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# Inquiry into Commonwealth unexplained wealth legislation and arrangements – Discussion Paper

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## **Parliamentary Joint Committee on Law Enforcement**

**31 January 2012**



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## Acknowledgement

The Law Council acknowledges the assistance of its Criminal Law Committee in the preparation of this submission.

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## Executive Summary

1. The Law Council accepts that the purpose of unexplained wealth legislation is to try and disrupt criminal enterprises by targeting those who may have benefitted from crime and live beyond their apparent means but are at arms' length from the actual commission of offences. However, the Law Council also believes that it is crucial that any legislation that seeks to enable the ultimate confiscation of assets by the State, balances this objective with the need to adhere to fundamental rule of law and human rights principles. The Law Council has some concerns about a number of the proposals in the Discussion Paper and the extent to which they adhere to these fundamental principles.
2. The Law Council is also concerned about the necessity of some of the proposals in the Discussion Paper. In particular, whether it is really necessary to clarify the objects clause in the *Proceeds of Crime Act 2002 (PoCA)*; and whether it is necessary to place the unexplained wealth provisions in stand alone legislation.
3. The Law Council submits that the need to link the Commonwealth unexplained wealth legislation to a Commonwealth offence, a foreign indictable offence, or a State offence with a Federal aspect, should be retained.
4. The Law Council also submits that respondents who are the subject of unexplained wealth investigations should be able to access restrained assets for the purposes of funding their legal costs. This is particularly important given the reverse onus of proof that applies in these matters.
5. The Law Council reiterates its previous concerns in relation to unexplained wealth legislation at the Commonwealth, State and Territory levels. Specifically, that these provisions:
  - Undermine the presumption of innocence and reverse the onus of proof;
  - Infringe the right to silence;
  - Have the potential for arbitrary application;
  - Create prosecutorial difficulties; and
  - Are unnecessary in light of other confiscation mechanisms.
6. Accordingly, the Law Council does not support harmonisation of unexplained wealth legislation at this time.
7. Finally, the Law Council maintains the view that it is too early to properly review the operation of the unexplained wealth provisions given the absence of court proceedings involving the provisions and the fact that the Commonwealth provisions have only been in operation for less than two years.

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## Introduction

8. The Law Council is pleased to provide the following submission to the Parliamentary Joint Committee on Law Enforcement (the Committee) in response to its November 2011 Discussion Paper on Commonwealth Unexplained Wealth Legislation and Arrangements (the Discussion Paper).
9. The Law Council notes that the purpose of the Discussion Paper is to provide the Committee with further information about some of the suggestions that have been put to the Committee over the course of its current inquiry into legislation and administrative arrangements relating to unexplained wealth.<sup>1</sup>
10. The Law Council notes that the previous Parliamentary Joint Committee on the Australian Crime Commission (the ACC Committee) examined the concept of unexplained wealth provisions in two inquiries. In 2007, the ACC Committee inquired into the impact of serious and organised crime and in 2008 the ACC Committee inquired into legislative arrangements to outlaw serious and organised crime groups.<sup>2</sup> The Law Council made a submission to the 2008 inquiry and answered questions on notice in relation to that inquiry, including a question relating to state and territory unexplained wealth provisions.<sup>3</sup>
11. The Law Council also notes that the Senate Legal and Constitutional Affairs Legislation Committee inquired into unexplained wealth provisions when they were introduced in the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2010* (the SOC Bill).<sup>4</sup> The Law Council made a submission to and gave evidence at that inquiry.<sup>5</sup>
12. The Law Council made a submission to the current inquiry on 17 August 2011 noting that the key terms of reference from its perspective were the effectiveness and operation of Commonwealth unexplained wealth legislation and administrative arrangements, as well as the likely effectiveness of

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<sup>1</sup> See Parliamentary Joint Committee on Law Enforcement, *Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements Discussion Paper*, November 2011, p. xxi. Available from [http://www.aph.gov.au/Senate/committee/le\\_ctte/unexplained\\_wealth/discussion/discussion\\_paper.pdf](http://www.aph.gov.au/Senate/committee/le_ctte/unexplained_wealth/discussion/discussion_paper.pdf)

<sup>2</sup> See Parliamentary Joint Committee on the Australian Crime Commission, *Report on the Inquiry into the future impact of serious and organised crime on Australian society*, September 2007. Available from [http://www.aph.gov.au/Senate/committee/acc\\_ctte/completed\\_inquiries/2004-07/organised\\_crime/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_ctte/completed_inquiries/2004-07/organised_crime/report/report.pdf). See also Parliamentary Joint Committee on the Australian Crime Commission, *Report on the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009. Available from [http://www.aph.gov.au/Senate/committee/acc\\_ctte/laoscg/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/report/report.pdf)

