeds) of non-terrorism offences.[10]

2.7 Mr Sherman AO considered submissions from the Australian Federal Police (AFP) and the Australian Federal Police Association that the Act should incorporate unexplained wealth provisions. Such provisions currently exist in Western Australia

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4 *Submission 5*, p. 2.

5 Commonwealth Director of Public Prosecutions, *Annual Report 2007-08*, at: http://www.cdpp.gov.au/Publications/AnnualReports/CDPP-Annual-Report-2007-2008.pdf (accessed 22 July 2009) p. 92.

6 Mr Tom Sherman AO, *Report on the independent review of the operation of the Proceeds of Crime Act 2002 (Cth)*, July 2006, at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportontheIndependentReviewoftheOperationofthePrceedsofCrimeAct2002(Cth) (accessed 21 July 2009), p. 68.

7 Mr Tom Sherman AO, p. 29.

8 Mr Tom Sherman AO, pp 57-58.

9 Mr Tom Sherman AO, p. D4. At present, there is a six year limitation except in relation to terrorism offences. See for example subparagraphs 18(1)(d)(ii) and 47(1)(c)(ii) and paragraphs 19(1)(d) and 49(1)(d) of the 2002 POC Act.

10 Mr Tom Sherman AO, p. D4. Paragraphs 19(1)(d) and 49(1)(c) of the 2002 POC Act provide for non-conviction based restraint and forfeiture of instruments of terrorism offences but not the instruments of other offences. However, where there are associated criminal proceedings, the provisions dealing with restraint and forfeiture apply to the instruments of both terrorism and non-terrorism offences: subsections 17(2) and 48(2).

and the Northern Territory.[11] These provisions empower the Director of Public Prosecutions in those jurisdictions to apply to a court for an unexplained wealth declaration against a person. The court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the respondent's wealth is greater than the value of the respondent's lawfully acquired wealth. The respondent must pay any unexplained wealth to the state or territory. Under the provisions, it is presumed wealth was not lawfully acquired unless the respondent establishes to the contrary.[12]

2.8 Mr Sherman AO concluded that:

> 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? Moreover, the adoption of the recommendations made in this report will, I believe, make the Act far more effective in attacking the proceeds of crime.
>
> 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.[13]

Parliamentary Joint Committee on the Australian Crime Commission inquiries

2.9 The Parliamentary Joint Committee on the Australian Crime Commission (the PJC) reported in September 2007 on its inquiry into the future impact of serious and organised crime on Australian society. The PJC made 22 recommendations including that:

- the recommendations of the Sherman report into the 2002 POC Act, where appropriate, be implemented without delay; and
- the Commonwealth, state and territory governments enact complementary and harmonised legislation for dealing with the activities of organised crime as a matter of priority.[14]

2.10 In August 2009, the PJC completed an inquiry into legislative arrangements to outlaw serious and organised crime groups. The PJC examined the unexplained wealth provisions of the Bill and recommended that those provisions be passed.[15]

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11 Sections 11-14 of the *Criminal Property Confiscation Act 2000 (WA)* and sections 67-72 of the *Criminal Property Forfeiture Act 2002 (NT)*.

12 Mr Tom Sherman AO, p. 37.

13 Mr Tom Sherman AO, p. 37.

14 PJC, *Inquiry into the future impact of serious and organised crime on Australian society*, September 2007, at: http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/organised_crime/report/index.htm (accessed 20 July 2009), recommendations 5 and 8.

15 PJC, *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009, at: http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/report/report.pdf (accessed 17 August 2009), recommendation 3, pp 114-117.

Provisions in the Bill

2.11 In relation to the proposed changes to the Commonwealth criminal assets confiscation regime, the Explanatory Memorandum explains that:

> The overarching purpose behind these amendments is to improve the ability of law enforcement agencies to target upper-echelon organised crime figures that derive the greatest financial benefit from offences, but are seldom linked by evidence to the commission of an offence.[16]

2.12 The 2002 POC Act currently provides for:

(a) restraining orders which prevent dealings with property which is liable to forfeiture under the Act (sections 16 to 45);

(b) forfeiture orders which require the forfeiture of the proceeds or instruments of crime either where there are associated criminal proceedings or on the basis of independent civil proceedings (sections 46 to 114);

(c) pecuniary penalty orders which require payment to the Commonwealth of amounts based on benefits derived from crime (sections 115 to 150);

(d) literary proceeds orders which require payment to the Commonwealth of amounts which are benefits derived from the commercial exploitation of the notoriety a person achieves by committing a crime (sections 151 to 179); and

(e) coercive measures to assist in the investigation of proceeds of crime matters including:

  (i) orders allowing the examination of any person who has an interest in property which is the subject of a restraining order (sections 180 to 201);

  (ii) orders requiring the production of documents (sections 202 to 212);

  (iii) notices to financial institutions requiring the provision of information or documents (sections 213 to 218);

  (iv) orders requiring a financial institution to monitor and provide information relating to transactions through an account (sections 219 to 224); and

  (v) search warrants, and searches of aircraft, vehicles or vessels without warrants in emergency situations (sections 225 to 266).[17]

Unexplained wealth provisions

2.13 Schedule 1 of the Bill would introduce new provisions to provide for the seizure of wealth a person cannot demonstrate was lawfully acquired.[18] Under these

16 Explanatory Memorandum, p. 2.

17 Mr Tom Sherman AO, pp 7-8.

18 Explanatory Memorandum, pp 2 and 5.

provisions, once a court is satisfied that an authorised officer has reasonable grounds to suspect that a person's total wealth exceeds his or her lawfully acquired wealth, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences. If a person cannot demonstrate this, the court must order the person to pay to the Commonwealth the difference between the person's total wealth and the person's legitimate wealth (the unexplained wealth amount).[19]

2.14 For the purpose of these provisions, an 'authorised officer' is an authorised member of the AFP, the Australian Crime Commission (ACC), the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Customs and Border Protection Service (Customs) or the Australian Securities and Investment Commission (ASIC).[20]

Restraining orders

2.15 Item 5 of Schedule 1 would insert a new section 20A into the 2002 POC Act allowing the DPP to apply for restraining orders in relation to a person's property where there are reasonable grounds to suspect that:

- a person's total wealth exceeds his or her lawfully acquired wealth; and
- the person has 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 such an offence.[21]

2.16 The purpose of restraining orders is to ensure that property is preserved and cannot be dealt with to defeat an unexplained wealth order.[22] However, the court may refuse to make a restraining order if it is not in the public interest to do so.[23]

2.17 Proposed subsection 20A(2)[24] provides that a restraining order may cover all of the property of the person suspected of having unexplained wealth amounts (the suspect), or specified parts of that person's property. In addition, the order can extend to property of another person if that property is suspected of being under the effective control of the suspect.[25]

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19 Explanatory Memorandum, p. 5.

20 Definition of 'authorised officer' in section 338 of the 2002 POC Act.

21 Explanatory Memorandum, p. 7.

22 Explanatory Memorandum, p. 6.

23 Proposed subsection 20A(4).

24 References to proposed provisions in this chapter refer to proposed provisions of the 2002 POC Act.

25 Explanatory Memorandum, p. 7. For example, where a person transfers property into the name of a relative but retains effective control of the property. Section 337 of the 2002 POC Act defines 'effective control'.

2.18 Proposed section 29A would allow a person to apply for property to be excluded from a restraining order on the basis that it is not the property of the suspect and is not under the suspect's effective control.[26]

Preliminary unexplained wealth order

2.19 Proposed section 179M would empower the DPP to apply for an unexplained wealth order.[27] Where the DPP does so, proposed subsection 179B(1) will require a court with proceeds jurisdiction[28] to make a preliminary unexplained wealth order if the court is satisfied that there are reasonable grounds to suspect that the person's total wealth exceeds the value of the person's lawfully acquired wealth and the affidavit requirements set out in proposed subsection 179B(2) are met.

2.20 The Explanatory Memorandum notes that proposed section 179B is intended to act as a gate keeping provision:

> Before a court with proceeds jurisdiction embarks on the hearing of an unexplained wealth order, it has an opportunity to assess whether an authorised officer has demonstrated reasonable grounds to suspect that the total value of the person's wealth exceeds the value of the person's wealth that was lawfully acquired. If the court does not consider that the authorised officer has reasonable grounds to hold that suspicion, it can refuse to make the preliminary unexplained wealth order and the application for an unexplained wealth order does not proceed any further.[29]

2.21 A preliminary unexplained wealth order will require a person to appear before the court in relation to an unexplained wealth order.[30]

2.22 Under proposed section 179N, the DPP may apply for an unexplained wealth order without initially providing notice to the person to whom the order would relate.[31] Once a preliminary unexplained wealth order is made, the DPP will have to provide written notice of the order to the person, as well as a copy of the application for the unexplained wealth order and any affidavit supporting the application.[32] However, the DPP will be able to delay providing a copy of the affidavit where the court considers it would be appropriate to order such a delay (for example where providing the affidavit would prejudice the investigation of an offence).[33]

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26 Explanatory Memorandum, p. 8.

27 Explanatory Memorandum, p. 14.

28 The courts that have proceeds jurisdiction for a preliminary unexplained wealth order or an unexplained wealth order are those of any state or territory with jurisdiction to deal with criminal matters on indictment. See proposed subsection 335(7); Explanatory Memorandum, pp 11 and 19-20.

29 Explanatory Memorandum, p. 10.

30 Proposed subsection 179B(1); Explanatory Memorandum, p. 10.

31 Explanatory Memorandum, p. 14.

32 Explanatory Memorandum, p. 14.

33 Proposed subsections 179N(4) and (5).

2.23 Proposed section 179C will allow a person who is subject to a preliminary unexplained wealth order to apply to the court to revoke the order. The application must be made within 28 days of the person being notified of the preliminary order or, where the person seeks an extension of time within the 28 days, within the time the court allows, up to a maximum of 3 months.[34] The court may revoke the order if it is satisfied that there were no grounds on which to make the order at the time the order was made.[35]

Unexplained wealth order

2.24 Where the court has made a preliminary unexplained wealth order in relation to a person, proposed subsection 179E(1) will require the court to make an unexplained wealth order if the person has failed to satisfy the court that his or her 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.[36]

2.25 A person 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.[37]

2.26 An unexplained wealth order will require the person to pay to the Commonwealth an amount equal to the difference between his or her total wealth and the value of the property that was *not* derived from the specified offences.[38]

Unexplained wealth amounts

2.27 Proposed section 179G provides that a person's wealth is property owned, effectively controlled, consumed or disposed of by the person at any time. The Explanatory Memorandum sets out the rationale for this approach:

> It is necessary to include property owned, effectively controlled, consumed or disposed of by the person at any time so that the person accounts for the entirety of his or her wealth over time and not just property he or she currently owns or controls. If a person's wealth were limited to a particular period of time, a person could escape accounting for large amounts of unexplained wealth derived from a potential lifetime of crime. Similarly, if wealth did not include property disposed of, a person could funnel

34 Proposed subsection 179C(2).

35 Proposed subsection 179C(6).

36 Explanatory Memorandum, p. 11. Item 37 of Schedule 1 inserts a definition of 'State offence that has a federal aspect' into section 338 of the 2002 POC Act providing that the phrase has the same meaning as in section 3AA of the *Crimes Act 1914*. Essentially, this encompasses offences which could have been validly enacted by the Commonwealth Parliament.

37 Proposed subsection 179E(3); Explanatory Memorandum, p. 12.

38 Proposed subsection 179E(2).

significant amounts of proceeds of crime through extravagant gifts or personal consumption.[39]

2.28 Proposed section 179H provides that property will still be treated as a person's property if it is vested in an insolvency trustee. This will prevent people avoiding accounting for unexplained wealth by declaring themselves bankrupt.[40]

2.29 Proposed section 336A will define 'lawfully acquired' property or wealth to require both that the property or wealth was lawfully acquired, and that any consideration given for the property or wealth was lawfully acquired. The Explanatory Memorandum states that this will ensure a person retains his or her lawfully acquired consideration but does not retain unlawfully acquired consideration or capital gains made on property that was not lawfully acquired.[41] The Explanatory Memorandum gives as an example: a person who purchases a house for $100,000 with $50,000 of lawfully acquired wealth and $50,000 of unlawfully acquired wealth, and whose house appreciates so that it is worth $200,000, will only be entitled to the initial lawfully acquired $50,000.[42]

2.30 However, it is not clear how the definition has this effect given that under proposed subsection 179E(2) the 'unexplained wealth amount' is calculated by deducting from a person's 'total wealth' amounts not derived from specified offences and thus does not seem to be linked the definition of 'lawfully acquired' property and wealth.

2.31 The dependant of a person whose property is the subject of an unexplained wealth order may seek a court order requiring the Commonwealth to pay an amount to the dependant to relieve any hardship that would be caused by an unexplained wealth order.[43] If the dependant is over 18 years of age, the court must be satisfied that he or she had no knowledge of the criminal conduct that forms the basis of the unexplained wealth order.[44]

Other amendments to the Proceeds of Crime Act 2002

2.32 Schedule 2 of the Bill would amend the 2002 POC Act:

(a) to introduce freezing orders to ensure assets are not dispersed;

(b) to remove the six year time limitation on orders for non-conviction based restraint and forfeiture of proceeds of crime;

(c) to provide for non-conviction based restraint and forfeiture of instruments of serious crime;

(d) to enhance information sharing under the 2002 POC Act; and

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39 Explanatory Memorandum, p. 12.

40 Explanatory Memorandum, p. 13.

41 Explanatory Memorandum, p. 20.

42 Explanatory Memorandum, p. 20.

43 Proposed section 179L.

44 Explanatory Memorandum, p. 14.

(e) to reimburse legal aid commission legal costs from the Confiscated Assets Account.[45]

2.33 The Explanatory Memorandum notes that some of these changes:

> ...respond to recommendations made in the Sherman report, including the amendments removing the six year time limit on non-conviction-based asset recovery, providing for the restraint and forfeiture of instruments of serious offences without conviction and enhancing information sharing under the Act. ...Recommendations of the Sherman Report that are not dealt with in this Bill are being considered for possible amendments in future legislation.[46]

Freezing orders

2.34 Part 1 of Schedule 2 of the Bill would amend the 2002 POC Act by introducing freezing orders. Under these provisions, an authorised officer of the AFP, ACLEI, ACC or Customs would be able to apply to a magistrate seeking the temporary restraint of liquid assets held in accounts with financial institutions.[47] The magistrate would be required to grant the order if satisfied that:

- there are reasonable grounds to suspect that the balance of an account is wholly or partly proceeds, or an instrument of an offence; and
- there is a risk the balance of the account will be reduced and this reduction would frustrate forfeiture proceedings.[48]

2.35 While the 2002 POC Act already allows the DPP to seek restraining orders in relation to property, the Explanatory Memorandum explains that:

> 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.[49]

2.36 A freezing order will only continue in force for a maximum of three working days.[50] However, a magistrate may make an order extending a freezing order if an application for a restraining order, relating to the account subject to the freezing order, has been made but not yet determined by a court. The extension may be for a specified number of working days, or until the court decides the application for the restraining order.[51]

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45 Explanatory Memorandum, p. 23.

