Law Council
OF AUSTRALIA

Supplementary Submission – Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012

Senate Legal and Constitutional Affairs Committee

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Introduction

1. The Law Council is pleased to make a supplementary submission to the inquiry by the Senate Legal and Constitutional Affairs Committee (the Committee) into the *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill 2012* (Cth) (the Bill).

2. The Law Council made a submission to the Committee on 1 February 2013 and appeared at a hearing before it on 7 February 2013. At that hearing, the Law Council indicated that it may seek to make a supplementary submission to the Committee. The Attorney-General's Department (the Department) also appeared at that hearing and took a number of questions on notice. The Department provided a response to these questions on 27 February 2013. This supplementary submission seeks to address that response.

The 'public interest' and 'interests of justice' tests for the exercise of judicial discretion

3. In evidence before the Senate Legal and Constitutional Affairs Committee on 7 February 2013, the Law Council raised concerns about the manner in which two different tests, that is the "the public interest" test and the "interests of justice test", are used to define the scope of judicial discretion in relation to unexplained wealth orders in the *Proceeds of Crime Act 2002 (Cth)* (the Act).

4. The Law Council noted that the inconsistent use of these tests may become more significant if the *Crimes Legislation Amendment (Organised Crime and Other Measures) Bill* (the Bill) is passed and the court's general discretion to refuse to make an order is removed.

5. A summary of the relevant judicial discretions as they currently apply, and as they will apply, if the Bill is passed, is set out below in relation to unexplained wealth restraining orders, unexplained wealth preliminary orders and unexplained wealth orders.

- **<u>Unexplained Wealth Restraining Order</u>**

- Under section 20A of the Act, the court has a general discretion to refuse to make an unexplained wealth restraining order (i.e. the court *may* make an order if the statutory requirements are met but it is not compelled to do so.)
- Under section 20A(4) the court has a specific discretion to refuse to make an unexplained wealth restraining order if it is not in the "public interest" to do so.
- Under section 42, the court may revoke an unexplained wealth restraining order, on application by the person affected, if he or she was not notified of the original application for the order and the court is satisfied that it is in the "interests of justice" to do so.

If the Bill is passed:

- The court will not have a general discretion to refuse to make an unexplained wealth restraining order (i.e. the language of section 20A will change from "may" to "must") but will retain a specific discretion to refuse to make an order where it is not in the "public interest" or where the unexplained wealth amount is less than $100,000.

- The court will still have discretion to revoke an order where the person was not notified of the original application and the court is satisfied that it is in the "interests of justice" to revoke the order.

6. Therefore if the Bill is passed it will result in the following anomalies:

- A person who is notified of and contests an application for an unexplained wealth restraining order will, assuming other criteria are met and the amount concerned exceeds $100,000, only be able to resist the application if the court is satisfied that it is not in the "public interest" to make the order. He or she will not be able to rely on the "interests of justice" test.
- A person who is not notified of an application for an unexplained wealth restraining order, but who seeks to revoke the order after it is made, will be able to rely on the "interests of justice" test. However, he or she will not be able to rely on the "public interest" test.

- **<u>Unexplained Wealth Preliminary Order</u>**

- Under section 179B the court has a general discretion to refuse to make an unexplained wealth preliminary order (i.e. the court *may* make an order if the statutory requirements are met but it is not compelled to do so.)
- Under section 179C(5), the court may revoke an unexplained wealth preliminary order, if the court is satisfied that it is in the "public interest" to do so, or it is otherwise in the "interests" of justice to do so.

If the Bill is passed:

- The court will not have a general discretion to refuse to make an unexplained wealth preliminary order (i.e. the language of section 179B will change from "may" to "must").
- The court will only have the discretion to refuse to make an order where the unexplained wealth amount is less than $100,000.
- The court will still have discretion to revoke an order where the court is satisfied that it is in the "public interest" to do so, or it is otherwise in the "interests of justice" to do so.

