Law Council
OF AUSTRALIA

Inquiry into the legislative arrangements to outlaw serious and organised crime groups – Supplementary Information

Parliamentary Joint Committee on the Australian Crime Commission

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Introduction

The Law Council of Australia is grateful for the invitation to provide supplementary information to the Parliamentary Joint Committee on the Australian Crime Commission ('the Committee') in relation to its Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups.

The Law Council provides supplementary information in respect of the following matters raised by the Committee in relation to evidence given by Law Council President Mr Ross Ray QC in Canberra on 6 November 2008:

- the impact of the States' referral of powers to the Commonwealth to deal with terrorism on the prosecution of State terrorist-related criminal acts; and
- the Law Council's position on the legislative provisions dealing with 'unexplained wealth' in Western Australia and the Northern Territory, and

A copy of the paper presented by Mr Ross Ray QC on the topic of anti-money laundering at the recent LAWASIA conference held in Malaysia on 30 October 2008 is attached to this submission.

Impact of the States' referral of powers to the Commonwealth to deal with terrorism on the prosecution of State terrorist-related criminal acts

During the hearing of the Inquiry the Law Council was asked by the Hon Mr Jason Wood MP:

> *Regarding one of the issues on the referral of powers from the state to the Commonwealth, there have been concerns raised that, if we did have a terrorist attack and the states did not use the Commonwealth terrorism laws and went back to their state legislation, that may be unconstitutional. Do you have any feelings about that? Are the states bound to use the federal laws or can they actually just use their existing state laws?*[1]

Mr Wood elaborated on this question as follows:

> *I suppose I am more after: if there was a terrorist attack and, say, the state police said, 'No, we will not use Commonwealth terrorism legislation; we will revert to our state legislation,' because they have referred their powers to the Commonwealth, will that cause any problems?*
>
> …
>
> *Considering the States have referred powers to the Commonwealth to deal with terrorism, can the States chose not to rely on the Commonwealth terrorism laws and continue to prosecute persons for terrorist related activity? What if the person subject to prosecution is a member of a proscribed organisation?*
>
> …
>
> *Even if it has been declared a terrorist incident, it would not make any difference?* [2]

As outlined below, the referral of powers that took place in 2002 and 2005 to enable the Commonwealth Parliament to enact provisions in the *Criminal Code* outlawing activities connected with terrorist acts or terrorist organisations does not exclude, limit or detract from the legislative power of the States to criminalise, prosecute and investigate terrorist-related activities.

Development of the Commonwealth's Powers in Respect of Terrorism

On 28 October 2001 the Prime Minister, stated that the Commonwealth Government intended to hold a summit of State and Territory leaders to develop a new framework for addressing transnational crime and terrorism at a Commonwealth level. One objective of the summit would be to obtain a 'reference of constitutional power to the Commonwealth to support an effective national response to the threats of transnational crime and terrorism'.[3]

The Prime Minister recognised that the Commonwealth faced constitutional constraints when legislating in respect of transnational crime and terrorism, as not all of the proposed measures fell within the legislative powers of the Commonwealth.[4] The Prime Minister said:

> *it's not absolutely certain that the Commonwealth has the necessary power, complete constitutional power, as I'm advised, to deal in the way that it might think appropriate for a terrorist attack on a particular part of Australia.*[5]

1 Committee Transcript, 6 November 2008, p. 51.
2 Committee Transcript, 6 November 2008, p. 52.
3 The Hon. John Howard, MP, 'A Safer More Secure Australia', Media Release, 30 October 2001.
4 The Hon. John Howard, MP, 'A Safer More Secure Australia', Media Release, 30 October 2001. As the Committee is no doubt aware, the *Commonwealth Constitution* limits the legislative powers of Commonwealth Parliament to those matters listed in section 51. State Parliaments retain the power to legislate in respect of all other matters.
5 The Hon. John Howard, MP, Transcript of Doorstop Interview, Brisbane, 30 October 2001.

For this reason, the Commonwealth Government sought a referral of powers by the State Parliaments pursuant to section 51(xxxvii) of the *Commonwealth Constitution,* which provides that the Commonwealth Parliament has the power to make laws with respect to:

> *matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;*

On 5 April 2002, the Council of Australian Governments (COAG) issued a 'Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime'.[6]

The COAG members agreed to refer legislative power to the Commonwealth pursuant to subsection 51(xxxvii) of the *Commonwealth Constitution* to ensure that the Commonwealth Parliament had the legislative power to make laws with respect to terrorist acts.

