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Committee Secretary
Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

By Post and Email to: le.committee@aph.gov.au

Dear Committee Secretary

INQUIRY INTO COMMONWEALTH UNEXPLAINED WEALTH LEGISLATION AND ARRANGEMENTS

Thank you for providing Queensland Law Society ("the Society") with the opportunity to make comments in relation to the Inquiry into Commonwealth unexplained wealth legislation and arrangements.

The Society understands that one of the reasons for this Inquiry is that no cases under the current unexplained wealth laws have been brought before the courts, and the Committee is examining ways to improve the operation of unexplained wealth legislation. The *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010* was enacted in February 2010, roughly two years ago. Given the short time frame since the laws have been in effect, it is our view that there should be no substantial changes to the legislation. We do not consider that a period of two years without applications is altogether surprising or troublesome. For example, in Western Australia, although there were 12 unexplained wealth declarations made in the first two years of the operation of their unexplained wealth laws, there has also had a period of three years (2004-2007) where no declarations were made at all.[1] A more prudent approach would be to refrain from modifying the legislation until there are case examples to analyse.

We also highlight that Australian Transaction Reports and Analysis Centre (AUSTRAC) has law enforcement powers under which they are able to pursue civil penalty orders. This may have contributed to the lack of applications made under unexplained wealth laws. We support coordination between agencies administering complementary legislation.
With this in mind, the Society makes brief comments in relation to some of the Observations detailed in the Discussion Paper for your consideration.

[1] 'Unexplained wealth laws in Australia', Australian Institute of Criminology, Lorana Bartels, July 2010 found on page 2 at http://www.aic.gov.au/documents/2/0/D/%7B20D3B223-C146-4E10-B05F-B30D9E8F59D4%7Dtandi395_001.pdf.

1. Observation 2- threshold amount

The Discussion Paper examines the possibility of introducing a monetary threshold for unexplained wealth. The Society would be supportive of such a threshold as it could help to ensure that applications are limited and focus on the most serious instances of unexplained wealth. For example, we consider that subjecting drug traffickers, who traffick small amounts of cannabis, to unexplained wealth orders would be a wholly disproportionate reaction.

We point to the 2004 Western Australia case in which an elderly couple who were convicted of drug trafficking and had in their possession $7000 had their home seized under the Western Australian *Criminal Property Confiscation Act 2000.* The public backlash against the sometimes harsh application of unexplained wealth laws, as experienced in this case, could be avoided by ensuring that only the most serious cases are pursued.

2. Observation 2- linking unexplained wealth to the commission of an offence- national harmonisation of legislation

Constitutional issues mean that an unexplained wealth order must be linked to a Commonwealth offence, a State offence with a federal aspect or a foreign indictable offence. This has been cited as a key reason why it has been difficult to make applications under Commonwealth legislation.

One of the suggested solutions is to advance nationally harmonised laws. The Society is keen to ensure that any model legislation or guidelines have at their forefront the protection of individual civil liberties to the greatest degree possible. We have long opposed the idea of unexplained wealth laws for key reasons:

a. The reversal of the onus of proof; and
b. Applications are not brought on the basis of a conviction.

The Society considers the confiscation of assets to be a highly intrusive act. At the very least there must be robust protections against misuse of these laws.

We understand that there are resourcing and strategic reasons for developing a national approach but we remain concerned with the fundamental human rights issues that are raised by the proposed laws.

3. Observation 3- 'deeming provisions' and cash as a criminal commodity

The Society objects to the inclusion of 'deeming provisions' in cases where an individual has no explanation for amounts, or where the amounts are inconsistent with declared taxation amounts or are apparently obtained in years when no taxation returns were filed. We consider that the reversal of the onus of proof is a significant hurdle for an individual, and is unjust considering the vast investigative powers and resources that law enforcement bodies have in prosecuting these matters. A deeming provision would go much further and present a much more difficult burden for individuals captured under these laws.
For similar reasons the Society would object to laws creating a rebuttable presumption that large amounts of cash without adequate explanation is derived from criminal activity.

The Society can foresee that there are some circumstances where the application of 'deeming provisions' would be inappropriate. For example, an individual may refuse to disclose the source of their legally obtained wealth for reasons of embarrassment or in order to protect another person. Embarrassment

may occur, for example, where the individual has obtained money from legal gambling and does not want to disclose the source of their wealth to the community in order to protect their livelihood or reputation.

We consider that the correct balance needs to be struck between protecting innocent people from unjust operation of these laws, and making an impact on the profit-making of criminal activity. These proposals go too far in determining this balance.

