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[by email to: HaveYourSay@justice.tas.gov.au]

27 July 2018

Dear Ms Craven

Re: Consultation on the *Crime (Confiscation of Profits) Amendment Bill 2018*

Thank you for your letter of 9 July 2018 inviting submissions on proposed amendments to the *Crime (Confiscation of Profits) Act 1993* (the Act) as set out in the above draft Bill (the Bill).

Civil Liberties Australia (CLA) supports the campaign for a Tasmanian Human Rights Act. We have scrutinized the Bill in light of human rights principles, in particular the fundamental human rights that could form part of a Tasmanian Human Rights Act as recommended by the Tasmanian Law Reform Institute (TLRI) in its 2008 report. However, the points we make below and the concerns we express remain valid even in the absence to date of a Human Rights Act in Tasmania.

Further, such scrutiny of Bills against human rights principles is in keeping with the TLRI's report which recommended that all new laws tabled in Parliament be accompanied by a statement of compatibility setting out how the new laws accord with human rights. Statements of compatibility are now established practice in several jurisdictions (including in the federal Parliament). As we hope to show below, this formal and rigorous process leads to better laws that would be to the benefit of all Tasmanians.

In summary, we consider ***the Act raises serious human rights issues*** that require reforms beyond those proposed in the Bill. In fact, some of the amendments proposed in the Bill add to the human rights concerns. ***CLA, therefore, does not support the proposed Bill***.

We have reached this view based on the following considerations.

(1) Included among the human rights the TLRI recommended should be protected under a Tasmanian Human Rights Act is the right to a fair hearing. Even in the absence of such an Act,

internationally recognized standards, which Australia has signed up to, firmly establish this right. For example, the Universal Declaration of Human Rights sets out that "everyone … has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence" (Article 11).

(2) ***Unexplained wealth laws go against the presumption of innocence which is central to our system of justice and of the rule of law.*** They remove the need to prove a person has engaged in any criminal activity or indeed that any offence has even been committed. Thus, unexplained wealth laws reverse the burden of proof by requiring a person to prove that assets are not the proceeds of crime.

It is sometimes argued that because these laws are not conviction-based, guilt or innocence does not come into it and therefore there is no reversal of the burden of proof. CLA rejects this argument and it has not been supported by independent legal experts. A small selection of these views includes:

- The federal Parliament's Senate Standing Committee for the Scrutiny of Bills found that the provision on unexplained wealth orders in the *Proceeds of Crime Act 2002 (Cth)* "reverses the usual burden of proof".[1]
- The Law Council of Australia says that the "reverse onus is contrary to established common law principles and runs counter to the presumption of innocence. It means that the respondent may lose legitimately obtained assets if he or she cannot show that his or her total wealth has been lawfully obtained."[2]
- The Australian Law Reform Commission's report *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129) elaborates on this further[3].
- The Queensland Parliament's Library and Research Service wrote in a Research Brief that, "Unexplained wealth laws go a step further than traditional confiscation laws … they reverse the onus of proof."[4]

(3) However, CLA acknowledges that rights protection is not absolute. Rights may be subject to reasonable limits where these limits are demonstrably justified to achieve legitimate public policy objectives or to the extent necessary to protect the rights of others. Again, this is consistent with international norms and is recognised by the TLRI in its report. The key question is therefore: ***is the encroachment by unexplained wealth laws on the fundamental human rights of Tasmanians justified?***

(4) At the time they were first introduced, unexplained wealth laws were justified to parliaments at federal and state levels around Australia ***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

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[1] https://www.aph.gov.au/binaries/senate/committee/scrutiny/bills/2009/b10.pdf

[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/organised_crime/submissions

[3] See chapter 9 at https://www.alrc.gov.au/publications/9-burden-proof-0

[4] http://www.parliament.qld.gov.au/documents/explore/researchpublications/researchbriefs/2012/rbr201209.pdf

would be extremely difficult to secure convictions against senior-level crime bosses. For example (emphasis added below):