The State and Territory Governments agreed that the Commonwealth should have responsibility for 'national terrorist situations' which include 'attacks on Commonwealth targets, threats against civilian aviation and those involving chemical, biological, radiological and nuclear materials.'[7] The State Governments also agreed to take:

> *whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll pack provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.*[8]

Following this agreement each State Parliament passed a *Terrorism (Commonwealth Powers) Act*[9] which contained a provision referring the following matters to the Parliament of the Commonwealth:

- the proposed Divisions 101 (terrorist act offences), 102 (proscription of terrorist organisations and related offences), 103 (financing terrorism) and 106 (transitional provisions) of the *Criminal Code* - the terms of these proposed provisions were set out in the State Acts;[10] and

- the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of making the laws with respect to that matter by making express amendments to the terrorism legislation or the criminal responsibility legislation.[11]

The State Acts made it clear that the reference of power in respect of the above matters only has effect:

> *If and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference to the purposes of section 51(xxxvii) of the Constitution of the Commonwealth); and*

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[6] COAG, *Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime*, (5 April 2002).
[7] COAG, *Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime*, (5 April 2002) at [1].
[8] COAG, *Commonwealth and States and Territories Agreement on Terrorism and Multi-jurisdictional Crime*, (5 April 2002) at [3].
[9] See *Terrorism (Commonwealth Powers) Act 2002* (NSW); *Terrorism (Commonwealth Powers) Act 2003* (Vic); *Terrorism (Commonwealth Powers) Act 2002* (WA); *Terrorism (Commonwealth Powers) Act 2002* (Qld); *Terrorism (Commonwealth Powers) Act 2002* (SA); *Terrorism (Commonwealth Powers) Act 2002* (Tas) ('the State Acts').
[10] See section 4(1)(a), Schedule 1 of the State Acts.
[11] See subsection 4(1)(b) of the State Acts. The State Acts explain that this meant that the terrorism legislation or the criminal responsibility legislation may be amended or have its operation otherwise affected by the provisions of Commonwealth Acts, the operation of which is based on legislative powers that the Parliament of the Commonwealth has apart from under the references, see subsection 4(4) of the State Acts.

If and to the extent that the matter is included in the legislative powers of the Parliament of the State.[12]

The State Acts also contained a provision stating that the Governor in each State may terminate the reference of power at any time.[13]

In September 2005 COAG held a special meeting on counter-terrorism. At that meeting the State and Territory Governments agreed to take measures to strengthen Australia's counter terrorism laws.[14] COAG leaders agreed to the *Criminal Code* being amended to provide for 'control orders and preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community.'[15] COAG leaders further agreed to extend the Commonwealth's ability to proscribe terrorist organisations to include organized groups that advocate terrorism, and to make amendments to the financing terrorism provisions.[16]

COAG leaders also agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and additional stop, question and search powers in areas such as transport hubs and places of mass gatherings.[17]

Following this agreement Divisions 104 and 105 of the Commonwealth *Criminal Code,* containing the control orders and preventive detention orders regime, were enacted by Commonwealth Parliament.[18]

State and Territory Parliaments also enacted legislation giving their law enforcement authorities greater powers to stop, question and search persons and to issue preventative detention orders in certain cases.[19]

It should be noted that the constitutional basis for the Commonwealth Parliament's law making powers with respect to terrorism is not entirely dependent on the referral of State powers made pursuant to subsection 51(xxxvii) of the *Constitution*. For example, the Commonwealth Parliament has the power under section 51 to make laws in respect of postal, telegraphic, telephonic, and other like services;[20] the naval and military defence of the Commonwealth;[21] immigration and emigration;[22] the influx of criminals;[23] external affairs.[24] Pursuant to section 122 of the *Constitution*, the Commonwealth also has the power to make laws with respect the Territories of Australia.

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[12] State Acts s4(2).
[13] See section 5 of the State Acts.
[14] COAG Communiqué, Special Meeting on Counter Terrorism, (27 September 2005).
[15] COAG Communiqué, Special Meeting on Counter Terrorism, (27 September 2005) p. 3. COAG acknowledged the existence of the Queensland Public Interest Monitor (PIM) and noted that Queensland would continue to use the PIM for control orders and preventative detention.
[16] COAG Communiqué, Special Meeting on Counter Terrorism, (27 September 2005) p. 3.
[17] COAG Communiqué, Special Meeting on Counter Terrorism, (27 September 2005) p. 4. COAG leaders noted that extensive stop, search and seizure powers already existed in many states, for example *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Community Protection) Act 2003* (Vic).
[18] These divisions were inserted into the *Criminal Code* along with a number of other significant reforms by the *Anti-Terrorism Act (No 2) 2005* (Cth).
[19] Legislative Acts included: *Terrorism (Extraordinary Powers) Act 2005* (WA); *Terrorism (Preventative Detention) Act 2005*(Qld); *Terrorism (Police Powers) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas). In addition to these specific Acts, pre-existing measures were expanded in NSW and Victoria, see *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* (NSW); *Terrorism (Community Protection) (Amendment) Act 2006* (Vic).
[20] *Commonwealth Constitution* s51(v).
[21] *Commonwealth Constitution* s51(vi).
[22] *Commonwealth Constitution* s51(xxvii).
[23] *Commonwealth Constitution* s51(xxviii).
[24] *Commonwealth Constitution s51*(xxix). This head of power is likely to be a primary basis for anti-terrorism measures in Australia, given the range of international instruments and statements that have a potentially binding effect on Australia. For example, UN Security Council Resolution 1373 (2001), which provides that all UN Member States 'shall ... prevent and suppress the financing of terrorist acts [and] [c]riminalize the wilful provision or collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... in order to carry out terrorist acts' and that all States: *Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are*