4. Observation 5- time limit for serving notice

We agree with the proposal that the Commonwealth should be able to apply to the court for an extension of time for service to accommodate for extraordinary circumstances.

5. Observation 6- wealth measured over a lifetime

In the interests of providing a complete and holistic view of the person's sources of wealth, it is imperative that wealth continues to be measured over a lifetime in the unexplained wealth regime.

6. Observations 6, 7 and 8- judicial discretion

Currently the legislation contains judicial discretion for the court to refuse to make a restraining order, preliminary unexplained wealth order or an unexplained wealth order if it is not in the public interest to do so. The Society objects to the removal of judicial discretion in these provisions.

Firstly, the Society is of the view that judicial discretion is the cornerstone of our justice system. It allows courts to be responsive and flexible to the individual circumstances of a case.

We understand that one of the main arguments for removing the judicial discretion provision is that it will align unexplained wealth provisions with the other proceeds of crime schemes contained in the *Proceeds of Crime Act 2002*, which do not contain this discretion. We reject this argument because unexplained wealth orders are simply not the same as other orders in the legislation, and the stronger safeguards against misuse must be retained if the process is to be fair. No other scheme under the *Proceeds of Crime Act 2002* places the onus of proof on the individual. We view judicial discretion as an important check and balance in the process. These are exceptional laws which require strict oversight to ensure that the rights of individuals are not disregarded.

We also note that as there have not been any applications made it remains to be seen how this discretion will operate in practice. In our view, it would be arbitrary to remove the judicial discretion without any cause to do so i.e. – the case may be different if applications were being denied on the basis of public interest provisions. There is currently no evidence of this.

We strongly advocate that judicial discretion be maintained in the making of an unexplained wealth order under section 179E of the *Proceeds of Crime Act 2002.* This is the definitive order under which property can be seized and maintaining a public interest consideration at this point is essential for the protection of the individual against unjust use of these laws.

Observation 8 opines that perhaps judicial discretion could be replaced by 'appropriate statutory oversight arrangements'. We disagree that the same level of scrutiny and analysis of the facts of the case can be achieved with statutory oversight. During court proceedings, all relevant materials are presented before the judge who is in the best position to objectively consider the issues. It would be virtually impossible for statutory oversight, such as an annual examination of cases or an Ombudsman review, to have the same effect.

7. Observation 8- Nominated judicial officers

The Society agrees with this observation, as specialised judges will be better equipped to appreciate the complexities involved with proceeds of crime matters.

8. Observation 9- Legal Aid arrangements

We repeat our position that, in our view, unexplained wealth orders are unlike any of the other schemes in the Act and stronger protections for individuals must apply to this legislative process. In this scheme where an individual is expected to discharge the onus of proof, it is only just that the person be allowed to dispose of assets in order to meet their reasonable legal costs.

Whilst we understand the concern that allowing an individual to dispose of assets could be abused, we stress that it is only '**reasonable** legal expenses' (emphasis added) which are allowed for. This creates the appropriate barrier against misuse. Perhaps the better alternative to removing this provision would be to strengthen the court's ability to monitor the disposal of assets for reasonable legal expenses.

Other comments

9. Indemnity costs

The Society is supportive of section 179EB of the *Proceeds of Crime Act 2002* which states that if the court refuses to make a preliminary unexplained wealth order or an unexplained wealth order it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

We do not agree that there needs to be any "test" or guidelines set out to explain the circumstances in which indemnity costs will be granted, as this is a function of judicial discretion which can be decided appropriately by the court analysing the circumstances of the case. Clearly, the court will only order costs on an indemnity basis if it considers it to be appropriate. In practical terms it is only in rare circumstances that the courts make orders for indemnity costs.

10. Information sharing between Australian Taxation Office and law enforcement bodies

The Discussion Paper canvasses increased information sharing powers between law enforcement agencies and the Australian Taxation Office. As the *Crimes Legislation Amendment Bill (No. 2) 2011* has recently been passed, we urge the Committee to refrain from further exploring this issue until there is some considered feedback from the agencies regarding improvements to information sharing processes.

Thank you for the opportunity to provide comments in response to this important law reform issue. For any further information please contact our Senior Policy Solicitor, Ms Binari De Saram on (07) 3842 5885 or b.desaram@qls.com.au; or Policy Solicitor Ms Raylene D'Cruz on (07) 3842 5884 or r.dcruz@qls.com.au.

Yours faithfully

Dr John de Groot
President