THE PRINCIPLED AND PRACTICAL LIMITS TO UNEXPLAINED WEALTH ORDERS

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The relatively recent introduction of unexplained wealth orders ('UWOs') in the United Kingdom has provided an opportunity to reflect on their more long-standing operation across Australian jurisdictions. In this article, whilst acknowledging the promise of UWOs, we identify some key limitations of the UK and Australian models of unexplained wealth regimes and suggest potential means of strengthening the performance of unexplained wealth laws in both countries, using lessons learned from our analysis of UK UWOs. We also address issues of principle which have proved to be problematic, and conclude that UWO processes can and should be refined to bolster both their protections for individual rights and their practical effectiveness, and that improvements in each area need not be mutually exclusive.

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I INTRODUCTION

Whilst legislation seeking to uphold the general principle that individuals should not be allowed to benefit from their crimes has existed for centuries in common law jurisdictions,[1] unexplained wealth laws are an altogether more recent phenomenon.[2]

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1 US civil forfeiture laws were first introduced in 1789. See, eg, Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders*, (Final Report, October 2012) 9. <https://www.ojp.gov/pdffiles1/nij/grants/237163.pdf>.

2 Ireland first introduced powers raising rebuttable presumptions in favour of enforcement authorities that certain property constituted the proceeds of crime in its *Proceeds of Crime Act 1996*. Western Australia introduced unexplained wealth laws to Australia in 2000 with its enactment of the *Criminal Property Confiscation Act 2000* (WA). Other Australian states, territories and the Commonwealth followed suit—some remarkably quickly—in updating their respective proceeds of crimes laws to provide for UWOs with the measure being introduced in the Northern Territory in 2002, in Queensland and South Australia in 2009, in New South Wales in 2010, in Tasmania in 2013, in Victoria in 2014, and in the ACT and at Commonwealth level in 2020.

As a rule, these laws have been enacted with a view to increasing the ease of actions to recover the proceeds of crimes committed within their respective jurisdictions.[3] Subsequent iterations have broadened their focus to encompass the proceeds of overseas corruption committed by senior public officials, their families and their close associates (collectively, politically exposed persons or PEPs).[4]

Since unexplained wealth orders ('UWOs') first became available in the UK in early 2018,[5] there has followed a remarkable proliferation of, or discussions on introducing, similar laws throughout common law jurisdictions.[6] Legislative and enforcement approaches have been the subject of much academic critique and evaluation.[7] Comparative evaluations of the models adopted by various jurisdictions have however tended to focus on their procedural (dis)similarities.[8] In this article, we instead focus on emergent practical and principled challenges inimical to the successful prosecution of unexplained wealth laws. We recognise such measures' potential benefits, particularly as an expressive and practical means of pursuing the proceeds of grand corruption across national borders.[9] However, there are trends evident in the operation of unexplained wealth laws which may, on liberal rights and praxis analyses, give pause to governments considering introducing similar laws and to asset recovery agencies and courts seeking to implement those provisions. Our aim is to reorient prevailing academic and policy discourses away from the design of the laws themselves and towards refining the use of those laws so that their use is consistent with respect for human rights standards while becoming operationally and expressively more effective. We sound a note of caution on how UWOs might be misused by governments eager to assert to their populations that 'something is being done' to deal with the proceeds of serious crime and corruption. The associated risk is that under-designed laws can be hastily introduced without consideration of the requisite financial

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3 For Ireland: see, eg, Liz Campbell, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *Journal of Criminal Law* 441. For Australian jurisdictions: see, eg, Marcus Smith and Russell G Smith, 'Exploring the Procedural Barriers to Securing Unexplained Wealth Orders in Australia' (Report, Criminology Research Advisory Council, December 2016).

4 The 2017 amendments to Part 5 of the UK's *Proceeds of Crime Act 2002*, for example, provide for a category of unexplained wealth provisions designed for use against individuals who are either (i) overseas PEPs or (ii) individuals suspected of involvement in serious crime, their family members and their close associates: *Proceeds of Crime Act 2002* (UK) s 362B ('UK POCA').

5 *Criminal Finances Act 2017 (Commencement No 4) Regulations 2018* (UK) SI 2018/78.

6 See Jean Pierre Brun et al, *Unexplained Wealth Orders: Toward a New Frontier in Asset Recovery* (Stolen Assets Recovery Initiative, June 2023) 1.1.2, where the authors cite Zimbabwe, Trinidad and Tobago and Barbados as examples. There also has been substantial public discourse on the introduction of such laws in Malaysia and Malta.

7 For the UK, see, eg Anton Moiseienko, 'The Limitations of Unexplained Wealth Orders' [2022] 3 *Criminal Law Review* 230, and for Australia, see Natalie Skead et al, 'Pocketing the Proceeds of Crime: Recommendations for Legislative Reform' (Australian Institute of Criminology, 2020).

8 Smith and Smith (n 3) and Skead et al (n 7) have each undertaken such analyses in highlighting the systems used in other jurisdictions in discussing Australia's approaches at state, territory and Commonwealth levels.

9 See Áine Clancy, 'UWOs against PEPs as a Response to Jurisdictional Limitations: Problems and Potential' in Micheál Ó Floinn, Lindsay Farmer, Julia Hörnle and David Ormerod CBE KC (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart Publishing, 2023) 293.

or political resources to instigate meaningful levels of asset recovery, and with limited regard for individual rights. Our central argument is that UWO processes can and should be refined to bolster both their protections for individual rights and their practical effectiveness, and that improvements in each area need not be mutually exclusive.

We focus on the regimes in the UK and Australia. The UWO mechanisms adopted in the Australian jurisdictions were repeatedly invoked in the UK's Parliament when the proposed introduction of UWOs was under discussion there.[10] Australia and the UK warrant comparison with each other because they are each grappling with a serious influx of 'dirty money' generated by overseas corruption being laundered in their respective countries,[11] and because in relative terms, asset recovery rates are low in each jurisdiction.[12] In our discussion, we conclude that there are aspects of the UK model which might usefully be considered in Australia to enhance both the practical use of the mechanism and the protection of individual rights. This comparative exercise is timely given the current marked divergence in approaches to asset forfeiture in the common law world. While the United States is becoming more, not less, protective of property holders in its asset forfeiture laws,[13] the general trend elsewhere is to strengthen state powers around asset recovery, as demonstrated by the European Commission's current development of a directive on asset recovery, confiscation and unexplained wealth.[14] It will be interesting to see, once the Commission's proposals are in force, whether a wider European roll-out of unexplained wealth laws will encounter

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10 See, eg, United Kingdom, *Parliamentary Debates*, House of Commons, 17 November 2016, cols 79-95.

11 JC Sharman, *The Despot's Guide to Wealth Management: On the International Campaign Against Grand Corruption* (Cornell University Press, 2017) 118-178.

12 For the UK: see n 33 below and accompanying text. For Australia, on the disparity of the success of unexplained wealth orders across jurisdictions, see Skead et al (n 7) 70-71. In terms of sums recovered, in the UK, the NCA observed: '[it is] a realistic possibility that the scale of money laundering impacting on the UK (including through UK corporate structures or financial institutions) is in the hundreds of billions of pounds annually.': *National Strategic Assessment of Serious and Organised Crime 2020-2021* (Report, 2021) 54. In the 2021/2022 financial year, enforcement authorities recovered a total of £354m, representing a small fraction of that estimate: Home Office, *Asset Recovery Statistical Bulletin: Financial Years Ending 2017 to 2022* (Web Page, 9 September 2022) <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022>. For Australia, Skead and her colleagues note the estimated $47bn cost of crime to Australia per annum with an average value of proceeds of crime recoveries at $44m each year: (n 7) 1.

13 See Alun Milford and Alicyn Cooley, 'Unexplained Wealth Orders, Explained: The UK Regime and Considerations for the United States (Part II of II)', *Compliance & Enforcement* (Blog Post, August 2020) <https://wp.nyu.edu/compliance_enforcement/2020/08/06/unexplained-wealth-orders-explained-the-uk-regime-and-considerations-for-the-united-states-part-ii-of-ii/#_ftn20>. These commentators note that the UWO is unlikely to be adopted in the US owing to self-incrimination concerns (unlike UK respondents, US respondents to civil forfeiture proceedings are entitled to plead their Fifth Amendment rights) and to the reverse burden issues.

14 The European legislators may have been emboldened to introduce UWO-type laws following *Gogitidze v Georgia* (European Court of Human Rights (ECtHR), Application No 36862/05, 12 May 2015), a case in which the European Court of Human Rights ruled that the use of laws allowing the courts to presume that unexplained wealth held by senior domestic public officials did not violate the asset-holders' property rights or right to innocence.

similar problems to those experienced in the UK and Australia.[15] Given a growing understanding of Australia's status as a haven for the proceeds of foreign corruption,[16] we also hope to inform policy considerations to be taken into account should PEP-specific forms of UWO be introduced in Australia.

