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Ms Elizabeth Kelly
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Department
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Dear Ms Kelly

RE: Proceeds of Crime Amendment Bill 2009

Thank you for your letter of 11 February in which you sought Civil Liberties Australia's (CLA) views on the review of the *Proceeds of Crime Act 2002* (Cth).

In addition to addressing a number of the questions raised in the policy statements document for the *Proceeds of Crime Amendment Bill 2009* prepared by your Department (AGD policy paper), I would like to make a number of more general comments about the Act. In particular, I would like to comment on the compatibility of a number of the provisions of the Act with international human rights instruments to which the Australian Government is a signatory. I trust those comments can be considered as part of your Department's review.

Introduction – the significance of international human rights instrument in the development of legislation

1. As you are aware, the Commonwealth Government has signed and ratified the *International Covenant on Civil and Political Rights* (ICCPR). It is, of course, well established that, because the Commonwealth Parliament has not given legislative effect to the terms of that convention, the convention does not form part of Australia's domestic law and the Commonwealth Government is not strictly bound to draft legislation is accordance with its terms. However, having ratified the ICCPR, the Commonwealth has both a moral obligation, and an obligation in international law, to act and develop legislation in accordance with the terms of that instrument. As Mason CJ and Deane J observed in *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273:

> …ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights… Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the convention.

2. In this context, CLA submits that is incumbent on the Commonwealth Attorney-General's Department to develop proposed legislation in accordance with the terms of the ICCPR. Article 14 of the ICCPR, which affords a number of substantive and procedural protections to people who are the subject of legal proceedings, is engaged by a considerable number of provisions in the *Proceeds of Crime Act* (the Act). CLA submits that where the Department proposes provisions which are inconsistent with the ICCPR, it should provide a detailed and compelling explanation as to why it has decided to pursue a legal policy outcome which is not in accordance with Australia's international human rights undertakings. CLA submits that it would not be appropriate for the Department to justify amendments of the Act which are inconsistent with Article 14 of the ICCPR with vague and imprecise assertions that it would be in the 'public interest' or 'in the interests of law enforcement'. Rather, any departures from Article 14 of the ICCPR should be justified with reference to the internationally accepted principles of proportionate limitations on human rights: see *R v Oakes* [1986] 1 SCR 103.

Article 14 of the ICCPR

3. Article 14 of the ICCPR provides a number of safeguards and legal protections for people who are the subject of legal proceedings. In particular, Article 14(2) contains a number of safeguards applicable to criminal proceedings including, *inter alia,* the presumption of innocence, the privilege against self-incrimination and the rule against double jeopardy. CLA submits that in interpreting the nature, meaning and extent of these rights, regard can and should be had to the judgements of international courts and tribunals which apply domestic human rights instruments expressed in similar terms to the ICCPR (e.g. the House of Lords, the European Court of Human Rights, the New Zealand Supreme Court, the Canadian Supreme Court and the United States Supreme Court). We note that human rights legislation in the ACT and Victoria which codifies and gives domestic effect to the ICCPR in those jurisdictions states that, in interpreting those Acts, regard can be had to the jurisprudence of foreign courts on the interpretation of human rights instruments, and the views and opinions of the United Nations Human Rights Committee.[1]

The nature of proceeds of crime proceedings

4. In order to assess whether proceedings under the Act are compatible with Australia's obligations under ICCPR, it is first necessary to establish whether such proceedings are "criminal proceedings" for the purpose of Article 14(2) of that instrument. If they are, the compatibility of the Act with the ICCPR will depend on whether the Act affords the protections required under Article 14(2) of the ICCPR.

5. A number of British cases have held that confiscation proceedings taken under *Criminal Justice Act 1988* (UK) and the *Drug Trafficking Act 1994* (UK) do not constitute "criminal proceedings" within the meaning of Article 6 of the *European Convention on Human Rights:* see *Philips v United Kingdom* (2001) 11 B.H.R.C. 280; *The Queen v McIntosh* [2003] 1 A.C.1078. 'Condemnation proceedings' under the *Customs and Excise Management Act 1979* (UK) have also been found to be civil, not criminal, proceedings: *Goldsmith v Customs and Excise Commissioners* [2001]

[1] See section 31(1), *Human Rights Act 2004* (ACT); section 32(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

WLR 16733; *R v Dover Magistrates Court* [2003] Q.B. 1238. Also, recovery proceedings under the *Proceeds of Crime Act 2002* (UK), which do not require a person to have been convicted of an offence as a 'condition precedent' to an order being made, have also been held to be civil proceedings: *R v He and Chen* [2004] EWCH 3021.

6. Notwithstanding the above cases, we think that the scheme established in the *Proceeds of Crime Act* can be easily distinguished from the confiscation schemes at the heart of European jurisprudence on this question.