This multidimensional constitutional basis for the anti-terrorism measures is reflected in Part 5.3 section 100.3 of the *Criminal Code* which provides:

> *(1) The operation of this Part in a referring State is based on:*
>
> *(a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and*
>
> *(b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Part relates because those matters are referred to it by the Parliament of the referring State under paragraph 51(xxxvii) of the Constitution.*
>
> *Note: The State reference fully supplements the Commonwealth Parliament's other powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.*
>
> *(2) The operation of this Part in a State that is not a referring State is based on the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)).*
>
> …
>
> *(3) The operation of this Part in the Northern Territory, the Australian Capital Territory or an external Territory is based on:*
>
> *(a) the legislative powers that the Commonwealth Parliament has under section 122 of the Constitution to make laws for the government of that Territory; and*
>
> *(b) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)).*
>
> *Despite subsection 22(3) of the Acts Interpretation Act 1901, this Part as applying in those Territories is a law of the Commonwealth.*
>
> *(4) The operation of this Part outside Australia and the external Territories is based on:*
>
> *(a) the legislative powers that the Commonwealth Parliament has under paragraph 51(xxix) of the Constitution; and*
>
> *(b) the other legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)).*

What impact does the referral of power have on the States and Territories prosecuting terrorist activity?

The referral of powers that took place in 2002 and 2005 to enable the Commonwealth Parliament to enact provisions in the *Criminal Code* outlawing activities connected with terrorist acts or terrorist organisations did not exclude, limit or detract from the legislative power of the States to continue to criminalise, prosecute and investigate terrorist-related activities.

The High Court has confirmed that a referral of power by the States to the Commonwealth pursuant to subsection 51(xxxvii) of the *Commonwealth Constitution* does not result in the Commonwealth

established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

Parliament enjoying *exclusive* legislative power over the referred subject matter. [25] The State Parliament making the referral retains the power to revoke such a referral and despite the making of the referral, continues to enjoy legislative power in respect of that subject matter.[26]

The High Court considered this question in 1950 in *Graham v Paterson*.[27] Chief Justice Latham observed that although section 51 of the *Constitution* invests the Commonwealth Parliament with a range of legislative powers, these powers are not declared to be the exclusive powers of the Commonwealth Parliament, and most can be exercised concurrently by the State and Commonwealth Parliaments. [28] The Chief Justice observed that the terms of section 51 'do not exclusively vest in the Parliament of the Commonwealth or withdraw from the Parliament of a State any powers previously possessed by a State'. [29] His Honour explained that it is section 52 of the *Commonwealth Constitution*, and not section 51, which gives exclusive power to the Commonwealth Parliament. [30]

In respect of subsection 51(xxxvii) Latham CJ observed:

> *[T]he reference of matters under s. 51 (xxxvii.) does not deprive the State Parliament of any power. It results in the creation of an additional power in the Commonwealth Parliament. If the Commonwealth Parliament exercises such a power, s. 109 of the Constitution may become applicable, with the result that if a law of the State with respect to a matter referred was inconsistent with a law of the Commonwealth, the Commonwealth law would prevail and the State law to the extent of the inconsistency would be invalid. But unless the Commonwealth Parliament exercises the power to legislate with respect to the matter referred, no effect whatever is produced in relation to the operation of State laws.* [31]

Indeed, this position is explicitly acknowledged in Part 5.3 of the *Criminal Code* itself. Section 100.6 provides that concurrent operation of State and Territory and Commonwealth laws in respect of terrorist acts and terrorist organisations is intended:

> *(1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.*
>
> *(2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:*
>
> *(a) an act or omission that is an offence against a provision of this Part; or*
>
> *(b) a similar act or omission;*
>
> *an offence against the law of the State or Territory.*
>
> *(3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:*
>
> *(a) provides for a penalty for the offence that differs from the penalty provided for in this Part;*
>
> *(b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;*

[25] See *Graham v Paterson* (1950) 81 CLR 1; R *v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207. See also *Cth DPP v Fukusato* [2003] 1 Qd R 272 per McMurdo P, with whom Davies JA, Thomas JA agreed.
[26] However, pursuant to section 109 of the Constitution, legislation passed by the Commonwealth Parliament in the exercise of the referred power will displace State legislation with which it is inconsistent. See *Graham v Paterson* (1950) 81 CLR 1; R *v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207.
[27] *Graham v Paterson* (1950) 81 CLR 1.
[28] *Graham v Paterson* (1950) 81 CLR 1 at [11] per Latham CJ.
[29] *Graham v Paterson* (1950) 81 CLR 1 at [11] per Latham CJ.
[30] *Graham v Paterson* (1950) 81 CLR 1 at [11] per Latham CJ.
[31] *Graham v Paterson* (1950) 81 CLR 1 at [12] per Latham CJ.

(c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.

(4) If:

(a) an act or omission of a person is an offence under this Part and is also an offence under the law of a State or Territory; and

(b) the person has been punished for the offence under the law of the State or Territory;

the person is not liable to be punished for the offence under this Part.

