Parliamentary Joint Committee on Law Enforcement

Inquiry into Commonwealth unexplained wealth legislation and arrangements

Questions on Notice from Senator Penny Wright dated 2 March 2012

Question 1

Under section 20A(3C) and 179SA(2) of the *Proceeds of Crime Act 2002* (PoCA), a court can engage a costs assessor to certify that legal expenses in defending unexplained wealth proceedings have been properly incurred.

a. **What is the process for appointing a costs assessor?**

b. **Does this occur before, during or at the conclusion of the court proceedings?**

c. **If the costs assessor is appointed at the conclusion of the court proceedings, what are the implications if the assessor finds that some legal expenses have not been properly incurred? Is this a risk borne by the lawyers or the person defending the proceedings and, if the latter, what if they have no means to pay the expenses already incurred?**

d. **Has this process ever been invoked? If so, what were the circumstances and the outcome/s (briefly)?**

Under subsection 20A(3A) of the POCA, a court may order that property specified in an unexplained wealth restraining order be disposed of (or otherwise dealt with) for the purpose of meeting a person's reasonable legal expenses arising from an application under the POCA. Subsection (3C) provides that a court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses in this way.

Similarly, section 179SA provides that a court may order (if it considers it appropriate to do so) that the whole, or a specified part, of property covered by an order under subsection 179S(1)[1] is not available to satisfy the unexplained wealth order, and may instead be disposed of or otherwise dealt with for the purpose of meeting a person's reasonable legal expenses arising from an application under the Act. A court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property.

As unexplained wealth restraining order and unexplained wealth order provisions have never been used, these processes have never been invoked. Accordingly, there is no precedent for how this provision should be approached.

[1] Subsection 179S(1) allows a court to make an order that property under a person's effective control is available to satisfy and unexplained wealth order.

Timing of an order for costs to be assessed

An order under subsection 20A(3A) is predicated on an unexplained wealth restraining order being in place. However, there is nothing in this provision which requires costs assessments to be made after the conclusion of the court proceedings. The ability of a court to order that restrained property be disposed of to meet costs indicates that an assessment for the purpose of settling the amount of costs to be paid can occur before the conclusion of proceedings.

An order under section 179SA can only be made once an unexplained wealth order has been made. This is because section 179SA is based on an order under subsection 179S(1) having been made (subsection 179S(1) is predicated on an unexplained wealth order having been made).

Process for appointing a costs assessor

The process for appointing costs assessors would be governed by the State or Territory court rules and directions applicable to appointing a costs assessor. For example, the following link from the NSW Supreme Court website sets out information about the use of costs assessors:

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_costsfaq.

Costs which are not allowed by a costs assessor would become a matter between the defendant and his or her legal representatives (subject to any applicable professional laws and requirements in that State or Territory).

Question 2

Under section 297(h) of PoCA, legal aid costs can be paid out of the Confiscated Assts Account – the account into which the value of confiscated proceeds and instruments of crime are paid.

a. **What is the process for this?**

b. **Has this process ever been invoked and, if so:**

    i. **How frequently is it invoked**

    ii. **What were the circumstances in which it was invoked, and**

    iii. **In each case, how much was recovered by legal aid? Was this the entire amount expended by legal aid or a proportion thereof? What was the time delay between the proceedings and the reimbursement of legal aid?**

The current provisions allowing for payments to be made to legal aid commissions were introduced into the POCA in 2010 by the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*.

Under paragraph 297(h), Confiscated Assets Account (CAA) funds can be used for any payments made to legal aid commissions under Part 4-2 of the POCA.

Part 4-2 of the POCA allows a legal aid commission to recover legal costs for:

- representing a person whose property was, at the time of the representation, covered by a restraining order, and
- representing a person who was a suspect at the time of the representation and whose property was at that time covered by a restraining order, in proceedings for defending any criminal charge against the person.

To recover their legal costs, legal aid commissions must give the Official Trustee a bill for their costs.

