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

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

Dear Committee Secretary

Re: Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

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) ***pending a proper review of the operation of Australia's unexplained wealth regime at both the federal and state levels***.

As the explanatory memorandum makes clear, this Bill contains a range of measures related to Australia's unexplained wealth regime. 'Unexplained wealth' laws and similar legislation at the state and territory level have been implemented and applied in ways contrary to their original intent and contrary to assurances given to state and federal parliaments. As such, they deny fundamental human rights and civil liberties to Australians.

A comprehensive examination of the unexplained wealth regime should take into account the following points:

(1) 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).

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

(3) At the time these laws were introduced and passed, parliaments were given assurances that they would only be used to combat serious and organised crime where there were 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, "unexplained wealth laws represent a reasonable, and proportionate response to the threat of serious and organised crime in Australia."

Similarly, in the second reading speech for unexplained wealth legislation in Tasmania, the then Attorney General of Tasmania 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."

(4) Information provided to CLA by state DPPs shows that the implementation of these laws goes against the assurances given to parliaments. According to this information, unexplained wealth laws have often not been used against "serious organised crime figures". Indeed, they have been used to recover amounts of as little as $3000.

(5) In many of these cases, there is no indication that any kind of sophisticated or impenetrable "business model" prevents these individuals being linked directly to the commission of offences or crimes that are the sources of their wealth. Indeed, in some cases, DPPs have pursued unexplained wealth orders while, at the same time, pursuing criminal convictions. CLA considers that many of these cases could and should be dealt with through standard processes of the justice system, namely investigation and legal proceedings.

Overall, the general intention of the proposed amendment in this Bill appears to be to bring the Commonwealth Act into line with draconian equivalents in jurisdictions such as Western Australian, Tasmania and the Northern Territory.

Those Acts are applied well beyond "organised crime" and impose oppressive, often life-destroying additional punishment on individuals who have already been through the criminal justice system and have already been subjected to punishment as determined by a judicial officer for the same conduct. A good example is Dickfoss v DPP (2012) 31 NTLR 16 where a soft drug user in his 50s causing no harm to anyone except perhaps himself and who had already been sentenced for the same conduct by a court, lost his home, which was of little value to anyone save of course himself.

To militate the harshness of these outcomes, the DPPs in NT and WA now exercise a very broad discretion to select which respondents will be subject to the Act. Those decisions – like all decisions of DPPs – are practically unreviewable. While that discretion relieves some respondents from the brutality of this legislation, it is difficult to imagine a less constitutionally desirable method for doing so.

In short, the thoughtless enthusiasm for broadening legislation of this kind is causing enormous hardship to individuals outside the contemplation of members of parliaments at the time of original enactment and, at the same time, doing significant and on-going constitutional damage. It is time for a rethink.

CLA believes that members of parliaments should be very concerned that laws that take the extremely serious step of reversing the burden of proof to deal with the specific cases of the "Mr Bigs" of the crime world are instead being used to deal with minor cases.

CLA also believes that members of parliaments should be very concerned that these laws are being used to circumvent the usual processes in cases that can and should be dealt with through normal investigations and legal proceedings.

Yours sincerely

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President

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