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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED WEALTH)
AMENDMENT BILL 2020**

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(Human Rights Act 2004, s 37)**

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**CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED WEALTH)
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Outline

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Purpose of the Bill

The Bill provides a local unexplained wealth scheme for the ACT. The purpose of introducing local unexplained wealth laws is to more effectively deter and disrupt serious criminal activity, including organised crime, and ensure those involved in such crime do not profit from their illegal activities.

The Bill provides for two types of orders which can be sought in relation to unexplained wealth:

- an unexplained wealth restraining order; and
- an unexplained wealth order.

An unexplained wealth restraining order is an interim order that restrict a person's ability to dispose of, or otherwise deal with, property. These provisions ensure that property is preserved and cannot be dissipated before a court can consider whether an unexplained wealth order should be made. A court must make an unexplained wealth restraining order if satisfied that there are reasonable grounds to suspect 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.

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 the value of the person's wealth that has been lawfully acquired. The court has a discretion to refuse to make an order or reduce the amount payable.

Human Rights Considerations

Safeguards have been put in place to ensure that unexplained wealth laws operate effectively and fairly.

Broadly, the Bill engages, and places limitations on, the following HR Act rights:

- Section 11 – Protection of family and children
- Section 12 – Right to privacy and reputation

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting governments must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.¹

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*.² A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”³.

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of deterring people from engaging in criminal activity and preventing those who are engaged in such activity from retaining profits gained from it.

¹ Colvin, M & Cooper, J, 2009 ‘*Human Rights in the Investigation and Prosecution of Crime*’ Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 ‘*Positive obligations under the European Convention on Human Rights*’, Council of Europe.

² [1986] 1 SCR 103.

³ *R v Oakes* [1986] 1 SCR 103.

Detailed human rights discussion

Rights engaged and limited

The amendments in the Bill primarily engage and limit the right to family and right to privacy and reputation. The limitations are discussed in detail below.

Section 11 – Right to family

Section 11 of the HR Act states that:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.*
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.*

Family has a broad meaning and includes all people who make up a family unit.

The nature of the right affected and the limitation (sections 28 (2) (a) and (c))

This right has strong links, particularly in relation to the Bill, with the right to privacy (section 12).

General comment 19 from the United Nations Human Rights Council on article 23 (right to protection of the family) of the International Covenant on Civil and Political Rights (ICCPR), notes that when read with article 17 (right to privacy), the right to protection of the family establishes a prohibition of arbitrary or unlawful interference with the family unit.

The nature of the right is not absolute. The measures in the Bill engage the right to protection of family and children noting the measures may cause financial hardship to a person's partner and dependants if the person is the subject of an unexplained wealth restraining order or an unexplained wealth order.⁴ The right is limited by the provisions of the Bill as family members may have their property, including their home, restrained and forfeited to the Territory due to the criminal behaviour of another family member.

The nature and extent of the limitation will depend on the property that is restrained and forfeited to the Territory to meet the unexplained wealth order. For example, the forfeiture of the family home could be expected to have a greater impact on dependants than the forfeiture of jewellery, cars or investment properties.

The importance of the purpose of the limitation (section 28 (2) (b))

The purposes of the limitation are to ensure that those involved in serious and organised crime do not profit from their illegal activities and to deter such criminal behaviour.

⁴ In relation to the engagement of the family see, *DPP v Ali (No 2)* [2010] VSC 503 [28].

Section 3 of the *Confiscation of Criminal Assets Act 2003* (the Act) sets out the purposes of the Act which are to:

- encourage law-abiding behaviour in the community;
- give effect to the principle of public policy that a person should not be enriched because of the commission of an offence, whether or not anyone has been convicted of the offence;
- deprive a person of all material advantage derived from the commission of an offence, whatever the form into which property or benefits derived from the offence may have been changed;
- deprive a person of property used, or intended by an offender to be used, in relation to the commission of an offence, whatever the form into which it may have been changed, and to prevent the person from using the property to commit other offences;
- enable the effective tracing and seizure by law enforcement authorities of property used, or intended by an offender to be used, in relation to the commission of an offence and all material advantage derived from the offence; and
- provide for the enforcement in the ACT of orders, notices or decisions (however described) made under corresponding laws.