46 Explanatory Memorandum, p. 23.

47 Proposed paragraph 15B(1)(a) and the definition of 'authorised officer' in section 338 of the 2002 POC Act.

48 Proposed section 15B; Explanatory Memorandum, pp 27 and 28.

49 Explanatory Memorandum, p. 27.

50 Proposed subsection 15N(3); Explanatory Memorandum, pp 27 and 31.

51 Proposed section 15P; Explanatory Memorandum, p. 31.

2.37 Proposed sections 15D and 15E would permit freezing orders to be applied for and granted by telephone, fax or other electronic means in urgent cases, or where the delay that would occur if the application was made in person would frustrate the effectiveness of the order.[52]

2.38 Where an account is subject to a freezing order, a person in whose name the account is held can apply to a magistrate to have the order varied to allow a withdrawal to meet the reasonable living expenses of the person or their dependants, the reasonable business expenses of the person or a specified debt incurred in good faith by the person.[53]

Removal of six year time limit

2.39 At present under the 2002 POC Act, non-conviction based asset recovery is generally limited to confiscation of the proceeds of crimes committed in the six years prior to recovery action commencing.[54] In particular, the provisions relating to:

- non-conviction based restraining orders (sections 18 and 19);
- non-conviction based forfeiture orders (sections 47 and 49); and
- pecuniary penalty orders (section 116),

are all limited by a requirement that the relevant criminal offence was committed within the six years preceding the application for a restraining order (unless the offence was a terrorism offence).[55]

2.40 The Explanatory Memorandum argues that:

> As criminals routinely attempt to conceal offences, and crimes such as fraud and money laundering may occur over extended periods, the time limit can pose significant obstacles for non-conviction-based recovery.[56]

2.41 The Sherman report recommended that the six year period be extended to 12 years provided that all of the conduct occurred within the 12 year period.[57] Mr Sherman AO noted that:

> In one sense, whatever period is specified, there will always be difficulties. However, in the case of more serious offences (which is the provenance of the Act) six years seems too short. Professional criminals engage in crime over long periods of time, many have life careers. Extending the 6 year limitation to 12 years seems reasonable. However, with the extended period

52 Explanatory Memorandum, pp 28-29.

53 Proposed section 15Q; Explanatory Memorandum, pp 27 and 31-32.

54 Explanatory Memorandum, p. 33. This time limit does not apply to conviction based forfeitures, literary proceeds orders or the forfeiture of the proceeds or instruments of terrorism offences.

55 Pecuniary penalty orders may not be preceded by a restraining order in which case paragraph 116(2)(a) of the 2002 POC Act provides that the offence must have occurred within six years preceding the application for the pecuniary penalty order.

56 Explanatory Memorandum, p. 33.

57 Mr Tom Sherman AO, p. D4.

> the case for covering part of the relevant conduct occurring before the 12 year period is weakened. There have to be some limits on what is essentially a civil liability.[58]

2.42 However, the provisions in Part 2 of Schedule 2 of the Bill would remove the time limit altogether.[59]

Restraint and forfeiture of instruments of serious crime

2.43 Currently, the 2002 POC Act provides for non-conviction based restraint and forfeiture of instruments of terrorism offences but not the instruments of other offences.[60] However, where there are associated criminal proceedings, the provisions dealing with restraint and forfeiture apply to the instruments of all indictable offences.[61] The Sherman report recommended that the instruments of indictable offences should be subject to non-conviction based restraint and forfeiture orders.[62]

2.44 The amendments in Part 3 of Schedule 2 would enable the restraint and forfeiture of instruments of offences without conviction but the amendments are limited to the instruments of 'serious offences'.[63] A serious offence is defined under the 2002 POC Act as an indictable offence punishable by at least 3 years imprisonment and involving certain other elements such as:

- unlawful conduct relating to narcotics or serious drug offences;
- unlawful conduct intended to cause a benefit or loss of at least $10,000;
- money laundering;
- terrorism; or
- certain people smuggling offences.[64]

2.45 The Explanatory Memorandum states that:

> The effect of these changes will mean that the DPP could apply to a court with proceeds jurisdiction to confiscate the premises of a person used as a laboratory to make narcotics, because the premises would be treated as an instrument of a serious offence.[65]

2.46 Under the proposed amendments, courts will have a discretion not to make a non-conviction based forfeiture order in relation to property that is an instrument of a

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58 Mr Tom Sherman AO, p. D3.

59 Explanatory Memorandum, p. 33.

60 Subparagraphs 18(2)(d)(ii), 19(1)(d)(ii) and 49(1)(c)(iv), paragraph 19(2)(b) and subsection 47(1) of the 2002 POC Act.

61 Paragraphs 17(2)(d) and 48(2)(d) of the 2002 POC Act; Explanatory Memorandum, p. 38.

62 Mr Tom Sherman AO, p. D4; Explanatory Memorandum, p. 39.

63 Explanatory Memorandum, p. 38.

64 Explanatory Memorandum, p. 38; section 338 of the 2002 POC Act.

65 Explanatory Memorandum, p. 38.

serious offence (other than a terrorism offence) if it is not in the public interest to make the order.[66]

Information sharing

2.47 The 2002 POC Act does not expressly limit the use and sharing of information obtained under the Act.[67] However, the New South Wales Supreme Court in *Director of Public Prosecutions v Hatfield* ruled that information obtained in an examination under Part 3-1 of the 2002 POC Act could only be used for the purpose of proceedings under the Act and could not be used or disclosed for any other purpose.[68] This decision was based upon the principle that:

> 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.[69]

2.48 While the decision in *Hatfield* related to information obtained using the examination powers under the 2002 POC Act, the same principle is likely to apply to material obtained using the other information-gathering powers under the Act.

2.49 The DPP noted that the decision in *Hatfield*:

> ...has placed an organisational burden on law enforcement agencies, requiring them to endeavour to "quarantine" information obtained from examinations, and has also inhibited law enforcement generally by preventing the free flow of relevant information and intelligence. [70]

2.50 The Sherman report recommended that the 2002 POC Act should be amended so that it provided a clear mandate for information acquired in any way under the Act, relating to any serious offence, to be passed:

- to any agency that has a lawful function to investigate that offence;
- to the Insolvency and Trustee Service Australia (ITSA) to assist in the discharge of its functions under the Act; and
- to the ATO for the protection of public revenue.[71]

2.51 The Explanatory Memorandum states that:

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66 Proposed subsections 47(4) and 49(4); Explanatory Memorandum, pp 39 and 40.

67 There are some exceptions to this. For example, section 198 provides that material provided by a person in an examination is generally not admissible in civil or criminal proceedings against the person.

68 [2006] NSWSC 195; Explanatory Memorandum, p. 41.

69 Brennan J in *Johns v Australian Securities Commission,* (1993) 178 CLR 408 at 424 cited in *DPP v Hatfield* at para 24.

70 *Submission 5*, p. 5.

71 Mr Tom Sherman AO, p. 29; Explanatory Memorandum, p. 41.

> It was never the intention of the [2002 POC] 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.[72]

2.52 The proposed amendments in Part 4 of Schedule 2 would ensure that information obtained under the 2002 POC Act can be disclosed when that information will assist in the prevention, investigation or prosecution of criminal conduct.[73] In particular, proposed section 266A will permit the disclosure of information to:

- an authority with functions under the 2002 POC Act where the disclosure would facilitate the authority's performance of its functions under the Act;
- an authority of the Commonwealth, a state, territory or foreign country that has a function of investigating or prosecuting crimes where the disclosure would assist in the prevention, investigation or prosecution of a crime against the law of the relevant jurisdiction; and
- the ATO where the disclosure would assist the ATO to protect public revenue.[74]

Reimbursement of legal aid commission costs

2.53 Part 5 of Schedule 2 would simplify arrangements for legal aid commissions to recover costs incurred by people who have assets restrained under the 2002 POC Act. The amendments would provide for legal aid costs to be paid directly from the Confiscated Assets Account, instead of from restrained assets.[75] These amendments respond to a recommendation of the Sherman report.[76]

Key issues

2.54 The key issues raised in evidence to the committee regarding amendments to the 2002 POC Act concerned the provisions related to:

- unexplained wealth;
- freezing orders;
- removal of the six year limitation period on non-conviction based forfeitures;
- non-conviction based forfeiture of the instruments of serious offences; and
- information sharing.

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72 Explanatory Memorandum, p. 41.

73 Explanatory Memorandum, p. 41.

74 Explanatory Memorandum, pp 42-43.

75 Explanatory Memorandum, p. 43.

76 Mr Tom Sherman AO, p. 58.

Unexplained wealth provisions

2.55 Mr Mark Burgess of the Police Federation of Australia noted that the unexplained wealth provisions have three objectives:

> ...firstly, to deter those who contemplate criminal activity by reducing the possibility of gaining or keeping a profit from that activity; secondly, to prevent crime by diminishing the capacity of offenders to finance any future criminal activity that they might engage in; and, thirdly, to remedy the unjust enrichment of criminals who profit at society's expense.[77]

2.56 The committee received some evidence endorsing the unexplained wealth provisions in the Bill. For example, Professor Roderic Broadhurst submitted that:

> Tainted or unexplained wealth may be the only means to reliably identify criminal entrepreneurs whose involvement in [organised crime] is usually indirect in terms of actual commission. Indeed unexplained wealth laws are one of the most effective means to investigate/prosecute the otherwise very difficult offences of corruption and bribery that often facilitate serious crime.[78]

2.57 Similarly, an officer from the AFP told the committee:

> The AFP sought these provisions as an additional method to investigate and confiscate the proceeds of crime generated by organised crime networks. In essence, they will enable us to investigate better those individuals who distance themselves from the commission of criminal activity but are actively involved in its planning and benefit from it.[79]

2.58 Amongst those opposed to the unexplained wealth amendments, views ranged from those who considered that the provisions are too broad to those that argued the amendments do not go far enough.

Concerns that the provisions infringe civil liberties

2.59 The Law Council of Australia (the Law Council) opposed the introduction of unexplained wealth provisions arguing that the provisions undermine the presumption of innocence by reversing the onus of proof and thus requiring the respondent to demonstrate that his or her wealth was lawfully acquired.[80] The Law Council submitted that:

> 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.[81]

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77 *Committee Hansard*, 28 August 2009, p. 25.

78 *Submission 12*, p. 1. See also Mr John Lawler, ACC, *Committee Hansard*, 28 August 2009, p. 46.

79 *Committee Hansard*, 28 August 2009, p. 47. See also p. 54.

80 *Submission 6*, pp 4 and 15.

81 *Submission 6*, p. 17. See also Civil Liberties Australia, *Submission 4*, supplementary submission, pp 4-5; New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 1.

2.60 In addition, Mr Tim Game SC of the Law Council told the committee:

> The central problem that we would see with the unexplained wealth orders is that to get to a forfeiture in unexplained wealth you do not need any evidence in relation to any offence. To get an unexplained wealth restraining order you do, but to get a forfeiture order you do not...[82]

2.61 Mr Game SC expressed particular concern at the impact of combining the reverse onus with the absence of a requirement to present evidence that shows there are reasonable grounds to suspect a person has committed an offence, or that his or her wealth is derived from an offence, in order to obtain a forfeiture order. He argued that the combination of these factors means that:

> ...you have put the person in a position where the suspicion in relation to the wealth is the sole thing that has triggered their forfeiture. That is the thing that we think goes too far.[83]

2.62 Finally, the Law Council submitted the powers available under the unexplained wealth provisions would be open to misuse and arbitrary application:

> [S]uch 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. 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.[84]

Concerns that the provisions will be ineffective

2.63 By contrast, the Office of Public Prosecutions Victoria submitted that the unexplained wealth provisions may not adequately strengthen the proceeds of crime regime. The Office argued that, in part, this was because, in order to meet the threshold requirement for obtaining a restraining order, the DPP would require much more detailed information regarding the respondent's financial affairs than was likely to be available in the absence of powers to compel the respondent to provide financial records.[85]

2.64 In a similar vein, the Australian Federal Police Association and the Police Federation of Australia (the Police Associations) argued that the unexplained wealth provisions in the Bill are too restrictive and 'would not enable the AFP to combat even simple money laundering techniques'.[86]

2.65 The Police Associations expressed particular concern about the link to offences in the unexplained wealth provisions. For example, in order to obtain a

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82 *Committee Hansard*, 28 August 2009, p. 2.

83 *Committee Hansard*, 28 August 2009, pp 5-6.

84 *Submission 6*, p. 18. See also New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 1; Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, p. 23.

85 *Submission 10*, p. 1.

86 *Submission 3*, p. 4.

restraining order under proposed section 20A there must be reasonable grounds to suspect that:

(a) the person has committed an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect; or

(b) the whole or any part of the person's wealth was derived from such an offence.

2.66 The Police Associations argued that, if there were reasonable grounds to suspect such offences were the source of the property, then property restraint could be pursued using the existing mechanisms in the 2002 POC Act and thus unexplained wealth provisions would not be required.[87]

2.67 The Police Associations acknowledged the constitutional limitations affecting the drafting of the Bill but urged a further evaluation of whether the external affairs power would support broader provisions and, if not, whether such provisions should be based on a referral of powers to the Commonwealth by the states.[88] The Police Associations advocated that these broader provisions should be modelled on the *Criminal Property Forfeiture Act 2002 (NT)* noting that around $6 million has been forfeited under that Act.[89] Mr Burgess summarised why the Police Associations considered the unexplained wealth provisions in jurisdictions such as the Northern Territory and Western Australia to be preferable to the provisions in the Bill:

> The key aspect ...is that in their provisions, Western Australia and the Northern Territory in particular, there does not need to be a link to an initial criminal offence to actually start the procedure whereas in this legislation there will need to be a link to an initial criminal offence. Some of the examples that have been provided to us from interstate are that there are people who are holding assets on behalf of these people who have gained substantial assets who it would be almost impossible to link to the criminal offence. The unexplained wealth provisions in Western Australia and in particular the Northern Territory have allowed the state to get the assets from those particular people.[90]

2.68 The Police Associations also made several specific recommendations for changes to the unexplained wealth provisions of the Bill. For example, they argued that, in addition to the DPP, the Commissioner of the AFP should be authorised to apply for a restraining order under the unexplained wealth provisions.[91] Federal Agent Whitehead explained the rationale for this recommendation:

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87 *Submission 3*, p. 4. See also Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, p. 26.