> (a) In its inquiry into Commonwealth Unexplained Wealth Legislation and Regulations, the federal parliament's 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***."[5]
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> (b) In its response to the above Committee's report, the federal 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."[6]
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> (c) The federal Parliament's Senate Standing Committee on Legal and Constitutional Affairs, in its report on amendments to the *Proceeds of Crime Act 2002 (Cth)*, said, "The committee wholeheartedly endorses the purpose of the unexplained wealth provisions: namely ***targeting the people at the head of criminal networks***, who receive the lion's share of the proceeds of crime, whilst keeping themselves safely insulated from liability for particular offences."[7]
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> (d) In NSW, in introducing the *Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010 (NSW)*, the then Minister for Police told the NSW Parliament, "Remember, these are serious and often highly organised criminals with complex accounting systems and business practices. These are not the 'small fry' of a criminal organisation."[8] Similar language was repeated in the other states and territories.
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> (e) In Tasmania, in the second reading speech for unexplained wealth legislation, the then Tasmanian 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***."[9]
>
> (e) Finally, the focus on "combating serious and organised crime" is repeated in the explanatory memorandum for the *Unexplained Wealth Legislation Amendment Bill 2018* which is currently before the federal Parliament. For example, paragraph 2 of the memorandum states: "Depriving criminals of their wealth is **a key element in combating serious and organised crime**."[10]. Furthermore, it is given as the key justification for measures

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5 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/2010-13/unexplained_wealth/index

6 *Ibid*

7 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2008-10/organised_crime/report/c06

8 https://www.parliament.nsw.gov.au/bill/files/1040/LA%206510.pdf

9 http://www.parliament.tas.gov.au/bills/Bills2013/pdf/notes/29_of_2013-SRS.pdf

10 https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6133

in the Bill that encroach even further upon fundamental human rights such as the right to privacy. Paragraph 73 states: "To the extent that the amendments in Schedule 6 may limit the right to privacy, these limitations are reasonable, necessary and proportionate to achieving **the legitimate objective of ensuring that law enforcement authorities are in a position to effectively combat serious and organised crime**." This demonstrates that the justification for any encroachment by unexplained wealth laws on fundamental rights and freedoms has not changed over time.

(5) If targeting serious and organized crime is the justification for unexplained wealth laws and the human rights encroachments they involve, the fundamental issue is whether these laws are indeed being used to combat this kind of crime. ***If unexplained wealth laws are not being used in Tasmania to combat serious and organized crime, the encroachments on fundamental human rights becomes untenable.***

(6) The Independent Review of Part 9 *Crime (Confiscation of Profits) Act (Tas)* 2017[11] carried out in Tasmania included details provided by the state's DPP which showed that unexplained wealth laws have been used to recover amounts of as little as $3,000. Based on the details provided by the DPP (see Annex C of the Review), it appears none of the individuals who have been subject to unexplained wealth laws in Tasmania could be described as a "senior organised crime figure". Indeed, the Review stated 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).

(7) If Tasmania's unexplained wealth laws are not confined to targeting senior organized crime figures, then ***Tasmania's laws are fundamentally at odds with the justification for these laws in every other jurisdiction around Australia*** as set out in point 4 above. And if Tasmania's laws are being used to target anyone – whether they are a senior organized crime figure or not – then it must be asked whether the erosion of principles as fundamental as the presumption of innocence and the burden of proof can be justified. It is our strong view that this cannot be justified. In line with justifications provided federally and in other states and territories, it can only be justified if the targets are the senior organized crime figures and, even then, only "with appropriate safeguards" (in the words of the federal parliament's Joint Committee on Law Enforcement as quoted above under point 4).

(8) Furthermore, we consider that the proposed amendments to Tasmania's unexplained wealth laws contained in the Bill only exacerbate the human rights implications of the laws. Facilitating access to information – including financial information – by the DPP in the course of unexplained wealth proceedings raises privacy concerns (the privacy implications of unexplained wealth laws are elaborated upon further in the explanatory memorandum for the Bill referred to above currently before the federal Parliament). And allowing disclosures made in the course of unexplained wealth proceedings to be used in other proceedings under the Act effectively disadvantages a person if they don't provide evidence against themselves, again raising the issue of their right to a fair hearing.

(9) It may be asked 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

[11] http://www.parliament.tas.gov.au/ha/tpapers/2017/p2017/HATP1_17_8_2017.pdf

unexplained wealth laws provide an easier option rather than the more onerous task of a conviction-based approach.

We strongly reject this argument. The burden of proof and the presumption of innocence are fundamental to our system of justice and are fundamental protections against arbitrary interference. The reversal of the presumption of innocence has been a hallmark of tyrannical regimes throughout history. There may be an argument for waiving these principles ("with appropriate safeguards") in certain very limited circumstances where criminal activity represents such a grave threat to our way of life, and where it is so well-organised and the business models are so sophisticated that even the efficient investigative agencies and 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. Tasmanians (including the Tasmanian Parliament) 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.

Yours sincerely

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Director
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