Provided that the Official Trustee is satisfied that the bill is true and correct, it must pay the legal costs (according to the bill) to the legal aid commission.[2] The Official Trustee (currently the Insolvency and Trustee Service Australia (ITSA)) has advised that it generally observes the following processes for making these payments:

- A request for payment and supporting documentation is received by the Financial Operations Area of ITSA from a legal aid commission.
- A payment request letter is created for each payment, which details document type, creditor (this depends on the State to which the payment is made), amount, applicable GST, general ledger account coding and remittance description. This is approved by the Financial Operations Accountant.
- The payment request letter and supporting documentation is entered into the Financial Management Information System (FMIS) as a creditor invoice into the CAA general ledger and is approved in a batch for payment.
- A payment run is processed for the CAA each Wednesday, which picks up any outstanding invoices.
- The payment batch is uploaded to the bank for overnight processing from the FMIS. This payment batch is approved by two ITSA officials and is double checked against the invoices, payment requests and supporting documentation.
- The appropriate bank account is checked the following day to ensure that the funds have been debited from our account, and the payment batch is then finalised in the FMIS.

Further information on the payments that have been made to legal aid commissions is in **Attachment A**.

[2] However, there is an alternative process if the balance of the CAA is insufficient to pay the legal costs (see subsection 293(2A).

Question 3

Given that unexplained wealth proceedings involve a reverse onus of proof (unlike other PoCA proceedings), what response would the Department have to the view that a respondent should be entitled to exercise a degree of control over their choice of legal representative as a fundamental aspect of the right to a fair trial.

The provisions that allow for a person's legal costs to be paid out of assets subject to an unexplained wealth restraining order were included as a result of Opposition amendments to the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.

Paragraph 24(1)(a) of the POCA precludes property that is subject to other types of restraining orders from being used for the purpose of meeting a person's legal costs. Instead, those who are subject to other proceeds of crime orders have access to legal aid. These legal aid costs are met from the Confiscated Assets Account.

As noted in evidence previously given to the Committee, the ability of a person to dispose of property to meet legal costs may weaken the effectiveness of the Commonwealth's unexplained wealth provisions by allowing wealth which law enforcement agencies suspect to have been unlawfully acquired to be used to contest proceedings. It may also lead to fewer assets being available to satisfy an unexplained wealth order.

While unexplained wealth orders differ from other types of order under the POCA in that they do not require proof of a particular offence, they are not the only type of order under the POCA that involves a reverse onus of proof. For example, once a restraining order has been obtained under section 18 of the POCA, the onus of proof is on the suspect to seek an exclusion order and show that property subject to the restraining order is not the proceeds of unlawful activity or an instrument of any serious offence.

It is also important to note that the right to a fair trial only applies in criminal proceedings, and proceedings under the POCA are civil proceedings. However, it is important to ensure that people who are subject to proceedings under the POCA have access to legal advice and representation, which is achieved through the provision of legal aid in POCA matters.

Question 4

Would it be possible to draft/insert a provision into PoCA to 'deem' that funds that have been used to pay legal expenses are 'untainted' to avoid the difficulty of lawyers having been paid from funds subsequently found to be unexplained wealth?

Under the existing provisions of the POCA, a court may allow a person to pay his or her legal costs using funds or assets that are subject to a restraining order, or an order under subsection 179S(1). However, it would not be legally accurate to describe such funds or assets as 'unexplained wealth' or 'tainted' funds. They are restrained funds or assets which

may later be used to satisfy any debt owed to the Commonwealth as a result of confiscation action.

Unexplained wealth orders require a person to pay an amount to the Commonwealth. This amount is a civil debt due by the person to the Commonwealth (section 179R). While this debt may ultimately be enforced by confiscating a person's property, the making of an unexplained wealth order doesn't require a court to identify that any particular property of the person is unexplained wealth.

The purpose of an unexplained wealth restraining order is to ensure that, if an unexplained wealth order is made, there is sufficient property available to satisfy the order, and that a suspect does not move all of their property out of the reach of law enforcement.

If there is not sufficient property available to satisfy the order, a deeming provision would not change the fact that, in practice, a person's legal costs were being paid out of unexplained wealth.

However, it is important to note that if a suspect used proceeds of crime to pay a lawyer for reasonable legal expenses incurred in connection with an application under the POCA or defending a criminal charge, the money paid to the legal practitioner would cease to be the proceeds of crime under paragraph 330(4)(c). This protects lawyers from being found to be in possession of proceeds of crime.

As noted in previous evidence to the Committee, enabling a person to use restrained property to pay his or her legal costs may weaken the effectiveness of the Commonwealth's unexplained wealth provisions by reducing the amount of property that is available to satisfy an unexplained wealth order.

Introducing a deeming provision may also have other unintended and inappropriate consequences. Depending on how the deeming provision was drafted, if money paid to lawyers was deemed to be 'untainted' or 'legitimately acquired', this could reduce a court's ability to make an order reflecting the total value of a person's unexplained wealth.

