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Criminal Proceeds Confiscation
Submission 003

The Research Director
Legal Affairs and Community Safety Committee
Queensland Parliament

Email: lacsc@parliament.qld.gov.au

Dear Madam/Sir

Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Bill 2012

Thank you for the opportunity to make a submission in relation to this Bill.

As we see it the fundamental features of this legislation are:-

1. The Court would only need to be satisfied that there is a reasonable suspicion that a person has engaged in serious crime related activity in order for the Orders to be invoked.
2. Under the current laws the Court can only make an Order if the activity occurred within the past six (6) years. Under the new laws there would be no time limit.
3. There is a presumption that all of the person's current and previous wealth is unexplained.
4. The person may be required to be required to pay a sum equal to the value of the persons unexplained wealth, even though they may no longer have all the assets.

Legislation Unnecessary and Dangerous

In 2009 the Queensland Confiscation of Profits Legislation was significantly amended with the effect that whilst it was not as draconian as unexplained wealth legislation now being proposed, it was certainly more draconian than the standard Proceeds of Crime legislation in place throughout the country. No where have we seen any evidence presented that this legislation is failing to perform its task. In the circumstances we fail to see why already obnoxious and draconian legislation is to be replaced with more obnoxious and draconian legislation.

It is a fundamental principle of our society that private property is sacrosanct and should not be taken away lightly. In particular, citizens should not be deprived of their private property without proper process and yet in the Council's submission that is exactly that what this legislation does.

Firstly, it reverses the onus of proof and the presumption of innocence. By doing so it is contrary to two (2) of the fundamental safeguards at place in our legal system to prevent the arbitrary confiscation of private property by the State.

Citizens are in effect to have their property put at risk on the basis of the mere suspicion of a police officer. This is the apparatus of an authoritarian State.

It fails to deal with the situation of people who have not kept through no fault accurate records such as receipts, cheque books, credit card statements to support their purchases. A person's capacity to establish how they acquired their assets may be affected by age, cultural or linguistic circumstances or physical or mental incapacity.

The legislation gives rise to the risk of what Senator Brandis has referred to as "lazy policing".[1]

There is a very clear risk that these provisions will become an alternative to prosecutions under which the police are required to establish an offence beyond a reasonable doubt.

They could also become a device by which suspects who have not been co-operative with police, are harassed.

This regime threatens a subtle erosion of the double jeopardy principle by allowing individuals to be punished other than by criminal prosecution or where the prosecution has failed.

Guarantees by the police and other authorities that these powers will not be abused and are not sufficient. Our system is meant to be a system of rule of law and not rule of men. Our liberties should not be depended upon the scruples of individuals who may vary from time to time.

It is important to appreciate that these powers may extend to property in the hands of third parties making the possibility of unjust confiscation of private property much greater.

It is in our view clear that this legislation has increasingly made the Supreme Court a vassal of the State by removing or limiting the Court's discretion in relation to Orders and an obligation for the Court to act in a certain way without assessing the merits of the matter.

In effect, the office which will have a role of monitoring these applications will be the Director of Public Prosecutions. In our view this is not a sufficient safeguard.

In 2006 the High Court[2] described similar Western Australian legislation as "draconian in its operation and complex in civil liberty provisions"[3]

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[1] Senate Legal and Constitutional Affairs Legislation Committee Public Hearing on the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, 28 August 2009 at page 29
[2] Mansfield v DPP (WA) [2006] H C A 38
[3] Ibid paragraph 50

The Cost of Legal Defence

What follows in this submission up to the heading "Examination Orders" is based on a paper prepared for the Council by Mr Julian Wagner, Barrister-at-Law, its purpose was to identify some of the difficulties with the current legislation particularly in relation to Legal Aid as a way of warning that no doubt similar difficulties will confront the proposed Laws.

The Legal Costs and Legal Aid Predicament

The current legislation and the Bill preclude the Court from setting aside money from the assets of the Respondent to enable them to defend the proceedings.

The legislation, in principle, envisages that legal aid will be available to defendants where property is restrained.[4]

There is no guarantee legal aid will be granted. This is so despite restrained property not being taken into account in assessing a legal aid application under the Legal Aid Act.[5]

In short, legal aid will not be granted if the Legal Aid Office 'means test' determines that the defendant is not in need of such assistance. This will be the case where unrestrained assets exceed the limited 'assets ceiling' to justify grant of legal aid. The family home, for instance, might be the only asset not restrained. Yet its' equity value may deny an entitlement to legal aid.

A defendant may be forced to further mortgage the family home or sell it at a 'fire sale' loss where the family home, for instance, is also the abode of children and/or other innocent third parties.

By contrast, a defendant would ordinarily be granted legal aid where all of the defendant's property has been restrained by a 'global order.'[6] Oddly, a defendant would be better off in terms of getting legal aid if all of his or her property were restrained.