Part 2 of this paper sketches at a high level how unexplained wealth laws work and points of distinction between Australian and the UK systems. Parts 3 and 4 critically evaluate key practical and rights-related concerns commonly arising in the operation of UWOs in each jurisdiction respectively. In the concluding section, we draw together the themes arising through our analysis of the implementation of the UK and Australian models and identify potential routes to strengthening the performance of unexplained wealth laws both in a practical context and in addressing the issues of principle arising recurrently though the jurisdictions.

II DEFINING AND DISTINGUISHING UWOS

The ways in which UWOs work, and in which they interact with non-conviction-based asset forfeiture ('NCBAF') processes more generally, vary significantly between jurisdictions. In the UK, enforcement authorities may apply to the (civil branch of the) High Court for UWOs in the relatively early stages of civil recovery investigations.[17] The orders are intended to build evidence for potential use in future civil recovery proceedings.[18] The High Court has wide discretion on whether to issue orders. The High Court *may* issue a UWO provided that it is satisfied on the balance of probabilities that:

(i) a respondent is a foreign high-ranking public official or an individual for whom there are reasonable grounds for suspecting involvement in serious crime (or is a family member of or is otherwise closely connected with either such person);

(ii) who holds the property specified in the UWO application;

(iii) the value of which is apparently incommensurate with the respondent's income or which is reasonably suspected of having been obtained through unlawful conduct; and

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15 Migration and Home Affairs, 'Ensuring that crime does not pay', *Confiscation and Asset Recovery* (Web Page, 2022) <https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/confiscation-and-asset-recovery_en>.

16 Sharman (n 11).

17 'Enforcement authorities' in this context are, in England and Wales: the National Crime Agency, HM Revenue & Customs ('HMRC'), the Financial Conduct Authority, the Director of the Serious Fraud Office and the Director of Public Prosecutions: section 362A(7) of the UK POCA. Some additional and/or alternative enforcement authorities have similar powers in Scotland and Northern Ireland.

18 Attorney General's Office, *Code of Practice Issued under Section 377A of the Proceeds of Crime Act 2002: Investigative Powers of Prosecutors* (June 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/997080/Code_of_Practice_issued_under_Section_377A_of_the_Proceeds_of_Crime_Act_2002.pdf>. Per paragraph 160:

> [The UWO] is specifically designed to support the building of a case for civil recovery under Part 5 of POCA but can also be used for other reasons both criminal and civil (provided there is a legal basis for using such information).

(iv) is valued at more than £50,000.[19]

Where UWOs are issued, the assets specified in the orders are frozen on an interim basis and respondents are required to explain the provenance of those assets. Where a respondent fails without reasonable excuse to respond with the information sought within the timeframe set out in an order, a presumption will arise that the assets specified therein are 'recoverable property' obtained through 'unlawful conduct' for the purposes of the *Proceeds of Crime Act 2002* ('UK POCA').[20] The High Court will take this (rebuttable) presumption into account where enforcement authorities subsequently apply in further and separate proceedings for civil recovery orders ('CROs') against the relevant property, thereby allowing for NCBAF.[21] Hence, to be clear, the failure to respond satisfactorily to the requirements of an UWO does not, strictly speaking, automatically result in the recovery of the assets the subject of the order. UWOs are regarded instead as an investigative tool in civil recovery investigations. In seeking CROs, enforcement authorities need to prove to the civil standard that the relevant assets represent the proceeds of crime. The presumption of recoverability raised by UWO processes can assist considerably in meeting this requirement. As the UWO process does not by itself entitle the state to permanently confiscate assets, the statutory tests to be satisfied by enforcement authorities seeking UWOs are less exacting than those required to obtain CROs.[22]

The targeting of PEPs is another distinctive feature of the UK regime. It can be impossible or politically imprudent to prosecute criminally corrupt overseas PEPs in their states of origin. The limitations of extraterritorial criminal enforcement jurisdiction, and political considerations around diplomacy and national security, can each contribute to the non-prosecution of foreign PEPs, essentially granting them impunity for their misdeeds. As UWOs are heard in the civil rather than the criminal courts, they represent one of the few (indeed maybe only) feasible means available to UK domestic enforcement authorities for acting against and publicly censuring foreign

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19 UK POCA s 362B. As a rule, the courts will also consider as general standards of English public laws whether the measures sought meet standards of proportionality and fairness when viewed against their objectives and against the rights impacted. See the proportionality and fairness tests as discussed by Lord Reed in his dissenting but influential opinion in *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38. Proportionality concerns were acknowledged in each of the UK's reported UWO decisions to date.

20 UK POCA s 362C. Section 304 of the UK POCA provides that 'Property obtained through unlawful conduct is recoverable property'. In other words, failure to respond to an order raises a presumption that the property the subject of an order has been obtained through criminality. At best, it is a state-made claim that the respondent is benefitting from the proceeds of criminality, see Campbell (n 70); at worst, the implication is that a respondent is responsible for the offences that generated the relevant assets

21 UK POCA s 304(1). Commentators including Moiseienko (n 7) and Tom Mayne and John Heathershaw, *Criminality Notwithstanding*: *The Use of Unexplained Wealth Orders in Anti-Corruption Cases* (Global Integrity, 2022) have highlighted certain unhelpful ambiguities in the UK's scheme, including the outcomes to be expected where a respondent purportedly but does not necessarily actually comply with the terms of an order.

22 The test for the latter being the High Court being satisfied on the balance of probabilities that the assets under discussion are, or represent, property obtained through unlawful conduct—UK POCA s 266.

PEPs suspected of stealing from their populaces.[23] UWOs thus offer a route of repatriation of misappropriated assets to states of origin.[24]

Unexplained wealth mechanisms in Australian states and in the Commonwealth differ substantially from the UK scheme described above and, to a lesser extent, differ from each other.[25] But broadly, the UWOs process in the Australian jurisdictions tends to happen in two stages. First, a preliminary UWO restraining the asset-holder from dealing with the assets is issued by the court on the application of enforcement authorities, provided that the court is satisfied that it is 'more likely than not' that not all of the respondent's assets have been lawfully acquired.[26] Then, assuming the preliminary UWO is not successfully challenged within a set time period after its issue, the court will issue a final UWO against the respondent. In each of the Australian states and territories and the Commonwealth, final UWOs comprise declarations requiring the individual named therein to pay to the state a debt enforceable using the usual civil processes.[27] The debt specified in the declaration or order is a sum representing the portion of the respondent's currently or previously held wealth that the court has determined on the civil standard of proof is unlawfully acquired wealth, subject to the operation of hardship provisions, where applicable, and less any of that wealth that the respondent proves is lawfully acquired.

In short, the purposes, consequences, and statutory tests applicable for UWOs vary significantly between jurisdictions. In the UK, UWOs are intended to work primarily as an investigative tool that will enable enforcement authorities to build sufficient evidence to pursue subsequent asset recovery proceedings. Their introduction was prompted in part by a desire to pursue UK-based assets of overseas PEPs suspected of involvement in corruption. The statutory thresholds to be satisfied in seeking the orders are relatively low, and courts have a high level of discretion to issue or refuse them. Failure to respond to UWOs or to satisfactorily establish the licit origins of assets specified in orders will raise a presumption that those specific assets constitute the proceeds of crime. Enforcement authorities can then use that presumption to recover those assets through subsequent civil proceedings.

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23 Although it should be noted that misappropriation sanctions are available in many jurisdictions for this purpose at executive level.

24 See the comments of the then-Minister for Security and Economic Crime, Ben Wallace MP, affirming the UK Government's commitment to repatriating the proceeds of official foreign corruption recovered through the use of UWOs in the parliamentary debates preceding their introduction: United Kingdom, House of Commons Public Bills Committee, Criminal Finances Bill, 22 November 2016, vol 617, col 193. The return of assets to states who were the prior legitimate owners of corruptly misappropriated property is consistent with the aims of the United Nations Convention Against Corruption ('UNCAC'), to which the UK is a party, albeit the UNCAC's States Parties are only *required* to turn those assets where requested on the basis of a final judgment handed down in the courts of the State Party from which the assets were stolen (Article 57).

25 Skead et al (n 7) 8. For a helpful summary, see Tom Keatinge, Anton Moiseienko and Helena Wood, *Unexplained Wealth Orders: UK Experience and Lessons for British Colombia* (Report, Royal United Services Institute ('RUSI'), December 2020) 23–26.

26 See section 12(1) of the *Criminal Property Confiscation Act 2000* (WA). Note that there are subtle variations in the test from jurisdiction to jurisdiction: see the works cited in n 8 above.

