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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STATUTORY REVIEW OF THE CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED
WEALTH) AMENDMENT ACT 2020**

**Presented by
Shane Rattenbury MLA
Attorney-General
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ACT
Government

Statutory Review

Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020

August 2022

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1. Executive Summary

- 1.1 This is a report on the statutory review (the review) of the *Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020* (the UW Act). The UW Act commenced on 29 August 2020 and introduced an unexplained wealth scheme for the ACT (the Scheme). This provides the ability for the relevant court to issue two types of orders:
- An **unexplained wealth restraining order**, which is an interim order that restricts a person's ability to dispose of, or otherwise deal with property, until the court considers and makes a decision about an application by the Director of Public Prosecutions (the DPP) for an unexplained wealth order in relation to the property; and
 - An **unexplained wealth order**, which is a final order that makes payable to the Territory an amount which, in the court's opinion, constitutes the difference between a person's total wealth and the value of the person's wealth that was lawfully acquired.
- 1.2 The purpose of the Scheme is to deter and disrupt serious criminal activity, including organised crime, and to ensure those involved in such crime do not profit from their illegal activities.
- 1.3 Section 258A of the *Confiscation of Criminal Assets Act 2003* (the COCA Act) requires a statutory review of the operation and effectiveness of the unexplained wealth provisions and any other Territory law related to the unexplained wealth provisions, as soon as practicable one year after section 258A commenced (that is, after 29 August 2021). A final report of the review is required to be presented to the Legislative Assembly before the end of the second year of operation (that is, before 29 August 2022).
- 1.4 The review considered input from relevant stakeholders on the operation and effectiveness of the Scheme. The review identified that there has been limited use of the Scheme since it commenced in August 2020 for a variety of reasons, including the redirection of law enforcement resourcing during the COVID-19 pandemic.
- 1.5 The review also disclosed that stakeholders hold a range of views on the operational impact and sufficiency of human rights protections of the Scheme. The review has found that some stakeholders consider the Scheme is a useful tool for disrupting and deterring serious and organised crime, including in other confiscation and forfeiture proceedings where the potential for an unexplained wealth application to be brought has been a driving factor in reaching consent orders.
- 1.6 Given the short period during which the Scheme has been in place and the limited data available for the review, it is recommended that a further review be undertaken three years after the publication of this report.

2. Introduction

- 2.1 The COCA Act was enacted to support law enforcement to combat serious and organised crime in the ACT. The COCA Act contains provisions that allow the DPP to apply to the court for an order to deprive a person of monetary advantage derived from the commission of an offence as well as any property used, or intended to be used, in the commission of an offence. The COCA Act allows the proceeds of crime to be forfeited where they have been converted into other forms, such as real estate, vehicles or high commodity items, such as jewellery.

Background

- 2.2 Prior to 2018, most Australian jurisdictions had implemented an unexplained wealth scheme to attempt to target the wealth of criminals who direct and profit from crime while not being directly linked to the commission of specific offences. In 2014 an Independent Panel on Unexplained Wealth had found that arrangements for dealing with unexplained wealth laws were not working effectively across multiple jurisdictions due to constitutional limits. In response, the Commonwealth, States and Territories worked together to develop the National Cooperative Scheme on Unexplained Wealth.
- 2.3 On 10 December 2018, the National Cooperative Scheme on Unexplained Wealth came into force in Australia, creating a framework that allows Commonwealth, State and Territory law enforcement agencies greater scope to trace, identify and seize assets where a lawful means of acquiring those assets cannot be identified. The purpose of the National Cooperative Scheme on Unexplained Wealth is for the Commonwealth, State and Territories to work together to deprive individuals involved in criminal activity of benefits obtained from such activity.
- 2.4 The ACT signed the Inter-Governmental Agreement on the National Cooperative Scheme on Unexplained Wealth on 6 December 2018, triggering obligations for the ACT to implement the legislation necessary to support the equitable sharing arrangements that allow the Commonwealth to pursue unexplained wealth matters where they arise from ACT offences. These obligations were fulfilled when the *Crimes Legislation Amendment Act 2020*, which commenced on 15 August 2019, introduced Division 10.3 into the COCA Act.