7. Therefore if the Bill is passed it will result in the following anomalies:

- Assuming the other criteria are met, a person will only be able to contest and successfully resist the making of an unexplained wealth preliminary order on the basis that the unexplained wealth amount is less than $100,000.
- However, once an unexplained wealth preliminary order has been made a person will be able to apply to revoke the order on the basis either that the order is not in the "public interest" or that it is not in the "interests of justice".

- **<u>Unexplained Wealth Orders</u>**

- Under section 179E the court has a general discretion to refuse to make an unexplained wealth order (i.e. the court *may* make an order if the statutory requirements are met but it is not compelled to do so.)
- Under section 179E (6), the court has a specific discretion to refuse to make an unexplained wealth order if it is not in the "public interest" to do so.

If the Bill is passed:

- The court will not have a general discretion to refuse to make an unexplained wealth preliminary order (i.e. the language of section 179E will change from "may" to "must") but will retain a specific discretion to refuse to make an order where it is not in the "public interest" or where the unexplained wealth amount is less than $100,000

8. Therefore if the Bill is passed it will result in the following anomalies:

   - Assuming the other criteria are met, a person will be unable to successfully resist an application for a final unexplained wealth order, even where the making of the order is not in the "interests of justice".

9. On the basis of this analysis it appears to the Law Council that the effect of the Bill will be to remove the court's general discretion to refuse to make various unexplained wealth orders, despite no evidence that this discretion has caused difficulty or frustrated the implementation of the legislation. The Bill will also leave the court with an uncertain and inconsistent residual discretion which invites confusion and may be insufficient to avoid injustices.

10. In the answers supplied to the Committee to questions taken on notice, the Department acknowledges that the current Act contains reference to both the "public interest" and the "interests of justice" and contends that it is appropriate to retain references to both tests as they involve different considerations.

11. While it is asserted that the "public interest" and the "interests of justice" are different concepts, the substance of the difference is not addressed. The Department does not explain why one test (or neither test) is appropriate when prescribing the scope of the discretion to refuse to make an order, and the other is appropriate or both tests are appropriate when prescribing the scope of the discretion to revoke the order.

12. The Department explains that the insertion of "interests of justice" test into the Act was in response to the High Court's decision in *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCA 49 (the International Finance case). However, the High Court's decision related to a provision in the *Criminal Assets Recovery Act 1990* (NSW) (the NSW Act) which allowed the NSW Crime Commission to make an ex parte application for a restraining order preventing dealings in property suspected to have been derived from serious criminal related activity. Under the provision as it then stood, the Supreme Court of NSW was required to make the order if an officer deposed to grounds for suspicion and the court considered that the grounds were reasonable.

13. Further, under the NSW Act, if a restraining order was made, it could only be discharged if an associated application for forfeiture was no longer pending or if the affected party could prove that the property was not illegally acquired – a negative proposition of broad import. The majority of the High Court concluded that the relevant provision was 'repugnant to the judicial process in a fundamental degree' and was invalid.

14. Following the International Finance case, the NSW Parliament amended the NSW Act to: allow the court to provide notice to the affected party of the application for the restraining order; grant the affected party the right to be heard and to provide the court with discretion to set aside the order.

15. The Attorney-General's Department notes in its answers that the Act was also amended following the International Finance case to provide that unexplained wealth restraining orders and unexplained wealth preliminary orders could be revoked if the court was satisfied that it was in the "interests of justice" to do so.

16. The Department also notes that the "public interest" is a broad term that may include a range of interests such as public safety, the economic well being of Australia and the protection of the rights and freedoms of citizens. It is also observed that the "interests of justice" test allows the court to have regard to matters that are relevant to the administration of justice.

17. However, the Department does not discuss why the "public interest" is relevant to the making of an unexplained wealth restraining order but not to its revocation or why the "interests of justice" are relevant to the revocation of an unexplained wealth restraining order or a preliminary unexplained wealth order, but not to the making of either order.