7. As was noted in *R v He and Chen,* the starting point in determining whether proceedings are criminal in nature is to apply the criteria laid down in *Engel v The Netherlands (No.1)* [1976] 1 E.H.R.R. 647. The three principal criteria are:

   (i) the manner in which the domestic state classifies the proceedings. This normally carries comparatively little weight and is regarded as a starting point rather than determinative: see *Ozturk v Germany* [1984] 6 E.H.R.R. 409 at 421-2;
   (ii) the nature of the conduct in question classified objectively bearing in mind the object and purpose of the Convention;
   (iii) the severity of any possible penalty – severe penalties, including those with prison in default and penalties intended to deter – are pointers towards a criminal classification of proceedings: see *Schmautzer v Austria* [1995] 21 E.H.R.R. 511.

8. In applying these criteria the British Court of Appeal in *R v Dover Magistrates Court* emphasised that:

> Generally under the second criterion one considers whether the liability is punitive and deterrent, whilst under the third regard is had to its nature and severity. All these considerations, however, necessarily raise the question whether liability involves blameworthiness. If it does, then by its very nature it may be thought to be a punitive (in the sense of retributive) element.

9. The Court also affirmed the importance of the second and third of the *Engel* criteria in *Bendenoun v France* (1994) 18 E.H.R.R. 54, where it held that even a minor financial penalty may be consistent with a scheme being treated as criminal if in truth its purpose is deterrent and punitive.

10. Applying these criteria to the *Proceeds of Crime Act,* it is clear that it has a significant deterrent and punitive element to it. The definition of 'instrument of an offence', which is at the heart of the Act, means that the scheme is considerably more draconian, and invests the court with much greater confiscation obligations and powers, than those found in corresponding schemes in British legislation.

11. Unlike the schemes found in the *Criminal Justice Act 1988* (UK), the *Drug Trafficking Act 1994* (UK) and the *Proceeds of Crime Act 2002* (UK), the *Proceeds of Crimes Act* empowers the Court to not only order the seizure of proceeds of crime, but also property that was honestly and legitimately obtained if it was used in relation to the commission of an offence.[2] To illustrate this point, consider the following example: A person is gainfully employed, and purchases a house for $400,000 through legitimate means. The house is their place of residence. In one bedroom, they artificially cultivate $30,000 worth of cannabis. Under the Act, not only can any proceeds from the sale of the cannabis be seized, but the entire house may also be forfeited if the DPP so applies. This is considerably different than confiscation schemes established under the British legislation, where only the proceeds of the sale of cannabis could be

[2] see the definition of 'instrument of an offence' at section 329(2) of the *Proceeds of Crime Act 2002.*

forfeited.

12. It is instructive to note that Australian Law Reform Commission Report No. 85, *Confiscation that counts* (1999), which formed the basis for the *Proceeds of Crime Act,* draws a distinction between the proceeds of crime, and property which is used in connection with the commission of an offence. In discussing the interaction between proceeds of crime orders and the ordinary criminal sentencing process, the Commission expressed the view that, as a general proposition, sentencing courts should not take into account confiscation orders made in respect of the proceeds of crime. However, it approved of Victorian and South Australian legislative amendments which allowed sentencing courts to consider confiscation orders that did not relate to the proceeds of crime in formulating a sentence. To this end, recommendation 6 of the ALRC report was that Commonwealth legislation should be amended to allow sentencing courts to consider confiscation orders that relate to the seizure of property other than the proceeds of an offence.3

13. The confiscation of property that is an 'instrument of an offence' can fairly be characterised as being punitive in nature, and having a deterrent effect – it certainly goes beyond merely depriving people of the benefits of their criminal activity, and preventing unjust enrichment. Although in some instances the seizure of the instruments of an offence might principally be intended to prevent the commission of further offences (i.e. the seizure of housebreaking implements), in other cases, such as in the example discussed above, the seizure would not have this effect. In this respect, the *Proceeds of Crime Act* can easily be distinguished from the confiscation schemes established under British legislation which are at the heart of much of the European jurisprudence on the issue.

14. We also note that subsection 5(c) of the *Proceeds of Crime Act 2002* (Cth) provides that one of the purposes of that Act is to "punish and deter persons from breaching laws of the Commonwealth or the nongoverning Territories."

15. It is also important to note that a forfeiture order under the Act is conditional on a person having been convicted of a serious criminal offence,4 or, as proposed in the AGD policy paper, being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'.5 Such a finding necessarily entails a finding of 'blameworthiness' or 'culpability' on the part of the respondent, which when viewed in light of the Court of Appeal's comment in *R v Dover Magistrates Cour*t*,* is another factor suggesting that the legislation is criminal in character.

16. Another relevant consideration is that proceedings under the Act are bought by the DPP, and not the Australian Government Solicitor. This is instructive given the DPP's role is traditionally confined to criminal prosecutions, and matters incidental to the criminal justice system.