Unexplained Wealth Scheme in the ACT

- 2.5 The ACT enacted its own unexplained wealth scheme by way of amendments to the COCA Act. These amendments were introduced in the UW Act, which creates two new types of orders: an unexplained wealth restraining order (at section 32A of the COCA Act) and an unexplained wealth order (at section 98D of the COCA Act).
- 2.6 Further to the amendments to the COCA Act, the ACT introduced the *Confiscation of Criminal Assets Amendment Regulation 2022* (Amendment Regulation) in May 2022 which amended the *Confiscation of Criminal Assets Regulation 2003* (Regulation) to recognise corresponding unexplained wealth orders of other jurisdictions. Part 11 of the

COCA Act provides that interstate orders made under prescribed corresponding laws can be registered in the ACT and once registered will be taken to be an order under the COCA Act and enforceable in the ACT. The Amendment Regulation also updated references in the Regulation to corresponding laws in other jurisdictions that were outdated and related to other types of confiscation of criminal assets orders.

Overview of the Scheme

- 2.7 **Unexplained wealth restraining orders** are interim orders that preserve the property the subject of the order and prevent disposal of the property while proceedings for unexplained wealth orders are underway. An **unexplained wealth order** is a final order that makes payable to the Territory an amount which, in the court's opinion, constitutes the difference between a person's total wealth and sum of the values of the property that the court is satisfied, on the balance of probabilities, was not derived from serious criminal activity.
- 2.8 Section 26A of the COCA Act provides that the DPP may apply to a relevant court for an unexplained wealth restraining order over the property of a person. The application must be supported by an affidavit made by a police officer in accordance with section 29A of the COCA Act.
- 2.9 Section 29A of the COCA Act provides that the affidavit must state that the police officer suspects that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, and the whole or any part of the person's wealth was derived from serious criminal activity. It is not necessary for the police officer to specify in the affidavit a particular offence for serious criminal activity, and it is sufficient if the police officer suspects and the affidavit describes the nature of the activity in general terms. The affidavit must state that the police officer believes that the property sought to be restrained may be required to satisfy an unexplained wealth order. The affidavit must also state the grounds for each belief or suspicion stated in the affidavit.
- 2.10 If the relevant court, having regard to the police officer's supporting affidavit and any other evidence before the court, is satisfied that there are reasonable grounds for the officer's suspicions as stated in the affidavit, the court must make an unexplained wealth restraining order pursuant to section 32A of the COCA Act. Section 48A of the COCA Act provides that an unexplained wealth order ends if no application for an unexplained wealth order has been made within six weeks after the unexplained wealth restraining order was made.
- 2.11 Pursuant to sections 37 and 38 of the COCA Act, a relevant court may, in a restraining order, allow expenses to be met out of restrained property of a person for the living and business expenses of the person, the living expenses of a dependent of the person, or the legal expenses in defending a criminal charge. The court must not allow expenses to be met out of restrained property unless satisfied of the criteria set out in those provisions.
- 2.12 A person claiming an interest in restrained property may apply to have property excluded from an unexplained wealth restraining order pursuant to section 75 of the

COCA Act. The court must not make an exclusion order for the property unless the court is satisfied that the property meets the criteria set out in section 77A of the COCA Act.

- 2.13 Part 7A of the COCA Act sets out the provisions for unexplained wealth orders. The DPP may apply to the relevant court for an unexplained wealth order under section 98B of the COCA Act. If an unexplained wealth restraining order has not already been made in relation to a person the subject of the application, the application must be supported by an affidavit made by a police officer in accordance with the requirements in section 98C of the COCA Act.
- 2.14 Section 98C of the COCA Act provides that the affidavit must state that the police officer suspects that a person's total wealth exceeds the value of the person's wealth that was lawfully acquired, and the whole or any part of the person's wealth was derived from serious criminal activity. The affidavit must also state the grounds for each belief or suspicion stated in the affidavit.
- 2.15 Section 98D of the COCA Act provides that the relevant court must make an unexplained wealth order against a person if the court is not satisfied that the whole or any part of the person's wealth was not derived from serious criminal activity. The provision reverses the burden of proof so that the respondent is required to prove that their wealth was lawfully acquired. Subsection 98D (2) states that the court may refuse to make an unexplained wealth order or reduce the amount that would otherwise be payable, if the court, having regard to the purposes of the COCA Act, thinks it is in the public interest to do so.
- 2.16 Section 98F of the COCA Act also provides that the relevant court making an unexplained wealth order may make an order directing the Territory, once the unexplained wealth order is fully satisfied, to pay an amount decided by the court to a respondent's dependant. The court may make such a hardship relief order if satisfied that the unexplained wealth order would cause undue hardship to the dependent, the amount would relieve the hardship, and, if the dependent is at least 18 years old, the dependent had no knowledge of the person's conduct that is the subject of the unexplained wealth order.
- 2.17 Provisions for the satisfaction of an unexplained wealth order are set out in Division 7A.3 of the COCA Act. On the making of an unexplained wealth order, any property restrained is automatically charged to secure the payment to the Territory of the amount of the unexplained wealth order. The amount ordered to be paid by a relevant court under an unexplained wealth order is a judgment debt owing to the Territory. Pursuant to section 98J of the COCA Act, the Public Trustee and Guardian (the PTG) is authorised to satisfy an unexplained wealth order out of any property restrained for the order.

