RECOMMENDATIONS OF THE MAURITIUS BAR ASSOCIATION TO THE HONOURABLE ATTORNEY GENERAL ON:

THE CONSTITUTION (AMENDMENT) BILL No. XXIX OF 2015 AND

THE GOOD GOVERNANCE AND INTERGRITY REPORTING BILL No. XXX of 2015

INTRODUCTION

The Bar Council, on behalf of the Bar, is pleased to have this opportunity to comment on the provisions of the *Constitution (Amendment) Bill 2015 and the Good Governance and Integrity Reporting Bill 2015* ("the Bill").

The Council has compiled the views of the members of the Mauritius Bar Association (MBA) prior to and following a Special Meeting of the MBA held on the 13 November 2015 and a presentation made by Honourable Minister Roshi Bhadain at the seat of the MBA on the 18 November 2015.

ISSUES

The Council has identified the following main issues:

1. Should the fast evolving UWO [Unexplained Wealth Order] concept be on the statute book?

2. Should civil processes be used in pursuit of criminal law objectives?

3. Is this a matter best left to the DPP, in view of his constitutional powers under s72 of the constitution?

4. Does its introduction require further constitutional amendment to Sections 3 and 10 of the constitution and, if so, to what extent?

5. Should the Bill apply prospectively, or retrospectively?

SUMMARY

Whilst the Council does not propose to go into the details of what each member of the MBA has voiced out, being pressed for time, the Council has compiled a list of the main recommendations based on the discussions held amongst its members at the Special Meeting of the 13 November 2015 and the presentation of the Honourable Minister R. Bhadain on the 18 November 2015. The discussions are available for further reference.

RECOMMENDATIONS AND OBSERVATIONS

- A much more extended definition of '*unexplained wealth*' by including rights of inheritance, donations, winnings, awards etc.

  The Council suggests the simpler and all-embracing language of s8(4)(a)(ii):
  '*to show that he has acquired the property* ***by lawful means***';

- Third parties' property rights, particularly inscribed creditors, should be expressly taken care of and safeguarded;

- A similar *caveat* to paragraph 8(4)(aa), by reproducing the existing caveat to s8(4)(a) '*except so far as that provision, or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society*' [this has already been taken care of by means of the proposed amendments dated 27.11.15, to be moved at [Committee stage]; and

- By recasting the proposed new paragraph 8(4)(aa) of the Constitution Amendment Bill so as to expressly reflect the avowed objective of the GGIR Bill: namely confiscation of unexplained wealth in the course of civil proceedings *in rem,* not *in personam*.

  [on account of the numerous references to '*person*' on no less than 5 occasions, which may give the wrong impression that confiscation proceedings are in *personam*]

GGIR Bill No. XXX of 2015

- The draft legislation should expressly provide that the proceedings for a confiscation order are ***in rem*** and not ***in personam***.

- There needs to be mentioned in the proposed legislation that unexplained wealth exclude property obtained by inheritance rights, donations or lottery or such lawful gains.

- The term ***reasonably justifiable in a democratic society*** should appear in the constitutional amendment as it appears in others parts of the Constitution [has already been taken care in the proposed amendments to be moved at Committee stage]

- The rights of financial institutions on the properties, which would become the subject matter of a confiscation order and which, was given to these financial institutions as security to guarantee a loan transaction should be clearly spelt out.

- Similarly, the property rights that third parties may already hold on the property that is sought to be confiscated should also be specifically addressed.

- The rights of co-owners in properties, which would become the subject matter of a confiscation order, should also be clearly defined.

- The language which should be adopted in the proposed legislation is that which already exists in the Constitution under Section 8 (4)(a)(ii) providing for ***"taking or possession of property in consequence of the inability of a person who has enriched himself by fraudulent or corrupted means to show that he has acquired the property by lawful means."***

- The trial of a criminal offence must, as a rule, be held in public and in the accused's presence, (section10 (9) of the Constitution), whilst not physically present, in the

course of summary proceeding conducted in chambers, from which the public and the parties themselves are generally excluded.

- After having defined, in the Constitution itself, under a new paragraph 8(4)(aa), the 3 situations in which such confiscation would be permissible by law, yet, one cannot help observing that, in the GGIR Bill, the mirrored expression "unexplained wealth" is, oddly enough, given an unexplainably wider meaning by the use of the word "includes", instead of "means". The Council very much doubts that this is intra vires the Constitution (Amendment) Bill in its present form.