Consistent with, and complementing, these purposes, the Bill adds the following additional purpose in section 3:

- deprive a person of any unexplained wealth derived from serious criminal activity.

Relationship between the limitation and its purpose (section 28 (2) (d))

The limitation is important to ensure that the purposes of the Act are met in relation to unexplained wealth orders. The purpose of depriving a person of unexplained wealth derived from serious criminal activity would be undermined if the person's family members could retain the unexplained wealth without any restrictions.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))

The restrictions imposed by the scheme on rights are proportionate to the aim of depriving a person of unexplained wealth and are the least restrictive means possible in the circumstances.

To ensure that the limitation of the right is proportionate and that the least restrictive way to achieve the purpose is adopted, safeguards in the form of judicial oversight, including significant discretion and hardship relief provisions, have been included in the Bill. The Court will have discretion to refuse to make an unexplained wealth order or reduce an unexplained wealth order if it is in the public interest. The Court will, at both the restraining

order and final unexplained wealth order stages, be able to make orders to ensure appropriate provision for relief from undue hardship.

The inclusion of these safeguards reflects the nature of the unexplained wealth scheme as a civil scheme rather than a criminal scheme.

The Bill also expands the definition of dependant for the purposes of the Act. To better reflect contemporary community standards and expectations, the Bill expands the definition to include any member of the person's household who depends on the person for support. This new definition will apply, not only in relation to unexplained wealth proceedings, but in other proceedings under existing provisions of the Act.

In circumstances where the restrained property sought to be used to meet reasonable expenses is tainted property, the Bill requires the Court to consider whether the release of the tainted property for that purpose will be 'just and equitable'.

Tainted property is property that the Court is satisfied was used in a specific offence or derived from the commission of a specific offence.

The requirement for the Court to be satisfied that it would be just and equitable to use tainted property to meet reasonable living expenses has been incorporated to reflect the policy that property which has some connection with a criminal offence should not be released without due consideration of relevant factors. These factors include, but are not limited to, the undue hardship to a person or their dependants that could result from not allowing expenses to be met from tainted property.

Other considerations may be relevant in assessing whether the release of tainted property is just and equitable. For example, where a third party may have an interest in property and to release the property for expenses would mean that their ability to recover their interest is extinguished.

The just and equitable assessment is proportionate and the least restrictive means by which to achieve the purposes of the Act. The just and equitable assessment will ensure that there is consideration of the particular circumstances of the respondent and their dependants and protection of the interests of third parties.

Additionally, a statutory review period for the unexplained wealth provisions is included in the Bill to ensure that the impact of the provisions can be monitored and assessed.

Section 12 – The right to privacy and home

Section 12 of the HR Act states that:

Everyone has the right—

(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and

(b) not to have his or her reputation unlawfully attacked.

The nature of the right affected and the limitation (sections 28 (2) (a) and (c))

A home is the place where a person and/or his family live. In *Director of Housing v Sudi*, Bell J stated the concept of home in human rights is autonomous and not based upon notions of legal or equitable title or rights. General comment 16 from the Office of the High Commissioner for Human Rights describes this right as the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence. The comment notes that the term ‘unlawful’ means that no interference can take place except in cases envisaged by the law.

The term ‘arbitrary interference’ is described as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the circumstances.

The right to privacy under the HR Act includes the right not to be subject to arbitrary or unlawful interference with one's privacy, family, home or correspondence. The right to privacy also encompasses a person's right to personal autonomy in one's private life. The right to privacy may be subject to reasonable limitations under section 28 of the HR Act.

The nature of the right is not absolute. The right is limited by the provisions of the Bill as family members may have their property, including their home, restrained and forfeited to the Territory due to the illegal activity of another family member.