17. As such, after applying the *Engel* criteria and the related jurisprudence to the Act, we are of the view that proceedings under the Act are for severe punitive and deterrent purposes, and would therefore be likely to be found to be criminal proceedings. This

[3] Australian Law Reform Commission, *Confiscation that Counts: A review of the Proceeds of Crime Act 1987,* Report No. 85 (1999), p 47.
[4] Section 92, *Proceeds o f Crimes Act*
[5] section 47(1), *Proceeds of Crime Act*

would particularly be the case where the proceedings relate to 'an 'instrument of an offence' which will often be property which is not the proceeds of a crime, but property which was used in relation to the commission of the offence. The discussion and recommendations in the ALRC report, when taken together with subsection 5(c) of the Act, reinforce this conclusion.

18. We also note that the Canadian courts have considered confiscation, or "forfeiture proceedings" as being a form of punishment, and characterised them as a "penal consequence" of conviction: *R v Green* [1983] 9 C.R.R. 78; *Johnston v British Columbia* [1987] 27 C.R.R. 206.

19. In summary, in light of the above jurisprudence and considerations, we believe the following points can be made:

    - Confiscation proceedings are **civil** in nature when they relate to the proceeds of crime (and hence do not engage Articles 14(2), (3) and (7) of the ICCPR);
    - Confiscation proceedings are **criminal** in nature when they relate to property which is lawfully obtained, but is an 'instrument of an offence' because it was used in relation to the commission of an offence (and hence engage Articles 14(2), (3) and (7) of the ICCPR).

Information sharing (Recommendation 1)

20. The AGD policy paper proposes that the Act be amended to permit information obtained in an examination conducted under Part 3-1 to be exchanged with other law enforcement agencies. CLA has serious concerns about this proposal.

21. As discussed at paragraph 42 of this submission, examiners have extraordinary coercive powers that are not ordinarily available to other law enforcement agencies. These powers abrogate the privilege against self-incrimination and legal professional privilege. CLA is concerned that if the Act is amended to allow information gathering, law enforcement agencies will agitate to have examinations conducted so as to facilitate the use of these coercive powers to collect information for investigations which they would not otherwise have been able to access through ordinary investigative powers.

22. For example, CLA would be concerned that drug investigation police might hit a "dead end", and would then agitate for an examination to be conducted and require that the suspect's lawyer attend and provide information in breach of client legal privilege. The use of the examination powers for such a purpose would, in CLA's view, be an egregious abuse of power, and clearly contrary to the purpose of an examination.

23. Any amendment which expands the scope of information sharing between law enforcement agencies should be carefully drafted so as to ensure that law enforcement agencies are not able to use the extraordinary powers given to examiners as a mechanism to subvert protections ordinarily afforded to people who are the subject of criminal investigations.

24. I note that paragraph 12 of the policy paper states that direct use immunity will continue to apply to information obtained under the Act if shared between agencies. For the reasons discussed in detail at paragraphs 50-62 of this submission, a direct

use is inadequate, and CLA therefore urges that a full derivative use immunity apply to any information obtained under the Act in breach of the privilege against self-incrimination.

Unexplained wealth provisions

25. Paragraph 35 of the AGD policy paper proposes that the Act be amended to include 'unexplained wealth' provisions. It is proposed that these provisions would require a respondent to demonstrate, on the balance of probabilities, that their assets were lawfully acquired. CLA does not oppose this amendment, but believes that the burden should ultimately be on the Commonwealth DPP, and not the respondent, to persuade the court that the assets in question were not lawfully obtained.

Threshold for commencing unexplained wealth proceedings: reasonable suspicion v reasonable belief

26. CLA believes that the threshold for being able to commence an 'unexplained wealth' proceeding should be the Commonwealth DPP demonstrating that it has reasonable grounds to **believe** (as opposed to the lower standard of reasonable grounds to suspect) that assets are unlawfully obtained.

27. Any unexplained wealth proceeding engages the right to privacy in Article 17 of the ICCPR. Article 17(1) provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation."

28. The question of what level of suspicion is required before a search is not arbitrary or unreasonable has been the subject of considerable human rights jurisprudence overseas, particularly in North America. North American courts have held that in order to avoid a search being found to be arbitrary, the judicial officer authorising the search needs to carefully balance between the state's interest in carrying out searches on the one hand, and the interest of the individual in resisting the state's intrusion upon their privacy on the other: *C.B.C. v. New Brunswick (A.G.)* [1991] 3 S.C.R. 459. Whether a search is reasonable will depend upon the point at which the individual's interest must give way to the state's, or vice versa. The Courts have concluded that searches based upon a reasonable suspicion will usually be unreasonable and arbitrary, whereas a search based on a reasonable belief of wrongdoing will not be unreasonable and arbitrary.

29. In *Hunter v Southam Inc.* [1984] 2 SCR 145, the Canadian Supreme Court considered the question of what level of suspicion is sufficient to tip this balancing exercise in favour of the state, and allow a search. It started by considering the appropriateness of a standard which would allow a search where the authorising officer only had to form the view that it was reasonable to think that evidence connected to an offence may be found. The Court unanimously held that:

> This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the state and limit the right of the individual to resist to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.

> Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue…. The American *Bill of Rights* provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation…" The phrasing is slightly different but the standard in each of these formulations is identical. **The state's interest in detecting and preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion. History has confirmed the appropriateness of this requirement as the threshold for subordinating the expectation of privacy to the needs of law enforcement.**

30. The Court has subsequently clarified that the concept of "credibly-based probability", which is the point at which the state's interest begins to outweigh the individual's, is encapsulated in the phrase 'reasonable belief', or 'believes on reasonable grounds': *Debot v The Queen* [1989] 2 SCR 1140; *Greffe v The Queen* [1990] 1 SCR 755.

31. Accordingly, CLA is of the view that, before an unexplained wealth proceeding is commenced, the Commonwealth DPP should be required to demonstrate that it believes on reasonable grounds that the person has unlawfully acquired assets.

Legal vs evidential burden on the respondent

32. If the Commonwealth DPP can show that it has reasonable grounds to believe that the respondent has unlawfully acquired assets, then an **evidential** burden (as opposed to legal or persuasive burden) should be cast upon the respondent to show that assets were legally obtained. That is to say, where the DPP can show there are reasonable grounds to believe that the assets are unlawfully acquired, the respondent should only be required to produce evidence which suggests that they are not. If the respondent does adduce such evidence, then the DPP should be obliged to persuade the Court, on the balance of probabilities, that the evidence does not demonstrate that the assets were lawfully acquired. Ultimately, the burden of persuasion should be on the DPP, and not the respondent. Of course, if the respondent fails or refuses to adduce any evidence, then it would be open to the Court to drawn the inference that the assets were unlawfully obtained, and it will be easier for the DPP to discharge its burden.

Civil restraint and forfeiture of instruments of serious crime (Recommendation D2)

33. CLA strongly opposes any amendment which would allow the forfeiture of the instruments of serious crime which relate to an offence for which a person has been acquitted.

34. As discussed above, proceedings which relate to the lawfully acquired property which are the 'instruments of an offence' are intended to serve a punitive and deterrent purpose and must be treated as criminal proceedings for the purpose of Article 14 of the ICCPR.

35. In CLA's view, any amendments which would allow authorities to have "a second bite at the cherry" and seize a person's lawfully acquired property on the basis that they have committed an offence – even though they have been acquitted of that offence – would violate the rule against double jeopardy which is protected by Article 14(7) of the ICCPR. Given that the confiscation of such property is punitive in nature, the imposition of a confiscation order in such circumstances would amount to a second and further attempt to impose a punishment after a person has already been

acquitted. Such proceedings can easily lend themselves to an abuse of power on the part of authorities and would create a mechanism for the overzealous pursuit of individuals by law enforcement agencies. In commenting on the rationale for the rule against double jeopardy, the United States Supreme Court observed in *Green v United States,* 355 U.S. 184 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

36. To allow the DPP and the AFP to pursue orders which a person would have to defend that might result in the forfeiture of a person's house, car or other property after they have already been acquitted of an offence would certainly create the anxiety and give rise to the expense that the rule against double jeopardy is intended to protect against.

37. It needs to be remembered that, in most Australian jurisdictions, costs are not available to defendants who successfully defend charges. This, in our view, is a considerable injustice in itself. This injustice would be compounded considerably if, after having to spend tens of thousands of dollars on legal fees in successfully defending a criminal charge, that person would then have to spend a similar amount again on legal fees having to prevent their property being forfeited on the basis of the same allegations which they had already successfully defended themselves against during a criminal prosecution.

38. In CLA's view, section 48 of the *Proceeds of Crime Act* in its current form strikes an appropriate balance between the interests of the state in providing a mechanism to deter and punish offending and removing implements which may be used in the commission of further offences on the one hand, and the interests of the individual in not being subject to repeated, protracted and costly legal proceedings after having been acquitted of an offence on the other hand. The proposed amendments would tip the balance unreasonably and unnecessarily in the favour of law enforcement agencies.

39. CLA notes that at paragraph 39 of the policy paper it is pointed out that "legislation in South Australia, Western Australia and Victoria also permits civil-based confiscation of property used in, or in connection with, an offence". In our view, such an observation is not a persuasive basis for any amendment: just because some of the States have passed draconian legislation which is unduly deferential to law enforcement agencies, it does not follow that the Commonwealth should also follow suit. It is trite logic to suggest that because some states have legislated in this direction, the Commonwealth should follow. Using that same logic, we would argue that the Commonwealth should not amend section 48 because legislation in New South Wales, Tasmania, Queensland and the Northern Territory does not allow for such a procedure.