88 *Submission 3*, p. 3; Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, pp 35 and 36-37; *Answers to questions on notice*, 11 September 2009, pp 3-5.

89 *Committee Hansard*, 28 August 2009, pp 25 and 27.

90 *Committee Hansard*, 28 August 2009, p. 27.

91 *Submission 3*, p. 7; Federal Agent John Whitehead, *Committee Hansard*, 28 August 2009, pp 37-38.

> One of the issues we have from a law enforcement perspective is that the resources of the DPP are sometimes stretched. It is sometimes less timely to have matters considered. They have to go to the director or the deputy director for consideration as to the liability for costs that the DPP considers. So ...there are additional impediments to the effective operation of the legislation. One of the recommendations ...was to transfer that power to the AFP commissioner ...to improve the efficiency with which the act can operate.[92]

Threshold for commencing unexplained wealth proceedings

2.69 The Office of the Privacy Commissioner did not oppose the unexplained wealth provisions. However, the Office recommended that consideration be given to authorised officers having to demonstrate to the court that they have 'reasonable grounds to believe' (rather than 'reasonable grounds to suspect'), that a person's wealth exceeds his or her lawfully acquired wealth, before a preliminary unexplained wealth order may be made.[93] Mr Timothy Pilgrim, Deputy Privacy Commissioner submitted that:

> ...given the wide reach of the powers and the nature of such orders, the office believes that, before a court issues them, authorised officers ...should be able to demonstrate a higher level of knowledge than just having reasonable grounds to suspect that a person's total wealth exceeds the estimated value of lawfully acquired wealth. The office suggests that authorised officers could instead be required to demonstrate reasonable grounds to believe that this is the case. ...The office believes that [this] could assist in making sure that individuals who have not actually committed any offence nor gained personally from any illegal activity are not inadvertently caught up through this mechanism.[94]

2.70 Civil Liberties Australia made similar comments in relation to the use of 'reasonable grounds to suspect' as the threshold for obtaining a restraining order and noted that:

> ...if enacted in its current form, the amendments would allow the restraint of property on the most flimsy and superficial briefs of evidence. The burden selected strikes an inappropriate balance between the law enforcement interests of the state on the one hand, and the interests of the individual on the other.[95]

Burden of proof

2.71 In addition, Civil Liberties Australia proposed that the Bill be amended so that the DPP has an overarching burden to satisfy the relevant court, on the balance of probabilities, that the wealth was obtained through illicit means. Under this approach a

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92 *Committee Hansard*, 28 August 2009, p. 37.

93 *Submission 9*, p. 5. See also Civil Liberties Australia, *Submission 4*, supplementary submission, pp 1 and 3-4; Mr Tim Game SC, Law Council, *Committee Hansard*, 28 August 2009, p. 6.

94 *Committee Hansard*, 28 August 2009, p. 8. See also *Submission 9*, p. 2; Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, pp 18 and 21.

95 *Submission 4*, supplementary submission, p. 4.

respondent would only bear an evidential, as opposed to a legal, burden of showing that wealth was lawfully acquired. However, if the respondent failed or refused to adduce any evidence, then it would be open to the court to draw the inference that the assets were unlawfully obtained.[96] Mr Bill Rowlings of Civil Liberties Australia noted that:

> We support the principle that people should not gain from crime, but how you get there is the problem. ...We do not support people having to explain their wealth; we would prefer it the other way. [97]

2.72 Further, Mr Lance Williamson of Civil Liberties Australia argued that respondents may have difficulty producing evidence demonstrating the source of their wealth even where their assets were obtained legitimately:

> I would suggest most people do not have receipts and documentation going back more than a couple of years on most of their business. I cannot produce receipts, for example, for cars I would have bought five years ago or 10 years ago.[98]

2.73 The DPP made a proposal which may assist a respondent seeking to discharge the burden of proving that his or her wealth is not derived from criminal activity. Specifically, the DPP argued that that the evidence given by a person at the hearing of an application for an unexplained wealth order should not be admissible in criminal or civil proceedings against the person except:

- in criminal proceedings for giving false and misleading information; or
- in proceedings under the 2002 POC Act or related proceedings.[99]

2.74 The 2002 POC Act already contains a similar provision in respect of evidence given at an examination.[100] The DPP noted that:

> Without such a provision, a person might well refuse to give any evidence at the unexplained wealth order hearing on the basis that their evidence may incriminate them.[101]

Definitions of wealth and unexplained wealth

2.75 The Police Associations submitted that the definition of 'unexplained wealth amount' in proposed subsection 179E(2) is too prescriptive in that it is focused on the source of funds applied to particular items of property. The Police Associations proposed that a less prescriptive approach be adopted that would allow, for example, unexplained wealth to be calculated by adding the total increase in a person's net assets to his or her expenses over a specified time period and then subtracting from

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96 *Submission 4*, supplementary submission, p. 5.

97 *Committee Hansard*, 28 August 2009, p. 18.

98 *Committee Hansard*, 28 August 2009, p. 22.

99 *Answers to questions on notice*, 1 September 2009, p. 4.

100 Section 198 of the 2002 POC Act.

101 *Answers to questions on notice*, 1 September 2009, p. 4.

this total the funds or income legitimately available to a person during the same period of time.[102]

2.76 The DPP expressed related concerns that the definition of 'wealth' in proposed subsection 179G(1) is overly prescriptive. Under that provision, 'wealth' is defined as property owned or under the effective control of the person at any time as well as property the person has consumed or disposed of at any time. The DPP argued that:

> This definition is exclusive and does not include items such as expenses met by a person or services used by a person. The provision would also seem to encompass double counting of property that has been sold and replaced by other property.
>
> Proposed subsection 179G(1) could be amended to an inclusive definition of wealth which would allow for flexibility in assessing a person's wealth and the inclusion of expenses and services.[103]

Government response

2.77 In relation to the arguments of the Police Associations that a restraining order under proposed section 20A of the unexplained wealth provisions should not require reasonable grounds to suspect that specified offences were the source of the property, the Attorney-General's Department explained that the link to specified offences is required to ensure the constitutionality of the provisions:

> The paragraphs that relate to the person being suspected of committing an offence or part of their wealth being derived from an offence were included in order to provide a connection to a Commonwealth constitutional head of power.[104]

2.78 The officer from the Attorney-General's Department further advised that, while the department had considered whether broader unexplained wealth provisions could be supported by relying on the external affairs power in conjunction with international conventions relating to organised crime, corruption and money laundering, these conventions would not support a comprehensive unexplained wealth regime.[105]

2.79 Contrary to the view that the unexplained wealth provisions would be ineffective, the ACC provided the committee with an outline of specific cases where those provisions would have supported ACC operations. One case involved $100 million in remittances overseas where it was suspected that the remittance service was being used to launder funds derived from organised crime. In this case, legitimate and

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102 *Submission 3*, pp 11-15. See also the concerns raised by the DPP in relation to the formula for calculating unexplained wealth: *Answers to questions on notice*, 1 September 2009, p. 2.

103 *Answers to questions on notice*, 1 September 2009, p. 2.

104 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 64. See also Explanatory Memorandum, p. 5; Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 57.

105 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, pp 64 and 65.

illegitimate funds were mingled and it was not clear what percentage of the funds were proceeds of crime.[106]

2.80 Similarly, the AFP noted that the provisions would enable the AFP to reconsider a range of investigations where the AFP had been unable to take action against people in the higher levels of criminal networks because they remain at arms-length from criminal activity.[107] The AFP also outlined the following specific example of a case in which the provisions could have been utilised:

> ...there were a series of significant illegal drug importation investigations in which an Australian based member of a syndicate was identified through criminal intelligence. Insufficient evidence could be obtained to prosecute the individual or connect him to the criminal activity. During and subsequent to the investigation, the AFP identified that the individual had accumulated significant assets and wealth with no detectable legal means to account for them. An unjust enrichment provision in that sense would be effective in allowing us to continue to target that person in relation to their unexplained wealth.[108]

2.81 In his second reading speech, the Attorney-General noted that:

> Organised crime affects many areas of social and economic activity, inflicting substantial harm on the community, business and government.
>
> It has been estimated to cost the Australian economy at least $15 billion each year.[109]

2.82 The committee questioned officers from the Attorney-General's Department and the ACC about the basis for this figure but did not receive any information that would corroborate this estimate other than advice that the figure is based on United Nations Office on Drugs and Crime projections.[110]

2.83 On the specific proposal from the Police Associations that the AFP Commissioner should be authorised to apply for a restraining order under the unexplained wealth provisions, an officer from the DPP noted:

> One of the things about looking at making these applications is that it is important that there is some process in place whereby there are people, probably outside the direct investigation, who have some oversight in terms of making the application. If the commissioner were given that power, I would expect that he or she would put in place some sorts of processes to ensure that the cases were properly considered before court action was

106 ACC, *Examples where ACC operations would have been enhanced through new powers*, tabled at public hearing, 28 August 2009.

107 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 49.

108 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 56.

109 The Hon Robert McClelland MP, *House Hansard*, 24 June 2009, p. 6964. See also Mr John Lawler, ACC, *Committee Hansard*, 28 August 2009, p. 46.

110 *Committee Hansard*, 28 August 2009, pp 58 and 65.

> commenced. Whether that would then allow it to happen any quicker than it happens now I do not know.[111]

2.84 The Attorney-General's Department rejected the view that the threshold for obtaining preliminary unexplained wealth orders should be 'reasonable grounds for belief' rather than 'reasonable grounds to suspect' that a person's wealth exceeds lawfully acquired wealth:

> ...there is quite a lot of information that has to be provided to a court by an agency, including the authorised officer having to indicate the property which they know or reasonably suspect to have been lawfully acquired, all the property they know or reasonably suspect to be owned by the person, as well as reasonable grounds to show why they think total wealth exceeds the person's wealth. It is a fairly comprehensive list of criteria that have to be satisfied and it is our view that 'reasonable grounds to suspect' is quite an appropriate threshold.[112]

2.85 The Attorney-General's Department also responded to concerns that the definition of 'wealth' in proposed section 179G may allow for double counting of property:

> A broad definition of wealth is required so that a person accounts for the entirety of his or her wealth over time and not just property he or she currently owns or controls.
>
> The Commonwealth's unexplained wealth provisions are modelled on the Western Australian and the Northern Territory unexplained wealth provisions... which operate in exactly the same way. That is, a broad definition of what constitutes a person's wealth coupled with a common sense approach that the proceeds of property disposed of cannot be counted in addition to further property purchased with those proceeds. There has not been any suggestion that the WA or NT provisions "double count" property in practice.[113]

2.86 Both the AFP and the ACC responded to concerns that the unexplained wealth provisions may be used in relation to minor offenders. An officer from the AFP explained:

> [O]ur resources are set to target the highest echelon of criminals across Australia that operate internationally and cross-jurisdictionally. It is those people who are able to distance themselves from the smaller crimes who build networks and sit on top of large criminal organisations. They are the ones who have been able to distance themselves in the past from the predicate offences, which has led to them amassing proceeds of crime and wealth within their organisations. So the AFP see little value in targeting at the bottom level...[114]

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111 *Committee Hansard*, 28 August 2009, p. 44.

112 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 67.

113 *Answers to questions on notice*, 7 September 2009, p. 1.

114 *Committee Hansard*, 28 August 2009, pp 50-51. See also Federal Agent John Whitehead, Police Associations, *Committee Hansard*, 28 August 2009, pp 27-28.

2.87 Under section 21 of the 2002 POC Act, the DPP may provide an undertaking with respect to the damages and costs of the respondent, and the court may refuse a restraining order if the DPP does not do so. An officer from the DPP explained that this also helps to ensure that the powers under the Act are exercised responsibly:

> To some extent, ...the courts feel some comfort in the fact that an undertaking as to damages is given so that if it turns out that we have all got it wrong at the end of the day the person can be compensated. As you would imagine, that is a fairly big consideration for us because in some of these cases, given their size and complexity, the potential fallout from that would be quite significant. Apart from any other reason to ensure that the cases are properly assessed in terms of the evidentiary material, we always have that as a reminder to us to exercise our powers responsibly.[115]

2.88 Finally, in response to questioning by the committee, the Attorney-General's Department argued that it would not be appropriate for the court have a discretion with respect to the making of an unexplained wealth order:

> ..for all the other types of orders under the Proceeds of Crime Act, it is mandatory, once the court has reached satisfaction of a number of criteria, which is also the case here, that the court has to make an order. And then there are a suite of provisions that allow specific exceptions and for property to be taken out of orders—for instance, if there is any hardship to dependants. The way it is constructed is that the court has a discretion in the sense that it has to consider and come to its own satisfaction in relation to the criteria, but once the court believes they have been satisfied, for unexplained wealth orders as well as for conviction based orders and non-conviction based orders under the current act, it must make an order.[116]

Drafting issue

2.89 The requirements for an affidavit in support of a preliminary unexplained wealth order are set out under proposed subsection 179B(2). This provision requires the authorised officer state:

- that the officer suspects a person's wealth exceeds his or her lawfully acquired wealth;
- the property the officer suspects is owned or under the effective control of the person; and
- the property the officer suspects was lawfully acquired.

2.90 The authorised officer is also required to state the grounds on which he or she holds suspicions in relation to the last two matters. However the authorised officer is not required to state the grounds on which he or she holds the suspicion that a person's

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115 *Committee Hansard*, 28 August 2009, p. 42. Federal Agent John Whitehead, Police Associations, *Committee Hansard*, 28 August 2009, p. 29.