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances). The right to privacy is limited by the Bill as the burden of proof is on the person to prove that their wealth was lawfully acquired. 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.

The Bill also engages and limits the right not to be subject to arbitrary or unlawful interference with a person's privacy and home, including on the basis that unexplained wealth restraining orders can be used to restrain property including real property. More generally, the restraining of a person's assets imposes a limit on that person's right to a private life, free from interference by the state. The Bill may also engage and limit the private life of a close family member who depends on the person for support.

The importance of the purpose of the limitation (section 28 (2) (b))

The purpose of the limitation is to ensure that criminals, including those involved in organised crime, do not profit from serious crime. It is the case that a person's dependants may enjoy a standard of living derived from the person's illegal activities. While it is appropriate for the scheme to include safeguards to avoid the imposition of undue hardship on family members, this does not necessarily mean that the person or their family will be allowed expenses to maintain a standard of living arising from illegal activities.

The reversal of the burden of proof, requiring the respondent to satisfy the Court that their unexplained wealth was not unlawfully acquired, is a key element of effective unexplained wealth laws. 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 in the context of a suspicion about its unexplained nature and connection with serious crime. To ensure the scheme is compatible with the HR Act the presumption of unlawful conduct has been narrowly contained to ensure the overall compatibility of the scheme with the HR Act.

The scheme relies on the ability to quickly and effectively make a restraining order over property that there are reasonable grounds to suspect is unexplained wealth. This aspect of the scheme assists to avoid the possibility that the property (or wealth) will be disposed of and the person allowed to profit from illegal activities. The ability to quickly make an unexplained wealth restraining order must be balanced with the right to family (discussed above) and the right of a person to access resources from their own property or home for legitimate purposes. The scheme enables the court to allow a person to access restrained property for legitimate purposes in certain circumstances. Legitimate purposes are not intended to include funding a lavish or luxurious lifestyle to which a person may have been accustomed due to a material advantage derived from an offence, the commission of an offence or unexplained wealth. The provisions are however intended to ensure that the person and their dependants are still able to participate in the community to an acceptable standard and not be subject to a meagre standard of living.

Relationship between the limitation and its purpose (section 28 (2) (d))

As noted above, unexplained wealth restraining orders are interim orders that restrict a person's ability to dispose of, or otherwise deal with, property. These provisions ensure that property is preserved and cannot be dissipated prior to the making of an unexplained wealth order.

In order to meet the purposes of the Act as set out in section 3 of the Act, there are certain necessary restrictions that are required to secure unexplained wealth on an interim basis. It is fundamental to the operation of the scheme that these seized funds are preserved pending a final order to forfeit any unexplained wealth.

As noted above, this scheme also operates in relation to existing COCA applications, and care has been taken to minimise the effects of amending the COCA scheme (which applies in relation to offences) while ensuring the new provisions can operate in relation to unexplained wealth orders.

The need to consider human rights while maintaining the operational viability of the COCA scheme has resulted in the need for a tailored ACT approach. Unexplained wealth provisions in other jurisdictions have also been considered in developing the Bill, together with operational information about the effectiveness and practical application of the existing COCA provisions, with the provisions establishing the ACT's unexplained wealth scheme

reflecting those considered to be what is required for an effective, human rights compatible scheme.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))

These restrictions are proportionate to the aim of ensuring that criminals, including those involved in organised crime, do not profit from serious crime, and as a deterrent to serious criminal activity, and are the least restrictive means possible in the circumstances.

