

**NORTHERN TERRITORY LEGAL AID COMMISSION  
SUBMISSION TO THE ECONOMIC POLICY SCRUTINY COMMITTEE  
ON THE CRIMINAL PROPERTY FORFEITURE AMENDMENT BILL 2019**

The Northern Territory Legal Aid Commission (“the Commission”) thanks the Economic Policy Scrutiny Committee for the opportunity to make a submission on the *Criminal Property Forfeiture Amendment Bill 2019*.

The Commission submits that the Committee recommend that the Bill not be enacted.

The Bill, if passed, will make the NT a "contributing jurisdiction" pursuant to the *Intergovernmental Agreement on the National Cooperative Scheme on Unexplained Wealth* scheme ("the Scheme").

The Commonwealth passed its own Bill pursuant to the Scheme in September 2018, which it succinctly explained in the following terms:<sup>1</sup>

The scheme will allow Commonwealth unexplained orders to be used where a person or property can be linked to a broader range of State and Territory offences. Further, the scheme allows participating jurisdictions to access powerful investigative tools and grants them preferential treatment in the distribution of seized assets.

New South Wales recently became the first State to take steps to join the Scheme, passing the legislation necessary to allow the Commonwealth to confiscate unexplained wealth in relation to certain New South Wales offences. Notably, however, no other States or Territories have apparently taken steps to join the Scheme.

The Commonwealth, by means of its “Territory power”<sup>2</sup> has roped the Northern Territory and the Australian Capital Territory into the Scheme as "participating jurisdictions". In effect, because the NT is a **participating** jurisdiction, the NT is obliged to participate in the scheme, but unless it also becomes a **contributing** jurisdiction by passing this complementary legislation, the NT is unlikely to be eligible for a share of any proceeds that are forfeited under the Scheme.

Nevertheless, the Commission has the following serious concerns about the NCS:

- The potential for the Scheme to apply retrospectively.<sup>3</sup>

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<sup>1</sup> The Hon Peter Dutton MP, Media Release, 20 September 2018, accessed at <https://minister.homeaffairs.gov.au/peterdutton/Pages/national-cooperative-scheme-on-unexplained-wealth.aspx>

<sup>2</sup> Clause 122 of the *Constitution of Australia*

<sup>3</sup> See Law Council of Australia, *Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Unexplained Wealth Legislation Amendment Bill 2018*, 20 July 2018 at [10] accessed at

- The potential abrogation of the privilege against self-incrimination.<sup>4</sup>
- The lack of "derivative use immunity" (ie potential for admissions made under the scheme to be indirectly used to incriminate)<sup>5</sup>
- The abrogation of legal professional privilege<sup>6</sup>
- The reversal of the burden of proof and undermining of the presumption of innocence<sup>7</sup>
- The potential for the scheme to be used oppressively against minor offenders, rather than "Mr Bigs"<sup>8</sup>
- The potential for the scheme to impose substantial penalties on innocent persons.<sup>9</sup>

The Scheme embraces the Northern Territory's existing criminal property forfeiture scheme, which, the Commission submits, is oppressive in that it potentially exposes genuinely innocent persons to forfeiture of their property, as exemplified by the "cuckoo-smurfing" case of *Kalimuthu & Anor v. Commissioner of the Australian Federal Police* [2019] HCA 39. That case involved a husband and wife ("Mr and Mrs Ganesh") who had arranged for the Malaysian equivalent of approximately \$AU5,000,000 to be deposited on their behalf in Australian bank accounts. The transactions themselves were carried out in breach of Australian anti-money laundering laws by unidentified persons apparently unknown to Mr and Mrs Ganesh. Consequently, the Australian Federal Police sought forfeiture of the funds in Mr and Mrs Ganesh's bank accounts. In its decision handed down on 13 November 2019, all members of the High Court accepted that Mrs Ganesh was, in effect, an innocent participant in this affair: her conduct was such that in the circumstances her acquisition of a share of the funds deposited in the Australian bank accounts would not have aroused a reasonable suspicion. Nevertheless, the plurality of the court dismissed Mrs Ganesh's appeal, while observing that "[a]lthough this may, at first blush, appear harsh".<sup>10</sup>

The Commission submits that this case graphically demonstrates the potential harshness, and the unfairness, of the Scheme.

On its face, one provision of the Bill appears to benefit the Commission. It would insert s130N into the existing Act, requiring that when distributing proceeds of unexplained wealth under the scheme, sufficient funds are retained to enable the Commission to be reimbursed for costs it has incurred by providing a person with legal aid in respect of proceedings under

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[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/UnexplainedWealth/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/UnexplainedWealth/Submissions)

<sup>4</sup> Law Council of Australia, *supra*, n. 3 at [11] – [15]

<sup>5</sup> Law Council of Australia, *supra*, n. 3 at [15]

<sup>6</sup> Law Council of Australia, *supra*, n. 3 at [17]

<sup>7</sup> See Civil Liberties Australia, *Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Unexplained Wealth Legislation Amendment Bill 2018*, 12 July 2018 at [1] – [2] accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/UnexplainedWealth/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/UnexplainedWealth/Submissions)

<sup>8</sup> Civil Liberties Australia, *supra* n. 7 at [3] – [8]

<sup>9</sup> Edward Greaves, *Submission to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Unexplained Wealth Legislation Amendment Bill 2018*, 2 August 2018 accessed at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/UnexplainedWealth/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/UnexplainedWealth/Submissions)

<sup>10</sup> *Kalimuthu & Anor v. Commissioner of the Australian Federal Police* [2019] HCA 39 at [117] *per* Kiefel CJ, Bell, Keane and Gordon JJ. Edelman J, in a dissenting judgment, would have allowed Mrs Ganesh's appeal.

the Act or criminal proceedings. However, there is no requirement that either the Commonwealth or the Northern Territory make such reimbursement, and to date the Commission's applications to have its costs reimbursed by government from the proceeds of forfeited property have all been declined. Consequently, the Commission does not generally grant aid to respondents in criminal property forfeiture applications.

In these circumstances, the Commission is of the view that the benefit to the Commission of s130N is apparent rather than real. Furthermore, respondents to applications under the Scheme will in many cases be required to appear without legal representation in complex technical proceedings leading to the loss of their property, whether or not they have actually been involved in the commission of a criminal offence.

The Commission also contends that the Statement of Compatibility with Human Rights issued in conjunction with the Bill is flawed. Firstly, the Commission submits that, contrary to the conclusions expressed in the Statement, Article 17 of the ICCPR (*Freedom from arbitrary or unlawful interference*) is engaged. That view is strongly supported by the dissenting judgment of Gageler J in the High Court decision of *Attorney-General of the Northern Territory v Emmerson* [2014] HCA 13; 307 ALR 174. Gageler J found that in relation to the particular part of the Northern Territory's criminal property forfeiture laws under consideration in that case, that they constituted an acquisition of property other than on just terms.

The plurality of the court found that the prohibition of laws acquiring property other than on just terms was inapplicable because this law was of a penal nature (or in other words, for the purpose of punishing offenders). On that analysis, the Commission submits that Article 14 of the ICCPR (*Right to a fair trial*) is engaged. As submitted above, the Commission is of the view that the Bill fails to accord affected persons the presumption of innocence, a guarantee of legal assistance, and protection against self-incrimination, all of which are expressly protected by Article 14. In its terms, Article 14 applies only to criminal proceedings, but the Commission submits that the Scheme, being penal in nature and punitive in effect, is one to which the protections provided by Article 14 should apply.



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Director

13 November 2019