<sup>3</sup> See Law Council of Australia Submission to the Parliamentary Joint Committee on Law Enforcement's *Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, June 2008. Available from [http://www.aph.gov.au/Senate/committee/acc\\_ctte/laoscg/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_ctte/laoscg/report/report.pdf)

<sup>4</sup> See Legal and Constitutional Affairs Legislation Committee, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, September 2009. Available from [http://www.aph.gov.au/senate/committee/legcon\\_ctte/organised\\_crime/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/report/report.pdf)

<sup>5</sup> See Law Council of Australia Submission to the Legal and Constitutional Affairs Legislation Committee on the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, August 2009. Available from [http://www.aph.gov.au/senate/committee/legcon\\_ctte/organised\\_crime/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/organised_crime/report/report.pdf). See also Senate Legal and Constitutional Affairs Committee Hearing Transcript, 28 August 2009. Available from <http://www.aph.gov.au/hansard/senate/committee/S12374.pdf>

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proposed Commonwealth unexplained legislation. The Law Council noted that in the absence of proceedings under the legislation it was unable to comment on its effectiveness and operation. The Law Council also noted that in the absence of draft proposed legislation it was also unable to comment on its likely effectiveness.<sup>6</sup>

13. The Law Council notes that when the PoCA was reviewed by Tom Sherman AO in 2006 he commented that three and a half years of operation was a relatively short time in which to assess the impact of legislation as complex as the Act, particularly having regard to the time it can take to develop the resources and skills necessary to effectively implement the legislation.<sup>7</sup> However, a statutory review was required after three years and Mr Sherman made a number of recommendations for amendments to PoCA which were subsequently adopted.
14. As noted in the Discussion Paper, the unexplained wealth provisions have been in operation for less than two years. The Law Council maintains the view that it is too early to properly review the operation of the unexplained wealth provisions. However, as the Committee has received a number of submissions and heard evidence in relation to the inquiry, which forms the basis of the Discussion Paper, the Law Council will provide some comments in relation to the Discussion Paper. The Law Council may be able to make further comments if proceedings are taken under the legislation or draft legislation is released publicly.
15. The Law Council has also made submissions on proceeds of crime legislation more generally including:
  - Submission to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the *Crimes Legislation Amendment Bill (No.2) 2011*<sup>8</sup> on 14 July 2011; and
  - Submission to the Attorney-General's Department on Proposed Amendments to the *Proceeds of Crimes Act 2002*.<sup>9</sup>

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<sup>6</sup> See Law Council Submission to the Parliamentary Joint Committee on Law Enforcement's *Inquiry into Commonwealth Unexplained Wealth and other Arrangements*, 17 August 2011. Available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=130358C5-FD11-C2D1-8447-BAD6571EA07F&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=130358C5-FD11-C2D1-8447-BAD6571EA07F&siteName=lca)

<sup>7</sup> See Tom Sherman AO, *Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002*, July 2006, p.13. Available from [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF/\\$file/5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF/$file/5POCA+report+-+Sherman+review+-+PDF+version+-+prelims.PDF)

<sup>8</sup> See Law Council of Australia Submission to the Senate Standing Committee on Legal and Constitutional Affairs' *Inquiry into the Crimes Legislation Amendment Bill (No.2)*, 14 July 2011. Available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=40A4BF0A-0D4D-10C9-3FE4-19BD3ABFA099&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=40A4BF0A-0D4D-10C9-3FE4-19BD3ABFA099&siteName=lca)

<sup>9</sup> See Law Council of Australia Submission to the Attorney-General's Department, *Proposed Amendments to the Proceeds of Crime Act 2002*, 5 March 2009. Available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uid=33199793-1E4F-17FA-D2F2-D51954748808&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=33199793-1E4F-17FA-D2F2-D51954748808&siteName=lca)

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16. The Law Council notes that it has raised the following concerns in relation to unexplained wealth legislation in the past, specifically that these provisions:
- Undermine the presumption of innocence and reverse the onus of proof;
  - Infringe the right to silence;
  - Have the potential for arbitrary application;
  - Create prosecutorial difficulties; and
  - Are unnecessary in light of other confiscation mechanisms.
17. Whilst the Law Council accepts that the purpose of unexplained wealth legislation is to “attack the business model that underpins criminal enterprise,”<sup>10</sup> the Law Council also believes that it is crucial that any legislation that seeks to enable the confiscation of assets by the State, balances this objective with the need to adhere to fundamental rule of law principles such as natural justice and procedural fairness.<sup>11</sup>
18. The Law Council’s submission will focus on the following issues:
- Whether the ‘objects’ clause of the PoCA should be made more explicit, particularly in relation to the purpose of unexplained wealth laws and the definition of serious and organised crime;
  - Whether the need to link a Commonwealth offence to unexplained wealth proceedings should be retained;
  - Whether it would be appropriate to deem certain types of unexplained wealth to be unlawfully obtained or treat large amounts of unexplained cash as a criminal commodity;
  - Whether respondents should be prevented from using their restrained assets to pay for their legal expenses incurred in unexplained wealth proceedings under the PoCA;
  - Whether it would be appropriate to separate the unexplained wealth provisions from the Proceeds of Crime ACT 2002 (the PoCA) and place them in stand alone legislation; and
  - Whether the Commonwealth and State and Territory laws should be harmonised.