27 Ibid.

In Australia, UWOs are similarly issued where a court is satisfied that an individual's wealth is incommensurate with their lawfully acquired assets, but the courts have much less discretion in deciding whether to issue the orders once this threshold is reached. The first step of the two step UWO process is akin to the UK's iteration of UWOs: respondents are required to establish the legitimate origin of their assets. The consequences of failing to respond satisfactorily to an order are different in Australia than in the UK: rather than raising a presumption of unlawfulness, as is the case in the UK, a final order is issued compelling the respondent to pay to the state, territory or Commonwealth, as the case may be, a sum representing the value of what the court deems to be the respondent's illicitly acquired wealth. In Australia, final UWOs are determinative of an individual's right to the impugned assets.

Despite these differences, some principled and practical implications of using UWOs recur across the jurisdictions, and the central mechanism: the imposition of a burden of evidence on *respondents* to establish that their property does *not* have illicit origins is replicated in each. Broadly speaking, in the UK and in Australia (states, territories, and Commonwealth), the orders are civil orders (i) governed by 'proceeds of crime' legislation and (ii) issued by the courts (iii) on the application of prosecution or enforcement authorities (iv) in circumstances where those authorities hold reasonably based suspicions (v) that the respondents' wealth is not all lawfully acquired.[28] And importantly, in each jurisdiction, UWOs represent a kind of 'hybrid' civil/criminal procedure, introduced to target the proceeds of crime, but not formally categorised as a criminal process in law, with the result that respondents are not entitled to the benefit of criminal procedural protections. Although unexplained wealth laws are used to reorient the evidential burden so that it falls on respondents, unexplained wealth processes have performed relatively poorly in aiding NCBAF to date. To understand why this is, it is instructive to look first at the practical challenges impeding the effective use of unexplained wealth mechanisms.

III PRACTICAL CONCERNS

Unexplained wealth powers are expressively attractive powers allowing legislatures to ensure their populaces of the state's vigilance around 'dirty money'. They have enjoyed limited success in practice across the common law jurisdictions in which they are available,[29] and they are often introduced without first making a thorough consequentialist enquiry of their potential impact.[30] The impact from an individual

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[28] There may of course be other statutory requirements depending on the jurisdiction. The UK's and many of the Australian jurisdictions' legislation require the applicant authorities to show additionally that there are reasonable grounds to suspect that the respondent is involved in serious crime or is connected to someone who is so involved.

[29] No data on sums actually recovered (not merely restrained) are yet available for the UK's PEP-specific UWOs. In its non-PEP UWO matters, it has likely confiscated assets of around £13m in value. See n 39. For Australia, see n 65. One common law jurisdiction notably bucking this trend. See the discussion on the Irish experience: n 57 and accompanying text.

[30] On the risks in introducing under-scrutinised but ostensibly attractive laws, see Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144(5) *University of Pennsylvania Law Review* 2021, 2045-2060.

rights perspective is considered in the next Part, but this Part focuses on the effectiveness of UWOs which, in this context, is measured by reference to (i) the value of assets confiscated and (ii) perceptions that the regime has proven effective in disrupting the flow of criminal proceeds.

The UWO laws are an example of a political choice to prioritise the introduction of laws without appropriate accompanying resourcing and, where necessary, structural change in support of their implementation. It is politically popular and financially inexpensive for lawmakers to legislate for expanded proceeds of crime powers. It expresses that 'something is being done' in response to public and media concerns about social ills.[31] Without meaningful policy reform allowing for effective implementation of those measures however, such innovations risk being relegated to relatively empty legislative gestures. In the UK, the political retort where concerns are raised around London's status as a destination for the proceeds of overseas corruption is increasingly to invoke the introduction of UWOs as 'proof' that that the Government is addressing the problem.[32] Yet there is little evidence to suggest that the UK's unexplained wealth laws have proven effective so far. In the UK, to date, only six sets of applications have been made for UWOs since the process was first made available in January 2018, most recently in June 2023 (the UWOs issued in one of these cases were subsequently overturned). Data on asset value recovered under UWOs available from the National Crime Agency (NCA), the sole applicant for UWOs in the UK to date, shows that '[as of March 2023] the NCA had obtained UWOs … with an estimated total value of £143m (based on nominal values i.e., not adjusted for inflation).'[33] This figure seems to relate to the value of assets temporarily *restrained* pending civil recovery proceedings or settlements rather than the value of assets permanently *recovered*. Of the six applications for UWOs to date, three have resulted in reported judgments, two of which involved PEPs.[34] The first of these reported judgments,

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31 In the UK, UWOs were (hastily) introduced into the Criminal Finances Bill shortly after the leaking of the Panama Papers and the conclusion of a global anti-corruption summit chaired by then-PM David Cameron in London. For a discussion of politicians appealing to their populaces 'sense of justice' in the context of Australian proceeds of crimes laws, see: Gregory Dale, 'Crime, Confiscation and Emotion' (PhD Thesis, Monash University, 2022).

32 In the two months preceding Russia's invasion of Ukraine in February 2022, some 50 references to 'unexplained wealth' or 'unexplained wealth orders' are made by politicians on the official record of the UK Parliament. Although it had been over 30 months were last successfully used at that point, it remains a politically convenient device for legislators to gesture at as evidence that 'something is being done' about corruptly-acquired wealth in the UK.

33 Home Office, *Asset Recovery Statistical Bulletin: Financial Years Ending 2017 to 2022* (Official Statistics, 8 September 2022) <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022/asset-recovery-statistical-bulletin-financial-years-ending-2017-to-2022>. The following year's bulletin confirmed that no UWOs were obtained during the financial year running from March 2022 to March 2023: <https://www.gov.uk/government/statistics/asset-recovery-statistical-bulletin-financial-years-ending-2018-to-2023/asset-recovery-statistical-bulletin-financial-years-ending-march-2018-to-march-2023#:~:text=Volume%20of%20Forfeiture%20Orders,in%20the%20previous%20financial%20year>.

34 Of the remaining applications, the hearing for one has been adjourned until after the date of writing (March 2024), and a respondent who is on the run has failed to respond to another, thereby raising a presumption of recoverable property against his assets: <https://www.nationalcrimeagency.gov.uk/news/failure-to-respond-to-unexplained-wealth-order-sets-legal-history>.

NCA v Hajiyeva, concerned a PEP who spent £16m in Harrods department store in London notwithstanding her apparent lack of legitimate income.[35] The respondent's husband is in jail in Azerbaijan having been convicted of fraud and embezzlement of funds from the bank partially owned by Azerbaijan of which he was chairman.[36] The second PEP-specific UWO case—which the respondents successfully challenged—was *NCA v Baker* which involved an investigation into the origins of properties owned by the daughter and grandson of the then-president of Kazakhstan.[37] In *NCA v Hussain*, a third (non-PEP) UWO respondent reached a settlement with authorities.[38] Since the UWOs in the *Baker* case were discharged in April 2020, the correct 'best case' value of recovered assets is likely closer to £35m.[39]

The few UK-based UWO cases to date suggests a lack of resourcing and appetite on the part of enforcement authorities to pursue potentially financially risky proceedings.[40] This lack of resourcing and enforcement appetite in turn suggests a lack of investment of political will to tackle suspected 'dirty money'. Whilst the political decision makers responsible for introducing UWOs have evidenced 'a common understanding of a particular problem on the formal agenda', they have failed in satisfying the second limb of a widely cited definition of 'political will', namely, '[demonstrating commitment] to supporting a commonly perceived, potentially effective solution.'[41] For the Government to demonstrate an understanding of and commitment to addressing the proceeds of corruption being laundered in the UK, significantly more financial support needs to be provided to enforcement agencies for the use of UWOs. This funding would need to be accompanied by a commitment to introducing a more holistic and perhaps a more politically fraught range of measures

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35 *NCA v Hajiyeva* [2020] EWCA Civ 108, [2020] All ER (D) 34.

36 Ibid, para 5.

37 [2020] EWHC 822 (Admin).

38 *NCA v Hussain* [2020] EWHC 432 (Admin).

39 This calculation is based on the assets available for recovery in the three successful UWO cases to date:
£9.8m worth of assets was recovered in *Hussain*, the £22m worth of assets to be accounted for in UWOs issued in *Hajiyeva* (see <https://www.nationalcrimeagency.gov.uk/news/court-dismisses-uwo-appeal-by-zamira-hajiyeva>) and the £3.2m recovered in an unreported case involving assets held by a Northern Irish woman: <https://www.nationalcrimeagency.gov.uk/news/nca-secures-unexplained-wealth-order-against-properties-owned-by-a-northern-irish-woman>. Realistically the total value of assets recovered to date is likely to be far less. Six and a half years after UWOs were first issued against Mrs Hajiyeva, CROs were issued by the High Court against assets the subject of those unexplained wealth orders. Pursuant to the terms of a settlement agreement reached in conjunction with the issuance of the CROs, the respondent's mansion in Knightsbridge in London and a golf course in Surrey will be sold and 70% of the proceeds of those properties will be forfeited to the NCA with the remainder of the proceeds to go to Mrs Hajiyeva. See: Jonathan Ames, 'Banker's wife gives up unexplained wealth', *The Times* (London, 6 August 2024) 3. No assets from other cases have yet been reported as having been recovered.