The States have in place an extensive law enforcement regime designed to investigate and prosecute terrorist related activities. There are a wide range of criminal offences at the State level that criminalise terrorist-related activities, such as conspiracy to commit murder, causing explosives to be placed near a building, vehicle, vessel, train or other conveyance or in a public place and possessing or manufacturing gunpowder, explosive substances or dangerous or noxious substances with intent to injure. In addition, State law enforcement officers have a wide range of investigative powers, including extensive powers to stop, question and search persons, enter and search premises and powers to detain persons for up to 14 days without charge.

As the *Graham v Peterson* case and section 100.6 of the *Criminal Code* make clear, the validity of these State criminal offences and investigation powers of State law enforcement powers is not affected by the provisions in Part 5.3 of the *Criminal Code.*[32] Therefore, as the Law Council has previously submitted, the existence of such extensive regimes at the State level raises serious questions about the necessity for the enactment of extraordinary forms of criminal liability and investigation powers at the Commonwealth level.

In the view of the Law Council, terrorist activity is criminal activity and can and should be investigated and prosecuted in accordance with established principles of criminal law and procedure.

If person is suspected of terrorist related activity, and that activity constitutes a criminal offence in a particular State, the Law Council would expect that State to investigate and prosecute the person pursuant to State laws. In doing so they would have access to a range of extraordinary police powers enacted as part of the aforementioned COAG agreement on terrorism.

If the terrorist related activity also constituted a criminal offence under the *Criminal Code* - such as activity that falls within the definition of 'terrorist act' in section 100.1,or is committed by a member of a terrorist organisation– the Law Council would expect federal law enforcement agencies to investigate the matter and federal prosecutorial agencies to consider pursuing federal charges.

The Law Council is not in a position to advise the committee as to what inter-governmental arrangements may exist between State and Federal police and State and Federal prosecutors in the investigation of a terrorist related activity. This would no doubt depend on factors such as the nature of the criminal activity in question, the range of investigation powers available to State and Federal law enforcement bodies, whether the activity has an international dimension and the resources available to such bodies.

The Law Council can advise, however, that the validity of the State's powers to investigate and prosecute such activity would not be jeopardised by the referral of legislative powers to the Commonwealth (unless such powers were found to be inconsistent with a Commonwealth law).

[32] See section 100.6 of the *Criminal Code.* See also above discussion re section 51(xxxvii) of the *Commonwealth Constitution.*

Law Council's position on the 'unexplained wealth' provisions operating the WA and NT

During the hearing of the Inquiry on 6 November 2008 in Canberra, Law Council President Ross Ray QC was asked the following question by the Hon Mr Chris Hayes MP:

> *Having regard to the issue of crime prevention and deterring participation in crime, what would the Law Council's position be with respect to unified or consistent unexplained wealth legislation?*[33]

For the reasons outlined below, the Law Council is opposed to the adoption of provisions similar to the WA and NT legislation dealing with 'unexplained wealth'.

The development of non-conviction based methods of confiscation

Traditionally, in common law jurisdictions, the power to confiscate unlawfully acquired property depends upon the existence of a criminal offence. The forfeiture of assets flows from conviction and the onus to demonstrate that the particular property was acquired through criminal activity rests with the prosecution.[34]

Until the late 1990s, confiscation law in Australia was dominated by conviction based statutory schemes. However, there was a general concern that these schemes were failing to make inroads into money laundering and organised criminal activity.[35] This led to the development of non-conviction based methods of confiscation.[36] An example of a non-conviction based approach can be found in *Proceeds of Crime Act 2002* (Cth). Under this Act, confiscation of assets can occur:

- without the need for a criminal conviction;
- independently of any criminal proceedings; and
- with the prosecution only being required to prove the commission of an offence or involvement in illegal activity to the civil standard of proof .[37]

The confiscation regimes contained in the *Criminal Property Confiscation Act 2000* (WA) ('the WA Act') and Northern Territory *Criminal Property Forfeiture Act* (NT)('the NT Ac') go even further. As well as providing powers to confiscate property acquired through or derived from criminal activity, the WA and NT approaches target property which is owned by someone whose wealth cannot be shown to have been lawfully acquired (unexplained wealth).[38]

Features of the WA and NT regimes

Under the WA and NT Acts 'unexplained wealth' is defined as property equal in value to any amount by which the total value of a person's wealth exceeds the value of the person's lawfully acquired

33 Committee Transcript, 6 November 2008, p. 55.
34 Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p. 66.
35 For example, the 1999 Australian Law Reform Commission review into criminal confiscations reported that the conviction based *Proceeds of Crime 1987* (Cth) had failed to yield substantial returns. See Australian Law Reform Commission, *Confiscation that Counts* (Report No 87, 1999).
36 For example, the *Criminal Property Confiscation Act 2000* (WA) ('CPC Act') was introduced to assist in combating organised crime, and was said to be needed in light of the limitation of the legislation in existenceat that time, particularly in the context of what was perceived to be a flourishing drug trade. Mr Barron-Sullivan, Parliamentary Secretary, WA, Legislative Assembly, *Parliamentary Debates,* (Hansard) 29 June 2000, p. 8611; Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC Under the *Criminal Property Confiscation Act 2002*'.
37 See for example *Proceeds of Crime Act 2002* (Cth) Part 2-2.
38 See WA Act Part 3 Division 1; NT Act Part 6 Division1.