40. We also note that the discussion paper makes the curious assertion that a civil confiscation scheme for the instruments of crime "has proven to be an effective mechanism to remove the proceeds of unlawful activity". We don't see how a scheme for the civil forfeiture of instruments of crime has any bearing on the

confiscation of proceeds of crime; the instruments of an offence are not the proceeds of an offence, so removing the instruments of an offence has nothing to do with the removal of the proceeds of a crime that has already been committed. Mixing these concepts can give rise to unnecessary confusion, and is not particularly helpful.

***Ex parte* examination orders (Recommendation D22)**

41. At paragraphs 67 – 70 of the discussion paper an amendment is proposed that would clarify that a court may make an examination order *ex parte.* CLA opposes this proposal.

42. Examination orders provide an examiner with extraordinary investigatory powers that are not ordinarily available to law enforcement officials. These powers abrogate a number of privileges afforded to people suspected of criminal wrongdoing under the ICCPR and the common law, including the privilege against self-incrimination, the right to silence and client legal privilege. It is an invasive procedure that allows an examiner to pry into a person's private life and personal affairs, and significantly affects their privacy interests. As such, examination orders should only be made after careful consideration of all relevant factors.

43. As a general rule, *ex parte* orders offend against fundamental principles of natural justice that both parties to a dispute should be heard before an order which affects their rights and obligations is made. This principle goes to the heart of our adversarial system of justice and should only be displaced in exceptional circumstances.

44. Moreover, on one view, the act of authorising an examination is an administrative and not judicial act. This is because an examination is itself an administrative procedure, and an examination order is not a final, binding and conclusive determination of the rights of the parties in the matter: *Huddert Parker and Co v Moorehead* (1909) 8 CLR 330. Moreover, it is not a function which has traditionally been given to courts: see *R v Davison* (1954) 90 CLR 353; *R v Quinn; Ex parte CFC* (1977) 138 CLR 1. If it is accepted that an examination order is an administrative order, i.e. an exercise of administrative power by a judicial officer, then the rules of natural justice and procedural fairness should apply, including a fair hearing: *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550. As such, the respondent should ordinarily be entitled to be heard in relation to an application for an examination order.

45. If an order is made *ex parte*, the court will be forced to make an order which can substantially effect the rights and privileges of a 'suspect' and subject them to an invasive procedure on the basis of an incomplete awareness of all the relevant facts and considerations that might affect the court's discretion as to whether to make an examination order. The court will only have before it those facts and considerations that the DPP thinks it is expedient to know about. It will, of course, not have the benefit of the 'suspect's' version of events or have heard the suspect's submissions. Unfortunately, when seeking *ex parte* orders in the past, the Commonwealth DPP has not always adhered to the obligation to provide full and candid disclosure of all relevant matters, which is a well accepted obligation on the part of a litigant seeking an *ex parte* order, and should be expected from the DPP as a model litigant: see *Commonwealth DPP v Garcia & Ors* [2004] QDC 523. Also, we know that where courts make *ex parte* orders in relation to criminal matters, they are notoriously deferential to the interests of law enforcement. For example, of 355 *ex parte*

applications for warrants under the *Surveillance Devices Act 2004* (Cth) in the financial year 2007-2008, only 6 (1.7%) were refused. And of the warrants issued, only 3% contributed, directly or indirectly, to a conviction.[6]

46. CLA accepts that in some instances the objects of an examination will be frustrated if the respondent is aware or forewarned that the DPP will be seeking an examination order. However, in most cases, the purposes and prospect for a successful outcome will not be frustrated if the respondent receives notice of the DPP's application. The examination will relate to events that have occurred before the application is made, and whether or not the respondent is served notice will ordinarily have no bearing on the examiner's ability to question them if the order is made.

47. As stated above, it is basic principle of justice that such applications should only be heard *ex parte* in exceptional circumstances. No compelling basis has been advanced why it should be the general rule that such applications should generally be heard *ex parte.* The fact that this might be convenient for the DPP is certainly not a compelling reason or an exceptional circumstance. Neither is the fact that such a rule might 'reduce court burden' as suggested in the discussion paper. The logical extension of this argument is the Court should be able to make any other kind of order under the Act on an *ex parte* basis because that too would reduce the burden on the court. Heaven forbid that a court might be 'burdened' with the responsibility of exercising its powers fairly by giving both parties an opportunity to be heard! Surely courts exist as the very institutions that are intended to bear this kind of 'burden' of adjudicating where the appropriate balance between the rights and interests of the individual and the state lie in individual cases.

48. Accordingly, CLA is of the view that there should be a presumption that a respondent will be served notice of an application for an examination order. The *Proceeds of Crime Act* should be amended to this effect. However, the Act should be also amended to provide the court with a discretion to hear and grant an application for an examination order on an *ex parte* basis when it is satisfied that to give the respondent notice could reasonably be expected to prejudice the examination hearing, or would otherwise be contrary to the interests of justice.

