THE LAW SOCIETY
OF SOUTH AUSTRALIA
THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

124 Waymouth Street, Adelaide, South Australia, 5000
GPO Box 2066, Adelaide, South Australia, 5001, DX 333
Phone 08 8229 0200 • Fax 08 8231 1929
Email email@lawsocietysa.asn.au • www.lawsocietysa.asn.au

8 February 2013

92.5
JW; ylh

Ms Julie Dennett
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
PO box 6100
Parliament House
CANBERRA ACT 2600

and via email: legcon.sen@aph.gov.au

Dear Ms Dennett

Inquiry into the *Crimes Legislation Amendment (Organised Crimes and Other Measures) Bill 2012*

I refer to your letter of 3 December 2012 inviting the Society to consider the Inquiry into the *Crimes Legislation Amendment (Organised Crimes and Other Measures) Bill 2012*.

Summary

The Society notes that these provisions concern unexplained wealth, as distinct from confiscation of proceeds of crime. The difference is an assumption behind unexplained wealth legislation, effectively: If a person cannot explain his wealth, he must have acquired it unlawfully.

That may state the assumption too simplistically. But it highlights the risk inherent in unexplained wealth legislation – that an owner of property is obliged to satisfy a court how he came to own it, at risk of confiscation if he fails.

The Society recognizes and agrees that there is a need to discourage crime by ensuring that convicted criminals or their associates do not profit from crimes, and that this need warrants effective steps to identify, trace and confiscate assets gained through crime.

That need must be balanced against the foreseeable injustice that results from measures which:

1. Confiscate assets which are not shown, on any evidentiary basis, to have been acquired with the proceeds of crime;

2. Reverse the onus of proof, and which require owners of property to prove the circumstances of acquisition of assets or be forcibly deprived of them.

The measures raise fundamental matters of principle. They:

- comprise a statutory presumption of, in effect, criminality to the origins of unexplained wealth,
- reverse the onus of proof (to the defendant);
- deny the right to silence,
- trespass on the right to the exclusive possession and enjoyment of one's assets, and
- apply the civil standard of proof for the making of the order (in what is, in substance, a criminal proceeding – see below).

Such principles should not be over-ridden for reasons of expediency.

The Society is asked to comment on proposed alterations to unexplained wealth legislation, not whether such legislation should exist. Nonetheless, we think it worth stating these matters of principle, despite their erosion by existing unexplained wealth legislation. At issue is the further reduction in the protections offered by these principles.

Other matters of principle are undermined by the proposed amendments:

- The practical effect of unexplained wealth proceedings is to force an owner to actively defend his interest. The innocent bear the risk and cost of defeating what may ultimately prove to be unwarranted applications. The amendments propose to prevent access to the assets under challenge to pay for defence. This infringes on the right to legal representation.
- The amendments compel a judicial officer to make orders sought by the applicant for an order. This is a fundamental inroad on judicial independence.

It is, we suggest, inappropriate to characterize unexplained wealth proceedings as 'civil' and so to distinguish them from criminal proceedings and associated rights. The confiscation of assets is plainly an adjunct to punishment, and is truly characterized as a penalty, although it may fall on associates rather than the primary offender.

The Society urges a principled approach to confiscation of the unexplained wealth. It suggests review of the powers available to prove a basis for confiscation, and the manner in which those powers are exercised, and opposes the proposed amendments.

Judicial Discretion

The Explanatory Memorandum speaks in support of the provisions denying judicial discretion by comparing them to other proceeds of crime legislation and stating that the safeguards built into the legislation/Bill are sufficient.

We, with respect, disagree. Firstly, even assuming the appropriateness of any proceeds of crime legislation mandating the will of the courts, the comparison with conventional proceeds of crime is not a valid one given the fundamental differences with unexplained wealth legislation. Secondly, the mere satisfaction of the criteria does not justify the making of an order. Such is the imbalance against the individual that a court may have good reason to decline to make an order.

In those cases where it does, reasons for declining will be given. If the reasons are not acceptable to the State the decision may be appealed or reviewed. Viewed in this light, there can be no proper justification for the removal of the judicial discretion. It should be noted the alarming tendency of the Executive arm of Government in legislating to impose its will on the judicial process at the expense of the will of the independent and impartial judiciary.

It follows that we also disagree with the suggestion that there are sufficient safeguards in the legislation to warrant mandating the judiciary in the manner proposed. The scope of the discretion in the Bill not to make the order is more confined than is presently the case.

Access to Justice

We consider it is imperative that individuals to be able to fund their defence to the draconian consequences of an unexplained wealth proceeding. The dilution of the presumption of innocence, and the reversal of onus, works to the great prejudice of the individual. The subject of an application may be accused of no crime, but is forced to contest a proceeding and prove ownership, with potentially far-reaching adverse consequences to the individual and family.

We therefore oppose the proposed amendments to the extent that they restrict in the ability of the individual to access his resources to obtain legal representation of his choosing.

Specific Provisions

- [clauses 1, 5, 13 and 16] sub-ss20A(1) and (5) and ss179B(1) and 179E(1) – remove judicial discretion: opposed (refer above);
- [clauses 2 and 20] repeal of sub-ss20A(3A) – (3C) and s179SA – access to justice: opposed (refer above);
- [clause 9] s45A(3A)(c) – This provision seeks to extend the life of a restraining order until appeal rights are extinguished. Appeals do not, nor should they, act as stays of execution. If the State intends to appeal then it is incumbent upon it to apply for an interim restraining order in the normal way;

- [clause 15] s179B(4) – we support the discretion in a court refusing to make an order where the unexplained wealth may be under $100,000, however it does not go far enough; and
- [clause 17] s179E(6)(b) – we recommend this provision be amended to mandate the refusal to make the order. Section 179E(6) provides that a court has the discretion to refuse to make an order if it is not in the public interest to make the order. Where a court is so satisfied, it not to make the order. No order should be made if it is not in the public interest. This is similar to the exercise of the prosecutorial discretion, which must be exercised against instituting a prosecution if it is not in the public interest.

Criminal Code

Aspects of the aggravated offences are vague and uncertain – arguably creating a single offence from a course of conduct.

Proposed s20A(1) deprives the Court of discretion.

We trust these comments are of assistance.

Yours sincerely

John White
PRESIDENT