wealth.[39] When determining whether the respondent has unexplained wealth, the court may have regard to 'the amount of the respondent's income and expenditure at any time or at all times.'[40]

The WA and NT Acts allow the Director of Public Prosecutions in those jurisdictions to apply to the respective Supreme Court seeking a declaration with respect to 'unexplained wealth' against a person.[41]

Where a court is satisfied that it is more likely than not that the respondent's total wealth is greater than the value of the person's lawfully acquired wealth, then the court *must* declare that the person has 'unexplained wealth'.[42]

There is a presumption that any property, service or advantage making up a person's wealth is *unlawfully* acquired, unless the respondent 'establishes the contrary'.[43]

Once a declaration of 'unexplained wealth' is made, the amount of wealth declared to be 'unexplained' must be paid to the State or Territory within one month of the declaration being made.[44]

Under the WA Act an application for an unexplained wealth declaration can also be made in conjunction with a freezing order.[45]

Under the WA Act, the DPP may apply to the court for a freezing order for 'confiscatable property', [46] which includes unexplained wealth.[47] The court may make a freezing order for property if:

- an examination order, a monitoring order or a suspension order is in force in relation to the property; or
- the DPP advises the court that an application for an examination order, a monitoring order or a suspension order has been made in relation to the property, or is likely to be made in relation to the property within 21 days after the freezing order is made.[48]

Once a freezing order has been made, it is an offence to deal with the property in any way.[49] The penalty for this offence is $100 000 or the value of the property, whichever is greater, or imprisonment for 5 years, or both.

Frozen property will be automatically confiscated if an objection to the confiscation of the property is not filed on or before 28 days after the service of the relevant notice or order on the person. [50]

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[39] WA Act s144 and NT Act s68 provide that a person has unexplained wealth if the value of the person's wealth is greater than the value of the person's lawfully acquired wealth. The value of the person's wealth is the amount equal to the sum of the values of all the items of property, and all the services, advantages and benefits, that together constitute the person's wealth. The value of the person's lawfully acquired wealth is the amount equal to the sum of the values of each item of property, and each service, advantage and benefit, that both is a constituent of the person's wealth and was lawfully acquired.
[40] WA Act s12(3); NT Act 71(3).
[41] WA Act s11; NT Act s67.
[42] WA Act s12(1); NT Act s71(1).
[43] WA Act s12(2); NT Act s71(2). \
[44] WA Act ss14, 25; NT Act ss72, 87. WA Act s12(5) and NT Act s69(1) provide that the value of the respondent's unexplained wealth is the 'amount equal to the difference between the total value of the respondent's wealth; and the value of the respondent's lawfully acquired wealth'. WA Act s12(6) and NT Act s69(2) provide that when assessing the value of the respondent's unexplained wealth, the court is *not* to take account of any property that has been confiscated under the Act or any other Act; any property, service, advantage or benefit that was taken into account for the purpose of making an earlier unexplained wealth declaration against the respondent; or any property, service, advantage or benefit in relation to which a criminal benefits declaration has been made.
[45] WA Act s11. When making a declaration of 'unexplained wealth', the court may also make 'any necessary or convenient ancillary orders', such as restraining the use of assets that may constitute 'unexplained wealth' WA Act s12(4); NT Act s75(5).
[46] WA Act s41.
[47] WA Act s142 provides that 'confiscatable property' includes ' property owned or effectively controlled, or that has at any time been given away, by a person who has unexplained wealth.'
[48] WA Act s43(1).
[49] WA Act s50.
[50] WA Act s7.

A similar regime exists under the NT Act, where an application for an unexplained wealth declaration may be made in conjunction with an application for a restraining order.[51] This can lead to an order that that the subject property be forfeited to the Territory if an unexplained wealth declaration has been made against the person who owned or effectively controlled the restrained property at the time the restraining order was made.[52]

Law Council's concerns

The Law Council is concerned that the WA and NT unexplained wealth provisions offend fundamental common law and human rights principles.

1. The provisions undermine the presumption of innocence and reverse the onus of proof

As noted above, under non-conviction based schemes, assets can be confiscated without the need for a criminal conviction[53] 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.[54]

The WA and NT Acts 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 provisions, there is a *presumption* that the property is unlawfully acquired unless the respondent can establish the contrary. [55]

This reverse onus is contrary to established common law principles and runs counter to the presumption of innocence.

The reverse onus means that the respondent may lose legitimately obtained assets if he or she cannot show that they have been lawfully obtained. There is a risk, for example, that liberal use of these powers may result in those who have failed to keep receipts or records losing their lawfully acquired assets.

By reversing the onus of proof and enacting a presumption against the respondent, the WA and NT unexplained wealth provisions remove the safeguards which have evolved at common law to protect innocent parties from the wrongful forfeiture of their property. As result a person may be liable to have their lawfully acquired property confiscated as unexplained wealth, even though there is no evidence that the property in question has been associated with, used for or derived from criminal activity.[56]

2. The provisions infringe the right to silence

The unexplained wealth provisions also have the potential to infringe the right to silence and exclude legal professional privilege. This is because the WA and NT Acts provide for a system of examination orders, which can be used by the DPP to gather information in respect of confiscation proceedings. 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 declaration. 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.