40 See n 44 and accompanying text.

41 Lori Ann Post, Amber NW Raile and Eric D Raile, 'Defining Political Will' (2010) 38(4) *Politics and Policy* 653, 659.

to address the enablers of corruption.[42] Agency under-resourcing is a central issue. The costs of UWO proceedings are prohibitive. The UK Government vastly underestimated the potential legal costs associated with UWOs from the outset. In its Impact Assessment for UWOs, it anticipated 20 UWO cases a year at an upper cost average of £10,000 per case, whether successful or not.[43] After losing *Baker*, a £1.5 million legal costs order in favour of the respondents was sought against the NCA.[44] The costs from that case alone absorbed over one third of the NCA's International Corruption Unit's annual budget of £4.3m.[45] The then-Director General of the NCA explained the relatively rare use of UWOs in the following terms:

> We are, bluntly, concerned about the impact on our budget, because [PEP respondents to UWOs] are really wealthy people with access to the best lawyers and the case that we have had a finding on [… NCA v Hajiyeva] has been through every court in the land.[46]

For PEP cases, the NCA's experience with UWOs may, if anything, expose weaknesses in the tools, expertise and resourcing available to enforcement authorities and their related appetite (or lack thereof) for prolonged litigation.[47] RUSI has observed that where UWO respondents who are PEPs are concerned, 'the publicity and media attention surrounding UWOs creates ample incentive for respondents to fight their issuance' given the value such respondents are likely to place on perceptions of legitimacy.[48] It suggests that, for this reason, UWOs might be more effective if used to pursue the assets of domestic organised crime gangs. Respondents to orders in those case may be more willing to walk away from assets with relatively fewer concerns around the message this might convey to law enforcement authorities (ie that their assets are illegitimately acquired). Forfeiting those assets rather than being forced to engage in lengthy information-sharing processes with enforcement authorities where they risk incriminating themselves or others and/or being forced to 'divulge potentially damaging information' might be the lesser of two bad options for them.[49]

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42 Note for example the relative lack of enforcement action taken against those professional financial services providers who enable corrupt actors: Nicholas Lord, Liz Campbell and Karin Van Wingerde, 'Other People's Dirty Money: Professional Intermediaries, Market Dynamics and the Finances of White-collar, Corporate and Organized Crimes' (2019) 59(5) *The British Journal of Criminology* 1217.

43 Home Office, *Criminal Finances Act – Unexplained Wealth Orders* (Impact Assessment No HO0282, 20 June 2017).

44 Reuters, 'Ex-Kazakh President's Grandson, Others Seek 1.5 Million Pound Costs after UK Wealth Order Failure' (online, 29 June 2020) <https://www.reuters.com/article/britain-kazakhstan-idINKBN2401C4>.

45 Oliver Bullough, *Butler to the World* (Profile Books, 2022) 202.

46 Oral evidence provided by Lynne Owens to the Intelligence and Security Committee of the UK Parliament on 24 January 2019 as quoted in: House of Commons Intelligence and Security Committee, *Russia* (House of Commons Paper No 632) 35. <https://isc.independent.gov.uk/wp-content/uploads/2021/03/CCS207_CCS0221966010-001_Russia-Report-v02-Web_Accessible.pdf.>

47 A related theme is of PEPs weaponizing their resources and the English courts in litigating against their critics in the media: Geoffrey Robertson KC, *Lawfare: How Russians, The Rich and The Government Try to Prevent Free Speech and How to Stop Them* (TLS Books, 2023).

48 See the RUSI Report (n 25) 19.

49 Ibid 16, citing *NCA v Hussain* [2020] EWHC 432 (Admin).

There is a broader discussion to be had on the under-resourcing and staffing problems in the NCA. Its current officer turnover has consistently approached 10% per year for the past few years.[50] The NCA's Command and Control Centre turns over *all* its staff on average every three years, with most of the staff being poached by banks.[51] It appears that the NCA cannot afford to match private sector salaries for investigators with specialist skills. These resourcing and structural issues are key. Moreover, while in the UK an 'enforcement authority' can apply for a UWO[52], no other enforcement agency has yet initiated proceedings.[53] In an interview with Áine Clancy in December 2020, senior members of the NCA suggested that other enforcement authorities may be waiting until the case law around UWOs becomes more settled to be sufficiently confident in instituting proceedings.[54] The NCA officers acknowledged the reputational risk to the Agency and the risk to taxpayers' money inherent in instituting UWO proceedings against PEPs in particular. The UK Government has sought already to mitigate this risk for future cases. It amended the law in 2022 to allow costs orders sought against enforcement authorities to be refused in UWO actions unless a respondent can establish that actions were instituted unreasonably, or that an enforcement authority acted dishonestly or improperly.[55] This piece of legislation has not been tested yet but may 'chill' future challenges to UWO proceedings.

The UWO experiences of UK enforcement authorities can be contrasted with the sole outlier in UWO 'success' rates in common law jurisdictions: Ireland. There, unexplained wealth mechanisms are highly resourced mechanisms that have been extensively judicially tested.[56] Countering the typical policy-transfer trend, whereby the Irish legislature emulates

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50 National Crime Agency, *Annual Report and Accounts 2022-2023* (Report, 18 July 2023) 58. The turnover for the police forces in England and Wales more generally for the same period was a record high of 6.6%: Home Office, *Police Workforce: England and Wales 2022-2023* (National Statistics, 26 July 2023).

51 Bullough (n 45) 203.

52 'Enforcement authority' meaning the National Crime Agency; His Majesty's Revenue and Customs; the Financial Conduct Authority; the Director of the Serious Fraud Office; or the Director of Public Prosecutions and, in Scotland, the relevant delegates of the Scottish Ministers: UK POCA ss 362A(7) and 396A(1) respectively.

53 Ali Shalchi, 'Unexplained Wealth Orders' (Briefing Paper No CBP 9098, House of Commons Library, 14 April 2022) <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf > (footnotes removed).

54 Three senior NCA officers were interviewed together in a single interview roughly 75 minutes long in December 2020. The interview received prior ethical clearance from Queen Mary University of London. The participants were provided with information sheets providing an outline of the matters to be discussed, the uses to which the content of the interview might be put, and a list of questions that would form the basis for discussion in the interview, with the opportunity to digress or expand on particular issues as the interview progressed. The interview took place via Skype. Consent to digitally record and transcribe the interviews was granted by all interviewees. Each interviewee was sent a copy of the transcript of the interview to allow them to review, clarify or expand on any of the points made, and to verify the accuracy of what was recorded. Each interviewee duly provided their sign-offs to their respective transcripts.

55 UK POCA s 362U.

56 Liz Campbell, *Organised Crime and the Law* (Bloomsbury Publishing, 2013).

developments originating in its neighbouring jurisdictions,[57] civil asset recovery in Ireland predated its UK equivalent.[58] and far outshines it in terms of 'success' on our measures.[59] A UK Parliament House of Commons Research Briefing on UWOs stated that unlike the unexplained wealth regimes in Australia and the UK, Ireland's is credited with having significantly disrupted economic crime.[60] RUSI's research suggests that the intended impact is more on profit-driven drugs crime in Ireland,[61] rather than economic crime more broadly, ie that the perceived targets differ.[62] On this point, a key take-away from the Booz Hamilton Allen report on UWOs for the US Department of Justice was the following:

> The single factor most important to the success of Ireland's [unexplained wealth] law is the [relevant enforcement authority, the Criminal Assets Bureau]. By forming an elite, well-resourced unit, with staff from not only police and prosecutors, but also tax and social welfare agencies, Ireland has been able to fully exploit the statute.[63]

This analysis went unheeded by the UK Government prior to its introduction of UWOs. Following the formation and dissolution of various law enforcement and/or asset recovery-specific agencies over the past three decades, UWO application powers are available to a relatively disjointed set of public authorities and the projected resources required to sustain the UWO as a viable asset recovery tool have been conspicuously under-estimated.[64] There is little evidence of multi-departmental cooperation across state agencies in the UK regime. Given the low rates of recovery, it is not possible at this juncture to say with any confidence that the availability of UWOs is disrupting the flow of criminal monies into or within the UK.

A similar pattern is evident in Australia, where recovery rates using UWOs are low.[65] As Natalie Skead and her colleagues note,

> What clearly emerged from many interviews was that success in unexplained wealth confiscation requires significant resourcing and skills, specifically in forensic accounting.[66]

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57 For example, anti-social behaviour orders were introduced in England and Wales in the late 1990s in the *Crime and Disorder Act 1998* (as amended by the *Police Reform Act 2002*), and were provided for in a modified form in Ireland in the *Criminal Justice Act 2007*. For an examination of the concept of policy transfer see Trevor Jones and Tim Newburn, *Policy Transfer and Criminal Justice: Exploring US Influence over British Crime Control Policy* (Open University Press, 2007).