Clarification regarding the privilege against self-incrimination (Recommendation D7)

49. The privilege against self-incrimination is a fundamental right protected by Article 14(2)(d) of the ICCPR and the common law: *Reid v Howard* (1995) 184 CLR 1. If the Government and the Commonwealth Attorney-General's Department are to take their obligations under the ICCPR seriously, they will ask themselves when, and in what circumstances, is a limitation on this right justifiable in light of the well-established human rights jurisprudence on that question.

The nature of the privilege against self-incrimination

50. The privilege against self-incrimination includes the right of a person charged with an offence "to remain silent and not contribute to incriminating himself": *Funke v France* (1993) 16 E.H.R.R. 297; *R v Herbert* [1990] 2 S.C.R. 151; *Miranda v Arizona* 384 U.S. 436 (1966). In addition, as the Canadian Supreme Court noted in *R v White*

[6] Commonwealth Attorney General's Department, "*Surveillance Devices Act 2004: Report for the year ending 30 June 2008.*".

[1999] 2 S.C.R. 417, the privilege against self-incrimination goes further than to provide a right to silence. The Court noted that the privilege is based on the principle that:

> …an accused is not required to respond to an allegation of wrongdoing made by the state until the state has succeeded in making a *prima facie* case against him or her. It is a basic tenant of our system of justice that the Crown must establish a "case to meet" before there can be any expectation that the accused will respond.

51. Drawing on these principles, the Court noted that the rule against self-incrimination, in its broadest form, can be expressed in the following manner:

> …the individual is sovereign and… proper rules of battle between government and individual require that the individual… not be conscripted by his opponent to defeat himself… Any state action that coerces the individual to furnish against him or her self in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination. Coercion, it should be noted, means the denial of free and informed consent.

52. An important distinction does, however, need to be drawn between "communications bought into existence by the exercise of state compulsion, versus documents that contain communications made before and independently of such compulsion." Requiring the production of the latter type of document, i.e. documents that may have existed prior to an ACC examination which may contain incriminating information, is permissible without breaching the privilege against self-incrimination: *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313; *Thomson Newspapers v Canada* [1990] 1 S.C.R. 627.

53. Applying these principles, it is clear that an order under section 39(1)(d), and the requirement to answer an examiner's questions under section 196 and 197 of the Act, create a *prima facie* breach of the privilege against self-incrimination.

Reasonable and proportionate limits on the privilege against self-incrimination

54. It needs to be emphasised that the privilege against self-incrimination is a fair trial right, and thus is ultimately concerned with the admission into evidence of evidence in a trial and the means by which the State obtains that evidence. Technically speaking, where the state uses coercive means to obtain incriminating evidence, the privilege is not breached until the point that the evidence is tendered against the person in judicial proceedings. Thus, in *R v Kearns* [2002] Crim L.R. 650, Aikens J explained that:

> …[a] law will not be likely to infringe the right to silence or not to incriminate oneself if it demands the production of information for an administrative purpose or in the course of an extra-judicial enquiry. However, if the information so produced is or could be used in judicial proceedings, whether civil or criminal, then the use of the information in those proceedings could breach those rights and so make the trial unfair.

55. As such, the question of the extent to which evidence obtained pursuant to sections 39(1)(d), 196 and 197 of the *Proceeds off Crime Act* can be used against a person in subsequent judicial proceedings, and the strength of any immunities which are provided, will be key to determining whether these sections contravene the privilege against self-incrimination.

56. At this point It is important to clarify the difference between a 'direct use immunity', which is created in section 198 pf the Act, and a 'derivative use immunity', which is

also often used where a provision interferes with the privilege against self-incrimination:

- Derivative use immunity: The result of a derivative use immunity is that any information, document or thing obtained as a direct or indirect consequence of the answers or production of documents will not be able to be used in evidence against the witness in criminal or civil proceedings, except in specified circumstances (eg. where the witness is prosecuted for perjury, contempt or providing false or misleading answers during the examination).

- (Direct) use immunity: A use immunity only prevents the answers to questions or information obtained under compulsion from being admitted as evidence. It does not, however, prevent further information which has been obtained as a result of the answers or information which the accused was compelled to provide from being admitted into evidence. Put differently, a use immunity does not prevent the admissibility of evidence, other than the answers to questions, which police otherwise would not have been lead to or obtained but for their ability to compel the accused to provide information and answer questions.

57. Section 198 of the Act only provides a use immunity. As a result, where a person is compelled through section 39(1)(d), 196 or 197 to provide incriminating information, and that information leads to further evidence which could not have been obtained but for the use of the powers in those sections, there is nothing to prevent that further information from being tendered against the person in subsequent judicial proceedings.