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[51] NT Act s67(2).
[52] See NT Act ss98-100.
[53] WA Act s5; NT Act s10(5); *Proceeds of Crime Act 2002* (Cth) s14.
[54] See for example *Proceeds of Crime Act 2002* (Cth)s47(3).
[55] WA Act s12(2); NT Act s71(2). When determining whether the respondent has unexplained wealth, the court may have regard to 'the amount of the respondent's income and expenditure at any time or at all times.' WA Act s12(3); NT Act 71(3).
[56] Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p at 76.

Under the WA and NT Acts,[57] a court can order a person to submit to an examination about a range of matters including:

- the nature, location and source of frozen property;
- the nature, location and source of property that is not frozen, but is suspected on reasonable grounds of being confiscable; and
- the income and expenditure of a person who has, or is suspected on reasonable grounds of having, unexplained wealth.[58]

The court can also order that the person give to the court any documents or information in the person's possession or control about particular property or about the person's wealth, liabilities, expenditure or income. The court can require the person to give information by affidavit, or to attend the court for examination, or both. [59]

It is an offence punishable by up to five years imprisonment for a person not to comply with an examination order.[60]

A person will contravene an examination order and be guilty of an offence if:

- the person fails to disclose material information, or gives false information or a false document, in purported compliance with the order; and
- the person was aware, or could reasonably have been expected to have been aware, that the information was material, or that the information or document was false.[61]

A person is not excused from complying with an examination order on the grounds that compliance:

- might incriminate the person or might render him or her liable to a penalty; or
- could result in the confiscation of property;
- would be in breach of an obligation of the person not to disclose information, or not to disclose the existence or contents of a document, whether the obligation arose under an enactment or otherwise.[62]

In addition, statements made by a person in the course of complying with an examination order can be used as evidence against the person in a proceeding against the person for a non-compliance offence; in any civil proceeding; and in any proceeding that could lead to the confiscation of property. [63]

The WA Act also operates to exclude the common law principle of professional privilege by requiring lawyers and other professionals to provide information normally protected by privilege to law enforcement officers. For example, subsection 139(1) of the WA Act is entitled 'legal professional privilege withdrawn' and provides:

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[57] WA Act s57; NT Act s17.
[58] WA Act s58; NT Act s18.
[59] WA Act s58; NT Act s18.
[60] If an owner of frozen property who is to be examined in connection with the property under an examination order contravenes the order, he or she will be precluded from filing an objection to the confiscation of the property and may also be guilty of an offence with a penalty of up to 5 years imprisonment, WA Act s61(1) and (2); NT Act s21(1) and (2). If a person examined under an examination order in connection with another person's wealth, liabilities, income or expenditure contravenes the order the person commits an offence and is liable imprisonment for a maximum of two years, WA Act s61(3); NT Act s61(3).
[61] WA Act s61(4); NT Act s21(4).
[62] WA Act s61(5); NT Act s21(5)-(6).
[63] WA Act 61(7); NT Act s21(7).

> *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.*

As a result, under the WA Act, lawyers, bankers, accountants and other persons with access to a respondent's financial records can be compelled to secretly disclose details of their client's financial affairs; answer questions and make documents available for inspection.[64]

3. The provisions do not allow a right to appeal

The Law Council is also concerned by the absence of a right to appeal under the WA and NT Acts in respect of an unexplained wealth declaration. Given the significant consequences an unexplained wealth declaration has for the property and procedural rights of a person, the absence of a statutory right to appeal adds to the draconian nature of these confiscation regimes.

4. The provisions have the potential for arbitrary application

The Law Council is concerned that the sheer breadth of the unexplained wealth provision leave open the real risk that they will be applied arbitrarily and give rise to the concern that their use could be politically motivated.

As noted above, the provisions in the WA and NT relating to unexplained wealth effectively render all persons within the jurisdiction liable to be brought before a court to demonstrate that their assets are lawfully acquired. There is no requirement for the prosecution to demonstrate that criminal proceedings are underway, or that a criminal charge is laid, or even that a criminal act may have occurred. Further, there is no concept of proportionality between the wrongful conduct presumed and the extent of confiscation flowing by operation of the statute.

When the DPP makes an application for an unexplained wealth declaration with respect to certain property, the respondent would be required to:

- produce to the court documentary or other proof of ownership of the property;
- adduce evidence of the lawful source of the funds used to acquire the property; and
- submit to cross examination about any other property that the DPP may wish to pursue.[65]

If an application for an unexplained wealth declaration is not objected to, the respondent stands to lose all property which is subject to the application, because assets are *presumed* to have been unlawfully obtained.

Such broad, sweeping powers are open to misuse, overuse and arbitrary application particularly when they also have the potential to result in significant monetary gains to the state.