116 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 67. See also proposed section 179L of the 2002 POC Act in relation to the power of the court to order an amount be paid to dependants of a person subject to an unexplained wealth order to relieve hardship.

wealth exceeds his or her lawfully acquired wealth. The Attorney-General's Department explained that there is no requirement for the affidavit to set out the grounds for this suspicion because under proposed subsection 179B(1) the court must be satisfied that there are reasonable grounds for such a suspicion so inevitably there will be evidence given to the court on that point. Despite this, the department and the DPP agreed that there would be no difficulty in clarifying the provision by including a requirement for the grounds for this suspicion to be set out in the affidavit.[117]

Freezing orders

2.91 The Law Council opposed the freezing order provisions arguing that the provisions have 'great potential to undermine the presumption of innocence and infringe individual rights.'[118] In particular, the Law Council expressed concern that freezing orders could be made without the affected party being heard and without the magistrate having any discretion to refuse to make the order once the requirements of proposed section 15B have been met.[119] The Law Council also queried the necessity of the proposed freezing order regime in light of the existing power of the DPP to apply for a restraining order without giving notice to the owner of the property.[120]

2.92 On the other hand, the Police Associations argued that the freezing order provisions do not go far enough and proposed that the AFP Commissioner should issue freezing orders rather than applications being made to a magistrate.[121] The Police Associations noted that:

> There is little incentive for investigators to apply to a Magistrate to hear an application for a freezing notice in the proposed form as it would often be easier to schedule an application with a written affidavit before a judge - and in doing so apply for a restraining order (subject of course to the involvement of the CDPP).[122]

2.93 However, the AFP appeared to support the requirement for freezing orders to be issued by a magistrate.[123]

2.94 An officer from the DPP suggested that, for practical reasons, it may be appropriate for freezing orders to be obtained by investigators rather than the DPP seeking such orders:

> At the moment you can get restraining orders and you go to either the Supreme Court or the district and county court, depending on which jurisdiction you are in. There is a little bit of time involved, but we can get those orders reasonably quickly. The freezing order is an intermediate step,

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117 Ms Sarah Chidgey, Attorney-General's Department, *Committee Hansard,* 28 August 2009, p. 63; Mr John Thornton, DPP, *Committee Hansard,* 28 August 2009, p. 39.

118 *Submission 6,* p. 23.

119 *Submission 6,* p. 23.

120 *Submission 6,* pp 23-24. See subsection 26(4) of the 2002 POC Act.

121 *Submission 3,* p. 18. See proposed section 15B.

122 *Submission 3,* p. 18.

123 Assistant Commissioner Mandy Newton, *Committee Hansard,* 28 August 2009, p. 57.

> if you like, where you have bank accounts which are obviously very liquid and quickly moved. If you have those sorts of assets there is probably a need to move even more quickly and so you have this provision, which only lasts for a short period while you get the restraining order. I would imagine that one of the key elements is the ability to move quickly, and in those circumstances and given the limited time that they will apply for there are probably reasons why you would have the investigator do that rather than come to us.[124]

Removal of the six year time limit

2.95 The Law Council opposed the removal of the six year limitation period arguing that some time limit was necessary to protect against unlimited interference with individual rights.[125] The Law Council argued that the risk of unjustified intrusion into the property rights of individuals is particularly acute given the mandatory nature of the civil confiscation regime and noted that these amendments would mean that:

> [P]rovided 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.[126]

2.96 However, the DPP noted that:

> ...experience under the existing provisions has been that in some cases – particularly complex fraud cases which take time to discover and then investigate – the 6-year time limit effectively means that the option of civil confiscation action is not available.[127]

Restraint and forfeiture of instruments of serious crime

2.97 In relation to the amendments to allow for the restraint and forfeiture of the instruments of serious offences in non-conviction based proceedings, the DPP commented that:

> ...experience under the existing provisions, particularly in cases involving suspected money-laundering, was that it was often difficult to ascertain whether property ought properly to be regarded as "proceeds" or an "instrument" of the relevant offending, and the unavailability of civil restraint and forfeiture of "instruments" of offences was therefore problematic.[128]

2.98 However, Civil Liberties Australia and the Law Council both opposed these amendments.[129] Civil Liberties Australia gave the following example of how the new provisions may operate:

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124 *Committee Hansard*, 28 August 2009, pp 43-44.

125 Mr Tim Game SC, *Committee Hansard*, 28 August 2009, p. 2.

126 *Submission 6*, p. 26.

127 *Submission 5*, p. 4.

128 *Submission 5*, p. 5.

129 *Submission 4*, supplementary submission, pp 8-9; *Submission 6*, pp 27-28.

> A person is gainfully employed, and purchases a house for $400,000 through legitimate means. The house is their place of residence. In one bedroom, they artificially cultivate $30,000 worth of cannabis. Under the Act, not only can any proceeds from the sale of the cannabis be seized, but the entire house may also be forfeited if the DPP so applies.[130]

2.99 Civil Liberties Australia argued that the provisions would allow authorities to have 'a second bite at the cherry' and seize a person's lawfully acquired property on the basis that he or she has committed an offence, even where the person has been acquitted of that offence, and would thus violate the rule against double jeopardy:

> Given that the confiscation of such property is punitive in nature, the imposition of a confiscation order in such circumstances would amount to a second and further attempt to impose a punishment after a person has already been acquitted. Such proceedings can easily lend themselves to an abuse of power on the part of authorities and would create a mechanism for the overzealous pursuit of individuals by law enforcement agencies.[131]

Information sharing

2.100 Proposed section 266A would specifically authorise the disclosure of information obtained under the 2002 POC Act for certain purposes. The Office of the Privacy Commissioner recommended that:

- the disclosure of information acquired under the Act should be limited to disclosure for the purpose of investigation or prevention of *serious* offences; and
- disclosure of information overseas, for the purposes of a criminal investigation, should not be made unless the offence under investigation would be considered a serious offence if it had occurred in Australia.[132]

2.101 With respect to disclosures to foreign law enforcement agencies, the Office noted that allowing personal information flows to foreign countries for the purposes of enforcing foreign laws poses particular privacy risks.[133] Mr Timothy Pilgrim, Deputy Privacy Commissioner, explained:

> In allowing the disclosure of personal information to foreign countries for the purpose of enforcing foreign laws certain privacy risks arise. In particular, there is a risk that the information requested may relate to conduct that is illegal in one country but lawful in Australia. This could create an inconsistency in the application of Australian privacy regulations by allowing personal information to be disclosed overseas when it would not be permitted to be disclosed in Australia.[134]

2.102 The Attorney-General's Department noted that the disclosure of information under proposed section 266A had not been limited to disclosure of information about

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130 *Submission 4*, supplementary submission, p. 8.

131 *Submission 4*, supplementary submission, p. 9.

132 *Submission 9*, pp 2 and 6. See also Law Council, *Submission 6*, p. 31.

133 *Submission 9*, p. 6.

134 *Committee Hansard*, 28 August 2009, p. 9.

serious offences because the definition of 'serious offence' in section 338 of the 2002 POC Act 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.[135] The department argued that:

> Disclosure of information about offences that do not meet the definition of "serious offence" under [the 2002 POC Act] may still be very relevant to combating crime and, when combined with similar pieces of information, could lead to the detection of serious offences.[136]

2.103 In response to questions from the committee, the Attorney-General's Department confirmed that the proposed provisions would permit disclosures of information even where a court declines to make a confiscation order under the 2002 POC Act:

> These provisions apply to all information that is gathered under the information gathering powers in the Proceeds of Crime Act. It was always understood that information could be passed under the act until a recent Supreme Court of New South Wales case. Following that the Sherman review recommended that we needed to clarify that information could be provided. It has never been the case that we have seen a need to restrict the provision of information to situations where a final order has been made by the court.[137]

135 *Answers to questions on notice*, 7 September 2009, p. 3.

136 *Answers to questions on notice*, 7 September 2009, p. 3.

137 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 63.

CHAPTER 3

INVESTIGATIVE POWERS AND WITNESS PROTECTION

Background

3.1 Schedule 3 of the Bill proposes to replace the existing provisions in the *Crimes Act 1914* (the Crimes Act) providing for controlled operations, assumed identities and witness identity protection with model laws. These model provisions were developed by the Joint Working Group of SCAG and the then Australasian Police Ministers Council and endorsed by SCAG in 2004.[1] The Explanatory Memorandum explains that:

> The model laws are intended to enhance the ability of law enforcement agencies to investigate and prosecute multi-jurisdictional criminal activity. This type of crime is becoming increasingly common due to advances in information and communication technology, and the increasing sophistication of organised criminal groups, particularly those involved in terrorism or transnational crime, including drug trafficking. Implementation of the model laws will enable authorisations issued under a regime in one jurisdiction to be recognised in other jurisdictions.[2]

3.2 The Senate Legal and Constitutional Affairs Committee reported on a bill to implement the model laws in February 2007: the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006.[3] However, that bill lapsed when Parliament was prorogued in October 2007.

Provisions in the Bill

Controlled operations

3.3 A controlled operation is a law enforcement operation in which a person is authorised to engage in unlawful conduct in order to obtain evidence of a serious criminal offence.[4] The current provisions regulating controlled operations are set out in Part 1AB of the Crimes Act. Controlled operations may only be authorised by senior members of the AFP, ACC and ACLEI.[5] Generally applications for, and authorisations of, controlled operations must be in writing but both the existing

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1 Explanatory Memorandum, p. 3; SCAG and Australasian Police Ministers Council Joint Working Group on National Investigation Powers, *Cross-Border Investigative Powers for Law Enforcement*, November 2003 at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Cross-borderinvestigativepowersforlawenforcementReport-November2003 (accessed 27 July 2009).

2 Explanatory Memorandum, p. 3.

3 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007.

4 Explanatory Memorandum, p. 46.

5 Section 15J of the Crimes Act and proposed section 15GF.

provisions and the Bill provide for applications and authorisations to occur orally in person, or by telephone, in urgent cases.[6]

3.4 The main differences between the existing provisions relating to controlled operations and the provisions set out in the Bill relate to:

- providing protection from criminal and civil liability to informants who participate in a controlled operation;
- providing for recognition of state and territory controlled operation laws;
- providing for urgent variations to controlled operation authorities;
- extending the timeframes for controlled operations;
- altering the reporting and recordkeeping obligations of authorising agencies; and
- increasing the Ombudsman's inspection powers.[7]

Protection for informants

3.5 At present, informants who participate in controlled operations are not protected from civil or criminal liability for any conduct they engage in as part of the controlled operation.[8] The Explanatory Memorandum states that:

> This has hampered the ability of law enforcement agencies to use informants to perform controlled conduct, which has presented a significant obstacle to law enforcement agencies in successfully conducting controlled operations. ...As organised criminal groups may only trust established members of their group, infiltration by undercover officers may only be possible with the ongoing assistance of an informant. ...It is also often necessary for informers to participate in criminal conduct in order to maintain the trust of, and their position in, the criminal group. These acts could be as simple as moving a suitcase containing drugs from the boot of a car to a premises. Informants who might be willing to assist law enforcement agencies if they were protected from liability for certain approved conduct are unlikely to provide that assistance if they cannot receive any protection from criminal liability.[9]

3.6 Proposed sections 15HA and 15HB[10] of the Crimes Act would protect civilian participants, including informants, from criminal and civil liability for conduct in accordance with a controlled operation authorisation.[11] The protection under proposed sections 15HA and 15HB would only apply where:

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6 Sections 15K and 15L of the Crimes Act and proposed subsections 15GH(2) and 15GJ(1).

7 Explanatory Memorandum, p. 47.

8 Subsections 15I(2A) and 15IA(2A) of the Crimes Act specifically exclude informants from the protections given to other participants in controlled operations.

9 Explanatory Memorandum, p. 53.

10 References to proposed provisions in this chapter refer to proposed provisions of the Crimes Act.

11 These provisions would also provide protection to law enforcement officers who participate in controlled operations on similar terms.

- the conduct is in the course of, and for the purposes of, the controlled operation and in accordance with the authority to conduct the operation;
- the participant is authorised to engage in the conduct;
- the conduct does not involve entrapment;
- the conduct is not likely to cause the death of, or serious injury to, any person, or involve the commission of a sexual offence; and
- in the case of a civilian participant, he or she acts in accordance with the instructions of a law enforcement officer.[12]

3.7 Civilians will only be authorised to participate in a controlled operation where the authorising officer is satisfied on reasonable grounds that a law enforcement officer could not adequately perform the role that the civilian will perform.[13] Further, under the proposed amendments an authority to conduct a controlled operation must detail the 'particular controlled conduct' that a civilian may undertake, while in relation to law enforcement officers only the 'nature of the controlled conduct' must be specified.[14] The Explanatory Memorandum argues that this will ensure that the behaviour of civilian participants is tightly controlled.[15]

Recognition of state and territory controlled operations laws

3.8 The Explanatory Memorandum states that the proposed amendments would:

> ...recognise corresponding State and Territory controlled operation laws and provide protection against liability for Commonwealth offences for participants in operations that have been validly authorised under those laws, without requiring a separate Commonwealth authority to be sought for the controlled operation.[16]

3.9 The Explanatory Memorandum notes that, as a result of the decision in *Gedeon v Commissioner of the New South Wales Crime Commission*, there is a risk that there is insufficient protection for evidence obtained from, and participants in, controlled operations authorised under a state or territory law where the operation may involve the commission of a Commonwealth offence.[17]

3.10 In that case, the High Court noted that an authority for a controlled operation issued under New South Wales legislation would only protect the participants in the operation in relation to activities which would otherwise be unlawful under New South Wales law. If the proposed controlled activity was also unlawful under federal

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12 Explanatory Memorandum, pp 73-75.

13 Proposed paragraphs 15GI(2)(h) and 15GQ(2)(h); Explanatory Memorandum, pp 53, 60 and 74.

14 Proposed paragraphs 15GK(1)(f), 15GK(2)(f) and 15GO(2)(b); Explanatory Memorandum, p. 73.

15 Explanatory Memorandum, pp 54, 61, 64 and 73-74.

16 Explanatory Memorandum, p. 47.

17 [2008] HCA 43; Explanatory Memorandum, p. 48.

criminal law then full protection for those involved could only be obtained by obtaining an authorisation for the controlled operation under the federal Crimes Act as well as the New South Wales legislation.[18]

3.11 Proposed section 15HH would provide equivalent protection from criminal liability for participants in controlled operations authorised under state or territory controlled operations laws, as would be provided to participants in a Commonwealth controlled operation.[19] This would mean that state and territory agencies would not have to seek simultaneous authorisation under Commonwealth law for a controlled operation where a Commonwealth offence may be committed in the course of the operation.[20]

Urgent variations to controlled operations authorities

3.12 The current regime for controlled operations provides for variations to the original authority for the controlled operation but these variations must be applied for and granted in writing.[21] The proposed amendments allow for urgent variation applications to be made orally in person, by telephone or by any other means of communication.[22] The amendments would also allow for the granting of urgent variations by these means.[23] The grounds for making an urgent application or variation is that the delay caused by requiring a written application or variation may affect the success of the controlled operation. In all cases, there would be a requirement to document the urgent application or variation as soon as practicable.[24]

Duration of operations

3.13 At present, authorisation for a controlled operation can only be given for a maximum of six months from the date an application was approved. Furthermore, authorisations which have been in place for three months must be reviewed by a nominated member of the Administrative Appeals Tribunal (AAT) who determines whether the authorisation should remain in force for six months.[25]

3.14 Under the proposed amendments, the maximum duration of a formal authority[26] for a controlled operation will be three months.[27] However, the duration of a controlled operation will be able to be extended by a nominated member of the AAT

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18 [2008] HCA 43 at paras 40-41.

