



**Government
of South Australia**

**Commissioner for
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Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
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AUSTRALIA

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Dear Chair,

**Re Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 -
Submission - Commissioner for Victims' Rights**

Thank you for the invitation to make a submission to the Inquiry into the Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017 [Provisions]. Please accept this letter as my submission as Commissioner for Victims' Rights.

His Excellency the Governor for South Australia appointed me as that Commissioner. I am an independent statutory officer, so the views expressed below are mine and should not be taken to be the views of the Government of South Australia.

Internationally and domestically confiscating the proceeds of crime is an important crime preventive tool. Such can happen as an independent punishment or as an addition to conventional punishment (for example, community service or imprisonment). A prime objective is to take away the financial and economic benefits criminals have attained from the crime, so criminals do not profiteer from their crimes but also their families.

Unlike a fine that is commonly imposed then paid into the state's consolidated revenue, the state can reattribute money derived for the confiscated proceeds of crime for particular purposes. In South Australia, for instance, such money is paid into the Victims of Crime Fund so the 'spoils of criminals ill-gotten gains' can be used to advance the interests of victims of crime. In some jurisdictions, the money derived from confiscated proceeds of crime can be used to pay for rehabilitative and health programmes, for example, needle exchange for drug users to minimise the spread of disease.

The Commonwealth Proceeds of Crime Act has provisions for several types of recovery orders.

- Forfeiture and automatic, which are used to recover assets generated from, or used in, a crime.
- Pecuniary penalty orders, which are debts payable to the Commonwealth for amounts based on the benefits derived from an offence or other illegal activity.
- Literary proceeds orders, which allow the Commonwealth to recover any profits made through the commercial exploitation of the notoriety gained from committing an indictable offence or a foreign indictable offence.

The Act also provides for the recovery of assets derived from the commission of certain foreign indictable offences.

Regarding the operation and possible amendment of the Commonwealth law, I urge the Senate to consider the interests of victims of crime.

A proportion of the money derived from confiscating assets should be paid into a dedicated 'Victims of Crime Fund', similar to the federal victims of crime fund in the United States and the South Australia Victims of Crime Fund.

The funds could then be utilised to pay for victim assistance programmes for victims of crimes under Commonwealth law, such as victims of terrorism, victims of human trafficking and child victims of sexual exploitation. Many victims of crime under Commonwealth law are victims of 'organised and transnational crime' who under international law are entitled to practical, medical, therapeutic and financial assistance.

Pecuniary orders are made against criminals in respect of the benefits derived by them from their crimes. These orders rest, according to Roden J (R v Fagher (1989) 16 NSWLR 67) on the principle of restitution by forcing convicted criminals to disgorge the 'proceeds' or 'profits' of their crime. Consistent with victims' right to restitution¹, these orders should be used to satisfy debts to victims of crime. Thus, if a criminal court in Australia orders an offender to pay restitution that order can be satisfied by reattributing money derived from the offender's confiscated assets.

Further, I point to a case of domestic violence resulting in murder that happened in South Australia. To avoid unnecessary intrusion on the surviving child victim's privacy and the child's surviving kin, I refer to the deceased victim as 'A', the murderer as 'B' and the child as 'C'.

A and B are married and are the parents of C. A and B have joint interest in the family home and other assets. B kills A, so the police arrest and charge B. The Director of Public Prosecutions later successfully prosecutes B. While on remand awaiting trial, B sort to utilise the 'value' of the family home and other assets to pay defence counsel fees. C, however, had hereditary right to a proportion of the family's assets, so as Commissioner for Victims' Rights, I engaged a lawyer to defend C's right. I expended appropriately \$40,000 to attain and enforce a civil freezing order. C's guardians who were elderly could not afford the legal fees. These guardians also 'inherited' the cost of bringing up C from childhood, through adolescents, and so on.

¹ Victims of crime are entitled to restitution and, if the victim of violent crime and the offender cannot pay, the victim is entitled to state-funded compensation (or financial assistance) (UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985).

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Mindful of the case and the prohibitive cost of attaining a civil freezing order, I ask the Committee to explore the practicality of extending the current Proceeds of Crime Act to authorise the restraining and confiscating of assets to ensure the interests of child victims of domestic violence are protected.

In summary, I support the confiscating of criminal assets and proceeds of crime, including the proposed amendments but also submit that the debate on the proposed amendments offers opportunity to make further amendments to advance the interests of victims of crime in general and victims of certain types of crime, such as victims of terrorism and victims of domestic violence, in particular.

Yours faithfully,

Michael O'Connell AM APM
Commissioner for Victims' Rights