There is also a concern that these powers could be used as 'fishing expeditions' for police, relieving law enforcement bodies of the burden of forensic investigation. Police may be motivated to bring unexplained wealth applications in order to gather evidence as evidence given by a respondent as to how his or her property was obtained may be relevant to another line of enquiry. For example, it may

[64] See e.g. WA Act ss58, 67 and 139. In contrast, under the NT Act, it is made clear that the common law rules (including the exceptions) relating to legal professional privilege apply in relation to proceedings under this Act, see NT Act s165.
[65] Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p 75.

provide the evidentiary basis for obtaining warrants to search and seize other property or items that may in turn be the subject of subsequent unexplained wealth declarations. [66]

The potentially arbitrary application of the unexplained wealth provisions is further exacerbated by the automatic and mandatory forfeiture in certain circumstances so as to remove judicial discretion to exclude assets from forfeiture in the interests of justice or compassion towards relatives. For example, under both Acts there is a right of objection to forfeiture by innocent parties with respect to crime used or deprived property, but not for unexplained wealth forfeiture.[67]

5. The provisions create prosecutorial difficulties

A natural corollary of the arbitrary nature of these broad provisions is the difficulties such provisions pose for prosecutorial authorities.

This has been demonstrated by the controversy surrounding the use of the unexplained wealth provisions in WA.

The 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.[68] For example, a table provided to a Parliamentary Committee by the WA DPP shows that only five out of total of 148 declarations for confiscation were made on the grounds of unexplained wealth, compared with 102 on the grounds that the person was a declared drug trafficker.[69]

In its 2007 Inquiry into the WA Corruption and Crime Commission, the WA Joint Parliamentary Standing Committee on the Corruption and Crime Commission queried both the WA Police and the DPP regarding whether minimal effort is exerted in relation to the pursuit of unexplained wealth. Mr Kim Porter, Detective Superintendent of the WA Police told the Committee:

> *Largely we deal with drug traffickers …. They take up considerable proportion of the time of the squad. The unexplained wealth side of things is more complicated and difficult. There is a philosophical hiatus between us and the Director of Public Prosecutions when it comes to unexplained wealth issues. In our view, the Criminal Property Confiscation Act 2000 was rewritten for the purpose of catering for unexplained wealth investigations. We are working with the DPP to define the differences between our interpretation of that section of the Act. We are working through the process at the moment where we see the Act as being one in which we are in a position to investigate people who have unexplained wealth … We want to investigate people we come across during the course of organised crime investigations. Even though we may not have caught them hands on with drugs, they live a wonderful lifestyle and there is a lot of suspicions about how they acquire their wealth. We think those people should explain where they get it from because their associations are such [that] they are*

[66] Ben Clarke, 'Confiscation of unexplained wealth: Western Australia's response to organised crime gangs', *South African Journal of Criminal Justice,* vol 15, 2002, p 75.
[67] For example, WA Act s153 provides for innocent parties to make applications to exclude certain property from forfeiture orders in respect of 'crime used' and 'crime derived' property, however no such provision exists in respect of 'unexplained wealth'. A similar provision exists under the NT Act s66.
[68] These figures relate to declarations of confiscation made between 2000 and 2006. Office of the Director of Public Prosecutions, *Annual Report 2005-2006* (2006). See also Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC Under the *Criminal Property Confiscation Act 2002*' p. 110.
[69] These figures relate to declarations of confiscation made between 2000 and 2006. Office of the Director of Public Prosecutions, *Annual Report 2005-2006* (2006). See also Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 110.

mixing with the criminal element. We are working our way through that. At the moment, I suspect there are a number of reasons that the DPP is still cautions about moving into that area.[70]

The DPP told the Committee that the majority of unexplained wealth applications occurred in situations where confiscation had commenced on other grounds and where the related investigation uncovered information indicative of unexplained wealth.[71] It said that although that the agency was not reluctant to progress unexplained wealth matters, such a perception may arise because the DPP often informs the WA Police that an investigation needs to be completed prior to any action being progressed.[72] The DPP expressed the view that the unexplained wealth provisions are useful in relation to property owned, controlled or given away by drug traffickers and should be routine in drug trafficking confiscation cases.[73]

While significant developments may have occurred since November 2007, these comments suggest that:

- the broad scope of the unexplained wealth provisions gives rise to the potential for differences in views between the DPP and the Police as to their correct application;

- the unexplained wealth provisions have been used sparingly since their introduction, and almost exclusively in conjunction with other confiscation mechanisms in the context of drug trafficking related confiscation proceedings.

6. <u>The provisions are unnecessary in light of other confiscation mechanisms</u>

The Law Council is not satisfied that it is necessary to further expand the already considerable confiscation powers at the Commonwealth level by introducing unexplained wealth provisions.

