**20 July 2018**

Law Council
OF AUSTRALIA

*Office of the President*

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

**Unexplained Wealth Legislation Amendment Bill 2018**

1. Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) Inquiry into the Unexplained Wealth Legislation Amendment Bill 2018 (**the Bill**).

2. The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.

3. Given the short timeframe in which to provide a response to the Inquiry, the Law Council has not had the opportunity to comprehensively examine and assess the Bill.

4. The Law Council recognises the need for the Commonwealth to develop measures to effectively combat serious and organised crime. The Law Council supports a national scheme for a single unexplained wealth order provided the scheme accords with the rule of law and enables the application for the order to occur in a location which is not unduly inconvenient for the respondent.

5. However, the Law Council is not satisfied that adequate safeguards have been included to ensure consistency with the rule of law. For these reasons, the Law Council does not support the passage of the Bill in its current form.

6. The Law Council does not wish to repeat its past advocacy on the general issues raised by this legislation other to state that it supports a comprehensive review of the *Proceeds of Crime Act 2002* (Cth) (**POCA**) as contemplated by the 2016 Australian Law Reform Commission's *Traditional Rights and Freedoms – Encroachments on Commonwealth Laws Report* (**ALRC Report**).[1] It is particularly important that any review of the POCA ensures consistency with fundamental rule of law principles.

*7.* Rather, in this brief submission, the Law Council seeks to draw the Committee's attention to particular aspects of the Bill that are of concern. These concerns are in large part shared by the Standing Committee for the Scrutiny of Bills (**the Scrutiny Committee**).[2]

[1] Australian Law Reform Commission *Traditional Rights and Freedoms – Encroachments on Commonwealth Laws*, Report No 129 (2016), 519.
[2] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018* (27 June 2018).

*Overview of Bill*

8. This Bill seeks to amend the POCA to:

- extend the scope of the Commonwealth unexplained wealth restraining orders and unexplained wealth orders to all Territory offences and relevant offences as specified by 'participating States';

- allow participating State and Territory agencies to access Commonwealth information gathering powers under the POCA for the investigation or litigation of unexplained wealth matters under State or Territory unexplained wealth legislation; and

- amend the way in which recovered proceeds are shared between the Commonwealth, states and territories and foreign law enforcement entities.

9. The Bill also seeks to amend the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) to enable Commonwealth, Territory and participating states law enforcement agencies to use, communicate and record lawfully intercepted information in relation to unexplained wealth investigations and proceedings.[3]

*Retrospectivity*

10. Several of the Bill's amendments would apply retrospectively by virtue of Schedule 1. Items 7 and 8, and Schedule 3, item 10. The impact of retrospective application may be particularly acute under a scheme that interferes with property rights of persons who have not necessarily been charged with, or convicted of, an offence. Generally, the rule of law requires that legislative measures operate prospectively for individuals to be able to rely upon the law as it exists and applies at the time. **The Law Council therefore recommends that the Bill only apply prospectively.**

*Privilege against self-incrimination*

11. The common law privilege against self-incrimination provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.[4] The common law privilege against self-incrimination and against penalty is a substantive right of long standing, applicable to criminal and civil penalties and forfeiture. It is deeply ingrained in the common law and is not to be taken to be abrogated by statute except in the clearest terms.[5] Its protection is required by the *International Covenant on Civil and Political Rights*[6] and is protected under Australia's legislative framework.[7]