58 Whereas in the UK the term 'asset recovery' is used, 'forfeiture' is used in Ireland.

59 See the snapshot provided by RUSI to the Cullen Commission of asset recoveries using UWOs (n 25) 25–26

60 Shalchi (n 53).

61 Liz Campbell, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) *The Journal of Criminal Law* 383, 450–452.

62 See RUSI's observation above agreeing that the UWO is similarly of greater potential use in this context, n 49 above and accompanying text.

63 Booz Allen Hamilton, *Comparative Evaluation of Unexplained Wealth Orders* (Report, US Department of Justice, October 2012) 1.

64 See n 46 and accompanying text.

65 See Smith and Smith (n 3) for data on the value of assets confiscated using UWOs in Australia as of 2016, and their observations on the incompleteness of available data and the unavailability of national data.

66 Skead et al (n 7) xii.

They contrast the relative effectiveness of Australian jurisdictions with independent and expert teams specialising in unexplained wealth enforcement against those where no such specialisation exists. They highlight, for example, the dedicated team sitting within the NSW Crime Commission recovering $12m during the period 2010-2015. For the same period, in WA, where unexplained wealth enforcement was at that time conducted by the police and the DPP's office, there were no unexplained wealth recoveries.[67] Since then, more specialised teams in WA's Corruption and Crime Commission have been vested with unexplained wealth investigation and confiscation powers. In the financial year 2022-2023, additional resourcing for unexplained wealth enforcement in that jurisdiction coincided with assets worth over $10m being frozen as part of unexplained wealth investigations.[68] There appears to be a discernible correlation between resourcing and expertise, and effectiveness.

It can be concluded that the effectiveness of UWOs is contingent on policymakers understanding, from the outset, the high level of expertise and resourcing required to pursue them. Where enforcement bodies are well-resourced, and where there is buy-in from across state agencies, UWOs hold the potential to disrupt economic crime. Although, as a matter of policy, the enforcement authority policy preference across jurisdictions is to enter settlements rather than engage in protracted litigation,[69] enforcement authorities should assume, especially where dealing with allegedly corrupt PEPs whose political credibility depends on perceptions of integrity, that expensive challenges to UWOs will follow.

IV PRINCIPLED CONCERNS

Our principled concerns around unexplained wealth laws centre on the implications for individual rights. The concerns here echo some of those raised in relation to NCBAF.[70] In this section, we highlight three issues in particular: 1) the low evidential base necessary to obtain UWOs; 2) the related impact on the presumption

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67 Ibid.

68 Western Australia Corruption and Crime Commission, *Annual Report 2022–2023* (Report, November 2023) 24, 71 and 73 <https://www.ccc.wa.gov.au/sites/default/files/2023-11/CCC9197%20Annual%20Report%202023%20WEB.pdf>. In the same financial period, NSW continued its relative success, with its Crime Commission estimating restraint of just under $14m of realisable assets using UWOs: New South Wales Crime Commission, *Annual Report 2022–2023* (Report, October 2023) 19 <https://www.crimecommission.nsw.gov.au/publications/annual-report>.

69 See eg ACT Government, *Statutory Review: Confiscation of Criminal Assets (Unexplained Wealth) Amendment Act 2020 Report* (Report, August 2022) para 4.1 <https://www.parliament.act.gov.au/__data/assets/pdf_file/0010/2062927/c0ce2c104d554ff14b13f084177b4fcc608a91e4.pdf> on the desirability of resolution of matters by way of consent orders; and the approval of enforcement authorities of enforcement authority interviewees from across Australian jurisdictions towards NSW's track record in finalising settlements in UWO matters in Smith and Smith (n 3) 57.

70 Note for examples the concerns raised by, *inter alios*: Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241; Liz Campbell, 'Criminal labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76(1) *Modern Law Review* 68; Colin King and Jennifer Hendry, *Civil Recovery of Criminal Property* (Oxford University Press, 2023).

of innocence and associated procedural protections that are available to criminal defendants but not to respondents to unexplained wealth processes; and 3) an overlapping impact on privacy rights.

In the UK, the Government's position has been that recovery of assets on the civil standard of proof is not a criminal matter attracting due process protections.[71] No jurisprudence from the English Courts or from Strasbourg indicates that the presumption of innocence as a legal protection is engaged or compromised by UWOs.[72] Indeed, the UK Government's European Convention on Human Rights ('ECHR') memorandum accompanying the legislation introducing UWOs expressly opined that, in the Government's view, Article 6 of the Convention (which *inter alia* guarantees criminal procedural protections including the presumption of innocence to those charged with crimes) was engaged by UWOs.[73] It similarly pre-empted suggestions that UWOs are capable of violating Article 1 of the First Protocol (right to property) and Article 8 (right of privacy and the associated right to reputation) of the ECHR. On property rights, it noted that the UK iteration of UWOs merely constitute investigative orders that do not entitle the state to permanently seize property. On privacy rights, the Government characterised UWOs as narrow in scope, limited merely to requiring an explanation as to how property was obtained—a privacy interference that was justified by reference to the public interest in ensuring the proceeds of crime are not deposited in the UK.

Beyond those rights, as with other NCBAF processes, unexplained wealth laws were designed to ease the evidentiary burden on enforcement authorities seeking to confiscate the proceeds of crime. NCBAF processes typically require enforcement authorities to establish to a civil standard that assets represent the proceeds of unlawful conduct of a specific kind or kinds or require them to present sufficient evidence to allow a court to draw an irresistible inference that assets were unlawfully obtained.[74] Unexplained wealth laws largely dispense with these requirements. In the Australian regimes, UWOs are issued on the basis of 'reasonable suspicions' that part of or all of an individual's wealth was derived from unlawful conduct. It is not necessary for applicants (ie state enforcement authorities) to specify the unlawful conduct in question. In the UK, the evidentiary threshold to issuing orders is lower still: no nexus with criminality at all need be established when seeking UWOs against PEPs; it is sufficient for a PEP to hold assets apparently incommensurate with their known lawful income.[75] For non-PEPs, there must be 'reasonable grounds for suspecting' that respondents 'involved' in serious crime (or those connected to such individuals) hold unexplained wealth, but, again, it is not necessary to link an application to a specific crime. Some of these low evidential premises for justifying

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[71] *Director of the Assets Recovery Agency v Customs and Excise Commissioners* [2005] EWCA Civ 334 [17]; *Walsh v Director of the Assets Recovery Agency* [2005] NICA 6 [23].

[72] The European Court of Human Rights has consistently ruled that as a rule, the presumption of innocence is not engaged in the absence of a formal criminal charge. See most recently: *Khodorkovskiy and Lebedev v Russia (No 2)*, ECtHR Application Nos 51111/07 and 42757/07, 14 January 2020, para 543.

[73] Home Office and HMRC 'Criminal Finances Bill (HL): European Convention on Human Rights' 28 February 2017 <http://data.parliament.uk/DepositedPapers/Files/DEP2017-0189/2017-02-28_CF_Bill_-_ECHR_Memo__HL_.pdf>.

[74] For a more detailed description of the operation of the UK's NCBAF regime, see Johan Boucht, *The Limits of Asset Confiscation: On the Legitimacy of Extended Appropriation of Criminal Proceeds* (Hart Publishing, 2017) 73–82.

[75] See n 19 above and accompanying text.

freezing assets and requiring individuals to account to law enforcement authorities and the courts are unprecedented.[76]

UWOs allow enforcement authorities to *presume* that respondents hold criminal proceeds without having first to make out a substantial case of criminality to either a criminal or civil standard of proof. This ability to raise presumptions allows a state to subvert the 'basic principle of civility' that a plaintiff or prosecutor must establish a case to answer in any court proceedings, even if only to a civil standard, before imposing obligations on respondents:

> We do not generally accuse people of doing us wrong unless we are able to back up the explanation with evidence, and in law this requirement is fairly easily mapped onto the rules governing the burden of proof.[77]

The principled concern therefore is that the threshold to be met before an individual is required by the state to account for themselves and their property by a criminal law enforcement authority in a quasi-criminal context is lowered considerably by UWOs. This concern is heightened by the fact that, owing to the order's categorisation in law as a civil process, respondents to UWOs are not entitled to the procedural safeguards usually afforded to criminal defendants including, in particular, the presumption of innocence. Where unexplained wealth mechanisms are used, a state's enforcement authorities are suggesting that they suspect that the respondent has, at best, benefitted from crime or, at worst, committed crime (albeit there is insufficient evidence available to institute a prosecution). The minimal obligations on enforcement authorities to first establish a link to criminality when seeking UWOs impacts on the presumption of innocence as a totem of what Antony Duff has described as 'the most minimal civil trust' that fellow citizens owe to each other by refraining from treating each other as 'suspicious strangers and potential enemies who must prove their bona fides'.[78]

In terms of other mechanisms within the proceeds of crime architecture, Tadros and Tierney refer to the stigma in confiscation following conviction.[79] Moreover, one of us has argued in relation to NCBAF that:

> while the ostensible rationale is to recoup unlawfully acquired assets, and while these orders are directed at the property rather than the person, [civil asset] recovery also incorporates a substantial stigma and incorporates the blame that distinguishes criminal from civil measures, with the former connoting 'should not do'. Certainly, moral responsibility and social blame accrue as a result of judicial determination that property represents the proceeds of crime. Civil recovery in fact places the label of criminal on a

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[76] In all of the UK's UWO cases to date, interim freezing orders have been sought in accordance with section 362J of the UK POCA and issued in tandem with UWOs in response to enforcement authority concerns around asset dissipation pending responses being provided to the UWOs.