## Suggested changes to the unexplained wealth provisions

### **Making the *Proceeds of Crime Act* more explicit**

19. The Law Council notes the Committee’s observation that it may be advantageous to clarify the objects of the PoCA so that the Act more clearly enunciates that one of its additional purposes is to address serious and

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<sup>10</sup> Parliamentary Joint Committee on Law Enforcement Hearing into Commonwealth Unexplained Wealth Legislation and Arrangements, Official Committee Hansard, 4 November 2011, p36. Available from <http://www.aph.gov.au/hansard/joint/committee/j429.pdf>

<sup>11</sup> See Ben Clarke, ‘A man’s home is his castle – or is it?’ *Criminal Law Journal* 2004, Vol 28, p 264

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organised crime through unexplained wealth provisions by undermining the profit motive.<sup>12</sup>

20. This observation appears to be made in response to a submission by the Australian Crime Commission (ACC) that a statement of clear and unambiguous objectives should be made in the PoCA to remove doubt regarding Parliament's intention as to the operation of the unexplained wealth provisions and to provide clarity as to the basis on which judicial discretion is exercised.
21. The Law Council suggests that in the absence of proceedings under the PoCA, it is difficult to see how doubt can have arisen as to Parliament's intention regarding the operation of the relevant provisions. It is also difficult to understand why clarity is sought when judicial discretion has not yet been exercised under the provisions.
22. The Law Council notes that the objects section already contains several references to purposes relating to unexplained wealth.
23. The principal objects of the PoCA are currently described as:
  - *to deprive persons of the proceeds of offences, the instruments of offences, and benefits derived from offences, against the laws of the Commonwealth, or the non-governing Territories; and*
  - *to deprive persons of literary proceeds derived from the commercial exploitation of their notoriety from having committed offences; and*
  - *to deprive persons of \*unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences; and*
  - *to punish and deter persons from breaching laws of the Commonwealth or the non-governing Territories; and*
  - *to prevent the reinvestment of proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts in further criminal activities; and*
  - *to enable law enforcement authorities effectively to trace proceeds, instruments, benefits, literary proceeds and unexplained wealth amounts; and*
  - *to give effect to Australia's obligations under the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and other international agreements relating to proceeds of crime; and*

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<sup>12</sup> Op.cit, *Unexplained Wealth Discussion Paper*, November 2011, p. 38.

- *to provide for confiscation orders and restraining orders made in respect of offences against the laws of the States or the \*self-governing Territories to be enforced in the other Territories.*<sup>13</sup>

24. The objects clause already describes three of the purposes of the PoCA as being to “deprive persons of unexplained wealth amounts that the person cannot satisfy a court were not derived from certain offences”;<sup>14</sup> “prevent the reinvestment of ... unexplained wealth amounts in further criminal activities;”<sup>15</sup> and “to enable law enforcement authorities to effectively trace ... unexplained wealth amounts”.<sup>16</sup>
25. The Law Council also notes that the second reading speech relating to the PoCA Bill referred to the introduction of the civil forfeiture scheme as directed at criminal organisations and persons distancing themselves from individual criminal acts and placing their profits beyond conviction based schemes.<sup>17</sup>
26. In the second reading speech on the SOC Bill which introduced the unexplained wealth provisions, the then Attorney-General referred to the Bill addressing the threat posed by organised criminal activity. The explanatory memorandum also referred to the unexplained wealth provisions being necessary to target senior organised crime figures.<sup>18</sup>
27. The relevant reports of the ACC Committee and the Senate Legal and Constitutional Affairs Committee also referred to the aims of the unexplained wealth provisions in addressing serious and organised crime.<sup>19</sup>
28. Section 15AB of the *Acts Interpretation Act 1984* (Cth) provides that the explanatory memorandum and the second reading speech may be used in the interpretation of a provision if it is ambiguous. It also provides that reports of parliamentary committees may be used to assist in interpretation.
29. In the light of the existing provisions in the objects section, the content of the relevant second reading speeches and explanatory memorandum and the relevant reports of the ACC Committee and the Senate Legal and Constitutional Affairs Legislation Committee, it appears to the Law Council that it may not be necessary to clarify the objects as suggested. However, if the Committee makes such a recommendation, the Law Council may wish to

<sup>13</sup> S.5, *Proceeds of Crime Act 2002*

<sup>14</sup> *Ibid.*, S.5(ba)