There are safeguards included in the Bill to ensure that the limitation is the least rights restrictive approach. These include:

- judicial discretion to refuse to make an unexplained wealth order or reduce the amount that would otherwise be payable under an unexplained wealth order, if it is in the public interest to do so;
- judicial discretion to make appropriate provision for dependants to avoid undue hardship, including a broad definition of dependant;
- judicial discretion to allow property that is subject to an unexplained wealth restraining order to be used to meet reasonable expenses necessary to avoid undue hardship to the person or the person's dependants, including that a person and their dependants are entitled to:
 - satisfy their essential physical and psychological needs;
 - have a minimum standard of living that is neither meagre nor luxurious;
 - to participate in the life of their community;
 - to have nutritious food, access to transport or personal transportation, appropriate clothing for the place where the person lives, furniture and essential appliances; and
 - to have equipment to participate in ordinary leisure activities; and
- a statutory review period to ensure that the provisions are working as intended.

Other rights engaged

The reverse burden of proof is a feature of the unexplained wealth scheme in the Bill, as it is a feature of other Australian unexplained wealth schemes. Reversal of the burden of proof, in a criminal proceeding, could limit the right to a fair trial.⁵ Given the structure of, including the safeguards within, the scheme, it is appropriately characterised as a civil scheme, rather

⁵ See Section 21 of the *Human Rights Act 2004*.

than a criminal scheme. Unexplained wealth proceedings do not result in any finding of criminal guilt and are not punitive in nature.

The reverse burden of proof is a key feature of unexplained wealth schemes as unexplained wealth proceedings require the respondent to establish that their wealth was not derived from serious criminal activity. A reversal of the burden of proof is appropriate in these circumstances because wealth that is ‘unexplained’ relates to a matter that typically is peculiarly within the respondent’s knowledge to explain and the respondent is therefore most appropriately placed to produce evidence explaining the origins of their wealth.

Proceedings under the unexplained wealth provisions are proceedings heard by a court in accordance with relevant evidentiary rules and procedures. The Bill includes safeguards which require the court to consider the public interest when deciding whether to make an unexplained wealth final order, whether to reduce the amount payable or whether to refuse to make the order. Throughout the proceedings there is adequate opportunity afforded to a respondent to present their case, such that the right to a fair trial will not be limited.

CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED WEALTH) AMENDMENT BILL 2020

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Confiscation of Criminal Assets (Unexplained Wealth) Amendment Bill 2020**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Gordon Ramsay MLA
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**CONFISCATION OF CRIMINAL ASSETS (UNEXPLAINED WEALTH)
AMENDMENT BILL 2020**

Detail

Clause 1 – Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020*.

Clause 2 – Commencement

This clause provides that the Act will commence on a day fixed by the Minister.

Clause 3 – Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Confiscation of Criminal Assets Act 2003*.

Clause 4 – Purposes of Act, New section 3 (da)

This clause inserts a new purpose of the *Confiscation of Criminal Assets Act 2003* (the COCA Act). This new purpose is in addition to the existing purposes of the COCA Act and is to deprive a person of any unexplained wealth derived from serious criminal activity.

Depriving criminals of their wealth is a key element in combating serious and organised crime. Unexplained wealth laws provide a further tool to law enforcement to confiscate property where a person linked to criminal activity cannot reasonably demonstrate that the property has been lawfully obtained. Property may include, among other things, assets such as real estate, motor vehicles and jewellery and money in bank accounts or cash.

The explanatory statement for the *Confiscation of Criminal Assets Bill 2002* detailed the importance of including in the Act a clear set of purposes to support the interpretation of those provisions. That explanatory statement points to the Australian Law Reform Commission 1999 Report “*Confiscation that Counts*” [at paragraph 2.74] and the important distinction between confiscation and punishment:

“The concept that a person should not be entitled to be unjustly enriched by reason of unlawful conduct is distinguishable from the notion that a person should be punished for criminal wrongdoing. That is to say that, while a particular course of conduct might at the one time constitute both a criminal offence and grounds for the recovery of unjust enrichment, the entitlement of the state to impose a punishment for the criminal offence, and the nature of that punishment, are independent in principle from the right of the state to recover the unjust enrichment and vice-versa.”

This distinction is a key element in contextualising and understanding the provisions in the COCA Act and in the Bill as civil proceedings and not criminal proceedings.