[77] Mike Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62(2) *Modern Law Review* 167, 173.

[78] RA Duff, 'Presuming Innocence' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 57. Duff was discussing reverse burdens in the context of the 'presumption of guilt' reverse burdens provided for under the (since-repealed) section 2 of the *Public Bodies Corrupt Practices Act 1889* (UK) 52 & 53 Vict, c 69.

[79] Victor Tadros and Stephen Tierney, 'The Presumption of Innocence and the Human Rights Act' (2004) 67(3) *Modern Law Review* 402, 406 and 431.

> person without due process protections: while the legislation refers to unlawful conduct, the assets seized are described as the 'proceeds of crime', both in relevant legislation and by the courts. This represents a declaration that encourages the public to believe the owner of the property to be guilty of criminality, broadly speaking.[80]

A comparable argument has been raised by Paul Latimer in an Australian context in his discussion of UWOs. He suggests that UWOs undermine the presumption of innocence by implying an individual has unexplained wealth which carries a certain stigma, even if it is without conviction or criminal liability.[81] The same may be argued in a UK context. We contend that the UK UWO process, albeit not a formally criminal process, is capable of casting state-made aspersions on respondents of holding unlawfully acquired wealth, in circumstances where claims are not tested to a high evidential standard. Moreover, requirements to respond to UWOs raise wider implications in terms of the potential for respondents to self-incriminate. In the UK iteration of UWOs, use immunity provisions in the legislation prohibit the use of any evidence gathered as part of the UWO process against a respondent to the UWO proceedings in subsequent domestic criminal proceedings.[82] The position on the use of information provided in response to an UWO in *foreign* criminal proceedings is unclear. It seems however that the starting point is that the privilege against spousal and self-incrimination is limited to incrimination in domestic criminal proceedings only.[83]

The impact of orders, where they are publicised, is also capable of affecting livelihood/reputation. One could argue that the various Proceeds of Crime Acts globally deploy the term 'criminal' explicitly, so ostensibly references to 'unexplained wealth' are less problematic in terms of fair labelling or conversely stigma. In practice however, both in the UK and across Australia, UWOs are provided for under each jurisdiction's proceeds of crime legislation and typically employ the same or similar procedural machinery and language as other NCBAF processes.[84] That said, in the UK, all initial applications will be held in private unless otherwise directed by the presiding judge.[85] As is evident from the applications in respect of properties owned by PEPs to date though,[86] subsequent challenges to UWOs tend to be highly publicized. UK enforcement authority policy is to actively 'publicise civil investigations to the

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[80] See Liz Campbell, 'Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence' (2013) 76(4) *Modern Law Review* 681.

[81] Paul Latimer, 'Unexplained Wealth Orders in Australia: Limits to Transparency and Responsibility for Other People's Wealth' (2021) 95(1) *Australian Law Journal* 36.

[82] UK POCA s 362F.

[83] The general rule for use immunity seems to be that it is intended to operate in respect of potential domestic proceedings only (see *Civil Evidence Act 1968* (UK) s 14(1) and the discussion in the decision in *Hajiyeva* (n 90) paras 45–56, albeit in *Brannigan v Davison*, Lord Nicholls acknowledged that the court may have some discretion at common law to excuse a respondent from making a statement on the ground of potential incrimination overseas: *Brannigan v Davison* [1997] AC 238, [1996] 3 WLR 859).

[84] That is, they are applied for by criminal law enforcement authorities, and applications are made pursuant to provisions of the UK POCA to the (civil) High Court.

[85] UK Ministry of Justice, *Practice Direction: Civil Recovery Proceedings*, updated as of February 2023, para 11.1 <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/civilrecovery_pd>

[86] *Hajiyeva* (n 90); and *Baker* (n 37).

maximum possible extent […and…] inform the media (as we do in criminal cases) and relevant NGOs of upcoming civil investigation events such as open court hearings…'.[87] Moreover, the 'McMafia' label is commonplace in media coverage and political discourse.[88] The three UK UWO cases with reported judgments to date were the subject of substantial amounts of media coverage which was often couched in terms highly aspersive for the respondents.[89] The respondent in *Hajiyeva* was widely referred to in media reports as a 'McMafia wife'.[90] The UWO respondent who reached a settlement with authorities was referred to as a 'mob manager'.[91] In the context of *Baker*, which involved the then-Kazakh president's daughter who appealed *successfully* against UWOs,[92] analysts speculated that her subsequent removal as speaker of Kazakhstan's senate was sanctioned 'after her legal battles in Britain drew unwelcome attention to [her] family's wealth.'[93] There is evidence of similar aspersive impact ensuing from UWOs in Australia.[94]

Of course, it is possible to argue that where UWOs are sought, enforcement authorities are in fact imputing the taint of criminality to the assets the subject of an order, rather than to the asset-holders themselves. This argument does not hold water in an Australian context: the unexplained wealth regime in all of the Australian jurisdictions are value-based remedies centred on an examination of the entirety of the respondent's assets. In a UK context, the argument might be more successfully invoked because orders are issued to facilitate civil recovery of specified assets—an *in rem* process. Nevertheless, the practicalities of how UWOs operate in the UK—the respondent's name is included the case title for each matter and the publicity that reported cases attract—means that respondents' reputations are tainted publicly by association with the alleged unlawful property. Moreover, while the UK Supreme Court recently affirmed the idea that individuals the subject of a *criminal* investigation are

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87 National Crime Agency, *Civil Financial Investigations and Associated Publicity: Policy* (Report, 18 February 2021) para 5 <www.nationalcrimeagency.gov.uk/who-we-are/publications/496-nca-civil-financial-investigations-policy-and-associated-publicity/file>.

88 Robert Neate, '"McMafia" banker's wife will have £22m seized unless she reveals source of wealth', *The Guardian* (online, 21 December 2020) <https://www.theguardian.com/law/2020/dec/21/mcmafia-banker-wife-seize-source-wealth-supreme-court-harrods>; Sean O'Neill, '£1.5m legal bill forces rethink over McMafia wealth orders', *The Times* (online, 13 July 2020) <https://www.thetimes.co.uk/article/1-5m-legal-bill-forces-rethink-over-mcmafia-wealth-orders-x02gc8s23>.

89 A search using the Lexis+ newspaper search service of British national newspapers for 2018—the first year that UWOs were available in the UK—shows that the word 'McMafia' was used in over 50 separate articles in the context of UWOs that year.

90 See eg the article cited at n 88 discussing *NCA v Hajiyeva* [2020] EWCA Civ 108, [2020] All ER (D) 34.

91 Sean O'Neill, '"Mob Manager" Hands over £10m to Investigators', *The Times* (London, 7 October 2020) News Section, 5, discussing *NCA v Hussain* [2020] EWHC 432 (Admin).

92 *Baker* (n 37).

93 Marc Bennetts 'Heir to Kazakh Leadership Sacked after Property Row', *The Times* (London, 5 May 2020) News Section, 29. Anton Moiseienko (n 7) argues that proceedings should have been taken directly against Mrs Nazarbayeva as the respondent given the potentially suspicious provenance of her personal wealth. Instead, the NCA made a weak and ultimately unsuccessful argument that the property represented the proceeds of her late former husband's crimes.

94 See Lorana Bartels, *Trends & Issues in Crime and Criminal Justice: Unexplained Wealth Laws in Australia* (Australian Institute of Criminology, July 2010) 2.

entitled to a general expectation of privacy as 'a legitimate starting point' pending a charge or the investigation being dropped given the stigma inherent in police investigations,[95] no similar expectation is available to those the subject of a NCBAF investigation. All of this raises questions as to the proportionality of publicised UWOs given their impact on public (or at least media) perceptions of the respondents.

