

Our Ref: Criminal Law Committee 2100339/5

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Research Director
Legal Affairs and Community Safety Committee Parliament House
George Street
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By Post and Email to: lacsc@parliament.qld.gov.au

Dear Research Director

CRIMINAL PROCEEDS CONFISCATION (UNEXPLAINED WEALTH AND SERIOUS DRUG OFFENDER CONFISCATION ORDER) AMENDMENT BILL 2012

Thank you for the opportunity to comment on the *Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012* ('the Bill').

Please note that in the time available to the Society and the commitments of our committee members, it is not suggested that this submission represents an exhaustive review of the Bill. It is therefore possible that there are issues relating to unintended drafting consequences or fundamental legislative principles which we have not identified.

The Society is pleased to note that it was given the opportunity to provide input into the framework of the proposed amendments. However, we were not provided with the draft legislation prior to it being introduced into the House. We are grateful to the Government for the opportunity to have contributed our views, but consider that early consultation on draft legislation is the key to developing good law.

We make the following comments for your consideration.

Unexplained wealth orders**1. Unexplained wealth orders**

The Society understands the policy rationale for the introduction of these provisions. We note that they may be an effective, yet draconian tool to combat serious and organised crime. Despite the potential benefits, the Society cannot support certain aspects of unexplained wealth legislation.

In particular, we note our following concerns:

- The Society does not support the reversal of the onus of proof which is inherent in unexplained wealth laws. We consider that this reversal undermines the presumption of innocence and that the onus placed on the respondent is oppressive. It is also contrary to the fundamental legislative principles set out in s4(3), *Legislative Standards Act 1992*;
- We consider that the confiscation of assets is a highly intrusive act. Therefore, it is appropriate for the State to bear the burden of proof before asset confiscation is effected. If the respondent is made to bear the onus of proof, there is serious risk that lawfully obtained assets and the assets of innocent people may be confiscated; and
- We consider that there should be a link between the assets believed to have been acquired unlawfully and commission of an offence, which is not envisaged by unexplained wealth laws.

We note in particular the recent comments provided by the Queensland Crime and Misconduct Commission (CMC) in its submission to the Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements:

Whilst the CMC notes the intuitive appeal of an absence of any indicator of criminal involvement to trigger an application for an unexplained wealth order, such a low threshold is quite draconian and will inevitably highlight the tension that exists between individual rights and the broader interests of the community. It also heightens the potential for malicious misuse.¹

Further the CMC stated:

In the CMC's view, unexplained wealth investigations are likely to be resource intensive with uncertain outcomes. In an environment of scarce resources and competing priorities this circumstance is likely to impact on resource allocation such that the utility of the provisions will be limited.²

The Society agrees with these views and notes that it is important to consider these comments, given the important role that the CMC plays in the civil-based criminal proceeds confiscation regime under the *Criminal Proceeds Confiscation Act 2002* (CPCA). We also note that the case has not been made out that the current civil confiscation proceedings are not working.

¹ Submission by the Queensland CMC to the Commonwealth Joint Committee on Law Enforcement regarding the Inquiry into Commonwealth unexplained wealth legislation and arrangements, 2012, found at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/unexplained_wealth/submissions.htm

² Submission by the Queensland CMC to the Commonwealth Joint Committee on Law Enforcement regarding the Inquiry into Commonwealth unexplained wealth legislation and arrangements, 2012, found at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=le_ctte/unexplained_wealth/submissions.htm

If the government is minded to implement this policy, the Society considers that the following important issues must be considered.

2. Clause 40 – insertion of s89G (Making of unexplained wealth order)

We note that it is proposed that there will be a statutory test of ‘reasonable suspicion’ only attached to the making of an order. That of course is a very low threshold to reach (too low, we say), and one which risks injustices occurring. That is especially so when combined with a reverse onus and a mandatory requirement on courts to make the orders if certain conditions are fulfilled. We consider that it would be more appropriate for a final order to be made on the basis that the court is satisfied that the person has engaged in serious crime related activity or serious crime related activities. In other words, that the onus is not reversed and that the State holds the burden of proof in these matters; in any event, that a higher test than mere suspicion be applied.

We note the inclusion of discretion for the Supreme Court not to make an unexplained wealth order if it is satisfied it is not in the public interest to do so (proposed s89G(2)).

