The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

20 December 2018

The Hon Wayne Martin AC QC
Review of the *Criminal Procedure Act 2004* (WA)
Department of Justice

By email: confiscationactreview@justice.wa.gov.au

Dear Mr Martin AC QC

REVIEW OF THE *CRIMINAL PROPERTY CONFISCATION ACT 2000* (WA)

Thank you for your letter of 20 September 2018 as regards the above.

The Law Society is delighted with the opportunity to provide comment.

As you may be aware, the Law Society has engaged with the Western Australian Government on numerous occasions on this issue, dating back to 2000 when it made a submission on the Criminal Property Confiscation Bill. The Law Society's previous submissions have to date failed to receive a substantive response from the Government. I **enclose** a copy of a Law Society submission dated 15 August 2000 and a joint submission dated 19 October 2006 between the Society and the Office of the Director of Public Prosecutions.

Terms of Reference (a)-(d)

Broadly speaking, the Law Society notes the Act can operate unfairly to produce harsh and disproportionate outcomes and does not adequately safeguard the rights of innocent third parties.

A major reason for this is that the Act dispenses two classes of justice: one where property is frozen by the court under a freezing order, and another where property is frozen under a freezing notice issued by a Justice of the Peace. A person under a freezing order has the right to seek that the court vary the order as justice demands and specifically can have access to frozen funds for living, legal and business expenses. That is not possible under a freezing notice.

Freezing notices are easy to obtain as they can be issued on mere suspicion that property is crime derived. In contrast, the person affected can only challenge a freezing notice in two difficult and expensive ways:

- administrative review to quash the notice; or
- objecting to the notice where the onus is on the person to prove that the property is not crime derived.

Presently, the Law Society co nsiders the fairness of the operation of the Act would be significantly enhanced and many of the harsh outcomes (including to innocent third parties) avoided if:

1. judicial discretion were introduced at the point of confiscation of property to allow the court to uphold an objection to confiscation where the court is satisfied that it is in the interests of justice to do so; and
2. the freezing notice regime were brought into alignment with the freezing order regime.

Level 4, 160 St Georges Terrace Perth WA 6000, DX 173 Perth
Telephone: (08) 9324 8600 Facsimile: (08) 9324 8699
Email: info@lawsocietywa.asn.au Website: www.lawsocietywa.asn.au
Please address all correspondence to The Law Society of Western Australia PO Box Z5345, St Georges Terrace Perth WA 6831

The Law Society considers those reforms could be implemented through adoption of the following process:

1. Police apply to, and a JP issues a freezing notice (**FN**) (as occurs now).
2. There be no default obligation to give a statutory declaration under s37, but rather, the issuing JP decides whether there is an *urgent* need for a statutory declaration.
3. Police must file the FN in the District or Supreme Court (the Magistrates Court should cease to have jurisdiction). The filing of the FN constitutes the commencement of a 'matter' before the Court.
4. If so ordered by the JP, people served with the FN must within 28 days (not seven days as present) give Police the statutory declaration.
5. People have three months from service of FN to file an appearance/objection in the matter.
    a. There should be no filing fee.
    b. The form should be simple and a pro forma attached to the freezing notice.
    c. If the three month deadline is missed, there should be a mechanism for people to apply, after the event, for an extension of time, if they can satisfy the Court that there was good reason for their failure to file within three months.
6. In the appearance/objection, the objector may:
    a. Consent (without admission) to confiscation. Only if all interested parties consent will confiscation occur.
    b. Ask the Court to consider afresh whether the frozen property meets the test for freezing. That test is to be applied based on whatever evidence the State/DPP then chose to file in the Court. It is a hearing *de novo*. If the Court is satisfied that ongoing freezing is justified the Court makes a Freezing Order (**FO**). If the Court is not satisfied it cancels the FN. To be clear, the FN remains in place until the Court adjudicates. The Court is in control of how long the State / DPP have to file their evidence. Hearsay evidence is already (and would continue to be) admissible. The test is only one of reasonable (objective) suspicion as to the relevant matters (depending on the stream of the Act).
    c. Ask the Court to cancel the FN, but nevertheless consent to the Court making an FO. This will allow the person to apply to the Court to modify 'the freeze' to suit the justice of the case.
7. If an FO is made (either on application of DPP/CCC as at present, or under the above procedures) the Court may:
    a. adjourn the objection pending any criminal charges if satisfied that that is appropriate; or
    b. programme the objection; and
    c. in either case make orders:
        i. for control and management under s91; and
        ii. that living, business and legal expenses may be met from frozen funds.

At the very minimum, judicial discretion for crime-used property and crime-used property substitution is needed. At present, a relatively minor offence committed on valuable property can have drastic consequences that are out of proportion to the offence. Indeed property can be forfeited as crime-used once a person forms an intention to commit an offence even if they never follow through and commit it.

Undertaking as to damages

The Society also considers that the s137 immunity must be removed in relation to losses flowing to an innocent person as a result of the freezing of property under FN or FO. The

State should be made expressly liable for such losses and there should be provision for the recovery of the same in a court of competent jurisdiction. If the State selects cases carefully, and acts reasonably when innocent people come forward to claim an interest, its losses will be minimal. Experience internationally is that these losses pale into insignificance compared to the value of funds that are forfeited.

Legal costs

Firstly, there should be a presumption that where a party succeeds in challenging a freezing notice on the basis that there were no proper grounds for its issue, and where a party is successful on an objection, the party is entitled to their costs on an indemnity basis.

Secondly, a pro vision similar to s330(4)(c) of the *Proceeds of Crime Act 2002* (Ct h) is appropriate. It provides that property ceases to be confiscable if it was acquired by a legal practitioner as payment for *reasonable* legal expenses incurred in connection with confiscations or criminal proceedings.

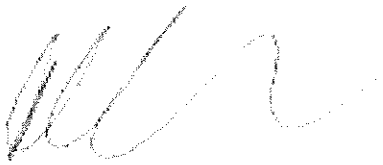
Terms of Reference (e)

The Law Society submits that Schedule VIII to the Misuse of Drugs Act should simply be repealed. In its place should be a mandate that "consumable cannabis" be stripped from any plant and weighed. Schedule VII would then apply.

Separately, sentencing Judges might also be given discretion on whether to declare a person a drug trafficker where the judge is satisfied (on the balance of probabilities, the onus being on the offender) that the offending was non-commercial in nature.

I hope the these submissions are of assistance to the Review. If you would like to discuss the above further, please do not hesitate to contact Mary Woodford, General Manager Advocacy at mwoodford@lawsocietywa.asn.au or on (08) 9324 8646.

Yours sincerely



Hayley Cormann
President