More positively, for UWOs in the UK, the judicial oversight process to date has proven exacting.[96] The judiciary in the UK has a high level of discretion in opting whether to issue UWOs and its careful consideration of their proportionality and fairness implications in each reported case to date demonstrates its moderating role against excessive state action.[97] This exercise of judicial discretion for now counterbalances the absence of criminal procedural protections for respondents. Furthermore, the UK Proceeds of Crime Act provides explicitly for the payment of compensation.[98] Nevertheless, some form of statutory assurance, whether through some form of sliding scale of presumption of innocence recognition for civil (quasi-criminal) matters instituted by criminal enforcement authorities or otherwise, would be welcome.[99]

By contrast, in the Australian jurisdictions, judicial discretion is comparatively limited, as a rule. In most jurisdictions, there is a discretion to refuse to grant an order if such refusal is in the public interest but there is limited discretion beyond that.[100] In Australian contexts, UWOs can (and in some instances, must) be issued if the Court is satisfied that there are reasonable grounds for suspecting that someone who is involved in serious crime (or someone who is connected to such a person) holds property incommensurate with their known lawful incomes.[101] Empirical research on proceeds of crimes regimes in Australia demonstrates how third parties, including dependent children, are affected by UWOs and other orders.[102] This echoes the sentiments of the English courts in observing the intractability of the proceeds of crime process and its impact on third parties.[103] Writing in an Australian context, Natalie Skead and her colleagues recommend a guided judicial discretion which would take into account

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95 *ZXC v Bloomberg LP* [2022] UKSC 5.

96 Proportionality considerations were referenced in each of the three reported UWO cases to date.

97 This is a good practical illustration of Packer's observation on the importance of the judiciary in 'assert[ing] limits on the nature of official power and on the modes of its exercise.' Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968) 22.

98 Liz Campbell, *Organised Crime and the Law* (Bloomsbury Publishing, 2013) and section 362R of the UK POCA. Notably, there is no reported instance of compensation in relation to the exercise of any asset recovery powers in the UK having been paid to date.

99 See Campbell's (n 80) and Peter Alldridge's past discussion of these proposals: Peter Alldridge, 'Civil Recovery in England and Wales: An Appraisal' in Colin King, Clive Walker and Jimmy Gurulé (eds), *The Palgrave Handbook of Criminal and Terrorism Financing Law* (Palgrave Macmillan, 2018) 515.

100 Though note the relatively wide discretion allowed for under the Cth legislation as an exception to this general rule.

101 *Proceeds of Crime Act 2002* (Cth) s 362B.

102 Skead et al (n 7) xiii and 72.

103 See the comments of Andrews J in *NCA v Azam (No 2)* [2014] EWHC 3573 (QB).

excessive disproportionality, severe hardship and the public interest, as well as appropriate third-party interest exclusion provisions.[104]

It is important, in concluding this Part outlining our concerns around UWOs, to acknowledge that many asset recovery practitioners might criticise this discussion as overstating the principled risks involved. Critiques like this one are sometimes dismissed as barriers to pragmatism by making the perfect the enemy of the good. As was broached in Natalie Skead and others' report:

> Finally, in response to criticisms by groups such as the Civil Liberties Council for Queensland and the Bar Association of Queensland, Mr Springborg commented:
>
> > There is due regard to process. There is due regard to natural justice. The sky is not going to fall. If this is such a problem, if we are going to see all of these people unjustly wronged not only in Australia but also throughout the world, then where are they? Where are all of these examples of people who have been wrongly stripped of their assets because of the draconian actions of government in this country and elsewhere? Once again we are playing hypotheticals and we are taking risk averseness to the nth degree. It is not going to be a problem and it should not be a problem...[105]

There may be instrumental value in lowering the standards of evidence and proof that enforcement authorities must fulfil in pursuing allegedly criminal proceeds. But we would question the underlying premise that examples of 'people who have been wrongly stripped of their assets' are necessary to make a finding that the law is problematic. Given the low evidential bar to the seizure of assets using unexplained wealth laws, it is difficult to determine accurately on a case-by-case basis whether assets are 'wrongly' stripped or not. We would argue moreover that there is a risk that the intrinsic political and communicative value of carefully reasoned decision-making on the part of the judiciary and enforcement authorities is undermined when using UWO regimes.[106] Enforcement authorities can apply for UWOs on the basis of comparatively (when compared to other NCBAF or conviction-based mechanisms) little evidence and (particularly in Australia) judges have little choice but to issue the orders once statutory criteria are fulfilled. This potentially allows for citizens' interests in property to be impacted notwithstanding the absence of an accompanying clear narrative from the state justifying that action. It might be thus argued that, in relying on UWOs, states are moving away from the orthodoxy and constraints of the criminal law to better address those people who are *allegedly* guilty but who can't be deemed *legally* guilty. This move towards a less-than-exacting mode of asset recovery is not ideal expressively as it risks implicitly undermining the state's own authority in ensuring that property rights

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[104] Skead et al (n 7) x, para 2. See also Natalie Skead et al, 'Reforming Proceeds of Crime Legislation: Political Reality or Pipedream?' (2019) 44(3) *Alternative Law Journal* 176. For completeness, note that some of the Australian legislative unexplained wealth regimes already provide specific albeit limited latitude for courts to consider dependents' hardship.

[105] Skead et al (n 7) 65 (references omitted).

[106] Conor Crummey recently made convincing philosophical claims as to these risks in the realm of judicial reviews in the UK but a broadly analogous argument might be made here for UWOs: Conor Crummey, 'Why Fair Procedures Always Make a Difference' (2020) 83(6) *Modern Law Review* 1221.

and the due process rights of citizens are upheld and respected. None of this allays concerns about overreach and the negative implications of these laws for civil liberties or associated principles.

V THE FUTURE OF UWOS

One of the leading rationales underpinning PEP-based UWOs is that they allow enforcement authorities seeking evidence in relation to the suspected proceeds of transnational crime to avoid many of the pitfalls associated with obtaining evidence from overseas. For former public officials, the success of the evidence-gathering process is contingent on the resources and the appetite of overseas jurisdictions to provide evidence through notoriously unreliable Mutual Legal Assistance processes.[107] The availability of an investigative tool that allows domestic enforcement authorities to circumvent these challenges by requiring a property holder to account directly for their assets holds promise. Furthermore, and as discussed in Part 3, for serious domestic crime, we recognise that individuals holding the proceeds of crime may be willing to effectively cede those proceeds rather than engaging in processes whereby they attempt to argue the legitimacy of the origins of those assets.[108] Where UWOs are used in the context of a preliminary investigation, the requirements imposed on respondents to evidence the origins of their wealth is relatively modest, and indeed, is a power frequently invoked under other regimes (notably the tax regime) albeit usually in a value-neutral and unpublicised context. UWOs are thus a potentially useful means of building evidence in asset recovery contexts. However, to date, PEP-based UWOs have proven largely ineffective in practice.[109] The design of UWOs could be refined in a number of ways so as to strike a more equitable balance between effective asset recovery and due process principles.

First, unexplained wealth laws could be reformed so that UWO cases remain subject to anonymity restrictions until respondents exhaust their appeals trajectories in the matters. This is clearly not ideal from an open justice perspective. However, given

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[107] Julinda Beqiraj and Richard MG Scott, 'Mutual Legal Assistance (MLA) in criminal matters in the UK and in developing countries: A scoping study' (Report, Bingham Centre for the Rule of Law, March 2022) <https://www.law.ox.ac.uk/sites/default/files/migrated/139_mla_report_final.pdf>.

[108] Indeed, in one of the three reported UWO cases in the UK (*NCA v Hussain* [2020] EWHC 432 (Admin)), the respondent ended up the respondent's data dump of 127 lever arch folders explaining his sources of wealth 'inadvertently gave NCA investigators clues to make a bigger case against him.' This resulted in the parties entering into a settlement agreement in respect of, inter alia, 45 properties and £583,950 in cash: <www.nationalcrimeagency.gov.uk/news/nca-secures-first-serious-organised-crime-unexplained-wealth-order-for-property-worth-10-million>.

[109] The only successful case for enforcement authorities involving PEPs to date in the UK is *Hajiyeva* (n 90). There is also no reported data on repatriation of assets by the UK to states of origin, which was one of the stated aims underpinning the introduction of PEP-specific UWOs in the UK. In 2022, UK Government has published a policy paper pledging greater transparency in its repatriation of corruptly-acquired assets to states of origin. It is notable however, that as of the date of writing (January 2024), the UK has not published its treatment of £101m confiscated from a former Nigerian politician: see <https://www.transparency.org.uk/new-confiscation-case-will-test-uk-s-commitment-transparent-asset-return>.

the insistence of legislators that NCBAF processes are 'civil' in nature, it might be argued that the public interest justifying publicity in such cases is less pressing. This reform may serve as an appropriate counterweight to the stigmatising impact of media attention surrounding UWO respondents.

Second, there are strong arguments for increasing the standard of proof to be satisfied before UWOs can be issued. For the imposition of UWOs to be expressively successful as a crime control tool, it would be helpful for both the public and respondents to have access to clearer narratives around the specific behaviours leading to individuals having their assets confiscated. Where evidence of overseas criminality is not directly available in cases involving PEPs, enforcement authorities should have the ability to summon independent experts to furnish testimony on levels of kleptocracy within jurisdictions, to allow courts to draw inferences on the provenance of assets, where necessary.[110] This may have the twin benefits of establishing stronger reasons to require the respondent to account for the origins of their assets and implicitly censuring the respondent's state of origin for permissive responses to official corruption.