Given the intrusive nature of these orders, we consider that the Bill should include further mechanisms to protect the discretion of the Supreme Court in these processes, namely that the Bill should provide that the Supreme Court **may** (not must) make an unexplained wealth order.

The Society also notes some concern with the wording of proposed s89G(3) which states:

A finding of the court under subsection (1)(a)—

(a) need not be based on a reasonable suspicion that a particular offence was committed; and

(b) may be based on a reasonable suspicion that some offence that is a serious crime related activity was committed.

The Society is of the view that this provision is unclear. The Society also considers that reasonable suspicion should be based on conduct amounting to a particular offence.

3. Clause 40 - insertion of s89P(1) (Effect of other actions on unexplained wealth order)

The Society is concerned with the premise that a person, who has not been convicted of committing an offence amounting to serious crime related activity, would still be subject to an unexplained wealth order made earlier. This is particularly the case if the offence is the only one which has led to a finding of serious crime related activity. We consider that the quashing of a conviction should lead to the unexplained wealth order being revoked or, at least, should trigger an automatic review.

4. Legal representation in proceedings for unexplained wealth orders

The Society maintains the view that the court should have a discretion to allow, on application by the defendant, legal costs to be met from the assets the subject of the application. Sufficient safeguards can be built in to the legislation to ensure concerns do not arise that the asset pool is improperly drained. That would protect the integrity of the proceedings and yet allow for the defendant to be properly represented. In our experience, the Crown appreciates the involvement of legal representatives for the defendant to ensure matters are progressed professionally and efficiently.

If that is not regarded favourably, then as a minimum, we would note the importance of ensuring that these applications fall within the operation of Chapter 6, Part 2 of the CPCA so that a person has access to legal representation in these matters. This is particularly important given the reversal of the onus of proof which is envisaged.

5. Monitoring and oversight of unexplained wealth regime

The Society is concerned that it appears no safeguards, in the form of oversight and monitoring structures, will be put in place. We do not consider that the inclusion of a 'public interest' exception available to the court would provide the appropriate systematic monitoring that would be required for these significant and intrusive applications.

We suggest that monitoring and oversight could be provided by the supervision of a Parliamentary Committee, and the right for the Public Interest Monitor to examine all investigations and court processes. We consider that there should be a specific requirement for the relevant Parliamentary Committee to review the operation of the Act every three years or so. Having regard to the fact that the Parliamentary Committee for the CMC effectively operates on the legal advice of a qualified lawyer, namely the Parliamentary Commissioner, the point could well be made that the Public Interest Monitor's role could be expanded to perform an analogous role to the Parliamentary Commissioner. The Society urges you to consider the options available and provide for monitoring of all stages of the application and court process.

Serious drug offender confiscation order scheme

6. Serious drug offender confiscation order scheme

The Society is concerned by the arbitrary nature of the proposed scheme, as there is no nexus between the serious drug offence certificate, the 6-year confiscation period and whether there was any lawful explanation for the initial acquisition of the property. The Society is also concerned that a person would not be provided with an opportunity to explain or be heard in this process. Further, we consider that this type of application may yield unjust outcomes and does not support the objects of the Act.

We also foresee that the practical result of this scheme will be to discourage persons from pleading guilty and will result in more criminal trials, which tend to be lengthy when serious drug matters are involved.

However, if the government is determined to implement this scheme, we provide the following comments for your consideration.

7. Clause 42 – insertion of s93E (definition of ‘protected property’)

The Society considers that further types of property should be excluded from the operation of this scheme. We consider that a prescribed respondent should be able to retain property for which he or she can provide a lawful explanation regarding its initial acquisition. This could include assets that were gifted to the person under a will or through the administration of an estate. This category of assets would clearly not be connected to criminal activity. In cases involving assets under a testamentary disposition, it would appear that it would be confiscating the assets of an innocent third party (such as a deceased parent). We note that ‘special property’, under a hardship application, includes this category. We consider that it should not only be a dependent that is able to apply to retain this category of property.

The Society acknowledges that there are valid policy reasons in place to combat the seriousness of drug crime, however we consider that it would be a reasonable and fair outcome if a person was allowed to retain assets which the court is satisfied were wholly lawfully acquired.

This would be consistent with the object of the CPCA described in s4(2)(a):

It is also an important object of this Act—

(a) to ensure that property rights are affected by orders under this Act, including orders limiting a person’s ability to deal with the property, only through procedures ensuring persons who may be affected by the orders are given a reasonable opportunity to establish the lawfulness of the activity through which they acquired the relevant property rights.