58. The Canadian Supreme Court considered the adequacy of different kinds of immunities to prevent to a breach of the privilege against self-incrimination as protected by the *Canadian Charter of Rights and Freedoms* where the State seeks to admit evidence obtained under compulsion in *R v S (R.J.)* [1995] 1 S.C.R. 451. After a rigorous analysis of the common law jurisprudence, and the approach taken to the privilege in the United States and other countries with human rights instruments, the Court concluded that:

> …derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of a witness, ought generally be excluded under s. 7 of the *Charter* in the interests of trial fairness.

59. In reaching this conclusion, the Court reasoned that:

> [s]uch evidence, although not created by the accused and thus not self-incriminatory by definition, is self-incriminatory nonetheless because the evidence could not otherwise have become part of the Crown's case. To this extent, the witness must be protected against assisting the Crown in creating a 'case to meet' (emphasis in original).

60. The European Court of Human Rights reached a similar conclusion in *J.B. v Switzerland* [2001] Crim.L.R. 748 when it held that right not to incriminate oneself "presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the 'person charged'".

61. Accordingly, the immunity which attaches to section 39(1)(d), 196 and 197 will only be sufficient to displace the *prima facie* incompatibility of those sections with Article 14(2)(d) of the ICCPR if it is a full derivate use immunity, and nor merely a direct use

immunity. As was pointed out in *R v Whyte,* a derivative use immunity is the mechanism which most effectively balances "society's goal of discovering the truth, on the one hand, and the fundamental importance for the individual of not being compelled to self-incriminate, on the other."

62. As such, CLA would only support any amendment to section 39 where it would be accompanied by a full derivative use immunity, and not a mere direct use immunity. Similarly, CLA recommends that the immunity in section 198 of the Act be amended so that is provides a full derivative use immunity.

Admissibility of transcripts of examinations (Recommendation D30)

63. The discussion paper proposes to amend section 318 of the Act to permit transcripts of examinations to be admitted as evidence in proceedings under the Act if the examinee is not available for questioning. CLA opposes this amendment.

64. CLA is of the view that, without such an amendment, the transcript is hearsay, and as such, can only be received by a court in accordance with the exceptions to the hearsay rule in Part 3.2 of the *Evidence Act 1995* (Cth).

65. The hearsay rule is an enduring rule of fundamental importance in our legal system. The proposed amendment seeks to abrogate this fundamental rule with no explanation as to why this is necessary, or justified. If the examinee of the statement is not available, then the transcript of examination, and any other hearsay evidence for that matter, should only be received where permitted under the *Evidence Act 1995.*

66. It should be remembered that the hearsay rule and its exceptions were the subject of extensive consideration by the Australian Law Reform Commission and the Commonwealth Parliament during the development of the *Evidence Act.* Indeed, the Australian Law Reform Commission's report on the Evidence Act was one of the most rigorous it has ever undertaken, and took almost 10 years to complete. It would be extremely poor legal policy on the part of the Attorney-General's Department to pursue amendments which undermine these fundamental principles based on a shallow analysis of the benefits of such an amendment and the say so of the Commonwealth DPP.

New ADJR exemption (Recommendation L1)

67. The discussion paper proposes that decisions to commence proceedings under the Act should be exempt from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). CLA opposes such an amendment.

68. CLA believes that all aspects of confiscation proceedings should be amenable to challenge under the ADJR Act. If authorities exceed their jurisdiction or otherwise act unlawfully at any stage during confiscation proceedings, then their actions should be amenable to review. It is ridiculous to suggest that "criminal, civil penalty and extradition" decisions should be exempt from such review. Given the interests at stake in such proceedings, and the injustices that errors in such proceedings can entail, there is even more reason to allow decisions as part of that process to be reviewable.

69. The proposed rationale for the exemption exposes the problematic nature of trying to describe quasi-criminal proceedings as civil proceedings — as a general rule, ADJR exemptions are not made from ordinary civil and administrative type proceedings, so if the Government wants to maintain that confiscation proceedings are civil and not criminal, then they should be subject to full ADJR review. It is duplicitous and hypocritical to maintain that proceedings under the Act are civil so as to justify lower burdens of proof for the Commonwealth DPP and deny respondent's safeguards which would ordinarily be available in criminal proceedings, whilst on the other hand suggesting that such proceedings are quasi-criminal proceedings in nature, and therefore should be exempt from ADJR review.

Minister may approve funding for community benefit programs (Recommendation J4)

70. The AGD policy paper proposes that section 298 of the Act to introduce an additional category of programs for which the Minister may approve funding. This new category would include programs of community benefit.

71. CLA strong supports and welcomes this proposal. CLA would encourage the term 'programs of community benefit' to be defined to include programs relating to the education and/or advancement of civil liberties, human rights and social justice issues and programs (see Addendum).

Other issues – the abrogation of legal professional privilege

72. Section 197(2)(b) and (ba), when taken together with section 196(1), abrogates the privilege against self-incrimination. The effect of these sections is that if a solicitor is asked to provide information on the affairs of a client as part of an examination, and that information is the subject of legal professional privilege, the solicitor will be required to breach that privilege and provide that information.