Clause 5 – General overview, Section 9, note 1

This clause amends Note 1 under section 9, which is a general overview of the scheme of the COCA Act. The amended Note 1 reflects the introduction of provisions for unexplained wealth restraining orders.

Clause 6 – Section 9, new note

This clause introduces new Note 3A under section 9. The new note reflects the new provision for the making of unexplained wealth orders.

Clause 7 – New sections 11A to 11C

Clause 7 inserts new sections 11A, 11B and 11C, providing definitions for key terms used in the provisions relating to unexplained wealth proceedings.

New section 11A provides the meaning of *total wealth*. This definition provides for the value of property which has already been spent, consumed or disposed of to be included in deciding the values of a person's wealth.

New section 11B provides the meaning of *wealth*. Importantly, the definition of wealth applies in relation to property whether it is owned, under the control of, or spent, consumed or disposed of by a person, or was previously owned or under the person's control, or spent consumed or disposed of, by the person.

New section 11C provides the meaning of *serious criminal activity*. Serious criminal activity is conduct (which at the time of the conduct was a serious offence) whether or not charges have been laid against a person for the conduct, or a person charged has been tried, acquitted, found guilty or convicted or had a conviction quashed for the serious offence constituting the conduct.

Clause 8 – Meaning of offence and of particular kinds of offences, Section 13 (2), definition of serious offence

This clause provides the definition of *serious offence* for the purposes of the unexplained wealth provisions, noting that *serious criminal activity* is conduct which at the time of the conduct was a serious offence.

Clause 9 – New section 13 (4)

This clause inserts a sign-post to the meaning of a *schedule offence*. The definition of *serious offence* includes, for an unexplained wealth provision, a schedule offence and any corresponding Commonwealth or State offence.

The signpost is to offences listed in section 61B of the *Crimes (Sentencing) Act 2005*. This section contains a table of schedule offences which fall under the general categories of violence; drugs; interfering with the administration of justice; and firearms.

Clause 10 – Meaning of effective control of property, Section 14 (3) (b), except notes

This clause amends section 14 explaining the meaning of *effective control* to reflect that if property is the subject of an application for an unexplained wealth restraining order or unexplained wealth order, it can be property that was disposed of at any time.

Clause 11 – Meaning of restraining order, Section 19

This clause amends the meaning of *restraining order* to reflect the amendments for the making of unexplained wealth restraining orders.

Clause 12 – New section 21A

This clause inserts new section 21A which provides for the newly defined term - *unexplained wealth restraining order* – being a restraining order made under new section 32A.

Clause 13 – Restraining orders – purposes, New section 22, note

This clause amends section 22 which states the purposes for which property ordered restrained can be available. The amendment reflects that property the subject of an unexplained wealth restraining order can be available for the purposes set out in section 22. A consequential amendment referencing the new part of the Act dealing with unexplained wealth orders is also made.

Clause 14 – Restraining orders over other property—application, Section 26 (6) (d)

This clause amends section 26, which sets out requirements for restraining order applications by the Director of Public Prosecutions, to the effect that the section does not apply to an unexplained wealth restraining order application. The requirements for an unexplained wealth restraining order application are set out in new section 26A.

Clause 15 – New section 26A

New section 26A provides for the circumstances in which an unexplained wealth restraining order can be made and the requirements for an application. The Director of Public Prosecutions can make an application for an unexplained wealth restraining order.

Clause 16 – Restraining orders—time for making certain applications, New section 27 (1) (c)

This clause amends section 27 which applies time limits on the making of certain applications for restraining orders. The amendment adds applications for an unexplained wealth restraining order to the other categories of restraining order applications which are not subject to these time limits. This reflects that there is not intended to be any time limit on the period

after which wealth was acquired, that the wealth could be the subject of an unexplained wealth restraining order application.

Clause 17 – New section 29A

New section 29A provides that an affidavit by a police officer must support an application under section 26A for an unexplained wealth restraining order.