19 Explanatory Memorandum, p. 78.

20 Explanatory Memorandum, p. 78.

21 Section 15NA of the Crimes Act.

22 Proposed paragraphs 15GP(3)(b) and 15GU(3)(b).

23 Proposed paragraphs 15GR(1)(b) and 15GW(1)(b).

24 Proposed subsections 15GP(8), 15GR(2), 15GU(7) and 15GW(2).

25 Subsection 15N(4) and section 15OB of the Crimes Act.

26 A 'formal authority' is one that is in writing and signed by the authorising officer (see Explanatory Memorandum, p. 60; proposed subsection 15GJ(1)).

27 Proposed paragraph 15GK(1)(h).

for three month periods, provided the total length of the operation does not exceed 24 months.[28]

3.15 The Explanatory Memorandum notes that extending the maximum duration of controlled operations to 24 months:

> ...recognises that some controlled operations, particularly those investigating organised crime, may extend for a long period of time and it would cause significant disruption to the investigation, and possible risk to participants, if the operation was interrupted at a sensitive state.[29]

3.16 Under proposed subsection 15GT(4), a nominated AAT member may only grant an extension of a controlled operation authority in the two weeks prior to the end of the period of effect of the authority. The Explanatory Memorandum states that the rationale behind this limitation is to ensure that the AAT member is considering the most recent events in the controlled operation before making the decision to extend the operation.[30]

3.17 The maximum duration of an urgent authority[31] will be seven days. This period cannot be extended.[32] However, the controlled operation authorised by an urgent authority will be able to continue beyond seven days if a formal application is subsequently made and a formal authority is granted.[33]

Record keeping and reporting by authorising agencies

3.18 At present, section 15R of the Crimes Act requires the chief officers of the AFP, ACC and ACLEI to report to the Attorney-General quarterly on controlled operations. In addition, the Attorney-General is required by section 15T to provide an annual report to Parliament on controlled operations.

3.19 Proposed section 15HM will provide that the chief officers of the AFP, ACC and ACLEI must report, every six months, to the Commonwealth Ombudsman and the Attorney-General on controlled operations and sets out the information which must be included in these reports.[34] The Ombudsman would be empowered to require the chief officer of an authorising agency to furnish additional information on any authorised operation contained in the report.[35]

3.20 In addition, proposed section 15HN will require the chief officers of the AFP, ACC and ACLEI to provide an annual report to the Commonwealth Ombudsman and the Attorney-General on controlled operations. Proposed subsection 15HN(3) will

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28 Proposed section 15GT; Explanatory Memorandum, p. 69.

29 Explanatory Memorandum, p. 63.

30 Explanatory Memorandum, p. 69.

31 An 'urgent authority' is one that is given orally in person, by telephone or by another means of communication (see Explanatory Memorandum, p. 60; proposed subsection 15GJ(1)).

32 Proposed subsection 15GO(3).

33 Proposed subsections 15GH(3) and 15GJ(2); Explanatory Memorandum, pp 62-63.

34 Explanatory Memorandum, p. 81.

35 Proposed subsection 15HM(3); Explanatory Memorandum, p. 82.

require the Attorney-General to table each report in Parliament within 15 sitting days of receiving the report.[36]

3.21 Proposed section 15HP would impose recording keeping obligations on authorising agencies with respect to controlled operations.[37] Authorising agencies would also be required to maintain a general register of controlled operation applications and authorities under proposed section 15HQ.[38] The Explanatory Memorandum notes that these new obligations will facilitate proper accountability and oversight of controlled operations and, in particular, will assist the Ombudsman in his oversight role.[39]

Ombudsman's inspection powers and reporting

3.22 Proposed sections 15HR to 15HY set out the powers of the Ombudsman in relation to his oversight of controlled operations in much greater detail than the existing provisions in the Crimes Act.[40] In particular, the Bill would provide the Ombudsman with explicit powers to:

- enter the premises of authorising agencies, have full and free access to relevant records of the agencies and make copies of those records; and
- require law enforcement officers to provide information or answer questions relevant to the Ombudsman's inspections.[41]

3.23 Proposed section 15HO would require the Ombudsman to prepare an annual report regarding the monitoring of controlled operations and provide that report to the Attorney-General and the chief officer of the law enforcement agency to which the report relates.[42] The Attorney-General would be required to table this report in Parliament within 15 sitting days.[43] Under existing section 15UC of the Crimes Act, the Ombudsman reports directly to Parliament on his monitoring of controlled operations rather than providing the Attorney-General with a report which must then be tabled.[44]

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36 Explanatory Memorandum, p. 82.

37 Explanatory Memorandum, pp 83-84.

38 Explanatory Memorandum, p. 84.

39 Explanatory Memorandum, p. 84.

40 Division 2A, Part IAB of the Crimes Act; Commonwealth Ombudsman, *Submission 2,* p. 2.

41 Proposed subsection 15HS(3) and proposed section 15HT; Explanatory Memorandum, pp 85-86.

42 Explanatory Memorandum, p. 83.

43 Proposed subsection 15HO(3).

44 Previous annual reports of the Commonwealth Ombudsman regarding the monitoring of controlled operations are available at: http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/publications_inspectionreports_all (accessed 4 August 2009).

Assumed identities

3.24 An assumed identity is a false identity that is used for the purpose of investigating criminal activity, or conducting intelligence or security activities.[45] The current provisions relating to the use of assumed identities are set out in Part 1AC of the Crimes Act. Under both the existing Crimes Act provisions and the provisions in the Bill, the use of assumed identities may be authorised by the head of the ACC, ACLEI, AFP, the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), ATO or Customs, or their delegates.[46]

3.25 Generally, assumed identities are used by law enforcement officers and intelligence officers but civilians, may be authorised to use an assumed identity under the supervision of a law enforcement officer or an intelligence officer.[47] There is also provision for foreign law enforcement, intelligence or security agents be authorised to obtain and use assumed identities.[48]

Strengthening of assumed identities provisions

3.26 The Bill would alter the regime regulating the use of assumed identities by introducing more rigorous requirements in relation to the granting, review and cessation of assumed identities. In particular, proposed section 15KA would establish a formal application process for acquiring or using an assumed identity including setting out the information which must be included in an application.[49] Proposed section 15KB would permit the chief officer to whom an application is made (or his or her delegate) to grant an authority to acquire or use an assumed identity. This provision would set out, in greater detail than the existing Crimes Act provisions, the factors a chief officer must be satisfied of prior to granting such an authority.[50]

3.27 The Bill would introduce a time limit of three months on authorities for civilians supervised by law enforcement officers.[51] However, this time limit will not apply to civilians supervised by intelligence officers. The Explanatory Memorandum notes that:

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45 Explanatory Memorandum, p. 48.

46 Section 15XG and the definitions of 'authorising person' and 'Commonwealth participating agency' in section 15XA of the Crimes Act; and proposed sections 15KA, 15KB and 15LH, and the definitions of 'law enforcement agency' and 'intelligence agency' in proposed section 15K. Under both the existing provisions and the provisions in the Bill, other Commonwealth agencies may be specified by regulation as agencies permitted to authorise the use of assumed identities.

47 Explanatory Memorandum, p. 88; subsection 15XB(2) of the Crimes Act and proposed subsection 15KB(3).

48 Subsections 15XB(1) and 15XG(3) and the definitions of 'approved officer' and 'foreign officer' in section 15XA of the Crimes Act; proposed subsections 15KA(2) and (3), proposed section 15KB and the definition of 'foreign officer' in proposed section 15K.

49 Explanatory Memorandum, pp 90-91.

50 Explanatory Memorandum, pp 92-93.

51 Proposed paragraph 15KC(2)(h) and proposed subsection 15KD(2). This would not prevent further authorities being granted in relation to a civilian supervised by a law enforcement officer: proposed subsection 15KC(4).

> This difference reflects the different operational contexts for civilians involved in law enforcement and intelligence operations. Law enforcement agencies are likely to require the assistance of a civilian in the context of a specific investigation of more defined duration, while intelligence agencies may require the assistance of a civilian in intelligence activities occurring over many years.[52]

3.28 Proposed section 15KF would introduce a requirement for:

- the chief officers of law enforcement agencies to review assumed identity authorities every 12 months; and
- the chief officers of intelligence agencies to review authorities granted to foreign officers and civilians every 12 months, and authorities granted to Australian officers every three years.[53]

3.29 If, after reviewing an authority, the chief officer is satisfied that an assumed identity is no longer needed, he or she will be required to cancel the authority. If the chief officer is satisfied that the assumed identity is still necessary, he or she will have to record the reasons for that opinion in writing.[54]

3.30 Furthermore, the Bill would give the chief officers of law enforcement and intelligence agencies an explicit power to request the return of evidence of an assumed identity, from the person who was authorised to use the identity, once an authority ceases.[55]

Mutual recognition of assumed identities laws

3.31 Under the existing Crimes Act provisions, state and territory law enforcement and anti-corruption agencies may authorise a person to acquire evidence of an assumed identity from a Commonwealth agency and use that identity.[56] The Bill would instead provide for mutual recognition of corresponding state and territory assumed identities laws. In particular, the Bill would:

- enable an assumed identity authority that was granted under a corresponding state or territory law to be recognised as if the authority had been granted under the Crimes Act;[57]
- ensure that officers who are authorised under a state or territory law to use an assumed identity are protected from criminal liability under Commonwealth law when using that identity;[58] and

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52 Explanatory Memorandum, p. 94.

53 Explanatory Memorandum, p. 96.

54 Proposed subsections 15KF(4) and (5); Explanatory Memorandum, p. 96.

55 Proposed section 15KM; Explanatory Memorandum, p. 99.

56 Section 15XH and the definition of 'State or Territory participating agency' in section 15XA of the Crimes Act.

57 Proposed section 15LA; Explanatory Memorandum, pp 48 and 107.

58 Combined effect of proposed sections 15LA, 15KP and 15KQ; Explanatory Memorandum, p. 48.

- enable a person authorised to use an assumed identity in one jurisdiction to lawfully acquire evidence of that assumed identity from issuing agencies in another jurisdiction.[59]

Witness identity protection

3.32 Section 15XT of the Crimes Act currently gives courts and tribunals a broad discretion to protect the real identity of a witness who is or was using an assumed identity.[60] The Bill would insert a new Part IACA into the Crimes Act setting out much more comprehensive provisions in relation to the protection of the identity of witnesses who are law enforcement or intelligence operatives.

3.33 One of the differences between the old and new regimes is that the protections will extend to operatives who are participants in a controlled operation even where the operative has not used an assumed identity.[61] More fundamentally, the new regime would provide for the chief officer of an intelligence or law enforcement agency (or his or her delegate) to issue a 'witness identity protection certificate' rather than a court or tribunal determining whether it is necessary to protect an operative's identity.[62] The Explanatory Memorandum argues that:

> The chief officer of a law enforcement agency or intelligence agency is well placed to make an informed decision about the need to protect an operative's identity to ensure his or her safety or avoid prejudicing operations. In most cases, the information about [an] undercover operative is highly sensitive and disclosing or filing this information could increase the risk to personnel and compromise operations. ...Further, allowing a chief officer to make the decision to protect identity in the first instance is appropriate given that the court retains the discretion to reveal the operative's true identity...[63]

3.34 In general terms, the new regime for witness identity protection would:

- govern the procedures and requirements for giving a witness identification protection certificate;[64]
- establish requirements for notifying the court and the parties to the proceedings of a certificate;[65]
- set out the effect of a certificate;[66]
- allow the court to make orders protecting the witness' identity and for the disclosure of the witness' true identity;[67]

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59 Proposed sections 15KX and 15KY; Explanatory Memorandum, pp 48 and 105-106.

60 Explanatory Memorandum, p. 49.

61 Explanatory Memorandum, p. 50.

62 Proposed sections 15ME and 15MX.

63 Explanatory Memorandum, pp 114-115.

64 Proposed sections 15MD to 15 MG.

65 Proposed sections 15MH and 15MI.

66 Proposed section 15MJ.

- introduce offences for unauthorised disclosures of the witness' identity;[68]
- provide that agencies which give certificates must meet certain annual reporting requirements;[69] and
- facilitate the mutual recognition of certificates given under corresponding state and territory laws.[70]

Granting of witness identity protection certificates

3.35 The witness identity protection provisions would extend to law enforcement and intelligence officers and other authorised people (such as foreign law enforcement officers and civilians) who have been granted an assumed identity or have been authorised to participate in a controlled operation.[71]

3.36 Proposed section 15MD would provide that the witness identity protection provisions will apply to a proceeding in which an operative is, or may be, required to give evidence obtained as an operative.[72]

3.37 Proposed section 15ME will set out the circumstances in which the certificate can be given.[73] The chief officer of the ACC, ACLEI, AFP, ASIO, ASIS, ATO, Customs or any other Commonwealth agency specified by regulation will be able to give a certificate if he or she is satisfied on reasonable grounds that disclosure of the operative's identity or address is likely to:

- endanger the safety of the operative or another person; or
- prejudice any current or future investigation or activity relating to security.[74]

3.38 Under proposed section 15MX, a chief officer would be able to delegate this power to senior officers.[75]

3.39 Before a witness identity protection certificate is given, the operative will be required to make a statutory declaration, under proposed section 15MF, setting out matters that go to his or her credibility such as:

- details of any offence the operative has been convicted of;
- details of any charges against the operative which are pending; and
- any adverse comments made by a court about the operative's credibility.[76]

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67 Proposed sections 15MK to 15MM.

68 Proposed section 15MS.

69 Proposed sections 15MU and 15MV.

70 Proposed section 15MW; Explanatory Memorandum, p. 50.

71 Definition of 'operative' in proposed section 15M; Explanatory Memorandum, pp 50 and 112.

72 Explanatory Memorandum, p. 113.

73 Explanatory Memorandum, p. 112.

74 Proposed subsection 15ME(1) and definitions of 'law enforcement agency' and 'intelligence agency' in proposed section 15M; Explanatory Memorandum, p. 114.

75 Explanatory Memorandum, p. 128.

3.40 Details relating to the operative's credibility must be included in the witness identity protection certificate.[77]

Filing of certificates and notification of parties

3.41 The witness identity protection certificate must be filed in court and a copy provided to each party to the proceedings at least 14 days prior to the operative giving evidence.[78] The Explanatory Memorandum states that:

> This will enable the operative's credibility to be challenged in the proceeding without disclosing his or her true identity. This will be an important safeguard to ensure the fairness of proceedings when a witness' identity is protected under this Part.[79]

3.42 However, proposed section 15MI would allow a court to waive the requirements for a witness identity protection certificate to be filed with the court and provided to the parties at least 14 days prior to the operative giving evidence.