- The rule of law and the whole fabric of the criminal justice system, as we know it, and which is enshrined in section 10 of our constitution, should not be subverted by resorting to civil processes in pursuit of criminal law objectives, in the process bypassing the DPP's constitutional powers which are exclusively conferred upon him under s72 of the constitution and which have been, so far, more or less preserved and insulated from the sphere of political influence.

- It is a fact that no citizen of this country may be punished until and unless he has been convicted of a "criminal offence" "which is punishable under the law of Mauritius" [s10 (12) of the Constitution]. The GGIR Bill seeks to legalise the confiscation of property in summary civil proceedings, conducted in chambers, not for a deliberate 'act' or 'omission' which has been criminalised; but for having been, unhappily, in any one of the 3 situations described above.

This raises the key question:

<u>May civil processes be used in the furtherance of criminal law objectives?</u>

- What about the presumption of innocence?

- What about its necessary corollary: the right to silence?
  [these issues have already been taken care in the proposed amendments to be moved at Committee Stage]

- What about the cornerstone of the criminal law: criminal offences may only be enacted prospectively and not retrospectively? [section 10 (4) of the Constitution] It stands to reason that you cannot retrospectively commit or be punished for a criminal offence on account of any 'act' or 'omission' that did not, at the time it took place, constitute such a criminal offence [section 10 (4) of the Constitution] [this is partly addressed in the proposed amendments by introducing the following: 'or any other provisions of Chapter II of the Constitution']

- The Council has serious concerns about the reversal of the onus of proof within unexplained wealth regimes, arguing that this runs contrary to established common law principles and to the presumption of innocence as guaranteed under our Constitution. Unexplained wealth regime allows the confiscation of assets without

the need for a criminal conviction, and there is no requirement to demonstrate an evidence-based link between the property in question, and the commission of a criminal offence. 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.

- Additionally, the Council noted that unexplained wealth proceedings essentially concern the whole of a person's financial affairs over his lifetime. There is no aspect of a person's income, expenditure, investments and business dealings (and potentially that of his family and close partners), which is not of possible relevance. In essence there are no practical limits placed on the type of information that may be seized in the course of executing a search warrant/disclosure order under unexplained wealth proceedings. [*vide* Henderson v Queensland (2014) HCA 52, at §15: *The appellant fails in his primary argument in this Court. In order to discharge the burden imposed by s 68(2)(b) it was necessary for the appellant to satisfy the Supreme Court that it was more probable than not that the jewellery was not illegally acquired in his father's hands at the time that the appellant received it. The placement of the burden of proof is uncompromising and unable to be ameliorated by any "conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct"**[34]**. On the facts found by the primary judge, there was no available hypothesis to explain how the appellant's father acquired the jewellery. The appellant failed to discharge the onus placed upon him.*[1]

- There is no provision for Annual Reports to be drawn up by the Agency, as has been and is the position in the UK. Further, no Board, with a chairman and members, has been provided for, vide s37 of the IGCA, as the Agency is a *body corporate*.

- There is no provision for Compensation orders (as in the Asset Recovery Act)

- There is no provision that interested parties should be put into cause, in the course of confiscation proceedings.

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[1] On 22 November 2011, the Supreme Court of Queensland made an order under the *Criminal Proceeds Confiscation Act* 2002 (Q) ("the CPCA") forfeiting cash to the value of $598,325 which had been found in the possession of the appellant, who was a person who had engaged in a serious crime related activity within the meaning of the CPCA.

An application by the appellant for exclusion of the cash from forfeiture was dismissed. It was dismissed on the basis that although the cash was not itself the proceeds of any illegal activity, it was the proceeds of the sale of jewellery, given to the appellant to hold for himself and three of his siblings by their late father, which itself was not shown not to have been illegally acquired property.

An appeal to the Court of Appeal of the Supreme Court of Queensland was dismissed on 16 April 2011. The appellant appeals to this Court against that decision by special leave granted on 16 May 2014. The appeal turns critically upon the construction of s 68(2) of the CPCA, which provides:

> "***The Supreme Court must, and may only, make an exclusion order if it is satisfied—***
>
> *(a) the applicant has or, apart from the forfeiture, would have, an interest in the property; and*
>
> *(b)* ***it is more probable than not that the property to which the application relates is not illegally acquired property***."

The appellant challenges the decision of the Court of Appeal primarily by reference to what he had to prove in order to satisfy the criterion in s 68(2)(b). For the reasons that follow, the appeal should be dismissed.

- The legislation is made *not* to apply to non-citizens.

- The Council further observes that there is a lack of safeguards in the unexplained wealth provisions to ensure that these extraordinary powers are only used when necessary and in pursuit of a legitimate end.

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