Basis for the Review

- 2.18 Section 258A of the COCA Act requires a review of the operation and effectiveness of the unexplained wealth provisions as soon as practicable after the end of one year after section 258A commences and a report of the review to be tabled in the Legislative Assembly before the end of the section's second year of operation.

- 2.19 The review was undertaken by the Justice and Community Safety Directorate (JACS) through consultation with key criminal justice system stakeholders. In undertaking the review, qualitative and quantitative information and data has been sought to understand the impact of the Scheme. Consultation with stakeholders sought data on the number of applications for unexplained wealth orders and unexplained wealth restraining orders and the outcomes of applications. Consultation also sought views from stakeholders on any practical issues identified in relation to applications for such orders, and whether amendments should be made to improve the operation of the Scheme.
- 2.20 Limited data was available for the review as only two applications for unexplained wealth restraining orders had¹ been made since the Scheme commenced. Both applications were resolved by consent orders that included orders to forfeit property to the Territory.
- 2.21 The limited use of the Scheme and related data available for the review likely reflects the relatively short length of time since the provisions commenced and also, potentially, the effects of the COVID-19 pandemic which may have suppressed the number of briefs that would otherwise have been referred to the DPP. Further, unexplained wealth proceedings are generally more resource intensive and legally complex than proceedings for other types of orders available under the COCA Act.

3. Stakeholder Consultation

- 3.1 The following stakeholders were contacted during the course of the review and were asked to provide input on the operation and effectiveness of the Scheme:
- ACT Bar Association
 - ACT Courts and Tribunals
 - ACT Human Rights Commission
 - ACT Law Society
 - ACT Policing
 - Director of Public Prosecutions (ACT)
 - Legal Aid ACT
 - Public Trustee and Guardian for the ACT

Terms of Reference

- 3.2 Stakeholders were provided with the following questions to prompt their feedback on the Scheme:
- *Based on your agency's involvement with the unexplained wealth scheme, do you have any comments on the operation or effectiveness of the Scheme?*
 - *Does the Scheme, as currently legislated, support or limit the purpose of the Act?*

¹ Based on information provided as at 3 March 2022.

- *How many applications for unexplained wealth restraining orders and unexplained wealth orders have been made since the Scheme commenced?*
- *How many of these types of applications were successful?*
- *How many of these types of applications were unsuccessful or discontinued, and why?*
- *Has your agency identified any practical issues in relation to applying for these orders?*
- *Does your agency have any comments in relation to provisions of the Scheme, such as the practical operation of the hardship provisions or the assessment of unexplained wealth?*
- *Does your agency have any comments in relation to possible amendments to the Scheme to improve its operation or effectiveness?*
- *Please include other comments that you feel may be relevant to this review.*

Stakeholder Comments

3.3 Comments were received from the PTG, Legal Aid ACT, the DPP, ACTP, the Human Rights Commission and the ACT Bar Association. Their comments are summarised below.

Public Trustee and Guardian (PTG)

3.4 The PTG comments that the Scheme is operating as intended, though its experience is limited to only two matters, both of which resolved by way of consent orders. The only concern the PTG raises relates to the length of time during which unexplained wealth restraining orders are in force. These types of orders lapse after a period of 6 weeks if no further action is taken. Division 8.1 specifically sets out how restrained property is to be managed by the PTG and gives the PTG authority to sell, modify or destroy property, or do anything necessary to preserve the value of the property. The PTG comments that 6 weeks is insufficient time for the PTG to be able to operate effectively under this Division.