Section 29A (1) outlines the requirements for the affidavit, including that the affidavit must state that the police officer suspects that—

- (a) a person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired; and
- (b) the whole or any part of the person’s wealth was derived from serious criminal activity.

Subsections (2) – (5) set out further affidavit requirements. Importantly, where there is property that the officer suspects is the property of someone else, the affidavit must also include information about whether the property is suspected to be tainted property or suspected to be property subject to the effective control of the person in relation to whom the order is sought.

The affidavit must state the grounds for each belief or suspicion of the police officer stated in the affidavit.

Clause 18 – New section 32A

New section 32A provides for the making of an unexplained wealth restraining order.

The relevant court must make an unexplained wealth restraining order if, based on the police affidavit and any other evidence, it is satisfied there are reasonable grounds for the officer’s suspicions stated in the affidavit.

Clause 19 – Payment of living and business expenses from restrained property, Section 37 (1), new note

This is a technical amendment to insert a note that refers to the meaning of *dependant* in the dictionary. This amendment is related to the amendment made by clause 22, omitting the definition of *dependant* in section 37(5).

Clause 20 – Section 37 (2)

This clause amends section 37 which provides that a relevant court may, where a restraining order is made in response to any restraining order application under the Act, make an order allowing certain expenses to be met out of restrained property.

The amendments made by the insertion of new section 37(2) will apply in relation to the payment of living and business expenses from restrained property, in relation to all types of

restraining orders under the Act, not only those made in relation to unexplained wealth restraining orders.

The changes made by new section 37(2):

- establish a new threshold for the payment of expenses out of restrained property – it must be reasonable and necessary to avoid undue hardship to the person or their dependants;
- sets out factors that the court must consider in deciding whether expenses are reasonable or necessary to avoid undue hardship;
- maintains the policy that property should not be released to meet expenses if the court is satisfied that the property has evidentiary value in criminal proceedings, but places the onus on the DPP, rather than the respondent, to prove that it has evidentiary value; and
- allows for expenses to be met out of tainted property, but only where unrestrained property, or restrained untainted property cannot meet expenses and it is just and equitable for the tainted property to meet the expenses.

The court must not allow expenses to be met out of restrained property unless the expenses are reasonable and are necessary to avoid undue hardship to the person or the person's dependants. Subsections (2A) and (2B) provide guidance to the court in determining whether expenses are reasonable or necessary to avoid undue hardship. In particular, the provisions are intended to clarify that a person is entitled to a certain minimum standard of living while acknowledging that these standards may be considerably different to those that the person enjoyed as a result of the commission of an offence, a material advantage derived from an offence or unexplained wealth. This aligns with the purposes of the Act and is the least restrictive means available to meet the purposes of the Act.

The court must also be satisfied that any property to be released does not have evidentiary value in any criminal proceeding. Subsection (2C) provides that the starting point is that the property is assumed not to have evidentiary value. This subsection ensures that the onus is on the applicant for the restraining order to prove that property has evidentiary value.

If the restrained property includes tainted property, the court must be satisfied if the tainted property is required to meet expenses, that it is just and equitable for the property to be used to meet the expenses. The 'just and equitable' test reflects the need to consider the interests of the respondent in having access to reasonable living expenses but that the Bill also safeguards against situations where it would not be just or equitable to release property, for example where a third party may have an interest in property and to release the property for expenses would mean that their ability to recover their interest is extinguished.

Clause 21 – Section 37 (3) (a)

This is a technical amendment to refer to the newly numbered subsections in section 37.

Clause 22 – Section 37 (5)

This amendment omits section 37 (5) which provides the meaning of dependant for section 37, as this term is now defined in the Dictionary. The new definition reflects a more contemporary understanding of the nature of dependants than the definition which has been omitted.

Clause 23 – Payment of certain legal expenses from restrained property, Section 38 (2) (c) (iv)

This clause, together with clauses 24 and 25, amends the considerations of which the court must be satisfied when allowing for legal expenses to be met out of restrained property. Restrained property continues to be unable to be used to meet legal expenses if the court is satisfied that it has evidentiary value in criminal proceedings. However, tainted property is able to be used, based on the same approach as is taken in the amendments to section 37 relating to living and business expenses.