<sup>15</sup> *Ibid.*, S.5(d)

<sup>16</sup> *Ibid.*, S.5(e)

<sup>17</sup> House of Representatives Hansard, 13 March 2002 at p 1112. Available from [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F2002-03-13%2F0025;orderBy=\\_fragment\\_number.doc\\_date-rev;page=3;query=Dataset%3Ahansardr.hansardr80%20Decade%3A%222000s%22%20Year%3A%222002%22;rec=14;resCount=Default](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=CHAMBER;id=chamber%2Fhansardr%2F2002-03-13%2F0025;orderBy=_fragment_number.doc_date-rev;page=3;query=Dataset%3Ahansardr.hansardr80%20Decade%3A%222000s%22%20Year%3A%222002%22;rec=14;resCount=Default)

<sup>18</sup> Explanatory Memorandum, *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*. Available from <http://www.comlaw.gov.au/Details/C2009B00131/Explanatory%20Memorandum/Text>

<sup>19</sup> *Op.cit.*, *Report on the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, September 2009. Available from [http://www.aph.gov.au/senate/committee/legcon\\_cte/organised\\_crime/report/report.pdf](http://www.aph.gov.au/senate/committee/legcon_cte/organised_crime/report/report.pdf). See also Parliamentary Joint Committee on the Australian Crime Commission, *Report on the Inquiry into the legislative arrangements to outlaw serious and organised crime groups*, August 2009. Available from [http://www.aph.gov.au/Senate/committee/acc\\_cte/laosccg/report/report.pdf](http://www.aph.gov.au/Senate/committee/acc_cte/laosccg/report/report.pdf)

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comment on the wording of such a provision in any draft legislation in relation to which public submissions are called for.

## Minimising the need to prove a Commonwealth offence

30. The Law Council notes that a number of law enforcement agencies have expressed concern about the Commonwealth unexplained wealth legislation needing to be connected to a Commonwealth offence, a foreign indictable offence or a State offence with a federal aspect before the unexplained wealth provisions can be used. Law enforcement agencies appear to have a particular problem with the need to demonstrate a link between the:
- “person/wealth and a crime which may effectively impose an onus of having to make out a predicate offence before unexplained wealth action can be taken”; and
  - “person/wealth and a crime within the Commonwealth’s legislative power which means that wealth derived from State offences that do not have a federal aspect will not be captured by the Commonwealth scheme”.<sup>20</sup>
31. Accordingly, the Committee is seeking further information as to how the operation of the unexplained wealth provisions could be improved in light of constitutional requirements.
32. The Law Council submits that in order for the legislation to be constitutionally valid, it needs to be supported by a head of Commonwealth constitutional power. The Attorney-General’s Department would appear to agree in this regard, having stated that it “...would have some significant issues with the link being removed”; that “there would be a real risk of a successful challenge on constitutional grounds”; and that the Department may “be perceived to be acting without power if we were simply acting to restrain someone’s assets and there was not a clear reason why the Commonwealth should be empowered to do that.”<sup>21</sup>
33. In determining whether a law is constitutionally valid, the court will consider whether the law is within one of the Constitutional heads of power that the Parliament is permitted to make laws in relation to.<sup>22</sup>
34. The High Court has held that “a Commonwealth law of general application providing for the taking of property for which fair compensation is incongruous or anomalous can be valid only if that law may be fairly characterised as falling wholly within one of the enumerated heads of Commonwealth legislative power.”<sup>23</sup>

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<sup>20</sup> Australian Federal Police, *Submission to the Parliamentary Joint Committee on Law Enforcement’s Inquiry into Unexplained Wealth*, October 2011, pp.5-6. Available from [http://www.afp.gov.au/Senate/committee/le\\_ctte/unexplained\\_wealth/submissions.htm](http://www.afp.gov.au/Senate/committee/le_ctte/unexplained_wealth/submissions.htm)

<sup>21</sup> Op.cit., Hearing into Commonwealth Unexplained Wealth Legislation and Arrangements, 4 November 2011, pp.35-36.

<sup>22</sup> *Airservices Australia v Canadian Airlines International Ltd* (1999) 202 CLR 133 at [343]-[344] cited in *Dickfoss v DPP & Ors* [2012] NTCA 1 at para 59.

<sup>23</sup> *Ibid.*, at [98]-[99],[148]-[149], [157]-[158],[342],[345],[347],[487]-[490]

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35. For this reason, the Law Council submits that the need to link the Commonwealth unexplained wealth legislation to a Commonwealth offence, a foreign indictable offence, or a State offence with a Federal aspect, should be retained.