Legal Aid ACT (Legal Aid)

3.5 Legal Aid comments that the Scheme appears to support the purposes of the COCA Act and that the hardship and public interest provisions appear to be appropriate. However, Legal Aid is of the view that the wording of section 32A (2) of the COCA Act, which relates to making unexplained wealth restraining orders, may lead to perverse outcomes. Legal Aid raises concerns that the wording of this section requires too low a threshold to be met for the court to make an unexplained wealth restraining order, as the decision to make this type of order is based solely on the police officer's suspicions as stated in the supporting affidavit. Legal Aid also notes that the wording may be seen to exclude relevant material that is proffered by a respondent after the affidavit is made.

3.6 Legal Aid also makes the comment that the placing of the onus on the respondent to prove that their wealth was lawfully acquired imposes an onerous burden. The rationale behind this view is that often respondents do not maintain accurate financial records and there is a risk that some people may be wrongly subject to unexplained wealth proceedings.

ACT Director of Public Prosecutions (DPP)

- 3.7 The DPP is strongly supportive of the Scheme, commenting that the unexplained wealth provisions have been an extremely effective tool in disrupting serious and organised crime, despite there having only been two applications for unexplained wealth restraining orders since the commencement of the Scheme.
- 3.8 The DPP notes that the Scheme has been an effective tool in the settlement of other confiscation proceedings. The DPP notes that the making of an unexplained wealth order is not restricted to property already restrained under section 32A of the COCA Act (Unexplained wealth restraining order – making). Accordingly, the DPP may pursue unexplained wealth orders against persons whose property has been restrained under an ordinary restraining order following the commission of an offence. The DPP notes that the availability of an unexplained wealth order has been an effective tool in the settlement of exclusion order applications. As a result, where it becomes apparent following restraint that a person has unexplained wealth, the overwhelming prospects of an unexplained wealth application being brought at a future point in the litigation can successfully compromise the person’s exclusion order application, notwithstanding the person may have a strong case under section 77 (Making of exclusion orders – serious offences).
- 3.9 The DPP is of the view that the success of the Scheme is not necessarily reflected in the number of successful unexplained wealth applications and is instead, perhaps counterintuitively, reflected in the relatively low number of applications when compared to other confiscation proceedings.
- 3.10 The DPP also notes that the Scheme supports the objects and purposes of the COCA Act. However, notes that the hardship provision in section 98F of the COCA Act has the potential to frustrate the objectives of the Act, in particular those set out in section 3 (b), (c) and (d) of the COCA Act. The DPP argues that the hardship provision permits a respondent’s dependants to benefit from established unexplained wealth and criminal offending.
- 3.11 Finally, the DPP notes that it has not identified any practical issues with the Scheme as it is relatively new. The DPP also notes that unexplained wealth proceedings are time consuming and legally complex compared to other proceedings under the COCA Act. In addition, the decision to commence an unexplained wealth proceeding requires a significant amount of legal and investigative resources and the decision is largely informed by detailed forensic accounting evidence.

ACT Policing (ACTP)

- 3.12 ACTP supports the Scheme, noting that it is consistent with the purposes of the COCA Act. ACTP shares the DPP’s views in relation to the hardship provisions and the complex nature of investigations into unexplained wealth.
- 3.13 ACTP raises concerns as to the identification of a respondent’s “lawfully acquired wealth” compared to their total wealth, as required to be set out in a police officer’s supporting affidavit pursuant to section 29A (1) (a) of the COCA Act. The concern is that

this phrasing assumes a respondent keeps accurate and detailed financial records, which is often not the case. It is also difficult to identify wealth that is acquired from gambling. ACTP also notes that tactics such as co-mingling and layering (repeatedly transferring funds between multiple accounts for no apparent genuine purpose) should be recognised as an indicator of money laundering and the onus should be on the respondent to explain why they are layering. ACTP suggests that there should be an assumption that co-mingling and layering efforts are being used to hide sources of wealth until proven otherwise.

