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Justice and International Mission Unit
Synod of Victoria and Tasmania, Uniting Church in Australia

Submission to Inquiry into
Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017
21 December 2017

The Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia (the Unit) welcomes this opportunity to make a submission in support of the *Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017*. The only amendment the Unit would support is to ensure the courts are left with some discretion to act proportionately in dealing with proceeds of crime where a property is partly derived from the proceeds of crime. For example, if a residential property was purchased with 10% of the mortgage payments being from the proceeds of crime, the court should have some discretion about preventing a disproportionate outcome in the manner in which the property is then treated as proceeds of crime while still not allowing people engaged in criminal activity from being able to financially benefit from their criminal activity.

The Uniting Church in Australia is committed to working for an end to poverty globally and corruption and financially motivated crimes are often barriers to poverty reduction. For example, we have conducted research into politically exposed persons (PEPs in the language used in anti-money laundering legislation) from PNG who have been charged with corruption related offences in PNG and appear to have been able to transfer assets freely into Australia.

In October 2012 Sam Koim, the then head of the Papua New Guinea anti-corruption body Taskforce Sweep, publicly stated that corrupt people from PNG:

> *have bought property and other assets, put money in bank accounts and gambled heavily in your casinos and have never been troubled by having their ill-gotten gains taken off them. Unless the money can be prevented from leaving our country or prevented from entering Australia, the bad guys win and the rest of Papua New Guinea suffers.*

He stressed what was at stake:

> *When money that is supposed to build hospitals, to buy medical equipment is used to buy real estate in Cairns or Brisbane, people die. And, quite frankly, those who turn a blind eye to this are as guilty as the offenders.*

He also said:

> *Be under no illusion, these people have chosen Australia as their preferred place to launder and house the proceeds of their crimes because it is easy. Cairns is only a short flight and property can be bought off the plan without permission. The financial system is stable and, it has been, up until now, extremely easy to get money into your system….*

We support the Bill to ensure that the unexplained wealth regime will cover wealth derived or realised, directly or indirectly from certain offences, to ensure that proceeds of crime authorities can appropriately restrain and confiscate property or wealth in cases in which illicit funds are used to make improvements to property or to wholly or partly discharge an encumbrance, security or liability incurred in relation to property. The Unit accepts the Government's arguments in the Explanatory Memorandum that the amendments are needed to ensure proceeds of crime authorities can appropriately restrain and confiscate property or wealth and frustrate the efforts of criminals to avoid the unexplained wealth and proceeds of crime laws by deliberately structuring their affairs to avoid the operation of the Act and retain their ill-gotten gains.

The Unit notes that the World Bank and UN Office on Drugs and Crime (UNODC) believe that $20 to $40 billion a year is lost from developing countries due to corruption (and this excludes money lost by tax evasion by multinational companies), only $5 billion in total has been repatriated to developing countries in the 15 years up until 2014.[1] They noted most of the legal barriers are onerous requirements to the provision of mutual legal assistance, a lack of non-conviction based asset confiscation procedures and an overly burdensome procedural and evidentiary laws.[2]

In cases of the theft of assets from governments and cases of corruption, often the only tangible evidence that a crime has taken place is the money that changes hands between the corrupt official and his or her partner in crime. Thus the enrichment of the corrupt official becomes the most visible manifestation of corruption. An offense such as bribery, which requires the demonstration of an offer by the corruptor or acceptance by the official, is difficult to prosecute in these circumstances. Similarly, once an offence has been established in a court of law, linking the proceeds to an offense for the purposes of recovering assets can often be a complex endeavour. Efforts to combat corruption are further challenged by the anonymity and fluidity with which assets can be moved, concealed, and transferred before effective means can be taken to seize, freeze, and return them to their rightful owners.[3]

[1] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 1. There does not appear to have been an updated study that provide the total that has been recovered and returned since 2014.

[2] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 3.

[3] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 5.

International Standards and Unexplained Wealth Laws in Other Jurisdictions

By 2010, over 40 jurisdictions has introduced legislation criminalising illicit enrichment.[4] Illicit enrichment was introduced as a mandatory offence in the 1996 Inter-American Convention against Corruption. The *UN Convention Against Corruption*, to which Australia is a state party, adopted a position in Article 20 that states should consider criminalising illicit enrichment by public officials "subject to the requirements of their constitutions and the fundamental principles" of their legal systems.[5] Article 12(7) of the UN *Convention on Transnational Organised Crime*, to which Australia is a states party, states that jurisdictions "may consider the possibility of requiring an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings."