Clause 24 – New section 38 (2) (d)

This clause inserts a new subsection that provides the court must be satisfied, if the tainted property is required to meet expenses, that it is just and equitable for the property to be released to meet the expenses. The ‘just and equitable’ test reflects the need to consider the interests of the respondent in having access to legal expenses but that there is a need to safeguard against situations where it would not be just or equitable to release property, for example where a third party may have an interest in property and to release the property for expenses would mean that their ability to recover their interest is extinguished.

This reflects the requirement in section 37 (2) (c).

Clause 25 – New subsection 38 (2A)

This clause inserts a new subsection to provide that the court must assume restrained property does not have evidentiary value unless the contrary is proved. This mirrors the requirement in section 37 (2C). This subsection ensures that the onus is on the applicant for the restraining order to prove that property has evidentiary value.

Clause 26 – New section 48A

This clause inserts new section 48A which sets out the circumstances in which an unexplained wealth restraining order ends. This provision ensures that a restraining order cannot remain in place for longer than reasonably necessary to allow an application for an unexplained wealth order to proceed.

Clause 27 – New part 7A

This clause inserts new Part 7A which provides for unexplained wealth orders.

Division 7A.1 General

New section 98A provides the meaning of an *unexplained wealth order*.

New section 98B provides that the DPP may apply to a relevant court for an unexplained wealth order in relation to a person.

New section 98C provides that if an unexplained wealth restraining order has not been made, an affidavit by a police officer must support an application under section 98B for an unexplained wealth order. The section outlines the requirements for the affidavit, which reflect the requirements for an affidavit in support of an unexplained wealth restraining order.

New section 98D provides for the making of an unexplained wealth order. Importantly, the court must make an unexplained wealth order if the court is not satisfied that the whole or any part of the person's wealth was not derived from serious criminal activity. However, the court may refuse to make an unexplained wealth order or may reduce the amount that would otherwise be payable if the court, having regard to the purposes of the Act, thinks it is in the public interest to do so.

New section 98D(3) makes clear that the public interest test will not be satisfied only because:

- a specific serious offence has not been particularised or proved to be associated with the person's unexplained wealth; or
- the person or the person's dependants will not have the same standard of living unless there is no order or reduction in the amount.

New section 98E provides for the assessment of unexplained wealth for the purpose of making an unexplained wealth order. Key features of this are:

- the amount of the person's total wealth that is not derived from serious criminal activity is determined by the court on the balance of probabilities;
- the burden of proof is on the person to prove their wealth was not derived from serious criminal activity;
- wealth that has been consumed or disposed of is able to be included in the assessment of the value of property;
- the court is not required to consider any wealth of which the DPP has not provided evidence.

New section 98F provides discretion to the court to make an order to provide hardship relief to one or more dependants of the person against whom an unexplained wealth order is made. Key features of this are:

- a relief amount can only be ordered by the court after the unexplained wealth order is fully satisfied (that is, fully paid);

- the relief order requires the Territory to pay an amount decided by the court, where the unexplained wealth order would cause undue hardship to the dependant and the amount would relieve the hardship;
- the relief order can only be made if, where the dependant is at least 18 years old, the dependant had no knowledge of the person’s conduct that this the subject to the unexplained wealth order;
- the court is limited to ordering a relief amount required to avoid undue hardship for a period in which the dependant could not reasonably be expected to meet their own living expenses;
- the court must, as far as practicable, having regard to the minimum standard of living mentioned in relation to hardship relief at the restraining order stage (section 37(2), not take into account loss of a previous standard of living to the extent that the previous standard of living was likely to have been the result of the commission of an offence, a material advantage derived from an offence or unexplained wealth;
- the relief amount can’t be more than the value of the person’s unexplained wealth.