- 3.14 ACTP has not identified any practical issues with the application process and court process for the Scheme. ACTP is of the view that “lawfully acquired wealth” should be explicitly defined and that any wealth that has not been declared to the Australian Taxation Office (ATO) and cannot otherwise be proven as lawfully acquired by the respondent should be considered unexplained wealth.
- 3.15 ACTP also proposes that a useful addition to the Scheme would be to include a power to compel the ATO to provide regular tax assessments or audits of offenders, on the basis that most offenders avoid tax responsibilities and the ATO is not mandated in taking action against subjects of the Scheme. Additionally, ACTP proposes amendments to the legislation to include a power to compel respondents to provide evidence of their income dating back several years. If respondents fail to provide satisfactory evidence, ACTP recommend their evidence be given little to no weight.

ACT Human Rights Commission (HRC)

- 3.16 The HRC raises concerns about the compliance of the scheme with the *Human Rights Act 2004* (ACT) (HR Act). The HRC comments that the human rights compatibility of the Scheme is dependent upon the extent of judicial discretion available but is concerned the Scheme limits judicial discretion in an overly prescriptive way and is likely to significantly limit the ability of the court to take all relevant circumstances into account to ensure that unexplained wealth orders remain proportionate where fundamental rights are at stake.
- 3.17 In particular, the HRC raises issues with the direction in section 98D (2) of the COCA Act which requires the court have regard to the purposes of the COCA Act when exercising discretion in the public interest to refuse to make an unexplained wealth order, or to reduce the amount payable under an unexplained wealth order. The HRC notes that the purposes of the COCA Act are limited to objectives that are aimed primarily at preventing enrichment from criminal activity, irrespective of the proportionality of such measures or their impact on innocent third parties. The HRC states that the phrasing of this provision, which turns on the narrow objects of the COCA Act, restricts the ability of the court to consider proportionality or the impact on innocent third parties when choosing to exercise discretion in accordance with section 98D (2) of the COCA Act, and that the wording should be amended to ensure these factors are considered by the court.

- 3.18 The HRC is also of the view that the hardship relief provisions are unnecessarily restrictive and complicated in respect of the relevant human rights (protection of family and children and the right to privacy and reputation). The HRC also proposes that hardship relief provisions are incorporated into other confiscation proceedings to ensure the human rights compatibility of the COCA Act more generally. The HRC has previously noted that the absence of a general hardship clause in the COCA Act is at odds with the approach taken in other Australian jurisdictions and is a long-standing issue of concern that remains unaddressed.
- 3.19 Finally, the HRC recommends that the DPP include a more detailed breakdown of data relating to unexplained wealth proceedings in their annual report to ensure transparency as to how the Scheme is operating in practice.

ACT Bar Association (ACTBA)

- 3.20 The ACTBA raises several concerns with the Scheme, though notes the relative infancy of the Scheme.
- 3.21 In summary, the ACTBA raises concerns that the Scheme infringes on human rights, limits judicial discretion, shifts the conventional burden of proof, and the threshold for commencing unexplained wealth proceedings is too low. Notably, the ACTBA is concerned that the definition of “serious criminal activity” is too broad and vague. In addition, as there is no need to specify a particular offence in the police officer’s supporting affidavit, the ACTBA is of the view that it is easy to elide the concept of criminal activity into serious criminal activity.
- 3.22 The ACTBA makes the following recommendations:
- The application of the Scheme should be more closely tied to only criminal activity which is in fact serious.
 - The concept of “serious criminal activity” should be better defined to prevent procedural unfairness to the defendant.
 - There should be a requirement for the police officer’s supporting affidavit to nominate a particular serious offence, without the need to particularise the offence with information such as offender, time, date and place.
 - Consideration should be given to reassigning the Scheme to the ACT Government Solicitor, rather than the DPP, given the Scheme is civil in nature.
 - Subsection 29A (5) of the COCA Act should be amended to ensure the grounds of suspicion are defined in the supporting affidavit. The subsection might be amended to the effect: “The affidavit must provide the evidence that grounds each belief or suspicion in the affidavit and expose the reasoning process said to ground the necessary suspicion or belief.”
 - The proof for respondents in unexplained wealth order applications should not be to satisfy the court that the whole or any part of the wealth was not derived from serious criminal activity but that there is no reasonable basis to suspect that the whole or any part of the wealth was derived from serious criminal activity.

- Section 32A of the COCA Act should be amended as follows:
 - (2) The relevant court may make an unexplained wealth restraining order over the property to which the application relates if, having regard to the police officer's affidavit supporting the application and any other evidence before the court, there are reasonable grounds to conclude on the balance of probabilities that:*
 - (a) a person's total wealth exceeds the value of the person's wealth that was lawfully acquired; and*
 - (b) the unexplained wealth was derived from serious criminal activity.*
- There should be a further review of the Scheme, noting that the unexplained wealth provisions are still in their infancy and yet to be thoroughly tested.