The World Bank and the UNODC point out that properly constructed legislation for the restraint and confiscation of unexplained wealth is consistent with human rights standards. The jurisprudence of the European Court of Human Rights clearly delineates that the presumption of innocence does not prevent legislatures from creating criminal offenses containing a presumption by law as long as the principles of rationality and proportionality are duly respected. Of particular relevance is whether institutions involved in the investigation, prosecution, and adjudication of illicit enrichment are properly monitored, accountable, resourced, and trained so that they are in a position to implement the obligations taken under the International Covenant on Civil and Political Rights and to pursue corrupt money effectively and fairly.[6] In the precedent set by *Salabiaku v. France* the European Court of Human Rights outlined its approach to the permissibility of burden-shifting provisions, as approach that has been referred to as the *Salabiaku* test.[7] The UN Human Rights Council has stated "effective anticorruption measures and the protection of human rights are mutually reinforcing and that the promotion and protection of human rights is essential to the fulfilment of all aspects of an anticorruption strategy."[8]

The World Bank and UNODC point out that freezing or seizure of assets infringes on the property rights of the asset holder, but such action is warranted when balanced against the rights of victims to recover stolen funds and the need to secure funds before the asset holder is tipped off. In addition, safeguards can be introduced to ensure that the asset holder has the opportunity to contest the freezing order.[9]

As noted in the previous Parliamentary inquiry into unexplained wealth legislation, such legislation already exists in Ireland, the US, the UK and Italy.[10]

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[4] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 8.
[5] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 9.
[6] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. xiv.
[7] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 31.
[8] UN Human Rights Council Resolution 7/11 of 27 March 2008, on the role of good governance in promoting and protecting human rights.
[9] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 55.
[10] Parliamentary Joint Committee on Law Enforcement, 'Inquiry into Commonwealth unexplained wealth legislation and arrangements', March 2012, p. v.

In addition in Germany, Criminal Code, Section 73d, is enabling legislation that shifts the burden of proof to the accused if the prosecution establishes a significant increase in the assets of a public official that have not been accounted for. The legislation requires forfeiture of assets "where there are grounds to believe that the objects were used for or obtained through unlawful acts." The Federal Supreme Court has argued that this does not reduce the burden of proof but absolves the prosecution from establishing "the specific details" of the offence.[11]

Similarly, Article 36 of the Dutch Criminal Code allows for the confiscation of the proceeds of the crime for which the offender has been convicted as well as the confiscation of assets "which are probably derived from other criminal activities". The Supreme Court has argued that this is consistent with the presumption of innocence because:[12]

> *Once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption. Once the criminal origin of the proceeds has been made probable, the burden to rebut – not simply to deny – this presumption lies with the defense.*

In Switzerland if it is established that an individual supports or is part of a criminal organisation, the court is obligated to order the confiscation of all the assets owned by that individual. Criminal Code, Article 59(3), creates a presumption that a criminal organisation controls the assets of all of its members. It is then up to the individual to rebut the presumption by demonstrating the legal origin of the assets. The Supreme Court upheld the position that this respects the presumption of innocence because the accused can rebut it by demonstrating that they are not under the organisation's control or the assets have legal origin.[13]

In 2010 the Swiss Parliament also introduced the *Return of Illicit Assets Act*, which seeks to facilitate the recovery of the proceeds of corruption in situations where the state of origin of the assets is unable to conduct a criminal procedure that meets the requirements of Swiss law on international mutual assistance. This provides for the freezing, forfeiture and restitution of assets held by foreign politically exposed persons (PEPs, a term defined within international anti-money laundering standards) and their associates in Switzerland on the basis of decisions by the Federal Administrative Court. The court may presume the unlawful origin of these assets where:

> *The wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person and the level of corruption in the country of origin or surrounding the politically exposed person in question during their time in office is or was acknowledged as high.*

The court may reject the presumption "if it can be demonstrated that in all probability the assets were acquired by lawful means." Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court.[14]

[11] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 35.
[12] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 35.
[13] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 36.
[14] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 37.

Importance of Non-Conviction Based Restraint and Confiscation

The World Bank and UNODC also point out the importance of having a non-conviction based confiscation and restraint mechanism, arguing that in many instances it is the only way to recover the proceeds of corruption and to exact some measure of justice.[15] In their research they found practitioners highlighted the usefulness of non-conviction based confiscation because it can be quicker and more efficient and may be the only recourse when the offender if dead, has fled the jurisdiction, or is immune from prosecution.[16] The World Bank and the UNODC further argue that it is best not to limit the scope of non-conviction based confiscation and restraint, but at a minimum it should apply to circumstances where the perpetrator is dead, a fugitive, absent or unknown as well as in "other appropriate cases".[17] In addition to having domestic legislation allowing for non-conviction based restraint and confiscation of assets, they recommend that jurisdictions should allow for enforcement of foreign non-conviction based restraint orders.[18]

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[15] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 66.
[16] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 67.
[17] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 67.
[18] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 69.