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Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

[by email to: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)]

12 July 2018

Dear Committee Secretary

**Re: Unexplained Wealth Legislation Amendment Bill 2018**

I write in response to the Senate Legal and Constitutional Affairs Committee's invitation to make submissions on the provisions of the above Bill.

Civil Liberties Australia (CLA) **does not support the proposed amendments** to the *Proceeds of Crime Act 2002* (the Act) contained in the Bill.

CLA believes that unexplained wealth laws and similar legislation at the state and territory level have been implemented and applied in ways contrary to their original intent. In particular, they have been applied in ways that deny fundamental human rights and civil liberties to Australians. CLA considers that this will only be exacerbated by measures contained in this Bill (see below).

CLA submits the following points to the Committee for its consideration:

(1) Unexplained wealth laws are not conviction-based. They remove the need to prove a person has engaged in any criminal activity or indeed that any offence has even been committed. Unexplained wealth laws reverse the burden of proof by requiring a person to prove on the balance of probabilities that assets are not the proceeds of crime. See for example chapter 9 of the Australian Law Reform Commission's report *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129)<sup>1</sup>.

(2) Such laws therefore undermine the presumption of innocence which is central to our system of justice and of the rule of law.

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<sup>1</sup> <https://www.alrc.gov.au/publications/9-burden-proof-0>

(3) At the time these laws were introduced, they were justified to parliaments at federal and state levels on the basis that they would be used to combat serious and organised crime where the criminals were using such sophisticated business models that it would be extremely difficult to secure convictions against senior-level crime bosses.

For example, in its inquiry into Commonwealth Unexplained Wealth Legislation and Regulations, the Parliamentary Joint Committee on Law Enforcement stated that, “with appropriate safeguards, unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia.” And in its response, the Government at the time stated that “these laws are designed to target senior organised crime figures who often derive large profits from illegal activity but distance themselves from the commission of actual offences.”<sup>2</sup>

Such language was repeated in the states and territories. For example, in the second reading speech for unexplained wealth legislation in Tasmania, the then Attorney General said, “senior organised crime figures, who organise and derive profit from crime, use business models which ensure that they are not linked directly to the commission of the offences or crimes which are the sources of their wealth. In those circumstances, the existing conviction-based confiscation and forfeiture laws cannot apply to the senior organised crime figures.”<sup>3</sup>

The focus on “combating serious and organised crime” is repeated in the explanatory memorandum for this Bill (see paragraphs 2 and 3). Furthermore, it is given as the key justification for measures in the Bill that encroach even further upon fundamental human rights such as the right to privacy (see paragraphs 68 and 73).

(4) The fundamental issue the Committee needs to consider is whether these laws are indeed being used to combat serious and organised crime. If this is not the case, the justification for the measures disappears and, in CLA’s view, the Committee would have to recommend against passage of the Bill.

(5) According to information received by CLA from around Australia, unexplained wealth laws are being used much more widely than against the Mr Bigs of the serious and organised crime world. The one systematic review of the operation of unexplained wealth laws was carried out in Tasmania – see the Independent Review of Part 9 *Crime (Confiscation of Profits) Act (Tas) 2017*<sup>4</sup>. This Review included details provided by the state’s DPP which showed that unexplained wealth laws have been used to recover amounts of as little as \$3000. We suggest that none of the individuals described in that Review (see Annex C) could be described as a “senior organised crime figure”. Indeed, this Review stated unambiguously that the application of unexplained wealth laws in Tasmania was not confined to senior organised crime figures. It applied to anyone who may have profited from crime or whose wealth was unexplained (see paragraph 6.9 of the Review).

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[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Law\\_Enforcement/Completed\\_inquiries/2010-13/unexplained\\_wealth/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/2010-13/unexplained_wealth/index)

<sup>3</sup> [http://www.parliament.tas.gov.au/bills/Bills2013/pdf/notes/29\\_of\\_2013-SRS.pdf](http://www.parliament.tas.gov.au/bills/Bills2013/pdf/notes/29_of_2013-SRS.pdf)

<sup>4</sup> [http://www.parliament.tas.gov.au/ha/tpapers/2017/p2017/HATP1\\_17\\_8\\_2017.pdf](http://www.parliament.tas.gov.au/ha/tpapers/2017/p2017/HATP1_17_8_2017.pdf)

(6) CLA urges the Committee to investigate for itself the application of unexplained wealth laws at federal and state levels. We are confident it will reach the conclusion that these laws have been applied in a manner contrary to assurances given to state and federal parliaments and, therefore, that Parliament can have no confidence that the new measures contained in this Bill will be used only to combat serious and organised crime as the Minister is claiming in the explanatory memorandum. Simply put, the justification provided by the Minister for the reversal of the onus of proof and for the further encroachments on human rights described in the explanatory memorandum – i.e., that they are necessary to combat “serious and organised crime” – does not hold water.

(7) Furthermore, CLA considers that the measures contained in this Bill will only serve to further encourage these laws to be used more widely than to combat serious and organised crime. We believe, for example, that the new arrangements for the sharing of recovered proceeds (paragraph 5 of the explanatory memorandum) provide a further financial incentive to pursue unexplained wealth beyond serious and organised crime.

(8) The Committee may wonder whether there is any harm in pursuing petty criminals under unexplained wealth laws. Perhaps no one should be allowed to profit from criminal activity, big or small, and perhaps unexplained wealth laws provide an easier option rather than the more onerous task of a conviction-based approach.

CLA strongly rejects this argument. The burden of proof and the presumption of innocence are fundamental to our system of justice. There may be an argument for waiving these principles in certain very limited circumstances where criminal activity is so well-organised and the business models are so sophisticated that even the well-developed justice system of a country like Australia cannot keep up. There can be no justification for this approach in the case of small-scale criminal activity. The Committee should be very concerned that these laws are being used to go around the usual processes in cases that can and should be dealt with through normal investigation and legal proceedings.

(9) Finally, in CLA’s view, the wide use of unexplained wealth laws beyond serious and organised crime requires a broader and deeper review of the operation of these laws more generally. CLA therefore suggests to the Committee that, in addition to recommending against the passage of this Bill, it also make a recommendation that such a federal review be held, including examining state and territory applications of such laws.

Yours sincerely

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President

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