18. These different tests, which will assume increased significance in the absence of a general discretion to refuse to make the relevant orders, invite confusion and litigation about the scope of the court's authority to refuse to make an order or to revoke an order in difficult or unusual circumstances. They create the possibility that a person contesting an application may be more limited in their ability to resist the order sought, than a person seeking to revoke the order after it has been made. Further, they create the possibility that a court may be compelled to make an order first, before it can then consider whether such an order is in the "interests of justice".

19. In the Law Council's view, ultimately, what is important is that the court has a sufficiently broad discretion to refuse to make an order if the outcome would be manifestly unjust or perverse on the facts of a particular case. No broader public policy issue should need to be enlivened. The Law Council submits that the "interests of justice" test probably better serves this purpose. However, both tests may also be used, as is currently the case in section 179C (application to revoke a preliminary unexplained wealth order).

20. The fact that the "public interest" test reflects the language currently used in section 20A (making of an unexplained wealth restraining order) and section 179E (making of an unexplained wealth order) is not a compelling argument for its retention. At present both those sections also afford the court a general, unconstrained discretion to refuse to make an order. It does not automatically follow that, if that general discretion is removed, the residual discretion should be framed by reference to the "public interest" test. Consistency with the corresponding revocation powers would suggest that an "interests of justice" test or a combined "interests of justice" and a "public interest" test is more apt. The Law Council suggests that the Committee should recommend that the relevant provisions be amended so that an "interests of justice" or a combined test is used consistently throughout the Act.

Legal Aid

21. In its submission of 1 February 2013 and its evidence of 7 February 2013, the Law Council raised concerns about the proposed repeal of subsections 20A (3A) to (3C) and section 179SA of the Act. These provisions give the court the discretion to allow the legal expenses of a person who is subject to unexplained wealth proceedings to be paid out of his or her restrained assets.

22. The Law Council submitted that these provisions have not been shown to be problematic and appear to be justified by the different nature of unexplained wealth proceedings. It also submitted that the provision of Legal Aid funding for persons subject to unexplained wealth proceedings is not adequate in the circumstances as there are significant restrictions on who may qualify for Legal Aid and on what expenses Legal Aid will meet. It is unlikely that Legal Aid will provide the same level of funding as the Commonwealth has available for such proceedings, particularly in terms of counsel, instructing solicitors and forensic accounting experts.

23. In its answers to the questions on notice, the Department did not provide details of any cases which indicate that the current arrangements for Legal Aid funding of such matters are working well. It merely observes that it is not aware of any significant concerns held by Legal Aid Commissions about the current arrangements.

24. No information has been provided about how many applications for legal aid for Commonwealth proceeds of crime matters have been received and granted or denied by Legal Aid Commissions.

25. No information has been provided about how difficult or otherwise it has been to manage the grant of legal aid in individual cases (for example, in making determinations about precisely what will be funded and to what degree);

26. Following extensive consultation with legal practitioners, including those working in Legal Aid Commissions, the Law Council has concluded that the national legal aid system is in crisis. Chronic underfunding means that only a very limited group of people qualify for legal aid and even those who do qualify for a grant of aid often receive legal assistance that falls well short of providing equality of arms.

27. In this context, no reliable assurance can be given that a person facing complex unexplained wealth litigation, and denied access to restrained assets to meet their legal costs, will both be entitled to and will receive a level of legal representation from Legal Aid which enables them to fairly contest the proceedings, particularly in view of the considerable resources expended by the Commonwealth in these matters. For these reasons, the Law Council suggests that the Committee should recommend that the relevant provisions allowing the court to grant access to restrained assets for unexplained wealth proceedings should not be repealed.

Conclusion

28. The Law Council thanks the Committee for the opportunity to make this supplementary submission and hopes that it is of assistance.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.