4. Issues raised by the review

Operational effectiveness

- 4.1 Several stakeholders indicate that the Scheme is operating as intended and that it supports the purposes of the COCA Act in section 3. The DPP and ACTP opine that the Scheme has been an effective mechanism to disrupt serious and organised crime, noting, however, that only two applications for unexplained wealth restraining orders having made since the commencement of the Scheme both of which resulted in consent orders. The DPP and ACTP note that the Scheme has been particularly effective as a tool in the settlement of other confiscation proceedings. JACS acknowledges that the resolution of matters by consent is a desirable outcome as it is more resource efficient and saves time and money by avoiding court proceedings.
- 4.2 The DPP and ACTP both note that unexplained wealth investigations and proceedings are resource intensive and legally complex. As a result, as more unexplained wealth proceedings are commenced there will likely be an impact on the resources of the DPP and ACTP. JACS notes that, given the infancy of the Scheme, it is too soon to consider these potential resourcing concerns and that they can be revisited if they eventuate once there is greater use of the Scheme.
- 4.3 The PTG raises concerns that the length of an unexplained wealth order is in force is insufficient for the PTG to effectively deal with property under Division 8.1 of the COCA Act. In addition, ACTP comments that there are difficulties for police identifying lawfully acquired wealth where there are not accurate financial records or co-mingling and layering efforts have been used to hide sources of wealth. ACTP also recommends a power to compel the ATO to provide regular tax assessments and a power to compel respondents to provide evidence of income. JACS notes that these comments are based on the limited utilisation of the Scheme to date and concludes that amendments should not be considered until the Scheme has been in operation for a longer period of time.

Human rights protections and other safeguards

- 4.4 Legal Aid and the ACTBA raise concerns about the threshold for making an unexplained wealth restraining order pursuant to section 32A (2) of the COCA Act. Legal Aid notes that the wording of section 32A (2) of the COCA Act requires the court's decision be based on the reasonableness of grounds of the officer's suspicions stated in the affidavit, rather than future prospects of an unexplained wealth order being made. As noted above, the ACTBA proposes that section 32A (2) of the COCA Act is amended so that the test is more objective and the threshold for making an unexplained wealth restraining order is increased.
- 4.5 JACS notes that all types of restraining orders made under Part 4 of the COCA Act are made on the basis of the court being satisfied that there are reasonable grounds for the police officer's suspicions set out in the supporting affidavit and not on the basis of whether there are reasonable grounds for a final order to be made. Restraining orders are for the purpose of quickly restraining property to prevent its disposal, or to prevent a decrease in its value, while forfeiture proceedings are on foot. Increasing the threshold for making unexplained wealth restraining orders would result in inconsistency with the tests for other types of restraining orders and lengthen proceedings for unexplained wealth restraining orders. It could also allow property that is not the subject of an unexplained wealth restraining order as a result of the higher threshold to be disposed of prior to the hearing for an unexplained wealth order. Moreover, the Scheme enables the court to allow a person to access restrained property for legitimate purposes in certain circumstances to balance rights. As a result and noting the limited use of the Scheme to date, JACS concludes that amendments should not be made to section 32A of the COCA Act at this stage.
- 4.6 The HRC raises concerns that the court has limited discretion in unexplained wealth proceedings because the provisions limit the ability of the court to take all relevant circumstances into account in a particular case. In particular, the HRC notes that section 98D (2) of the COCA Act requires the court to have regard to the purposes of the COCA Act when exercising its discretion to refuse to make an unexplained wealth order or reduce the amount payable, if it thinks it is in the public interest to do so. The HRC considers that section 98D (2) of the COCA Act should also expressly reference the need for the court to have regard to considerations of proportionality to ensure that human rights are balanced. JACS acknowledges that judicial discretion is crucial to ensuring effective oversight of the Scheme and ensuring that the Scheme is compatible with human rights. JACS notes that the absence of an express requirement to consider proportionality does not prevent the court from considering human rights as part of the public interest test. JACS also notes that these concerns have not been raised in response to a particular decision in which the court failed to consider proportionality. In the circumstances, JACS considers that no amendments are required at this time.
- 4.7 Legal Aid and the ACTBA also raise human rights concerns regarding the Scheme's reversal of the burden of proof. Legal Aid argues that the placing of the onus on the respondent in unexplained wealth applications to prove that their wealth was lawfully acquired imposes an onerous burden and assumes that the respondent keeps accurate

records of their finances which they can tender to prove their wealth is lawfully obtained.

