



14 June 2011

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The Honourable John Rau MP  
Attorney-General  
DX 336  
ADELAIDE SA

Dear Mr Attorney

***Criminal Assets Confiscation (Prescribed Drug Offenders) Amendment Bill 2011***

Thank you for providing the Society with the opportunity to consider the above Bill. I provide the following comments from the Criminal Law Committee.

The Bill seeks to deprive offenders of their assets where there is no connection between the commission of the offence and the receipt of any income or benefit therefrom. Indeed, the fact that no income or benefit was derived is irrelevant. The assets are still subject to forfeiture.

To the extent the Bill so deprives offenders, the Society does not support the Bill. Indeed, the Society wishes to express its opposition in the strongest terms.

The Bill is inimical to a free society which applies the rule of law and encourages the citizen to be self sufficient. To say that it is draconian only tells a fraction of the story. A citizen should not be deprived of his/her lawfully acquired assets because he commits an offence.

**Legality**

The Society expresses a concern as to whether the proposed legislation infringes the "Kable principle". In that regard we note the discussion in *International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319*. Bill.

**No Nexus**

The Bill imposes a consequence to the citizen for committing the offence ("civil consequence"). This, in itself, is not unusual. For example:

- directors of corporations who commit certain offences are, as a result and independent of the criminal justice system, disqualified from taking part in the management of corporations;
- child sex offenders are placed on a child sex offender's register and are subject to certain conditions as a result.

In these and other cases, there is a clear and justifiable nexus between the civil consequence and the offending. Company directors who offend in a certain way are deemed not to be fit and proper people to manage corporations. Child sex offenders are deemed to be a risk to society and, therefore, are required to comply with certain conditions when in the community.

There is no such nexus in the Bill. It is indiscriminate in its effect because the citizen's assets are subject to forfeiture irrespective of the fact they were lawfully gathered. In that sense the Bill is clearly punitive.

If Parliament considers that the penalties are insufficient then it should consider raising them. That, however, is unlikely given that the penalties for most of the trigger offences are very substantial. All but two of the offences carry maximum sentences of life or 25 years imprisonment. One of those two has a maximum of 15 years and the other two years.

### **Additional Punishment**

It is patently unjust and unfair for a citizen to be given an *additional* punishment for an offence above that for the actual offending, let alone one of losing their lawfully acquired assets. Not only is there no nexus to the assets, but there is no quantitative formula or basis that applies in assessing the value of the assets that should be forfeited. In truth, there could be no quantitative formula because there is no nexus between the offending and the assets.

The only possible justification for forfeiture of a citizen's assets is on the basis that they have made money out of the crime. This reasoning is, however, very flawed. A citizen may, under the Bill, be declared a prescribed drug offender without having made any money from the offence. Indeed, that will often be the case.

One would not expect much money to be made from the offence of sale of equipment (s33D), procuring a child to commit an offence (s33H), supply or administer controlled drug to children (ss33F and 33G) or even sale to a child.

As mentioned, however, this is not to the point. A citizen who leads a blameless life, works hard and acquires wealth stands to lose most of their wealth if they commit an offence irrespective of whether they profited or stood to profit from it.

### **Not Proceeds of Crime**

A major concern with the Bill is that it is under the banner of "proceeds legislation". This may give the veneer of justifiability, but the most cursory of examination of the terms of the Bill tells a different story.

### **Other Jurisdictions**

It is of no comfort that other jurisdictions have introduced such legislation, particularly those that also introduced mandatory sentencing. In many respects this Bill is considerably more unjust than mandatory sentencing.

It is more telling that other jurisdictions do not have such legislation.

### **The Bill is Discriminatory**

The Bill is discriminatory in that the citizens who are industrious and acquire wealth suffer a far greater punishment than those who have no assets, either through their lack of effort, desire or otherwise. The citizen who has assets should not be treated differently to someone who does not, where they are otherwise convicted of the same or similar offences with the same or similar culpability.

### **Innocent Third Parties Become Victims**

Quite apart from the palpable unfairness to the citizen who commits the offence(s), the Bill just as harshly deprives the citizen's family of the assets, regardless of whether they are dependants. They, as well as the offender, would become victims under this proposed legislation.