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[3] Ibid, 5.
[4] *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.
[5] *Smith v Read* (1736) 1 Atk 526 at 527; [26 ER 332]; *R v Associated Northern Collieries* (1910) 11 CLR 738 at 742, 744; *Sorby v Commonwealth* (1983) 152 CLR 281, at 309–310 and 316; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 554; *Rich v ASIC* (2004) 220 CLR 129 at 141- 143.
[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(3)(g).
[7] *Evidence Act 1995* (Cth), 1995 (NSW), 2001 (Tas), 2008 (Vic), 2011 (ACT), *Evidence (National Uniform Legislation) Act* (NT), ss128, 128A; *Human Rights Act 2004* (ACT), s22(2)(i); *Charter of Human Rights and Responsibilities Act 2006* (Vic), s25(2)(k). See also *Australian Securities and Investments Commission Act 2001* (Cth), s68; *Banking Act* 1959 (Cth), s52F; *Competition and Consumer Act 2010* (Cth), ss155(7), 155B, 159; *Corporations Act 2001* (Cth), ss597(12) and (12A), *Work Health and Safety Act 2011* (Cth), s172; *Royal Commissions Act 1903* (Cth), ss6A (3), (4).

12. The ALRC Report noted that legislative provisions that abrogate the privilege against self-incrimination require further review including 'whether its abrogation in Commonwealth laws has been appropriately justified, and whether statutory immunities offer appropriate protection'.[8] The ALRC Report cited particularly those that provide only use immunity, for example *Australian Crime Commission Act 2002* (Cth) section 30.[9]

13. Proposed Schedule 4 would allow a magistrate to make a production order requiring a person to produce certain documents, or make those documents available, to a relevant authorised State or Territory officer. Proposed paragraph 5(1) would abrogate the privilege against self-incrimination to the extent that a person would not be excused from producing a document or making a document available pursuant to a production order on the ground that to do so would tend to incriminate them or expose them to a penalty.

14. A use immunity is provided under proposed subsection 5(2) for natural persons and is limited to criminal proceedings (except in relation to false or misleading documents). There is no proposed derivative use immunity. Proposed section 18 would allow a person who gained information as a result of a production order to disclose that information in certain circumstances. Proposed paragraph18(5)(b) provides that proposed section 18 does not affect the admissibility in evidence of any information, document or thing obtained as an indirect consequence of a disclosure under this provision.

15. The Law Council notes that generally where the privilege against self-incrimination is abrogated this requires a clear justification in the Explanatory Memorandum as to why it is necessary and both a use and derivative use immunity should apply. There should be a prohibition of any derivative use of this material as it could lead potentially to concerns and issues being raised as to whether a person has received a fair trial if information is used in any criminal prosecution.[10] In relation to the issue of information sharing with state or territory agencies, it is also important to ensure that no direct or derivative use can be made of the material by state or territory agencies in relation to criminal proceedings.

16. **The Law Council recommends that:**

- **A fuller explanation be provided in the Explanatory Memorandum of the importance of the public interest and why the abrogation of the privilege is considered absolutely necessary; and**
- **Both a use and derivative use immunity should apply to civil and criminal proceedings.**
- **In relation to the issue of information sharing with state or territory agencies, no direct or derivative use should be made of the material by state or territory agencies in relation to criminal proceedings.**

[8] Australian Law Reform Commission Traditional Rights and Freedoms – Encroachments on Commonwealth Laws, Report No 129 (2016), 18.
[9] Ibid, 24.
[10] See e.g. *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

*Legal professional privilege*

17. Legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice.[11] Accordingly, **the Law Council does not support proposed paragraph 5(1)(c) of Schedule 4** which would provide that a person is not excused from producing a document or making a document available under a production order on the ground that it would disclose information that is the subject of legal professional privilege.