Even without the unexplained wealth provisions, the schemes operating in WA and the NT provide a wide range of expansive mechanisms to recover ill-gotten gains and proceeds of crime, including:

- freezing orders for crime use and crime deprived property;

  Under the WA and NT Acts, the DPP has the power to seek freezing orders with respect to 'crime-used'[74] or 'crime-derived'[75] property. When property is made the subject of a freezing

[70] Mr Kim Porter, Detective Superintendent, WA Police, *Transcript of Evidence,* 1 August 2007, pp.3-4. Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 111.
[71] Mr Ian Jones, Practice Manager, Confiscations, Officer of the Director of Public Prosecutions, *Transcript of Evidence,* (26 September 2007), p. 8. Joint Standing Committee on the Corruption and Crime Commission, *Report of the Inquiry into the Legislative Amendments to the Corruption and Crime Commission Act 2003 – The Role of the Corruption and Crime Commission in investigating Serious and Organised Crime in Western Australia,* (9 November 2007), Chapter 8: 'Empowerment of the CCC under the *Criminal Property Confiscation Act 2002*' p. 112.
[72] Mr Ian Jones, Practice Manager, Confiscations, Officer of the Director of Public Prosecutions, *Transcript of Evidence,* (26 September 2007), p. 3.
[73] Mr Robert Cock, Director of Public Prosecutions (WA), Office of the Director of Public Prosecutions (WA), *Transcript of Evidence*, 26 September 2007, p. 8.
[74] 'crime used' property is defined in the WA Act in section 146 as property 'used, or intended for use, directly or indirectly, in or in connection with the commission of a confiscation offence, or in or in connection with facilitating the commission of a confiscation offence; used for storing property that was acquired unlawfully in the course of the commission of a confiscation offence or any act or omission was done, omitted to be done or facilitated in or on the property in connection with the commission of a confiscation offence'. A similar definition is contained in NT Act s11.
[75] 'crime derived' property is defined in the WA Act in section 148 as property 'that is wholly or partly derived or realised, directly or indirectly, from the commission of a confiscation offence is crime-derived, whether or not anyone has been charged with or convicted of the offence, whether anyone who directly or indirectly derived or realised the property from the commission of the offence has been identified; whether anyone who directly or indirectly derived or realised the property from the commission of the offence was involved in the commission of the offence. A similar definition is contained in NT Act s12.

order, and no objection to that order has been lodged within 28 days, the property will be automatically confiscated.[76]

- criminal benefits declarations

The respondent to such an application is presumed to have acquired a 'criminal benefit' if the court is satisfied that it is more likely than not that: the property is a constituent of the person's wealth; the respondent was involved in the commission of a 'confiscation offence'; and the property was directly or indirectly acquired as a result of the respondent's involvement in the commission of the offence.[77] A criminal benefits declaration can also be sought for 'unlawfully acquired property'.[78] When the court makes a criminal benefits declaration, the respondent is liable to pay to the State an amount equal to the amount specified in the declaration.[79]

- crime-used property substitution declarations

Where property is used in the commission of a crime, and that property is not available for confiscation (because, for example, it is now owned by an innocent party or has been disposed of) the court can make a crime-used property substitution declaration to enable confiscation of other property owned by the respondent. [80] When a court makes a crime-used property substitution declaration, the respondent is liable to pay to the State or Territory an amount equal to the amount specified in the declaration as the assessed value of the crime-used property.[81]

A comprehensive range of confiscation powers also exist under the Commonwealth *Proceeds of Crime Act 2002*, including:

- restraining orders prohibiting disposal of or dealing with property (which do not rely on the owner of the particular property being convicted of an offence;[82] and
- forfeiture orders under which property is forfeited to the Commonwealth (which apply when certain offences have been committed, however it is not always a requirement that a person has been convicted of such an offence.); [83] and
- forfeiture of property to the Commonwealth on conviction of a serious offence; [84] and
- pecuniary penalty orders requiring payment of amounts based on benefits derived from committing offences; [85] and
- literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences.[86]

These processes provide a wide range of mechanisms to investigate and recover ill-gotten gains and proceeds of crime, without requiring the existence of a criminal conviction or the instigation of criminal proceedings.

[76] See WA Act Part 2; NT Act Part 7 Division 2.
[77] WA Act s16; NT Act s75
[78] WA Act s17; NT Act s76.
[79] WA Act s20; NT Act s80.
[80] WA Act ss21-22; NT Act s81.
[81] WA Act s24(1), NT Act s86(1). If a crime-used property substitution declaration is made against 2 or more respondents in respect of the same crime-used property, the respondents are jointly and severally liable to pay to the State an amount equal to the amount specified in the declaration as the assessed value of the property, WA Act s24(2): NT Act s86(2).
[82] *Proceeds of Crime Act 2002* (Cth) Part 2-1.
[83] *Proceeds of Crime Act 2002* (Cth) Part 2-2.
[84] *Proceeds of Crime Act 2002* (Cth) Part 2-3.
[85] *Proceeds of Crime Act 2002* (Cth) Part 2-4.
[86] *Proceeds of Crime Act 2002* (Cth) Part 2-5.

Before considering whether or not to adopt additional confiscation powers at the federal level, the Law Council would strongly urge the Committee to examine the expansive confiscation powers already in existence and any evidence that they are ineffective mechanisms to recover proceeds of crime and other ill-gotten gains.

For the above reasons, the Law Council is opposed to the adoption of the WA or NT 'unexplained wealth' provisions at the federal level as a mechanism to address serious and organised crime.

Attachment A: Profile of the Law Council of Australia

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 50,000 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 of the 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.