This invidious conundrum raising fundamental civil liberties concerns is due to the State, in effect, indirectly determining whether a defendant ultimately gets legal aid.

It is the only DPP, which has an unfettered discretion concerning the extent of property to be restrained, such that the DPP, by implication, effectively determines the likelihood of legal aid.[7] The Court has no say, least of all the defendant.

Any assumption that the State would ensure fairness in its approach to restraining orders and confiscation order generally can never be made. Furthermore, the usual requirement of an undertaking as to damages and/or costs as a condition of a

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[4] Section 31(5).

[5] As to legal aid assessments generally see the *Legal Aid Queensland Act* 1997

[6] Pursuant to an 'all property' or global order' under section 31(5) of the CPCA.

[7] See s 28(3) as to all or any property.

restraining order[8] is never, in reality, going to adequately compensate a defendant who is ultimately successful in a confiscation proceeding. By the time an undertaking is called upon, after a typically long and protracted proceeding, there is potentially irreparable damage. Furthermore costs are invariably never awarded on an indemnity basis.

One notable instance of a denial of legal aid in Queensland was where the defendant's remaining unrestrained asset was the family home. The defendant needed legal representation for both serious criminal charges and related complex confiscation proceedings. Yet the defendant, for various legitimate personal and economic reasons, was not in a position to sell the family home. Nor, it appears was the defendant able to raise a loan against the family home given his sudden unemployment due to the criminal proceedings.

In summary, the availability of legal aid and a defendant's predicament generally is at the whim of the State from the outset when a restraining order is sought.

Legal Aid – Inadequacy of Current Position.

At the outset, it is understood that Legal Aid (Qld) does not have an 'in house' specialist team dedicated to representing defendants subjected to Confiscation proceedings. It is also understood that the Legal Aid (Qld) is currently going through cost cutting measures and funding difficulties whereby the possibility of a specially trained team in the future is unlikely.

Secondly, if a grant of legal aid is approved for private representation, there is no certainty that a defendant will obtain adequate representation in this complex area of law.

In reality, there are only a handful of Queensland law firms and Counsel who have the expertise and high level of competence required to adequately represent clients in this complex area and a number of such lawyers are not prepared to take on such matters at legal aid rates. Legal aid rates fall well short of the reasonable market rate for legal fees even where a reasonable fixed fee basis is agreed under a legal costs agreement.

Barristers, for instance, are obliged by the so-called 'Cab Rank Rule' to accept a brief in a field that the barrister practices though the fee offered should be acceptable to the barrister.[9]

Any argument that lawyers simply always want to be paid more and are greedy holds no water in this arena.

Confiscation proceedings are often very time consuming and complex. Voluminous amounts of documentary and other evidence is not uncommon and then there's the ongoing need to contend with a team of State lawyers and investigators who are well versed in the machinations of Confiscation proceedings.

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[8] Section 32 CPCA.
[9] Rule 89 of the Barrister Rule 2007 (Qld).

Arguably, the complexity of confiscation legislation and proceedings requires a higher level of skill than might otherwise apply in civil litigation. In addition to being well versed with the Uniform Civil Procedure Rules (UCPR), there are numerous areas under the CPCA where competent legal representation is required. Hearings include various types of restraining orders, proceeds assessment orders, pecuniary penalty orders and various types of forfeiture orders as well as applications for hardship orders and exclusion orders (for 3rd parties or Respondents). Representation at Court ordered Examinations is also necessary as well as general out of Court involvement which now also includes the preparation and provision of a statement of 'property particulars.'

The non-availability of adequate legal representation also has the potential to cause grave difficulties even from the State's perspective. In England, for instance, there was a case where a defendant was granted legal aid but 30 barristers turned down the case because of the low fees. The defendant's assets had been frozen whereby he could not pay otherwise pay for representation. Ultimately, a confiscation order was set aside on the grounds that the defendant could not get legal representation.[10]

There is also a limit to legal aid funding not only in relation to legal representation. Forensic accountants, for instance, may need to be engaged by a defendant. Such extra professional services must, however, be shown to the Legal Aid Office as justified.

Another factor in this area which may cause lawyers to be hesitant in representing clients is the concern as to where payment does in fact come from when a defendant is 'somehow' able to pay fees at reasonable rates despite claiming to have had all of his or her assets restrained. This raises both ethical concerns and also concerns as to potential allegations of money laundering. Lawyers, needless to say, are far from exempted from requirements of accountability and the exercise of a search warrant on a law firm can be highly damaging to one's practice even if the lawyer is completely innocent.