*Other matters*

18. The Law Council shares the following additional concerns expressed by the Scrutiny Committee:

- *Disallowance exemption* – Proposed subsection 14F(4) would allow the Minister, by legislative instrument, to declare that a State is not a cooperating State and proposed subsection 14F(5) provides that a declaration under subsection 14F(4) would be a legislative instrument, but would not be subject to disallowance under section 42 of the *Legislation Act 2003 (Cth).* The Law Council notes that the Scrutiny Committee has requested 'the Minister's justification for exempting declarations made under proposed subsection 14F(4) from disallowance under the *Legislation Act 2003* (Cth)'.[12]

- *Significant matters in delegated legislation*[13] – the Scrutiny Committee has noted that the Bill would 'appear to permit the regulations to confer coercive evidence-gathering powers on a potentially broad range of persons' and that it does 'not set a limit on the categories of persons on whom powers may be conferred'.[14] It has: (a) requested the Minister's detailed justification for allowing regulations to prescribe classes of persons authorised to issue notices to financial institutions under proposed section 12 of proposed Schedule 1; and (b) sought the Minister's advice as to the appropriateness of amending the Bill to specify the category of persons who may be empowered under the regulations to issue notices under proposed section 12 of proposed Schedule 1.[15] **The Law Council recommends that the criteria or class of persons for the definition of who may exercise coercive evidence-gathering powers in self-governing Territories, should be set out in the primary legislation.**

- *Immunity from liability – the Scrutiny Committee has requested the Minister's advice* as to 'why it is considered appropriate to confer immunity from civil and criminal liability in relation to certain actions (particularly without any requirement that the action be taken in good faith), such that persons would have no right to bring an

[11] See e.g. *Baker v Campbell* (1083) 153 CLR 52.
[12] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018* (27 June 2018), [1.13].
[13] Proposed section 12 of Schedule 1 seeks to allow certain officials of participating States and self-governing Territories to give written notices to financial institutions. Such notices would require the institution to provide to an authorised officer of the State or Territory information or documents relating to specified persons' accounts and transactions. A failure to comply with a notice under proposed section 12 would be an offence, subject to a penalty of 6 months imprisonment, 30 penalty units, or both. Proposed subsection 12(3) sets out the officials who may give a notice under proposed section 12, which are mainly the Commissioner or head of the relevant police force or the Director of Public Prosecutions. However, paragraph 12(3)(d) would provide that, for a self-governing Territory, a person may give a notice to a financial institution if they are a person of a kind prescribed by the regulations in relation to the Territory.
[14] Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2018* (27 June 2018), [1.33].
[15] Ibid, [1.36]-[1.37].

action to enforce their legal rights'.[16] This request was made subsequent to the Scrutiny Committee noting that proposed section 12 of Schedule 1 seeks to allow certain persons to issue notices to financial institutions. Such notices would compel the institutions to provide financial information about persons holding accounts with the institution, or with whom the institution otherwise deals. Proposed section 14 of Schedule 1 would provide that no action, suit or proceeding would lie against a financial institution, or an officer, employee or agent of the institution acting within the course of that person's employment or agency, in relation to any action taken by the institution or person under a notice under proposed section 12, or in the mistaken belief that action was required under the notice. As the Scrutiny Committee has noted, this 'removes any common law right to bring an action to enforce legal rights' and 'this applies even if the relevant action was not taken in good faith'.[17]

- *Privacy* – The Scrutiny Committee has raised scrutiny concerns as to the 'appropriateness of expanding existing disclosure laws under the TIA Act to cover information relevant to unexplained wealth provisions'.[18] As previously noted by the Parliamentary Joint Committee on Intelligence and Security, the TIA Act has two key objectives: to protect the privacy of communications by prohibiting unlawful interception, while enabling limited interception access for the investigation of serious crime and threats to national security.[19] Further, the information that must be provided pursuant to a notice under proposed section 12 may include a substantial amount of personal and financial information. **The Law Council recommends that the views of the Privacy Commissioner be obtained on the privacy impacts of the Bill to ensure that the measures are necessary and proportionate.**

Thank you again for the opportunity to provide this submission.

In the first instance, please contact Dr Natasha Molt, Acting Director of Policy at if you would like any further information.

Yours sincerely

**Morry Bailes**
**President**

[16] Ibid, [1.41].
[17] Ibid, [1.39].
[18] Ibid, [1.45].
[19] Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (2013) rec-1, [2.17], 13.