Division 7A.3 Satisfaction of unexplained wealth order

New section 98G provides for the creation of unexplained wealth charge over restrained property. On the making of an unexplained wealth order, the restrained property is automatically charged to secure the payment to the Territory of the amount of the unexplained wealth order.

Protections are included to ensure that encumbrances on the property existing prior to the charge are not overridden.

New section 98H sets out the circumstances in which an unexplained wealth charge over property ends. This can include when property is sold or disposed of with the consent of the court or the Public Trustee and Guardian

New section 98I provides that an unexplained wealth order is enforceable as a judgment debt owing to the Territory.

New section 98J provides the Public Trustee and Guardian with the power to satisfy an unexplained wealth order out of any property restrained for the order, including by selling property.

New section 98K provides that the Public Trustee and Guardian must pay any surplus amount, not needed to satisfy the unexplained wealth order amount, to the person against whom the order was made.

Division 7A.4 End of unexplained wealth order

New section 98L provides for when an unexplained wealth order ends.

Clause 28 – Payments into trust fund, New section 131 (1) (da)

This clause amends section 131 which sets out amounts that must be paid into the Confiscated Assets Trust Fund (CAT fund) established under section 130 of the Act. The amendment adds amounts received to satisfy unexplained wealth orders as amounts required to be paid into the CAT fund.

Clause 29 – Interstate restraining and forfeiture orders etc— registration, New section 137 (1) (d)

This clause amends section 137 to recognise that an interstate unexplained wealth order applies to property in the ACT.

Clause 30 – Interstate restraining and forfeiture orders etc—interim registration, Section 138 (1)

This clause provides for the interim registration of an interstate unexplained wealth order.

Clause 31 – Interstate restraining and forfeiture orders etc—effect of registration, New section 139 (4A)

This clause provides that a registered interstate unexplained wealth order is taken to be an unexplained wealth order under the Act.

Clause 32 – Interstate restraining and forfeiture orders etc—ending of registration, Section 140

This clause provides for the ending of the registration of an interstate unexplained wealth order.

Clause 33 – Interstate restraining and forfeiture orders etc— cancellation of registration, Section 141 (1)

This clause provides for cancellation of registration of an interstate unexplained wealth order.

Clause 34 – Section 141 (2)

This clause amends section 141 (2) to recognise interstate unexplained wealth orders.

Clause 35 – Meaning of confiscation proceeding, New section 236 (1) (ha), New section 32A

This clause amends the meaning of a confiscation proceeding to include proceedings for an unexplained wealth order.

Clause 36 – New section 258A

This clause inserts section 258A which provides for the review of the operation and effectiveness of the unexplained wealth provisions and includes a requirement that this occur within a year of the commencement of the provisions, and a report of the review be provided to the Legislative Assembly.

Clause 37 – Dictionary, new definition of dependant

This clause inserts the new definition of *dependant* into the dictionary. This new definition expands the existing definition to also include ‘a member of the person’s household, who depends on the person for support’. This amendment acknowledges the need to safeguard the Human Rights Act right to family (section 11) and the need for the definition of those who may be considered family to extend beyond a person’s domestic partner or any children.

Clause 38 – Dictionary, definition of fully satisfied

This clause amends the definition of *fully satisfied* to reflect the provisions for unexplained wealth orders.

Clause 39 – Dictionary, new definition of interstate unexplained wealth order

This clause inserts the definition for *interstate unexplained wealth order* into the dictionary.

Clause 40 – Dictionary, new definition of serious criminal activity

This clause inserts the definition of *serious criminal activity* into the dictionary.

Clause 41 – Dictionary, new definition of total wealth

This clause inserts the definition of *total wealth* into the dictionary.

Clause 42 – Dictionary, new definitions

This clause inserts definitions for *unexplained wealth charge*, *unexplained wealth order*, *unexplained wealth provision* and *unexplained wealth restraining order* into the dictionary.

Clause 43 – Dictionary, new definition of wealth

This clause inserts the definition of *wealth* into the dictionary.