We consider that all applications under the CPCA should involve a process by which the person who may be affected is given reasonable opportunity to establish the lawfulness of how he or she acquired the property.

8. Clause 42- insertion of s93ZC (Privilege—examination order)

The Bill makes provision for examination orders to be conducted. Proposed s93ZC(c) states that a person is not excused from answering a question or from producing a document or other thing on the ground that it would disclose information that is subject to legal professional privilege. Whilst this mirrors similar provisions found in other parts of the principal Act, the Society is nonetheless concerned that this fundamental principle is abrogated by this legislation.

9. Clause 42 - insertion of s93ZZB (Making of serious drug offender confiscation order)

The Society is concerned with the lack of judicial discretion available in the process, namely that the sentencing court must issue a serious drug offence certificate under proposed s161G of the *Penalties and Sentences Act 1992* if the court is satisfied that the person has been convicted of a prescribed serious drug offence or offences. Additionally, the court must make a serious drug offender confiscation order unless it is satisfied that it is not in the public interest to do so.

The Society strongly recommends that these aspects should be changed so that the court **may**, not must, use its powers in relation to these provisions. We consider that the court is best placed to determine whether the making of the order is appropriate in the particular circumstances of each case.

We note that the drug offences which fall under the operation of this scheme can take into account a wide range of factual situations. For example, the definition of 'supply' under the *Drugs Misuse Act 1986* can include doing or offering to do any act preparatory to, in furtherance of or for the purpose of giving, selling, distributing, administering or supplying a dangerous drug. With such a wide range of factual situations falling into definitions such as these, we strongly consider that the decision to issue a serious drug offence certificate must rest with the court looking at the facts of the case.

10. Inclusion of a threshold amount

The Society considers that there will be significant cost consequences to the State if no legislative guidelines exist on when applications should be brought. The costs of making an application would be significantly disproportionate where the person's assets are not substantial. We can foresee a situation where a person captured under this legislation has little to no assets or income. In these cases, making an application will be of little benefit. Therefore, the Society recommends that there should be a threshold amount for the value of a person's assets, under which applications for confiscation cannot be brought, for example \$25,000.

11. Legal representation in proceedings

We make the same representations as made earlier in this submission in relation to allowing for legal representation in these proceedings.

Amendments to the CPCA

12. Clause 20 - Amendment to s28(4), CPCA- application for restraining order

The Bill will propose to remove the requirement in s28(4), CPCA for the State to prove that the property belonging to a person who has engaged in external serious crime related activity was 'derived' from that serious crime related activity. This appears to be

proposed so that external serious crime related activity will be treated in the same way as serious crime related activity that takes place in Queensland.

The Society considers that there are appropriate policy reasons in place which treat external serious crime related activity differently from domestic serious crime related activity. The nature of this issue is such that investigating officers must be sure that it is appropriate jurisdictionally for Queensland to bring an application. Further, we consider that, in circumstances where the actual crime related activity does not take place in Queensland, the State should be held to a higher standard of accountability in terms of investigating the source of the property.

13. Clause 36 - Amendment to s83(2) and (3), CPCA- How particular amounts may be treated

The Bill will propose to remove the word 'an' before the words 'illegal activity' to clarify that the State is not required to prove a link between the proceeds and a specific illegal activity when obtaining a proceeds assessment order. The Society maintains that a link should be established between the commission of an offence and assets which may be dealt with under the CPCA.

14. Amendment of Chapter 8, Part 2, Division 3- Notices to financial institutions

The Bill will propose to widen the scope of information that may be obtained to include information that confirms the existence of an account in a certain name or names, the account number and the current account balance. We consider that the expansion of access to private financial records should be treated with sufficient regard to individual liberties and the protection of a person's information.

These proposed amendments will also include the ability for investigators to request immediate production of information in urgent circumstances where there is an imminent risk of funds being dissipated. We consider that there should be a minimum time frame in which the officer cannot ask for the information to be provided in, for example, three days after the giving of the notice (similar to what is contained in s214(1)(e)(ii), *Proceeds of Crime Act 2002* (Cth)).

Thank you for providing the Society with the opportunity to comment on these issues. Please contact our Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au or Jennifer Roan on (07) 3842 5885 or j.roan@qls.com.au.

Yours faithfully

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President