### **Deeming certain types of unexplained wealth to be unlawfully obtained**

36. The Law Council notes the recommendation by the ACC in the Discussion Paper to introduce express provisions or presumptions to deem amounts of money which:

- an individual cannot explain; or
- which are inconsistent with levels of income declared in tax returns; or
- obtained in years for which no tax return was filed

as illegally obtained.<sup>24</sup>

37. The Discussion Paper also notes another recommendation by the ACC regarding the introduction of laws which, in appropriate circumstances, would treat cash as a criminal commodity by creating a rebuttable presumption that possession of large amounts of cash without adequate explanation is connected to criminality.<sup>25</sup> The Law Council notes the Committee is seeking information on the advantages and disadvantages of these proposals.
38. The motivation behind these suggested reforms appears to be a perceived need by law enforcement agencies to overcome the “difficult investigative burden”<sup>26</sup> they have encountered when considering whether a person’s wealth has been legitimately or illegitimately acquired under the current unexplained wealth provisions.
39. The Law Council has a number of concerns with these suggestions, particularly in relation to the significant impact that the introduction of these types of express provisions or presumptions could have on a person’s rights and indeed, livelihood.
40. One of the risks of introducing express provisions or presumptions to deem amounts of money as illegally obtained or connected to criminality is that these types of provisions may capture the behaviour of individuals who lack capacity to explain how they acquired particular amounts of money perhaps due to age, cultural and linguistic background or physical or mental incapacity. In relation to cultural and linguistic background, the ACC suggested in evidence to the Committee that one scenario where someone

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<sup>24</sup>Op. cit., *Unexplained Wealth Discussion Paper*, November 2011, p. 47.

<sup>25</sup> Ibid. See also Australian Crime Commission, *Submission to Parliamentary Joint Committee on Law Enforcement’s Inquiry into Unexplained Wealth Legislation*, 23 August 2011, p.4. Available from [http://www.aph.gov.au/Senate/committee/le\\_ctte/unexplained\\_wealth/submissions.htm](http://www.aph.gov.au/Senate/committee/le_ctte/unexplained_wealth/submissions.htm)

<sup>26</sup> Op. cit., Hearing into Commonwealth Unexplained Wealth Legislation and Arrangements, 4 November 2011, p.13.

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may not be able to explain how they accumulated assets would be a refugee who liquidates assets in the country from which he or she is fleeing and then arrives in Australia.<sup>27</sup>

41. Another risk of introducing these types of express provisions or presumptions is that they may also capture the behaviour of people who have simply failed to keep receipts or records, have made errors in tax returns or have not filed tax returns for legitimate reasons, such as illness.
42. Given the implications that these types of express provisions or presumptions could have on a person's life, the Law Council believes that judicial discretion and oversight in assessing unexplained wealth should not be constrained. Indeed, "in the common law tradition, the power to deprive a person of property may not be exercised in an arbitrary manner (and) any decision to take someone's property should be reviewable by the courts."<sup>28</sup>
43. The ACC submission does not detail what would constitute 'appropriate circumstances', or a 'large amount of cash' in relation to the creation of a rebuttable presumption to treat cash as a criminal commodity. The ACC submission also does not provide any further detail of the express provision to deem money to be illegally obtained in certain circumstances.
44. The broad nature of these proposals would appear to be "prima-facie in conflict with norms such as the sanctity of property ownership, freedom of citizens from unnecessary interference by the state and the right to privacy."<sup>29</sup> Accordingly, the Law Council does not support them.

### **Preventing legal expenses from being met from restrained property**

45. The Law Council notes the Committee's observation that the provisions relating to legal expenses could be harmonised with other proceeds of crime provisions so that respondents have to apply for access to legal aid rather than using restrained assets to fund their legal costs in unexplained wealth matters.<sup>30</sup>
46. The Law Council notes that this proposal was raised by the Australian Federal Police (AFP) and Australian Crime Commission (ACC) in their submissions to the Committee in October 2011 and August 2011 respectively, due to a belief that provisions allowing legal expenses to be paid for out of restrained property could be exploited to "deliberately frustrate the objectives of the scheme and dissipate property through protracted litigation".<sup>31</sup>
47. The Law Council does not agree with this suggestion, and submits that respondents should continue to have access to restrained assets so that they

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<sup>27</sup> Op.cit., *Unexplained Wealth Discussion Paper*, November 2011, p. 27.

<sup>28</sup> Op. cit., 'A man's home is his castle – or is it?', p.263.

<sup>29</sup> Ibid.

<sup>30</sup> Op. cit., *Hearing into Commonwealth Unexplained Wealth Legislation and Arrangements*, 4 November 2011, p.57.

<sup>31</sup> Op. cit., *AFP Submission to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Unexplained Wealth*, p.15.

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retain an appropriate degree of control over their choice of legal representative.

48. Everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.<sup>32</sup> Indeed, the right to choose your own legal representation is a fundamental aspect of the right to a fair trial and is recognised as such under Article 14(3)(d) of the *International Covenant on Civil and Political Rights*.
49. Respondents involved in unexplained wealth proceedings, and indeed other proceedings under the PoCA should be able to make an application to the court to have restrained assets released to meet legal costs. This approach ensures that people whose assets are restrained, retain an appropriate degree of control over their choice of legal representatives and relieves the burden for legal aid commissions of dealing with such matters, which are often outside their core functions.
50. Under the PoCA, if the court orders that property is to be restrained under an unexplained wealth restraining order, the court may order that specified property may be disposed of or otherwise dealt with for the purposes of meeting a person's reasonable legal expenses arising from an application under this Act.<sup>33</sup> This differs from other proceeds of crime proceedings under the PoCA, where the court is unable to make an order that a respondent's legal costs be met out of restrained property, and respondents must apply for legal aid instead.<sup>34</sup>
51. The Law Council has previously expressed its concerns in relation to the increased pressure that is placed on Legal Aid Commissions as a result of the complex and resource-intensive nature of proceeds of crime proceedings. Indeed, "the resources expended on these matters have the potential (without full recovery) to impact negatively on the core business and priorities of the Commission, which is primarily about serving socially and economically disadvantaged clients."<sup>35</sup>
52. Whilst the Law Council would like to see the PoCA amended so that respondents are able to access restrained assets for the purposes of funding their legal costs for all proceeds of crime proceedings under the PoCA, the Law Council submits that it is particularly important that such a provision is retained in relation to unexplained wealth matters, which involve a reverse onus of proof.
53. One of the other concerns raised by the AFP in their submission to the Committee was that the provision in the PoCA that enables a court to engage

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<sup>32</sup> Law Council of Australia, *Policy Statement on the Rule of Law Principles*, March 2011, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca)

<sup>33</sup> S.20A(3A), *Proceeds of Crime Act 2002*

<sup>34</sup> *Ibid.*, S.24(2)(ca).

<sup>35</sup> NSW Legal Aid Commission submission to the Sherman Review, cited in the Law Council of Australia Submission to the Senate Committee on Legal and Constitutional Affairs Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, August 2009, p.33.

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a costs assessor to certify that legal expenses have been properly incurred, is an insufficient safeguard to prevent the inappropriate dissipation of assets in unexplained wealth matters.<sup>36</sup> Section 20A(3C) of the PoCA provides that:

*“...a court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property covered by an unexplained wealth restraining order and may make any further or ancillary orders it considers appropriate.”<sup>37</sup>*

54. As there have been no proceedings using the unexplained wealth provisions, the Law Council submits that it is premature to suggest that the costs assessment safeguard is insufficient. Cost assessment is commonly undertaken in other civil proceedings and by court appointed officers in relation to taxation of costs where legal costs are queried.<sup>38</sup> It is an efficient and effective method for these purposes and it is equally valid at this stage to assume that it would be an effective safeguard in unexplained wealth proceedings as it is to assume that it would be an insufficient safeguard.

### **Placing unexplained wealth provisions in stand-alone legislation**

55. One of the areas that the Committee is seeking further evidence on is whether it would be beneficial to separate the unexplained wealth provisions from the PoCA and place them in stand-alone legislation.
56. The motivation behind this suggestion appears to be that by placing Commonwealth unexplained wealth provisions in a Commonwealth stand-alone statute, the current need for unexplained wealth legislation to be linked to a Commonwealth offence might be able to be overcome.<sup>39</sup>
57. The Law Council’s concerns in relation to removing the need for unexplained wealth provisions to be linked to a Commonwealth offence are outlined above. In addition to the issues of constitutional validity that this proposal raises, the Law Council submits that such a change is not supported by any relevant overseas practice that the Law Council is aware of. Indeed, the provisions in the United Kingdom that are similar to Australia’s unexplained wealth legislation are incorporated with other proceeds of crime provisions in the *Proceeds of Crime Act 2002 (UK)*. They are not found in stand-alone legislation.
58. Therefore, without any further information as to why placing unexplained wealth provisions in stand-alone legislation is justified, the Law Council does not support this proposal.

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<sup>36</sup> Op. cit., AFP Submission to the Parliamentary Joint Committee on Law Enforcement’s Inquiry into Unexplained Wealth, p.15.

<sup>37</sup> S.20A(3C), *Proceeds of Crime Act 2002*

<sup>38</sup> See <http://www.courts.qld.gov.au/courts/supreme-court/costs-assessment-legal-profession-act-2007>

<sup>39</sup> Op. cit., Hearing into Commonwealth Unexplained Wealth Legislation and Arrangements, 4 November 2011, p.34.