For example, person X has large amounts of cash in a bank account and is suspected of being involved in organised crime. The police apply to restrain funds in a bank account belonging to person X that has $200,000 in it, and a court grants a restraining order over those funds. The court subsequently makes an order under subsection 20A(3A) allowing $20,000 of those funds to be used to meet person X's legal expenses.

Under the current unexplained wealth provisions, a court does not consider the amount paid for a person's legal expenses in calculating the proportion of a person's wealth that is unexplained. If the court determined that person X had $200,000 in unexplained wealth, they could make an order requiring the person to pay the Commonwealth $200,000 (as a civil debt owing to the Commonwealth). This order may ultimately be enforced against the $180,000 of funds restrained in person X's bank account (ie the original $200,000 that was in the person's bank account minus the $20,000 that was used to meet person X's legal expenses). The remainder of the amount due to the Commonwealth under the unexplained wealth order

would still be a civil debt due by the person to the Commonwealth, but could be difficult to recover as there are no other restrained assets.

If a deeming provision was introduced stating that legal expenses were deemed to be 'legitimately acquired' or 'untainted', it could also reduce the amount that is payable under an unexplained wealth order. For example, if person X's legal expenses were deemed to be 'untainted', a court determining the amount of unexplained wealth that a person has could count the portion spent on person X's legal expenses as property that has been 'legitimately acquired'. Consequently, a court would make an unexplained wealth order for $180,000 (on the basis that $20,000 had been made 'clean' by being used for person X's legal expenses).

Question 5

In order to overcome the problem of vexatious defences or the unreasonable delay or extension of proceedings, is the Department aware of any provisions in other legislation (or other jurisdictions) whereby a court or independent assessor may determine, in a staged process, the 'reasonableness' of proposed legal steps.

Sections 37M, 37N and 37P of the *Federal Court of Australia Act 1976* are broadly framed provisions which govern case management in civil proceedings. These provisions describe how case management decisions in particular proceedings are to be made by a judge hearing a matter. They also give the Court broad powers to require things to be done within particular timeframes, limit the number of witnesses or documents that may be called as evidence, dismiss, strike out or amend any part of a party's claims or defences, or disallow particular evidence sought to be adduced.

The High Court Rules and Federal Court Rules relating to vexatious litigants also allow the courts to make orders that a particular person must seek leave of the court to commence proceedings or make applications, if reasonably satisfied that the person has persistently and without reasonable grounds instituted vexatious legal proceedings.

Many State and Territories also have legislation covering case management principles applicable to courts and vexatious litigants.

Attachment A

LEGAL AID PAYMENTS FROM THE CONFISCATED ASSETS ACCOUNT

Since the current provisions for legal aid payments were introduced into the POCA, there have been 25 payments made for a total amount of $1,099,920.54. The distribution by State is set out below:

State	QLD	NSW
Amount	$190,585.58	$909,334.96
Number	3	22

The Distribution by financial year is set out below:

Financial Year	2010/11	2011/12
Amount	$450,511.44	$649,409.10
Number	11	14

The table below lists all individual payments:

Payment made to:	Amount
Legal Aid Queensland - November 2010	$162,095.09
Legal Aid Queensland - February 2011	$15,781.99
Legal Aid NSW payments - March 2011 (4 separate matters)	$129,700.30
Legal Aid NSW payment - March 2011	$20,022.59
NSW Legal Aid - April 2011	$57,544.97
NSW Legal Aid - April 2011	$5,337.73
NSW Legal Aid - April 2011	$47,320.27
Legal Aid Queensland - April 2011	$12,708.50
NSW Legal Aid - July 2011	$12,518.55
NSW Legal Aid - July 2011	$41,765.67
NSW Legal Aid - July 2011	$157,202.89
NSW Legal Aid - August 2011	$788.66
NSW Legal Aid - August 2011	$57,571.90
NSW Legal Aid - August 2011	$9,296.63
NSW Legal Aid - August 2011	$80,376.89
NSW Legal Aid - August 2011	$165,506.66
NSW Legal Aid - August 2011	$29,619.56
NSW Legal Aid - September 2011	$4,053.63
NSW Legal Aid - September 2011	$38,658.30
NSW Legal Aid - September 2011	$40,620.62
NSW Legal Aid - September 2011	$1,020.94
NSW Legal Aid - October 2011	$10,408.20
TOTAL	**$1,099,920.54**