Effect of a certificate

3.43 The effect of a certificate will be that the operative is permitted to give evidence under a pseudonym.[80] In addition, the certificate will prevent:

- a witness from being asked a question, or being required to answer a question, that may disclose or lead to the operative's true identity or address, being revealed; and
- a person involved in the proceeding from making a statement that discloses, or may reveal, the operative's true identity or address.[81]

Court's discretion to override a certificate

3.44 Proposed subsection 15ME(4) would provide that a decision to give a certificate is final and cannot be challenged or reviewed in any court. The Explanatory Memorandum argues that it would defeat the purpose of the witness identity protection regime if a certificate could be challenged or reviewed because this would require sensitive operational information to be disclosed, which may risk the safety of an operative or the integrity of an operation.[82]

3.45 However, a party to a proceeding would be able to apply to the court to override a certificate to allow questions or statements which may lead to the disclosure of the operative's real identity or address.[83] The court would not be permitted to allow such evidence or statements unless the court is satisfied that:

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76 Proposed subsection 15ME(3); Explanatory Memorandum, pp 115 and 116.

77 Proposed subsections 15MG(1).

78 Proposed subsections 15MH(1) and (2).

79 Explanatory Memorandum, p. 117. See also p. 119.

80 Proposed section 15MJ; Explanatory Memorandum, p. 118.

81 Explanatory Memorandum, p. 119.

82 Explanatory Memorandum, p. 115.

83 Proposed section 15MM; Explanatory Memorandum, p. 121.

- there is evidence that, if accepted, would substantially call into question the operative's credibility;
- it would be impractical to test properly the credibility of the operative without allowing the risk of disclosure of the operative's true identity or address; and
- it is in the interests of justice for the operative's credibility to be able to be tested.[84]

Reporting requirements

3.46 Proposed section 15MU will require the chief officer of a law enforcement agency to submit an annual report to the Attorney-General about the certificates given by the chief officer and require the Attorney-General to table that report in Parliament within 15 sitting days.[85]

3.47 Similarly, the chief officer of an intelligence agency will be required to provide an annual report to the Inspector-General of Intelligence and Security about the certificates given by the chief officer. However, this report will not be tabled in Parliament.[86]

Mutual recognition of witness identity protection laws

3.48 The proposed amendments would recognise corresponding state and territory witness identity protection laws and provide that certificates issued under those laws would be treated as if they had been issued under the Crimes Act.[87] The Explanatory Memorandum explains that these mutual recognition provisions will:

> [E]nable undercover operatives – who often have to work across jurisdictions – to be protected by a certificate issued by their home agency that is recognised in proceedings which may be held in another jurisdiction.[88]

Key issues

3.49 No significant issues were raised in the evidence to the committee regarding the provisions to implement the model laws in relation to assumed identities.[89] However, some issues were raised regarding the provisions dealing with controlled operations and witness identity protection.

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84 Proposed subsection 15MM(5); Explanatory Memorandum, p. 121.

85 Explanatory Memorandum, p. 127.

86 Explanatory Memorandum, p. 127.

87 Proposed section 15MW and definitions of 'corresponding witness identity protection certificate' and 'corresponding witness identity protection law' in proposed subsection 15M(1); Explanatory Memorandum, pp 49 and 127-128.

88 Explanatory Memorandum, p. 127.

89 The Law Council noted that it had some concerns about both the existing assumed identities provisions in the Crimes Act and the amendments but did not detail these concerns: *Submission 6*, p. 45.

Controlled Operations

3.50 There was some support for the proposed changes to the regime governing controlled operations.[90] Furthermore, even witnesses who had reservations about these provisions, acknowledged that the Bill addresses a number of the concerns that were raised when similar reforms to the controlled operations regime were proposed by the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006.[91] The key remaining concerns related to:

- the proposal to extend the maximum length of controlled operations to 24 months;
- the provisions which would extend civil and criminal immunity to informants participating in controlled operations; and
- reporting requirements in relation to controlled operations.

Duration of operations

3.51 When the Senate Legal and Constitutional Affairs Committee considered the controlled operations provisions in the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006, the provisions set no limit on the number of three month extensions of an operation which could be granted. That committee recommended that an absolute limit of 12 months should be placed on each authorised controlled operation.[92] Under the existing provisions in the Crimes Act, the maximum duration of a controlled operation is six months.

3.52 Mr Phillip Boulten of the Law Council acknowledged that the provisions in the Bill include a time limit on controlled operations but argued that no adequate justification has been provided for extending the maximum duration of a controlled operation from the existing limit of six months to 24 months:

> ...a two-year cap is just far too long. There is no need for a controlled operation to last for two years. The most extraordinary undercover drug or even terrorist operation is over and done with in a year. We would have thought that a 12-month cap would be more than adequate.[93]

Protection for informants

3.53 The Law Council expressed concern about the proposal to extend criminal and civil immunity to informants participating in controlled operations, particularly in the absence of an external authorisation process for controlled operations. The Law Council cited the view of the Criminal Bar Association of Victoria that:

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90 Police Associations, *Submission 3*, p. 1; Mr Jon Hunt-Sharman, Police Associations, *Committee Hansard,* 28 August 2009, p. 25; Assistant Commissioner Mandy Newton, AFP, *Committee Hansard,* 28 August 2009, p. 48.

91 Law Council, *Submission 6*, p. 36. That bill was not enacted.

92 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, recommendation 3, p. 16.

93 *Committee Hansard*, 28 August 2009, p. 3. See also *Submission 6*, p. 39.

> ...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[s] 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.[94]

3.54 The Ombudsman's submission also noted that the use of informants can add complexity and risk to a controlled operation, and suggested that law enforcement agencies would need to place a greater emphasis on the use of appropriate conditions and controls, particularly where informants' activities involve dealing with illicit goods.[95]

Reporting requirements

3.55 The Commonwealth Ombudsman was generally supportive of the changes to the reporting and inspection regime in relation to controlled operations noting that:

> The proposed amendments will enhance this office's oversight function by providing stronger legislative powers for the Ombudsman in relation to inspections, and greater clarity with respect to the recordkeeping and reporting obligations of law enforcement agencies.[96]

3.56 However, the Ombudsman raised two specific issues. Firstly, he recommended 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 after the completion of the operation and the report should include, amongst other things:

- 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.[97]

3.57 The Ombudsman noted that there is a requirement for such a report under the legislation regulating controlled operations in New South Wales, Queensland, Victoria, and the Australian Capital Territory.[98] He submitted that:

> Such reports would seem to provide an important tool for law enforcement agencies to assess their own performance in terms of the outcome of a controlled operation, and would provide information necessary for this

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94 *Submission 6*, pp 39-40.

95 *Submission 2*, p. 4.

96 *Submission 2*, p. 1. See also Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 9.

97 *Submission 2*, p. 3.

98 See for example section 37 of the *Crimes (Controlled Operations) Act 2004 (Vic)* and section 27 of the *Crimes (Controlled Operations) Act 2008 (ACT)*.

> office to ensure that agencies are compliant with annual reporting and other requirements.[99]

3.58 Secondly, the Ombudsman noted that under existing provisions in the Crimes Act there is a requirement for agencies to include in quarterly reports information regarding the handling of narcotic goods and the people (other than law enforcement officers) who had possession of those goods.[100] The Ombudsman expressed concern that there is no provision in the Bill that requires this information to be recorded and stated that:

> In my view, it is an important control and safeguard on the handling of narcotic goods that everybody who is not a law enforcement officer who has handled those goods should be recorded in the official record that can then be audited later on—for the obvious reason, as human experience teaches, that there are allegations from time to time that narcotics goods go missing during the course of policing and allegations that the quantity that is officially destroyed at the end of an operation is less than the quantity that commenced the operation.[101]

3.59 The Ombudsman suggested that the Bill should make provision for information relating to the handling of narcotic goods, and people who had possession of narcotic goods, to be recorded in the general register that authorising agencies will be required to maintain under proposed section 15HQ.[102]

Other concerns

3.60 The Law Council expressed two further concerns regarding the controlled operations provisions. Firstly, the Law Council suggested that an external approval process for controlled operations should be established under which an independent authority, such as a retired judge, would authorise controlled operations rather than operations being authorised by a senior law enforcement officer.[103]

3.61 Secondly, the Law Council suggested that, in providing for mutual recognition of state and territory controlled operations regimes, the proposed amendments do not guarantee that those regimes will incorporate equivalent safeguards to those required under the Commonwealth regime either now or in the future.[104] Mr Boulton of the Law Council argued that this has the potential to dilute the safeguards incorporated in the federal regime:

> If a state or territory regime has more liberal or lax provisions that allow their officials to do more than what the Commonwealth laws would require, the proposed amendments will then effectively dispense with the

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99 *Submission 2*, pp 2-3. See also Prof. John McMillan, *Committee Hansard*, 28 August 2009, pp 9 and 10.

100 Paragraph 15S(2)(e) and subsection 15S(3) of the Crimes Act; *Submission 2*, p. 3.

101 Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 13. See also *Submission 2*, p. 3.

102 *Submission 2*, p. 4; Prof. John McMillan, *Committee Hansard*, 28 August 2009, pp 9 and 10.

103 Mr Phillip Boulton, *Committee Hansard*, 28 August 2009, p. 3; *Submission 6*, p. 38. See also Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, p. 19.

104 *Submission 6*, pp 41-42.

> requirement for controlled operations to comply with the Commonwealth laws. That will mean that Federal Police might choose deliberately not to get a controlled operation certificate under these provisions and to allow their state or territory counterparts to get the controlled operation under their provisions if it is thought that it is more efficacious to get the controlled operation under a more lax regime. For this reason at the very least, this law should require the Commonwealth to recognise only those state or territory regimes which are at least equal in force to the Commonwealth regimes.[105]

3.62 Finally, the New South Wales police portfolio recommended that the controlled operations provisions should allow for retrospective authorisation of unlawful conduct by a participant in a controlled operation within 24 hours of the conduct.

> [C]ontrolled operations can place police officers in dangerous situations where, despite good planning, circumstances can change rapidly. Allowing police to adapt controlled operations within defined limits (for example, purchasing a different type of illicit drug when the one originally discussed is no longer offered) allows police to operate effectively, efficiently and with a greater degree of safety in potentially dangerous situations.[106]

Government response

3.63 In evidence to the committee, an officer of the AFP submitted that the arrangements for approval and oversight of controlled operations in the Bill were appropriate.[107] Similarly, the Attorney-General's Department argued that the Law Council's concern regarding the lack of an external approval process for controlled operations was not justified:

> ...the AAT have external oversight for any extensions, from three months onwards, and the Ombudsman has very detailed oversight of all reports and monitoring of the conduct of controlled operations. ...In addition, I would also point out that the Commonwealth already has controlled operations provisions that are reasonably similar. They have been in operation since 2001 without, as far as I am aware, any issues ever having arisen about inappropriate behaviour when using those provisions.[108]

3.64 The Ombudsman supported the view that his oversight role in relation to controlled operations has helped to ensure that these powers are exercised properly:

> My view is that... the compliance auditing inspection regime that is a part of this act and of other legislation that enables exercise of coercive, intrusive powers by law enforcement agencies is an appropriate regime. In my experience, this detailed inspection and regular reporting regime has focused the attention of law enforcement agencies quite closely on the need to be rigorous in complying with the detailed legislative requirements, and

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105 *Committee Hansard,* 28 August 2009, p. 3.

106 *Submission 13,* p. 2.

107 Mr Peter Whowell, *Committee Hansard,* 28 August 2009, p. 58.

108 Ms Sarah Chidgey, *Committee Hansard,* 28 August 2009, p. 66.

> so it provides that reassurance of the propriety and integrity that is required.[109]

Witness identity protection

3.65 The Law Council opposed the witness identity protection amendments arguing that the amendments prioritise 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.[110] The Law Council submitted that:

> [T]he 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.[111]

3.66 While proposed section 15MM would allow the court to grant leave for questions and statements which may reveal an operative's true identity, the Law Council submitted that:

> [T]his 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.[112]

3.67 The Senate Legal and Constitutional Affairs Committee considered very similar provisions in its report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006. The committee expressed significant reservations about the provisions and stated that:

> 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. ...[A]ny 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.[113]

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109 Prof. John McMillan, *Committee Hansard*, 28 August 2009, p. 10.

110 *Submission 6*, p. 49.

111 *Submission 6*, p. 48. See also Mr Phillip Boulton, *Committee Hansard*, 28 August 2009, p. 3.

112 *Submission 6*, p. 47.

113 Senate Legal and Constitutional Affairs Committee, *Report on the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006*, February 2007, p. 25.

CHAPTER 4

JOINT COMMISSION PROVISIONS

Provisions in the Bill

1.1 Part 1 of Schedule 4 of the Bill would amend the *Criminal Code Act 1995* (the Criminal Code) to include a new ground for extending criminal liability where persons jointly commit an offence.[1] The Explanatory Memorandum states that these provisions would introduce to the Criminal Code the common law principle of 'joint criminal enterprise'.[2] The aim of these amendments is to:

> ...target persons who engage in criminal activity as part of a group. The amendments will enable the prosecution to obtain higher penalties for offenders who commit crimes in organised groups by aggregating the conduct of offenders who operate together.[3]

1.2 Joint commission would apply when:

- a person and at least one other person enter into an agreement to commit an offence; and
- either an offence is committed in accordance with that agreement; or
- an offence is committed in the course of carrying out the agreement.[4]

1.3 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.[5]

1.4 Under proposed subsection 11.2A(5),[6] an 'agreement' can consist of a non-verbal understanding between the members of the group. Furthermore, the agreement may be entered into before, or at the same time as, conduct constituting the physical elements of the joint offence.[7]

1.5 Proposed subsection 11.2A(2) would provide that an offence is committed 'in accordance with the agreement' only where the offence that is actually committed is an offence of the same type as the offence agreed to. The Explanatory Memorandum states that:

> [This] requirement is broad enough to cover situations where the exact offence agreed to may not have been committed by the parties to the

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1 Explanatory Memorandum, p. 132.