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## Harmonisation of Commonwealth, State and Territory unexplained wealth laws

59. The Law Council notes the Committee's views regarding the desirability of harmonising unexplained wealth provisions across Australia. The need for harmonisation of these provisions was highlighted by a number of law enforcement agencies in their submissions to the current inquiry. These submissions outlined the difficulties that Australian law enforcement agencies currently experience in "identifying and confiscating assets which may be located in, or moved between, various jurisdictions,"<sup>40</sup> and suggested that these gaps could be "significantly overcome if there was nationally consistent unexplained wealth legislation".<sup>41</sup>
60. While the Law Council supports the consistency of approach offered by harmonisation, it has serious reservations about harmonisation of existing state and territory laws, particularly if the Northern Territory (NT) or Western Australian (WA) legislation is used as model legislation or the basis of a referral of powers.
61. The Law Council has previously raised a number of concerns about the unexplained wealth legislation that has been introduced in the NT and WA which offends fundamental common law and human rights principles. The provisions in these laws:
- a) Undermine the presumption of innocence and reverse the onus of proof;
  - b) Infringe the right to silence;
  - c) Have the potential for arbitrary application; and
  - d) Create prosecutorial difficulties.

### The provisions undermine the presumption of innocence and reverse the onus of proof

62. Under non-conviction based schemes, assets can be confiscated without the need for a criminal conviction<sup>42</sup> and prosecuting authorities need only prove the commission of an offence or involvement in illegal activities to the civil standard (balance of probabilities) before confiscation is triggered.<sup>43</sup>
63. The unexplained wealth provisions in the *Criminal Property Confiscation Act 2000 (WA)* (the WA Act), *Criminal Property Forfeiture Act (NT)* (the NT Act), and indeed the Commonwealth PoCA, take this position even further by reversing the onus of proof and requiring the respondent to prove that they lawfully acquired the property in question. Under the unexplained wealth

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<sup>40</sup> Victoria Police, *Submission to the Parliamentary Joint Committee on Law Enforcement's Inquiry into Unexplained Wealth*, p.4. Available from [http://www.aph.gov.au/Senate/committee/le\\_ctte/unexplained\\_wealth/submissions.htm](http://www.aph.gov.au/Senate/committee/le_ctte/unexplained_wealth/submissions.htm)

<sup>41</sup> *Ibid.*, p.4.

<sup>42</sup> WA Act s5; NT Act s10(5); *Proceeds of Crime Act 2002* (Cth) s14.

<sup>43</sup> See for example *Proceeds of Crime Act 2002* (Cth) s 47(3).

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provisions, there is a *presumption* that the property is unlawfully acquired unless the respondent can establish the contrary.<sup>44</sup>

64. This reverse onus is contrary to established common law principles and runs counter to the presumption of innocence.
65. As the Law Council has stated in previous submissions,<sup>45</sup> the reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained. The respondent may be unable to show that assets were lawfully obtained because of a lack of capacity to explain how they acquired particular assets due to age, cultural and linguistic background or physical or mental incapacity, or a lack of skills in record keeping.
66. The Law Council continues to be concerned that by reversing the onus of proof and enacting a presumption against the respondent, the unexplained wealth provisions remove the safeguards that have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. As a result a person may be liable to have their lawfully acquired property confiscated as unexplained wealth in WA, even though there is no evidence that the property in question has been associated with, used for or derived from criminal activity.<sup>46</sup>

#### The provisions infringe the right to silence

67. Another concern that the Law Council has in relation to existing unexplained wealth legislation at the Commonwealth and State/Territory level is the potential for the unexplained wealth provisions to infringe the right to silence and exclude legal professional privilege, particularly when used in combination with examination orders, as is the case in Western Australia.
68. Under such examination orders, family members, associates, colleagues and even legal representatives of suspected criminals can be targeted for cross-examination in respect of an unexplained wealth order or related proceedings.<sup>47</sup> The mere suspicion that a person may have information about, or assets derived from, the suspected criminal activities of others may be sufficient for the person to be compelled to answer questions on oath.
69. Additionally, the WA Act and PoCA also operate to exclude the common law principle of legal professional privilege by requiring persons to provide information normally protected by privilege in certain circumstances. For example, subsection 139(1) of the WA Act is titled 'legal professional privilege withdrawn' and provides:

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<sup>44</sup> WA Act s12(2); NT Act s71(2), Proceeds of Crime Act s179E(3).

<sup>45</sup> See for example, Law Council of Australia Submission to the Senate Committee on Legal and Constitutional Affairs Inquiry into *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*, August 2009, available from <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/criminal-law/proceeds.cfm>

<sup>46</sup> Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice*, vol 15, 2002, p. 76.