Discretion

The Court has no power to refuse an Order except where the Court finds that it is in the public interest not to make an Order. The amorphous concept of the 'public interest', however, is not defined. It is unclear, therefore, whether the 'public interest' proviso includes, for instance, the public interest that a person is entitled to a fair trial by being given legal aid and adequate legal representation. Nor is it clear whether there can be various competing public interests whereby the Court must decided upon a dominant public interest. So far, it has been held that the lack of proportionality between the property sought to be restrained and the alleged offences was not a 'public interest' basis to forestall the making of a restraining order.[11]

Where there is no provision for adequate legal representation, it is not inconceivable that a *Dietrich* type argument[12] will one-day soon be accepted by the Supreme Court. This might either be based on the 'public interest' proviso (which also appears

[10] *The Times* 28 October 2009.
[11] *Queensland v Kupfer* [2003] QSC 458
[12] See *Dietrich v The Queen* (1992) 177 CLR 292 and the Queensland decision of *R v East* [2008] QCA 144 where Keane JA (as the new High Court Justice then was) observed that a defendant was disadvantaged by not having legal representation.

elsewhere in the CPCA) or under the Supreme Court's general and/or inherent jurisdiction. It has already been seen that in England a Court refused to make a confiscation order where a defendant was unrepresented.

Dietrich, of course, concerned criminal proceedings. In our view as stated above confiscation proceedings are in reality criminal proceedings. Perhaps a Court will prepared one day to side step the legislative fiction that confiscation orders are not a form 'punishment.'[13] However if the legislature were truly being attentive to the basic liberties of citizens this would not be necessary.

Lastly, Courts are conscious of the ever-increasing numbers of self-represented defendants and litigants generally. This places more onerous requirements on the judiciary and also adds to the cost and time it takes to justly hear and determine proceedings.

Examination Orders

These Orders are strenuously objected to by the Council. They infringe on the right to silence and exclude legal professional privilege. The mere suspicion that a person may have information or assets derived from the suspected criminal activities may be sufficient for them to be compelled to answer questions.

Under these provisions family members, associates, colleagues and even legal representatives can be cross-examined in relation to Unexplained Wealth Orders and related proceedings.

This is entirely unacceptable. There are already more than sufficient ways by which the police can run around the privilege against incrimination and other privileges to be found at common law. These provisions will be abused in the same way that powers allocated to the CMC have been consistently in our view abused.

Amendments to the bill

Having set out our clear and principled objections to this legislation, we make the following suggestions for amendments to the Bill.

Firstly, the Court should be given a general discretion to refuse an Order.

Secondly, the court should be able to allow the Defendant to pay their legal costs from the restrained assets, subject to assessment by an independent costs assessor.

Thirdly, the threshold for commencing an Unexplained Wealth Proceeding in the current Bill is "reasonable suspicion". The concept of a reasonable suspicion has been described as "state of conjecture or surmise", or a "slight opinion but without sufficient evidence": *George v Rockett* (1990) 170 CLR 104 at 115. That is a very low bar. The standard should be raised from a reasonable suspicion to a "reasonable belief" that a person has unlawfully acquired wealth. This was the recommendation of the Senate

[13] Section 9 CPCA.

Legal and Constitutional Affairs Legislation Committee in relation to the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009.*

Fourthly, the Director of Public Prosecutions should have the legal burden of proof and the respondent should only have an evidential burden.

In any Application for an Unexplained Wealth Order, the Applicant should as suggested by Senator George Brandis be required to explain why a criminal prosecution has not been brought or if it has why it has failed[14]. Following on from that, the Court should be given a power to stay any confiscation proceedings until criminal proceedings have been concluded or decline to make an Order if it feels that the process is simply being used as an attempt to avoid the requirements of a Criminal trial.

A time limit should be imposed of say six (6) years as is contained in the current legislation or twelve (12) years as had been suggested by Mr Tom Sherman.

An asset threshold should be introduced as is found in Ireland and the UK.

This legislation is consistently justified on the basis that it is designed to attack organised crime. As is the case in Canada, it should be a requirement that there is proof of some connection between the subject of the Order and the "gang" or criminal organisation with which they are supposed to be associated.

Summary

It is said that confiscation of profits legislation is justified as providing a more effective tool against organised crime than ordinary prosecutions. Even if this were accepted as correct unexplained wealth laws go too far. This legislation will effectively render every person in this State liable to be brought before a Court to demonstrate that their assets are lawfully acquired. Such broad powers are liable to be abused or arbitrarily applied.

There used to be a common expression particularly amongst people on the left of politics that every person who becomes a millionaire must have committed a crime. There would be nothing to prevent some future government which held that view from using this legislation on the basis of trumped up charges or allegations to call everyone who might have more than a million dollars before a Court to explain why their wealth shouldn't be expropriated.

We trust this is of assistance to you in your deliberations.

Michael Cope
Executive Member
Queensland Council for Civil Liberties
8 February 2013

[14] See the comments at page 33 of the transcript referred to previously