2 Explanatory Memorandum, p. 133.

3 Explanatory Memorandum, p. 3.

4 Proposed subsection 11.2A(1); Explanatory Memorandum, p. 134.

5 Proposed subsection 11.2A(1); Explanatory Memorandum, p. 133.

6 References to proposed provisions in this chapter refer to proposed provisions of the Criminal Code.

7 Explanatory Memorandum, p. 137.

> agreement, but a joint offence of the same type was committed. This is particularly relevant where people agree to commit a specific drug offence, but the quantity of the drugs, or the type of drug varies from the offence agreed to.[8]

1.6 In addition, proposed subsection 11.2A(2) would provide that an offence is committed 'in accordance with the agreement' where the conduct of one or more parties makes up the physical elements of the joint offence.[9] This provision would therefore allow the prosecution to aggregate the criminal conduct of parties to the agreement. The Explanatory Memorandum argues that the ability to aggregate the conduct of the parties to the agreement would have the following three advantages:

- Firstly, it would enable the prosecution to target groups who divide criminal activity between them. An example would be where one party commits one element of an offence and another party commits other elements so that neither is individually liable for the particular offence.
- Secondly, it would mean that it is not necessary for the prosecution to specify which party to the agreement engaged in particular conduct. This may be helpful in situations where it is difficult to determine with precision the role each party to the agreement has played.
- Finally, it would enable the prosecution to charge criminal groups with more serious offences (for example, where members of the group have all imported quantities of a drug less than a commercial quantity but if aggregated the amount of the drug would be a commercial quantity and its importation would therefore constitute a more serious offence).[10]

1.7 Under proposed subsection 11.2A(3) a joint offence will be committed 'in the course of carrying out the agreement' where:

- an offence, other than the offence agreed to, was committed by another party to the agreement;
- the offence was committed in the course of carrying out the agreement; and
- the accused was reckless as to the commission of that collateral offence by the other party.[11]

1.8 An accused 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.[12]

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8 Explanatory Memorandum, p. 134.

9 Explanatory Memorandum, pp 134-5.

10 Explanatory Memorandum, p. 135.

11 Explanatory Memorandum, p. 136.

12 Section 5.4 of the Criminal Code; Explanatory Memorandum, p. 136.

1.9 The Explanatory Memorandum gives the following example of how proposed subsection 11.2A(3) would operate:

> For example, persons A and B agree to 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 for the collateral offence to person A.[13]

1.10 Proposed subsection 11.2A(6) would provide 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 all reasonable steps to prevent the commission of the offence.[14]

Issues raised in submissions

1.11 Dr Andreas Schloenhardt argued that it is doubtful that the proposed amendments relating to the joint commission of offences will assist significantly in the prevention and suppression of serious and organised crime, especially crime associated with criminal organisations such as outlaw motorcycle gangs.[15] Dr Schloenhardt suggested that legislatures should:

- consider introducing a special offence for leaders of criminal organisations who have the intention to exercise this function and have a general knowledge of the nature and purpose of the organisation;
- criminalise deliberately financing criminal organisations, especially where a person seeks to gain material or other benefit in return; and
- explore the creation of offences (or aggravations to offences) that target the involvement of criminal organisations in existing substantive offences (such as selling firearms to a criminal organisation or trafficking drugs on behalf of a criminal organisation).[16]

1.12 The Police Associations also considered that the proposed amendments relating to joint commission were very restrictive and would not adequately address organised crime groups and transnational criminal enterprises.[17] The Police Associations proposed that the existing offences in the Criminal Code relating to terrorist organisations should be replicated in relation to transnational and organised

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13 Explanatory Memorandum, p. 136.

14 Explanatory Memorandum, p. 137.

15 *Submission 1*, p. 3.

16 *Submission 1*, p. 4.

17 *Submission 3*, p. 27.

crime organisations.[18] In addition, the Police Associations advocated creating offences in relation to participation in criminal groups and recruiting persons to engage in criminal activity.[19]

1.13 On the other hand, the Law Council opposed the enactment of the joint commission provisions on the basis that there has been insufficient consultation regarding the provisions and inadequate consideration of the basis upon which the provisions will make a person criminally liable. The Law Council was particularly opposed to proposed subsection 11.2A(3) arguing that:

> ...it makes [a defendant] 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 [a defendant] 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.[20]

1.14 Moreover, Mr Stephen Odgers SC of the Law Council argued the amendments go beyond codification of the common law principle of joint criminal enterprise:

> It is critically important to understand that the common law does not go as far as these provisions. The common law says that if you participate in a joint criminal venture, then you may be liable for an offence committed during the commission of that venture if you were reckless about it. ...[T]hese provisions do not even require participation. Let us say you have agreed to an assault. You will be liable for murder if that is defined as being of the same type of offence, or you were reckless about it, which ultimately means you are aware of a risk it might occur. It is a major extension of liability. It is not justified under the common law. We are not aware of any other jurisdiction in Australia which goes so far.[21]

1.15 Ms Julie Ayling was generally supportive of the provisions but she raised specific concerns about the scope of the provisions. One of her concerns related to the broad definition given to 'agreement' by proposed subsection 11.2A(5). This provision is intended to ensure that the existence of an agreement can be inferred from all the circumstances, rather than requiring any overt or verbalised expression.[22] She argued that this means:

> ...there is a risk that mere membership of a group that regularly commits crime could be used as a basis to infer an agreement to commit a particular

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18 *Submission 3*, p. 28. Division 102 of the Criminal Code allows for an organisation to be specified a 'terrorist organisation' by regulation and creates offences in relation to directing the activities of a terrorist organisation, membership of, and recruiting for, such organisations.

19 *Submission 3*, pp 30-33; Mr Jon Hunt-Sharman, *Committee Hansard*, 28 August 2009, p. 26.

20 *Submission 6*, p. 54.

21 *Committee Hansard*, 28 August 2009, p. 4.

22 *Submission 12*, p. 5; Explanatory Memorandum, p. 137.

> offence (for example, a drug offence or a murder), and thus make all members of the group presumptively culpable for joint commission.
>
> This risk is exacerbated by the fact that under [subsection] 11.2A(5) the agreement can be inferred to come into existence at the same time as the actual offence. Thus a member of a gang who does not agree with the commission of a particular impulsively committed offence (say, a drive-by shooting) might be inferred to have agreed to it (possibly even if not present)...[23]

1.16 Secondly, Ms Ayling expressed concern that proposed subsection 11.2A(6), which provides 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 all reasonable steps to prevent the commission of the offence, is drafted too narrowly:

> ...the provision requires that "all" reasonable steps be taken – one may not be enough. This places a large burden on a person who may have already made clear to others that they have withdrawn from an agreement to do much more, perhaps even at a risk to their own safety (subject to reasonableness considerations). This suggests an imbalance in the onus of proof. It appears it will be relatively easy for a person's involvement in an agreement to be inferred but quite difficult for that person to refute that inference.[24]

Government response

1.17 Contrary to the view of the Police Associations and Dr Schloenhardt that the joint commission provisions would not be an effective means of targeting criminal organisations, an officer of the AFP told the committee that:

> ...the proposed joint commission offence will be an additional tool for law enforcement to combat organised crime, augmenting the existing extensions to criminal liability in chapter 2 of the Commonwealth Criminal Code. The joint commission provisions would allow law enforcement and prosecutorial agencies to jointly prosecute offenders who work in concert to commit offences. ...The creation of a joint commission offence will have direct application to organised crime groups, because the Commonwealth will now be able to jointly charge and prosecute offenders who group together to commit an offence or offences.[25]

1.18 The DPP also supported the amendments to introduce joint commission provisions and argued that the amendments would simply return the Commonwealth to the position prior to the enactment of the Criminal Code 'that allowed for criminal liability based on joint commission or joint enterprise.'[26]

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23 *Submission 12*, pp 5-6.

24 *Submission 12*, p. 6.

25 Assistant Commissioner Mandy Newton, *Committee Hansard*, 28 August 2009, p. 48.

26 *Submission 5*, p. 6.; *Correspondence regarding public hearing*, 1 September 2009, p. 2.

CHAPTER 5

TELECOMMUNICATIONS INTERCEPTION

Provisions in the Bill

5.1 Criminal organisation offences have been introduced in New South Wales by the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* and in South Australia by the *Serious and Organised Crime (Control) Act 2008 (SA)*. In general terms, these acts:

- allow organisations to be declared criminal organisations;
- allow control orders to be granted over members of a declared organisation; and
- create offences in relation to associating with members of a declared organisation.[1]

5.2 Part 2 of Schedule 4 of the Bill would amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to allow state and territory law enforcement agencies greater access to telecommunications interception warrants for the purpose of investigating criminal organisation offences.[2]

5.3 Under the TIA Act, interception agencies may only be granted a telecommunications interception warrant in relation to the investigation of a 'serious offence.[3] Item 17 of Schedule 4 would amend the definition of 'serious offence' in section 5D of the TIA Act to include associating with, contributing to, aiding and conspiring with a criminal organisation or a member of that organisation for the purpose of supporting the commission of prescribed offences.[4] 'Prescribed offence' is defined in section 5 of the TIA Act and includes serious offences and offences punishable by at least three years imprisonment.[5]

Issues raised in submissions

5.4 The South Australian Commissioner of Police supported these amendments.[6] However, submissions from the New South Wales Government expressed concern that the proposed amendments would limit the use of interception warrants to investigations involving organisations that have already been declared, and thus offer no assistance in relation to investigations against organised criminal activity where a

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1 For a more detailed discussion of these laws see: Law Council, *Submission 6,* pp 7-9.

2 Explanatory Memorandum, p. 143.

3 Paragraphs 46(1)(d) and 46A(1)(d) of the TIA Act; Explanatory Memorandum, p. 144.

4 Explanatory Memorandum, p. 144.

5 Explanatory Memorandum, p. 144.

6 *Submission 8,* p. 2. See also Mr Jon Hunt-Sharman, Police Associations, *Committee Hansard,* 28 August 2009, p. 26.

declaration has yet to be made against an organisation.[7] The New South Wales police portfolio explained that:

> It is not being suggested that police be allowed to obtain warrants to collect evidence for criminal organisations declarations. However, it is likely that there will be some evidence that police wish to present to an authorised justice that includes lawfully obtained telecommunications interceptions product from previous investigations into serious and prescribed offences.[8]

5.5 To remedy this, the New South Wales police portfolio proposed amending the TIA Act to allow the use of material obtained through telecommunications interception warrants in proceedings under the *Crimes (Criminal Organisations Control) Act 2009 (NSW)* to obtain criminal organisations declarations as well as proceedings to obtain interim control orders or control orders over members of those organisations.[9]

5.6 In addition, the New South Wales Government noted that the definition of 'prescribed offence' would not capture the offence of controlled members of a declared organisation associating with each other because under the New South Wales legislation this offence carries a maximum penalty of two years imprisonment for a first offence.[10] The New South Wales police portfolio pointed out that, to the extent that association between members occurred by telephone and electronic means, this would effectively mean this offence could not be investigated.[11]

5.7 The New South Wales Department of Justice and Attorney-General suggested that the proposed amendments take an unnecessarily broad approach by treating all 'prescribed offences' associated with criminal organisations as 'serious offences'. Instead, the department advocated including only the following specified offences within the definition of 'serious offence':

- knowingly participating in a criminal group;
- controlled members of a declared organisation associating with each other; and
- recruiting others to become a member of a declared organisation.[12]

5.8 By contrast, the Law Council argued that telecommunication interception powers should not be available in relation to the New South Wales and South Australian criminal organisation offences. The Law Council submitted that:

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7 New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 2; New South Wales police portfolio, *Submission 13*, pp 2-3.

8 *Submission 13*, p. 3.

9 *Submission 13*, p. 4. The proposed amendment would involve including these proceedings within the definition of 'exempt proceeding' in section 5B of the TIA Act.

10 New South Wales Department of Justice and Attorney-General, *Submission 11*, p. 2; New South Wales police portfolio, *Submission 13*, pp 3-4; section 26 of the *Crimes (Criminal Organisations Control) Act 2009 (NSW).*

11 *Submission 13*, p. 3.

12 *Submission 11*, pp 2-3; section 93T of the Crimes Act 1900 (NSW); and sections 26 and 26A of *Crimes (Criminal Organisations Control) Act 2009 (NSW).*

> 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.[13]

13 *Submission 6*, p. 5. See also pp 57-60; Ms Julie Ayling, *Submission 12*, pp 7-8.

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.

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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

Additional Comments by Liberal Senators

1.1 Organised crime imposes major costs on the Australian community both in financial and human terms. Liberal Senators therefore strongly support the aim of the Bill to strengthen the legislative mechanisms available to tackle organised crime. We also endorse the recommendations in the majority report, apart from recommendation 12 which relates to proposed changes to the TIA Act. In addition to our concerns about recommendation 12, Liberal Senators have a number of further comments and recommendations for amendments to the Bill.

Amendments to the Proceeds of Crime Act 2002

Constitutionality of the unexplained wealth provisions

1.2 At the public hearing for this inquiry, Liberal Senators questioned officers of the Attorney-General's Department in relation to the constitutional validity of the unexplained wealth provisions in the Bill. The answers provided to the committee at the hearing were less than satisfactory and ultimately these questions were taken on notice.

1.3 Given the recent decision of the High Court in relation to the constitutional invalidity of the legislation establishing the Australian Military Court, it would seem prudent for Senate committees to independently scrutinise the reasoning of government departments with respect to the constitutional validity of provisions in bills.[1] In particular, Liberal Senators note that the concerns of the Senate Standing Committee on Foreign Affairs, Defence and Trade about the constitutionality of the Australian Military Court were disregarded, with most unsatisfactory results.[2]

1.4 The Government has obtained legal advice on the constitutionality of the unexplained wealth provisions but was unwilling to provide that advice to the committee. It is difficult to see how the disclosure of legal advice provided to the Government in these circumstances is contrary to the public interest. It would assist committees in performing their role to scrutinise proposed legislation and it may well help the Government to avoid the embarrassment of having legislative provisions struck down with potentiality more dramatic consequences than would have arisen from amending the original bill. Moreover, the failure to disclose the legal advice leaves perhaps unwarranted suspicions that the advice was not unequivocal.

1.5 The Government's failure to disclose this legal advice robs Liberal Senators of an opportunity to be reassured that the proposed unexplained wealth amendments are constitutional. We therefore recommend that, unless the Senate is provided with early advice that persuasively confirms the constitutionality of the provisions, a more

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1 *Lane v Morrison* [2009] HCA 29.

2 *Report on the inquiry into the provisions of the Defence Legislation Amendment Bill 2006*, October 2006, at: http://www.aph.gov.au/Senate/committee/fadt_ctte/completed_inquiries/2004-07/def_leg_bill_06/report/report.pdf (accessed 9 September 2009), pp 5-6.

cautious approach would be to base such provisions upon a referral of powers by the states to the Commonwealth.

Additional recommendation 1

1.6 Liberal Senators recommend that, unless the Senate is provided with early legal advice which persuasively confirms the constitutionality of the proposed unexplained wealth provisions of the *Proceeds of Crime Act 2002*, those provisions should be based upon a referral of powers from the states.