<sup>47</sup> *Ibid.*, p.75

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*“A person is not entitled to contravene an order or requirement under this Act in relation to any information or any property-tracking document or other document, on the basis that the information, property-tracking document or other document is subject to legal professional privilege, or contains or is likely to contain information that would, apart from this subsection, be subject to legal professional privilege.”*

70. As a result, under the WA Act, lawyers and other people with access to a respondent’s financial records can be compelled to secretly disclose details of their client’s financial affairs or answer questions and make documents available for inspection.<sup>48</sup>
71. Conversely, under the NT Act, section 165 clearly states that common law rules relating to legal professional privilege apply in relation to proceedings under that Act.

The provisions have the potential for arbitrary application

72. The Law Council has previously outlined its concerns in relation to the potential for the unexplained wealth provisions to be applied arbitrarily. This concern is particularly relevant given the broad nature of these provisions in conjunction with the reversal of the onus of proof.
73. In their current form, the unexplained wealth provisions at both the State/Territory and Commonwealth level effectively render all persons within those jurisdictions liable to be brought before a court to demonstrate that their assets are lawfully acquired. Such broad powers are open to being misused or arbitrarily applied.
74. The lack of safeguards to prevent the misuse of the Commonwealth and State/Territory unexplained wealth legislation continues to be of significant concern to the Law Council. For example, under section 179B of the PoCA, a person is required to appear in court and demonstrate that their total wealth is lawfully acquired if the court is satisfied that an authorised officer has reasonable grounds to suspect that the person’s total wealth exceeds the value of the person’s lawfully acquired wealth. There is nothing to prevent the misuse of this power by the authorising officer, other than the court’s power to strike out the affidavit (or parts of the affidavit) prepared by the authorising officer, or revoke the order under section 179C in accordance with the person’s application for such an order.

The provisions create prosecutorial difficulties

75. A natural corollary of the broad nature of these provisions is the difficulties they pose for prosecutorial authorities.
76. This has been demonstrated by the controversy surrounding the use of the unexplained wealth provisions in WA.

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<sup>48</sup> See WA Act s139; see also s 179 *Proceeds of Crime Act (Cth)*.

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77. The WA Director of Public Prosecutions (WA DPP) has reported that the number of proceedings finalised in circumstances where a declaration of confiscation was made in respect of unexplained wealth appear to represent a very small proportion of the total number of confiscation declarations made.<sup>49</sup> For example, according to the 2010-2011 Annual Report of the WA DPP, only four out of a total 116 declarations for confiscation were made on the grounds of unexplained wealth in the 2010-2011 financial year, compared to 58 on the grounds that the person was a declared drug trafficker.<sup>50</sup>
78. The fact that there have been prosecutorial difficulties in relation to unexplained wealth provisions was further reinforced by the WA Police representative who appeared before the Committee at its hearing into the unexplained wealth provisions on 9 September 2011 in Perth, where it was stated that there are some “serious legislative impediments” with the existing WA unexplained wealth provisions that prevent the WA Police from utilising the unexplained wealth provisions to their full potential.<sup>51</sup>
79. The Northern Territory experience suggests that when faced with an application under unexplained wealth provisions, respondents have not contested such applications. Indeed, as at July 2010, there had been nine unexplained wealth matters finalised: all by consent and/or settlement conferences.<sup>52</sup> This being the case, it is difficult to say whether the unexplained wealth provisions under the NT Act are operating effectively or fairly or to determine whether appropriate safeguards are in place to guard against their arbitrary application.

## Conclusion

80. The Law Council considers that there has not been enough experience with the operation of the Commonwealth unexplained wealth provisions for them to be effectively reviewed at this time. However, as a number of suggestions for amendments to the provisions and for harmonisation of state and territory laws have been made to the Committee, the Law Council has attempted to address these suggestions.
81. In doing so, the Law Council recognises the need to combat serious and organised crime in an efficient and effective way. However, the manner in which law enforcement agencies and the government go about this should not impact disproportionately on fundamental human rights and rule of law principles.

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<sup>49</sup> These figures relate to declarations of confiscation made between 2010- 11. Office of the Director of Public Prosecutions, *Annual Report 2010-2011* (2011), p.31.

<sup>50</sup> Ibid.

<sup>51</sup> Parliamentary Joint Committee on Law Enforcement hearing transcript, Perth, 9 September 2011, p. 2. Available from <http://www.aph.gov.au/hansard/joint/commtee/j285.pdf>

<sup>52</sup> Lorana Bartels, *Unexplained Wealth Laws in Australia*, Trends and Issues in Crime and Criminal Justice No.395, July 2010. Available from <http://www.aic.gov.au/publications/current%20series/tandi/381-400/tandi395.aspx>

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82. The Law Council considers that a number of suggestions made to the Committee for changes to Commonwealth unexplained wealth laws and for the harmonisation of state and territory laws would have a disproportionate effect on fundamental human rights and rule of law principles. The Law Council submits that the Committee should take such impacts into account in recommending any changes to the Commonwealth provisions or recommending any models for harmonisation.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- 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 of the Australian Capital Territory
- 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 Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.