### **Existing Legislation (Proceeds/Unexplained Wealth)**

The current *Criminal Assets Confiscation Act 2005* is comprehensive and far reaching. It not only deprives the citizen of the proceeds of crime but also of the instrument of crime, despite the fact the instrument may be lawfully acquired and of considerable value.

There are compelling public policy reasons for the current legislation to have such an extensive reach.

Less compelling is the automatic forfeiture provisions that have the effect of forfeiting the citizen's assets that are the subject of a restraining order but are not otherwise the proceeds or an instrument of crime (where the citizen has not successfully applied to exclude the property).

The point the Society make is that this State's principal proceeds legislation is more than sufficient to deprive an offender of tainted assets.

Notwithstanding this, Parliament recently passed the *Serious and Organised Crime (Unexplained Wealth) Act 2009*. This extended the reach of the authorities even further than the *Criminal Assets Confiscation Act*. The police were given extensive investigative powers, and the benefit of reverse onus provisions (in favour of the Crown), with a view to establishing that a citizen had wealth which could not be explained.

The novel aspect of the legislation is that it is unnecessary to show that the citizen's assets were the proceeds of crime. After establishing that the Act applied (eg, trigger offence), all that was necessary was to show that there was no satisfactory explanation that the assets were lawfully acquired.

Those two pieces of legislation are more than sufficient for the authorities to acquire the assets suspected of being the proceeds or instruments of crime or otherwise tainted.

### **Lack of Due Process**

In the event that the citizen challenges the police/Crown, then a hearing will be held. The Society considers that current legislation, particularly the *Unexplained Wealth Act*, is weighted against the citizen. Nevertheless, the citizen will get their day in court. This is the fundamental cornerstone of our system of justice which is often referred to as "due process".

The Bill, however, takes away the citizen's right to challenge the acquisition of their assets. As such, there could not be said to be due process.

### **Specific Provisions of Bill**

The Society comments on some of the specific provisions of the Bill below.

#### Clause 5(6) and (8) [section 3]

The combined effect of cl5(6) and (8) is to significantly broaden the definition of "serious offence" to capture a substantial number of low level offending conduct in both the *Controlled Substances Act 1984* and any other Act. The Society does not support this amendment.

The current law is that only three offences that can be dealt with summarily (ss32(3), 33B(3) and 33C(3)) are within the definition of "serious offence". The effect of broadening the definition is that restraining orders (and ultimately forfeiture) can be obtained over the property of a much greater number of defendants. The Society considers that this outcome is wholly inappropriate for low level offending.

#### Clause 7 [section 6A(1)(b)]

The proposed s6A introduces and defines the concept of "*prescribed drug offender*". As outlined above, a prescribed drug offender will, in effect, lose their assets by virtue of convictions, not a proven nexus between the assets and the offence(s). The Society have indicated our strong opposition to this provision.

The Society draws attention, however, to that part of the definition which provides that a person is a prescribed drug offender if he has three convictions of certain offences within a 10 year period. The intent of the Bill appears to be for the offender to fall within the definition if they come before the courts on three separate occasions and are convicted on each occasion. The definition does not achieve this because it will capture at least two convictions from the same information and possibly three. This makes the already unjust provision even more unjust.

#### Clause 10 [s34(3)]

The proposed s34(3) (and ss62A and 76B) seeks to avoid the defendant obtaining a double benefit. It does so, the Society suggests, the wrong way around (*cf* proposed s224).

A defendant should not be denied a legitimate claim for exclusion of their assets from a restraining order merely because the court had regard to any forfeiture that "*might*" result from the conviction.

This is likely to lead to an unfair outcome for the defendant. The benefit they *might* receive on sentence (which is not required to be stipulated by the sentencing court) may well be substantially less than the value of the asset(s).

This provision is, as are many others in the Bill, heavily weighted against the defendant in favour of forfeiture of the asset.

**Conclusion**

As you will gather, the Society feels strongly about this Bill and invites you to consider further discussion before it progresses.

I trust these comments are of assistance.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ralph Bönig', with a horizontal line above the name.

Ralph Bönig  
**PRESIDENT**