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Mrs Giulia Jones MLA
Chair
Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

Dear Mrs Jones

I write in response to the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (**the Committee**) Report No 40 of 24 March 2020, which comments on the Confiscation of Criminal Assets (Unexplained Wealth) Amendment Bill 2020 (**the Bill**). I have addressed each of the issues raised by the Committee below.

Reversal of the burden of proof

The Committee has expressed concerns regarding the Bill being reasonably justified given the uncertain relationship between the limitations on rights identified and the Bill's purpose, and whether there is any less restrictive means reasonably available to achieve that purpose. The Committee has commented that there is 'no necessary link between all of the unexplained wealth and the serious criminal activity' meaning that 'a court could make an order where the unexplained wealth far exceeds the wealth, if any, derived from the serious criminal activity that might have been identified in the affidavit accompanying the application.'

There is no requirement for the serious criminal activity referred to in the supporting police affidavit to be specifically linked to the property which is the subject of unexplained wealth proceedings, and this is consistent with the Bill's purpose. However, it does not follow that a court could make an order where the unexplained wealth far exceeds the wealth derived from serious criminal activity. The court is required to assess unexplained wealth by reference to the difference between the person's total wealth and the sum of the values of the property that the court is satisfied, on the balance of probabilities, was not derived from serious criminal activity. The Bill introduces a mechanism to target people reasonably suspected of being involved in criminal activity and who possess unexplained wealth, which is the likely proceeds of crime. If there were evidence to prove a

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direct link between unexplained wealth and serious criminal activity, other existing proceeds of crime provisions could be used to confiscate that property.

Unexplained wealth schemes are premised on an assumption that when a person is involved in serious criminal activity and cannot show that their wealth has been lawfully acquired, that wealth is presumed to be the proceeds of crime and should be forfeited. The particular crime from which the wealth has been derived is not a critical element in unexplained wealth proceedings. These provisions operate to target persons who appear to profit from serious criminal activity but where it may be difficult to obtain sufficient evidence to link the person's wealth to a specific offence. Unexplained wealth provisions cannot be less restrictive in these circumstances as they would otherwise fail to achieve this purpose. I note that at every stage of unexplained wealth proceedings, an application is subject to judicial scrutiny and an order will only be made if the court is satisfied to the requisite standard. Wealth or property that can be shown to have been lawfully acquired will not be included in the assessment of unexplained wealth for the purpose of making a final order and, to that end, lawfully acquired wealth will not be forfeited.

The Committee has also commented that the purpose 'to deprive a person of any unexplained wealth derived from serious criminal activity' seems to restate the operation of provisions of the Bill and does not identify a legitimate objective justifying interference with rights under the Human Rights Act 2004 (**the HRA**). In response to this comment, I stress that targeting unexplained wealth is a purpose distinct from the existing confiscation provisions in the Confiscation of Criminal Assets Act 2003 (**the COCA Act**). The purpose of depriving a person of unexplained wealth allows for law enforcement to more effectively deter and disrupt serious criminal activity including by targeting those profiting from criminal activities at arms-length. These provisions are unique in their ability to target high level criminals where it may be difficult to prove that they have committed a specific offence and ensure that these criminals do not profit from their illegal activities. Targeting serious criminal activity through confiscation of unexplained wealth is a legitimate objective, and one that has been identified as a highly effective way of disrupting serious and organised crime.

I emphasise that the making of orders under unexplained wealth provisions does not amount to, or result in any finding of criminal guilt. Further, the forfeiture of wealth that cannot be shown to have been lawfully acquired does not operate as a specific punishment for a person's wrongdoing, rather it operates to target criminal activity more generally and to remove the profit motive from criminal offending. Extensive consultation occurred during the preparation of the Bill and I am confident that the scheme is correctly characterised as civil, in line with unexplained wealth schemes in other jurisdictions.

The Committee has commented that there may be a number of reasons why it could be difficult for a respondent to establish that wealth was not derived from serious criminal activity. I acknowledge these potential difficulties, however, I note that the factors listed by the Committee (length of time since property was acquired, whether the property in question was a gift, or whether property is directly or indirectly 'derived' from criminal activity) evidence the sort of knowledge that would lie peculiarly within a respondent's knowledge, illustrating well why a respondent is best placed to carry the burden of proof to establish that unexplained wealth was not derived from serious criminal activity.

The Committee has also noted that it is not clear what additional factors would be taken into account by the court in considering the public interest in not making or in reducing the quantum of an unexplained wealth order. The factors that the court may consider include whether a person is

likely to experience undue or severe hardship if an order is made or the interests of third parties. Public interest tests involve balancing exercises that are frequently undertaken by courts.

The Committee has noted the Explanatory Statement sets out that sources of wealth are a 'matter that typically is peculiarly within the respondent's knowledge to explain and the respondent is therefore most appropriately placed to produce evidence explaining the origins of their wealth'. The Committee has commented, however, that it is not clear that displacing the burden of establishing the source of wealth in all circumstances, regardless of the nature of that wealth and its relationship with the serious criminal activity, is a reasonably proportionate response to the objective of preventing gain from serious illegal activity.

Proceedings under the unexplained wealth provisions are proceedings heard by the court in accordance with relevant evidentiary rules and procedures. The Bill also includes safeguards such as requiring the court to consider the public interest when deciding whether to make an unexplained wealth final order, whether to reduce the amount payable and whether to refuse to make an order. Throughout the proceedings, adequate opportunity is afforded to a respondent to present his or her case. I consider that the reversal of the burden of proof in these circumstances is a reasonably proportionate measure to achieve the objective of preventing financial gain from serious criminal activity.

Retrospective operation

The Committee has highlighted its concern about the possible retrospective operation of the Bill. The Committee has noted that there is no requirement that the suspected serious criminal activity referred to in a supporting police affidavit occur after the commencement of this Bill. The Committee has further raised concerns about the potential for an unexplained wealth restraining order to be made against any current property of a person, meaning that property which may have been lawfully acquired and that is used by innocent dependents could be restrained.

The Committee has requested that I provide further information on the intended operation of the unexplained wealth restraining order and the impact on dependants so far as it enables restraining use, or forfeiture, of property with no established connection to serious criminal activity, where that activity occurred prior to the commencement of the Bill. The Committee has asked that consideration be given to including reference to this retrospective operation of the Bill and its justification in the explanatory statement.

I am not concerned about the retrospective operation of the Bill as currently drafted. If the serious criminal activity in question was a serious criminal offence at the time it was committed, then it would not be unfair to a respondent that the proceeds of that activity be restrained pursuant to the provisions in this Bill. In relation to the restraint or forfeiture of property with no established connection to serious criminal activity, I emphasise again that the purpose of unexplained wealth proceedings is to target wealth that cannot be directly connected to specific criminal offences and which cannot be shown to have been lawfully acquired. I further assure the Committee that the provision of judicial discretion to refuse to make an order or reduce an amount payable at the final order stage is an appropriate means by which to provide hardship relief for dependants. It will not be in the public interest to send dependents into poverty, nor will it be in the public interest to reduce an order to allow for excessive or luxurious expenses to be met. The Courts are well practiced in undertaking public interest tests and a final unexplained wealth order will not allow for the forfeiture of property that has been proven to be lawfully acquired.

I thank the Committee for drawing these matters to my attention and trust this further clarification is of assistance.

Yours sincerely

Gordon Ramsay MLA
Attorney-General