- 4.8 JACS notes that the right to privacy (section 12 of the HR Act) may be limited by the burden of proof shifting to the respondent. In order to satisfy the court that their wealth was legally obtained the person will be obliged to share bank records, receipts of purchase or other relevant evidence. However, the reversal of the burden of proof is a key element of effective unexplained wealth schemes. This is appropriate as information about any lawful source of an asset or cash would typically be peculiarly within the knowledge of the respondent. Therefore, it would be significantly more difficult and costly for the prosecution to establish this information. These issues were considered during the development of the Scheme and the presumption of unlawful conduct was narrowly contained to ensure the overall compatibility of the scheme with the HR Act.
- 4.9 The ACTBA recommends that the definition of serious criminal activity is amended and that there is a requirement for the police officer's supporting affidavit to identify a particular serious offence. These issues were considered during the development of the Scheme. The concept of serious criminal activity, which encompasses conduct which was a serious offence at the time of the conduct, was adopted to differentiate the Scheme from other types of proceedings under the COCA Act which require identification of a particular offence. The Scheme was considered to be compatible with human rights despite the absence of a requirement for the supporting affidavit to identify a particular offence. Noting the infancy of the Scheme, these concerns can be reconsidered if significant issues arise once the Scheme is utilised more.
- 4.10 The DPP and ACTP raise concerns that the hardship provision in section 98F of the COCA Act permits a respondent's dependants to benefit from established unexplained wealth and criminal offending. In contrast, the HRC is of the view that the hardship relief provision is unnecessarily restrictive and that there may be less restrictive alternatives available. JACS notes that these concerns were raised during the development of the Scheme and section 98F of the COCA Act was included in the Scheme to appropriately balance human rights with the operational viability of the Scheme, to ensure compatibility of the Scheme with the HR Act. Section 98F of the COCA Act operates as a safeguard that helps to ensure that the limitations of the Scheme on the right to family (section 11 of the HR Act) and the right to privacy and home (section 12 of the HR Act) are proportionate and the least restrictive means to achieve the purpose of depriving a person of unexplained wealth. Section 98F grants discretion to the court to make appropriate relief orders for dependants to avoid undue hardship. The provision includes a requirement for the court to consider, as far as practicable, the minimum standard of living that is neither meagre nor luxurious. In accordance with section 37 of the HR Act, the Attorney-General prepared a compatibility statement indicating that the UW Act was consistent with the HR Act.
- 4.11 Moreover, JACS notes that as there have been no court proceedings for unexplained wealth orders to date, the comments raised by stakeholders about the hardship provision during the review are not made on the basis of specific concerns arising from the court's application of section 98F of the COCA Act.

5. Conclusion and recommendation

- 5.1 The UW Act introduced an unexplained wealth scheme in the ACT. The Scheme introduced two new types of orders under the COCA Act: unexplained wealth restraining orders and unexplained wealth orders. A statutory review of the Scheme is required to be presented to the Legislative Assembly no later than two years after the commencement of the Scheme, in accordance with section 258A of the COCA Act.
- 5.2 The review considered the operation and effectiveness of the unexplained wealth provisions, relying largely on feedback from relevant stakeholders. Due to the relatively short length of time for which the Scheme has been operating, and potentially also occurrence of the COVID-19 pandemic, there was limited data available for the purposes of the review.
- 5.3 The review found that stakeholders hold a range of views in relation to the Scheme. Some stakeholders raised practical issues, particularly in relation to the complexity and resource-intensive nature of investigations into unexplained wealth. Other stakeholders raised concerns about the sufficiency of the human rights protections in the Scheme and the onerous burden on respondents.
- 5.4 Given the short period during which the Scheme has been in place and the limited data that is available, the review makes no substantive recommendations in relation to amendments to the Scheme. However, it is recommended that a further review be conducted in three years from the publication of this report. It is anticipated that there will be the opportunity to consider more data on the operation and effectiveness of the scheme at that time.