Third, a separate and potentially troubling aspect of the introduction of UWOs centres on concerns about incremental increase of powers available to state agencies against the public (including, in the UK, 'non-citizens').[111] There is a trend in crime control and asset recovery laws both in the UK and in Australia of 'exceptional' powers first being introduced against limited cohorts or for use in tightly restricted circumstances, and then subsequently expanded for broader or general use with little scrutiny.[112] Introducing laws for specific use against (i) foreign PEPs and (ii) those involved in serious crime is implicitly pejorative towards and risks folk-devilment of (i) foreigners, and (ii) PEPs, especially without any empirical evidence that foreign PEPs are more or less likely than anyone else to hold unlawfully acquired property.[113] Indeed,

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[110] See Mayne's and Heathershaw's recommendations in this regard (n 21).

[111] The use of the term 'citizen' being understood not only as a person legally being a member of a community, but as also an individual who is entitled to enjoy civil, political, and social rights within a given society, and who shares at least some measure of common cultural values with 'integrated' members of society. See Barry Vaughan, 'Punishment and Conditional Citizenship' (2000) 2(1) *Punishment & Society* 23. Vaughan distinguishes between 'full citizens' and 'partial' or 'conditional' citizens: 'people who may be moulded into full citizens but who are, at present, failing to display the requisite qualities expected of citizens' (at 26). It is into this latter category of 'not-quite' members of the community that PEPs, for example, might be said to fall.

[112] Some examples in a UK context include asset recovery laws for use only in terrorism or drugs offence contexts being expanded to all crimes; the extension of investigative powers originally for use only in conviction-based forfeiture contexts to NCBAF-contexts, etc. And for an account of the increasingly severe? criminal proceeds powers across Australia in current decades, see Skead et al, 'Reforming Proceeds of Crime Legislation' (n 104). for a consideration of Ireland, see Campbell (n 98).

[113] A 'folk devil' is a member of a cohort who can be identified using the same criteria as may be applied to the actors who embody a particular social or legal concern. In this context, 'foreigners' and 'PEPs' meet some of the same criteria as 'corrupt foreign PEPs' against whom the UK's PEP-specific UWO is targeted. For more on the concept of folk-devilry, see: Stanley Cohen, *Folk Devils and Moral Panics: The Creation of Mods and Rockers* (Routledge, 3rd ed, 2003).

the PEPs provisions could be characterised as legislating against 'non-citizens'.[114] A further risk inherent in the roll-out of UWOs in various jurisdictions is that it is plausible that quasi-criminal UWO-type laws with low evidential thresholds will become normalised by first making them available against selected groups and subsequently rolling their use out against larger parts of the population with relatively little scrutiny. There is a need for careful appraisal of the likely efficacy of, and rights and procedural protections implications of models of unexplained wealth laws, whether through the commission of independent reports, parliamentary inquiries, or through law reform commission projects.[115]

Fourth, there is scope for governments to examine further the relative success of other anti-corruption mechanisms used or under development in other jurisdictions. The US, for example, has introduced Geographical Targeting Orders, which require title insurers to report the beneficial owners of properties of specified minimum values bought without bank financing to FinCEN.[116] Requiring regulated professionals to provide high quality data on defined parts of the economy particularly susceptible to money-laundering risk may complement the use of UWOs by providing a firmer evidence base on which enforcement authorities can pursue unexplained wealth. As reporting is triggered by cash purchases above a certain value rather than any particular aspect of a purchaser's profile, the measure holds a relatively value-neutral valence.

Finally, there is scope for reform to address some unfortunate confusion in the political discourse on UWOs of the dealings of corrupt PEPs which, whilst contemptible and undertaken at the expense of a citizenry, are not necessarily criminal acts in the jurisdiction in which they take place. The ability across jurisdictions for respondents to UWOs to avoid having their assets seized if they can establish the 'lawful' provenance of those assets risks impacting upon the measure's efficacy as it applies against elites from some kleptocratic regimes. Where lawmakers talk about recovering assets in 'Londongrad' using proceeds of crime legislation for example, they fail to appreciate that the property of which they speak may not represent what are legally recognised as criminal proceeds.[117] Double criminality requirements can operate

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[114] Lucia Zedner, 'Security, the State, and the Citizen: The Changing Architecture of Crime Control' (2010) 13(2) *New Criminal Law Review* 379.

[115] Note, for example, the careful work of the Commission of Inquiry into Money Laundering in British Columbia (Cullen Commission) in considering the reform of BC's money laundering laws and the introduction of unexplained wealth laws. BC opted to move ahead with unexplained wealth-type laws having considered testimony from almost 200 experts including JC Sharman and RUSI. Andrew Dornbierer and Jeffrey Simser, 'Targeting unexplained wealth in British Columbia' (Working Paper No 41, Basel Institute on Governance, October 2022) <https://baselgovernance.org/sites/default/files/2022-09/220929_Working%20Paper_41.pdf>.

[116] See, eg, the GTO issued by US Department of the Treasury, Financial Crimes Enforcement Network, Geographic Targeting Order Covering Title Insurance Company, 15 November 2018, <https://www.fincen.gov/sites/default/files/shared/Real%20Estate%20GTO%20GENERIC_111518_FINAL%20508.pdf>. In Australian or UK real estate contexts, licensed conveyancers and solicitors might be made subject to similar reporting requirements, or, to avoid 'client capture' concerns, this might be undertaken by the land title registries in each jurisdiction on properties which have no charges registered against them on transfer of ownership.

[117] The UK POCA defines 'recoverable property' under the Act as 'Property obtained through unlawful conduct'.

to place out of bounds property that the states in which the assets end up might regard as corruptly-acquired but which under the laws of the state of origin were obtained legally. Moreover, the 'public law taboo' precludes courts in the UK from ruling on the criminal laws of another jurisdiction and that in turn prevents them in some cases from ruling that assets represent the proceeds of a crime that has been committed in another country.[118] It is worth considering therefore, particularly when dealing with jurisdictions which are perceived as having adopted permissive approaches to official corruption, whether the proceeds of crime paradigm is appropriate at all—perhaps a *sui generis* jurisdiction is required—but that is a discussion that falls far outside the scope of this article.[119] Pending any developments in that regard, lawmakers will need to consider the thorny question of whether they intend on proceeds of 'corruption' rather than 'crime' *simpliciter* to be subject to unexplained wealth laws. One route to doing this might be to develop a holistic and practical list of criteria to assess the legitimacy of wealth of PEPs, along the lines of those developed and published by the UK's Financial Conduct Authority. It cites factors including 'wealth derived from the granting of government licences (such as mineral extraction concessions…)' and 'appointment to a public office that appears inconsistent with personal merit' as risk factors potentially indicative of illegitimately acquired wealth.[120] These gauges of potentially illegitimate wealth are a realistic and less legalistic reflection of the fact that not all dirty money is necessarily formally criminally acquired, and serve as the kind of factors that judges hearing unexplained wealth cases could usefully consider in future in evaluating the likelihood that wealth was amassed without the taint of impropriety.

The UWO models currently used in Australia and the UK are imperfect. Reforms such as those suggested in this section will not be straightforward. Evidence of the proceeds of foreign corruption being held in 'haven' states like the UK and Australia periodically incite concern and outrage within those countries at their failures to stymie the influx of 'dirty money'. But the victims of those crimes and the impact of those offences are often felt far away from those haven states, and the political impetus for reforming models to ensure that the rights of those victims are vindicated by proper investment of resourcing and political will can be limited when lawmakers are faced with domestic matters that they perceive as more pressing. 'Haven' states may be further disincentivised by perceptions that their laws require onerous due diligence to be performed before foreign direct investment can be sanctioned. Where laws allowing for pursuit of the suspected of crime are introduced, it is all too easy to introduce politically attractive but draconian state powers against those under suspicion. The

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118 For discussion of the jurisdictional problems in play, see Clancy (n 9).

119 Getting to a point where stakeholders reach consensus on what such a jurisdiction would look like would likely be fraught with controversy. There is a nascent legal and academic discourse on a potential global anti-corruption court: Mark Wolf, 'The World Needs an International Anti-Corruption Court' (2018) 147(3) *Daedalus* 144, albeit it is failing to gain substantial political traction: United Kingdom, *Parliamentary Debates,* House of Lords, 6 July 2023, vol 831, cols 1301-1304.

120 Financial Conduct Authority, *The Treatment of Politically Exposed Persons for Anti-Money Laundering Purposes* (Finalised Guidance 17/6, 2017) para 2.32. At the time of writing (January 2024), the FCA is conducting a review the treatment of domestic Politically Exposed Persons ('PEPs') by financial services firms and expects to publish its findings in June 2024.

challenge for policy-makers around unexplained wealth is to surmount those challenges in providing for fair, proportionate and effective laws, and in ensuring that the processes used for enforcing those laws are properly resourced with the necessary finances and expertise.