1.7 Liberal Senators also consider that additional amendments to the 2002 POC Act should be considered in relation to:

- the grounds on which preliminary unexplained wealth orders are granted;
- the power to apply for restraining orders under the unexplained wealth provisions;
- the grounds on which an unexplained wealth order is granted; and
- the disclosure of information gathered under the Act.

Preliminary unexplained wealth orders

1.8 While Liberal Senators support the unexplained wealth provisions in the Bill, it is critical to minimise the possibility of innocent parties being captured by those provisions. This could be readily achieved by providing that before issuing a preliminary unexplained wealth order a court should be satisfied that there are reasonable grounds to *believe*, not merely reasonable grounds to *suspect*, that a person's wealth exceeds his or her lawfully acquired wealth. The Office of the Privacy Commissioner suggested such an amendment to the committee and noted that requiring this higher level of knowledge:

> ...could assist in making sure that individuals who have not actually committed any offence nor gained personally from any illegal activity are not inadvertently caught up through this mechanism.[3]

1.9 The test of 'reasonable grounds to believe' is not uncommon under federal legislation and exists in provisions in both the Crimes Act and the Criminal Code. For example, the Deputy Privacy Commissioner explained how the two tests are used in current provisions in the Criminal Code:

> ...'reasonable grounds to believe' requires a higher level of knowledge than, say, 'reasonable grounds to suspect'. This distinction has been applied in some other legislation. An example I can give is the *Criminal Code Act 1995*, where both levels of knowledge are required in different circumstances. So, for example, within the Criminal Code Act, ...at section [105.43(2)(b)]—and that concerns taking fingerprints, recordings or samples of handwriting or photograph use—it is required that the police officer... believes on reasonable grounds that there is enough evidence or information to support those actions. Whereas in section 105.24, where it is

3 Mr Timothy Pilgrim, *Committee Hansard*, 28 August 2009, p. 8. See also *Submission 9*, p. 2; Mr Lance Williamson, Civil Liberties Australia, *Committee Hansard*, 28 August 2009, pp 18 and 21.

> referring to the conduct of ordinary searches, it only requires the police officer to suspect on reasonable grounds.[4]

1.10 The test of reasonable grounds to believe is also applied under existing section 244 of the 2002 POC Act in relation to whether a thing may be moved to another place for processing or examination in order to establish whether it may be seized under a search warrant.[5]

1.11 The Law Council supported the strengthening of the test applicable to preliminary unexplained wealth orders to 'reasonable grounds to believe' at the public hearing.[6] While Civil Liberties Australia was critical of the use of the test of 'reasonable grounds to suspect' even at the earlier stage of obtaining a restraining order under the unexplained wealth provisions and argued that:

> The burden selected strikes an inappropriate balance between the law enforcement interests of the state on the one hand, and the interests of the individual on the other.[7]

1.12 Liberal Senators accept that the test of 'reasonable grounds to suspect' is appropriate in the context of restraining assets under proposed section 20A. Indeed this is the test applicable to other restraining orders under existing sections 18 to 20 of the 2002 POC Act. However, to apply the same test to a preliminary unexplained wealth order is quite a different matter given the serious consequences of such orders: namely that an individual will be required to prove the provenance of his or her property or face forfeiture of that property. As a result, Liberal Senators recommend that the higher threshold of 'reasonable grounds to believe' ought to be met before a preliminary unexplained wealth order is made.

Additional recommendation 2

1.13 Liberal Senators recommend that before making a preliminary unexplained wealth order under proposed section 179B of the *Proceeds of Crime Act 2002* a court must be satisfied that there are reasonable grounds to *believe* that a person's wealth exceeds his or her lawfully acquired wealth.

Power for AFP to apply for a restraining order

1.14 Liberal Senators are also concerned that criminals should not be able to evade the unexplained wealth provisions by dispersing assets before they can be restrained. Liberal Senators therefore support the Commissioner of the AFP being empowered to apply for a restraining order under proposed section 20A of the 2002 POC Act. In circumstances where assets may be dispersed quickly to defeat unexplained wealth proceedings, it would seem reasonable for the Commissioner of the AFP as well as the DPP to be able to seek restraint of those assets.

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4 Mr Timothy Pilgrim, *Committee Hansard,* 28 August 2009, p. 13.

5 Attorney-General's Department, *Answers to Question on Notice*, 7 September 2009, p. 7.

6 Mr Tim Game SC, *Committee Hansard,* 28 August 2009, p. 7.

7 *Submission 4*, supplementary submission, p. 4.

Additional recommendation 3

1.15 Liberal Senators recommend proposed section 20A and related provisions of the *Proceeds of Crime Act 2002* be amended to empower the Commissioner of the AFP to apply for a restraining order under the unexplained wealth provisions.

Granting unexplained wealth orders

1.16 Under proposed paragraph 20A(1)(g) of the 2002 POC Act, a court must be satisfied that there are reasonable grounds to suspect that a person has committed specified offences or that a person's wealth was derived from such offences before issuing a restraining order. This requirement is not replicated in the provisions dealing with preliminary unexplained wealth orders and unexplained wealth orders. In response to questions from the committee, the Attorney-General's Department explained the reason for this anomaly was that proposed paragraph 20A(1)(g) provides the nexus to constitutional heads of power by linking the provision to offences which are within Commonwealth power. Such a connection is not required in relation to preliminary unexplained wealth orders under proposed section 179B. In relation to unexplained wealth orders under proposed section 179E, the constitutional nexus is achieved through the definition of 'unexplained wealth amount' as the difference between total wealth and wealth that was not derived from offences within Commonwealth power.[8] An officer from the department explained:

> It was appropriate [in proposed section 179E] for us to connect it to Commonwealth power to describe unexplained wealth by reference to offences that were within Commonwealth power. But it was not appropriate to include that second ground that is in [proposed paragraph 20A(1)](g), which relates to the person's commission of an offence, in part because that would move it away from being an unexplained wealth order and, in addition, if the person also had to demonstrate that they had not committed an offence to the satisfaction of the court that would be quite an inappropriate provision to include in the making of an unexplained wealth order.[9]

1.17 While this reasoning may be sound in relation to the constitutional bases for the provisions, it leaves the rather unsatisfactory outcome that at the final stage of making a forfeiture order in relation to unexplained wealth there is no specific requirement for a court to be satisfied that there are reasonable grounds for believing that a person's wealth is illicit. Liberal Senators accept that it would be inappropriate for the onus to be on the respondent to demonstrate that he or she had not committed one of the specified offences as well as having to account for the source of his or her assets. Nevertheless, the court should remain satisfied that there are reasonable grounds to believe a person has committed offences or derived wealth from offences when making an unexplained wealth order. Consideration should be given to

8 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 62.

9 Ms Sarah Chidgey, *Committee Hansard*, 28 August 2009, p. 62.

amending proposed section 179E of the *Proceeds of Crime Act 2002* to achieve this result.

Disclosure of information

1.18 The Bill would create extensive powers to share information obtained under the 2002 POC Act for a broad range of purposes. Liberal Senators support recommendations 4 and 5 of the majority report which limit the provisions allowing the disclosure of information to law enforcement and prosecuting agencies to disclosures for the purpose of preventing, investigating or prosecuting indictable offences punishable by imprisonment for three or more years. However, these recommendations do not go far enough.

1.19 As drafted, the provisions in the Bill would permit the disclosure of information obtained in relation to individuals even where a court refused to make a forfeiture order or other penalty order in relation to the person. This means that information can be exchanged between agencies even in cases where a court was not satisfied on the balance of probabilities that a person was involved in any criminal activity or was the recipient of illicit funds. Liberal Senators believe that disclosures should be limited to cases where such adverse findings have been made in relation to the respondent or where forfeiture has been ordered as a result of a criminal conviction.

Additional recommendation 4

1.20 Liberal Senators recommend that disclosures of information acquired under the *Proceeds of Crime Act 2002* should be limited to cases where a forfeiture order, pecuniary penalty order or literary proceeds order has been made by the court.

1.21 A further issue is that the table in proposed subsection 266A(2) of the 2002 POC Act would allow the exchange of information for the ill-defined purpose of 'assisting in the prevention of a crime'. It is difficult to imagine what disclosure of information to law enforcement agencies could not be justified on the basis that it may serve the purpose of assisting the prevention of crime. Liberal Senators observe that the drafting of item 2, column 2, in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* would be improved by omitting the word 'prevention'.

1.22 Similarly, Liberal Senators do not support the capacity to share information obtained under the 2002 POC Act for the purpose of the ATO investigating tax matters. The coercive information gathering powers granted under the Act are directed at disrupting organised crime. They should not be available for subsidiary purposes such as protecting public revenue. Liberal Senators consider that item 3 in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* should be deleted.

1.23 Where a person provides information or documents in compliance with the information gathering powers under the 2002 POC Act, proposed subsection 266A(3) would prevent the use of answers and documents provided by the person in evidence in criminal or civil proceedings against the person (apart from certain specified proceedings). As drafted, proposed subsection 266A(3) does not prevent the subsidiary use of this material against third parties. This provision could result in

considerable injustice to the family members or business associates of a person required to provide information under the Act. In essence, it may circumvent an individual's right to silence by compelling the production of information related to his or her affairs from his or her family or associates. To avoid this outcome, consideration should be given to inserting the words 'or against any other person' in proposed subsection 266A(2) of the *Proceeds of Crime Act 2002* after the phrase 'against the person who gave the answer or produced the document'.

Telecommunications interception

1.24 Finally, the Bill would expand the scope of offences which may be investigated utilising telecommunications interception warrants to include offences associated with a criminal organisation which are linked to prescribed offences. Prescribed offences, in general terms, are offences punishable by imprisonment for a term of at least three years. Recommendation 12 of the majority report would include 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 TIA Act. This offence has a maximum penalty of only two years imprisonment. The change proposed by the majority report would ultimately allow telecommunications interception warrants to be obtained in relation to the investigation of this offence.

1.25 Any amendments to the TIA Act must be applicable to both the existing state legislation targeting criminal organisations in New South Wales and South Australia as well as able to accommodate any future legislation passed by other states and territories. It is not practical, nor is it good policy, to tailor provisions to any particular state regime. It is therefore inappropriate and unacceptable to broaden the definition of 'prescribed offence' to include a specific offence which the New South Wales Parliament did not consider warranted a sentence of more than two years imprisonment.

Senator Guy Barnett **Senator Mary Jo Fisher**

Deputy Chair

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1.	Andreas Schloenhardt
2.	Commonwealth Ombudsman
3.	Australian Federal Police Association
4.	Civil Liberties Australia
5.	Commonwealth Director of Public Prosecutions
6.	Law Council of Australia
7.	Australian Institute of Criminology
8.	South Australia Police
9.	Office of the Privacy Commissioner (Cth)
10.	Victorian Director of Public Prosecutions
11.	NSW Department of Justice and Attorney-General
12.	ANU College of Asia and the Pacific
13.	NSW Law Enforcement Police Portfolio

ADDITIONAL INFORMATION RECEIVED

1. Referral by Justice Riley to the Full Court pursuant to S 21(1) of the Supreme Court Act in the matter of Lloyd Green – Tabled at public hearing on Friday 28 August 2009 by Civil Liberties Australia
2. Relevant impacts of decision of the Full Bench in the NT Lloyd Green case - Tabled at public hearing on Friday 28 August, 2009 by Civil Liberties Australia
3. Examples where ACC operations would have been enhanced through new powers - Tabled at public hearing on Friday 28 August 2009 by the Australian Crime Commission (ACC)
4. Correspondence regarding public hearing on Friday 28 August 2009 - Provided by the Commonwealth Director of Public Prosecutions, Tuesday 1 September 2009
5. Transcript from The District Court of New South Wales Criminal Jurisdiction Tuesday 10 June 2003 - Regina v Pui Man Liu & Sin Chun Wong - Provided

by the Commonwealth Director of Public Prosecutions, Tuesday 1 September 2009

6. Answers to Questions on Notice - Provided by the Commonwealth Director of Public Prosecutions, Tuesday 1 September 2009

7. Answers to Questions on Notice - Provided by the Attorney-General's Department on Tuesday 8 September 2009

8. Answers to Questions on Notice - Provided by the Office of the Privacy Commissioner, Wednesday 9 September 2009

9. Answers to Questions on Notice - Provided by the Australian Federal Police Association Friday 11 September 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, Friday 28 August 2009

ASHCROFT, Ms Rebecca, Principal Legal Officer
Commonwealth Director of Public Prosecutions

BOULTEN, Mr Phillip, Representative of the Law Council of Australia's National Criminal Law Committee
Law Council of Australia

BURGESS, Mr Mark, Chief Executive Officer
Police Federation of Australia

CAIRNS, Ms Louise, Acting Principal Legal Officer, Criminal Law Policy, Criminal Law and Law Enforcement Branch
Attorney-General's Department

CHIDGEY, Ms Sarah, Assistant Secretary, Criminal Law and Law Enforcement Branch
Attorney-General's Department

DEAKIN, Ms Kate, Manager, Litigation and Operational Legal Advice
Australian Crime Commission

DONOVAN, Ms Helen, Co-Director, Criminal Law and Human Rights
Law Council of Australia

FLORIAN, Ms Kathleen, Brisbane Office Manager
Australian Crime Commission

GAME, Mr Tim, SC, Co-Chair, National Criminal Law Liaison Committee
Law Council of Australia

HINCHCLIFFE, Ms Jaala, Senior Assistant
Commonwealth Director of Public Prosecutions

HUNT-SHARMAN, Mr Jon, National President
Australian Federal Police Association

KELLY, Ms Wendy, Director, Legislation and Strategic Development Section, Telecommunications and Surveillance Law Branch
Attorney-General's Department

LAWLER, Mr John, Chief Executive Officer

Australian Crime Commission

MANNING, Mr Michael, Principal Specialist, Legal Policy and Reform
Australian Crime Commission

McCARTNEY, Federal Agent Ian, Manager Economic
Australian Federal Police

McMILLAN, Professor John, Commonwealth Ombudsman
Office of the Commonwealth Ombudsman

NEWTON, Assistant Commissioner Mandy, Assistant Commissioner Executive Services
Australian Federal Police

ODGERS, Mr Stephen, SC, Member, National Criminal Law Liaison Committee
Law Council of Australia

PILGRIM, Mr Timothy, Deputy Privacy Commissioner
Office of the Privacy Commissioner

ROWLINGS, Mr Bill, Chief Executive Officer and Secretary
Civil Liberties Australia

SENGSTOCK, Mrs Elsa, Principal Legal Officer, Criminal Law Reform Section, Criminal Law and Law Enforcement Branch
Attorney-General's Department

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