73. These provisions are extraordinary, and even go beyond the powers which are given to ACC investigators tasked with investigating serious organised crime.[7] The abrogation of this fundamental privilege is an obscene example of the interests of law enforcement trampling all over the rights of an individual in Australian society, and is a clear and unambiguous violation of Article 17 of the ICCPR, and the Australian Law Reform Commission's recommendations on when it is appropriate to abrogate legal professional privilege.

International human rights law jurisprudence

74. Article 17(1) of the ICCPR provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation."

75. In *R v Derby Magistrates Court ex parte B* [1996] A.C. 487, Taylor LJ described legal professional privilege as "a fundamental human right protected by the European Convention." He went on to note that:

> It is a fundamental condition on which the administration of justice as a whole rests… Nobody

[7] Section 26(3) of the *Australian Crime Commission Act 2003* provides that legal practitioners are not obliged to disclose material which is the subject of legal professional privilege to ACC investigators.

> doubts that legal professional privilege could be modified, or even abrogated, through statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms.

76. Similarly, the Strasbourg Court has held legal professional privilege to be a human right in holding that an abrogation of the privilege will ordinarily involve a violation of the right to a fair trial and the right to privacy. In *Brennan v United Kingdom* (2002) 34 E.H.R.R. 507 the court observed that:

> Article 6 § 3 normally requires that an accused be allowed to benefit from the assistance of a lawyer at the initial stages of an interrogation. Furthermore, an accused's right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial and follows from Article 6 § 3 (c). If a lawyer were unable to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (see *S. v. Switzerland*, judgement of 28 November 1991, Series A no. 220, p. 16, § 48). The importance to be attached to the confidentiality of such consultations, in particular that they should be conducted out of hearing of third persons, is illustrated by the international provisions cited above (see paragraphs 38-40).

77. In *Foxley v United Kingdom* (2001) 31 E.H.R.R. 25 the Court observed that:

> where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see the Niemietz v. Germany judgment of 16 December 1992, Series A no. 251-B, pp. 35-36, § 37).

78. The Canadian jurisprudence on the relationship between the right to privacy as protected by the unreasonable search and seizure provisions in s. 8 of the *Canadian Charter of Rights and Freedoms* and legal professional privilege is also particularly insightful. In *Lavallee v Canada* [2002] 3 S.C.R. 209, the Canadian Supreme Court considered whether provisions regulating the seizure of privileged material from a solicitor's office was consistent with section 8 of the *Charter.* It held that they were not. In delivering its judgment, the court started by observing that:

> A client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential, and an expectation of privacy of the highest order when such documents are protected by the solicitor-client privilege.

79. The Court then reasoned that only limitations that relate to truly exceptional circumstances would be taken to be a reasonable limitation on the right:

> Where the interest at stake is solicitor-client privilege — a principle of fundamental justice and civil right of supreme importance in Canadian law — the usual balancing exercise referred to above is not particularly helpful. This is so because the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.

80. The Court went on to hold that given the exceptionally high privacy interests surrounding legally privileged material, and the prejudicial effect that compelled disclosure can have on the justice system as a whole, that the "privilege must remain as close to absolute as possible if it is to retain its relevance."

The Australian Law Reform Commission's position

81. The Australian Law Reform Commission recently considered the importance of client legal privilege in its report entailed “Privilege in Perspective: Client Legal Privilege in Federal Investigations (Report No. 107, January 2008)”.

82. The Commission concluded that:

> It is the ALRC’s view that the doctrine of client legal privilege is a fundamental principle of the common law providing an essential protection to clients – both individual and corporate – enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of the confidentiality of such communications facilitates compliance with the law and access to a fair hearing in curial and non-curial contexts, thereby serving the broad public interest in the effective administration of justice.

83. It went on to express the view that:

> …in the course of ordinary enforcement and investigatory activities, the importance of the privilege in encouraging compliance overrides the benefits of abrogation to the regulator. As such, any wholesale abrogation of the privilege in relation to federal investigations is not supported.
>
> While a case can be made that client legal privilege claims do frustrate and delay investigations, the ALRC agrees with the views expressed in submissions and consultations that efficiency and effectiveness of investigations are not in themselves sufficiently good reasons for abrogation of the privilege.

84. Based on the relevant European and Canadian human rights jurisprudence, it is clear that subsections 197(2)(b) and (ba) of the Act breach Article 17(1) of the ICCPR. They are also inconsistent with the Australia Law Reform Commission’s position on this issue.

85. Accordingly, CLA strongly urges the Attorney-General’s Department to prepare amendments which omit subsections 197(2)(b) and (ba) as soon as possible.

If you would like to discuss any of the issues raised in this submission, please do not hesitate to contact the principal author of this submission, CLA Director Mr Anthony Williamson, on 02 6205 3390 or 0412 629 035, or at awilliamson@cla.asn.au.

Yours sincerely

Dr Kristine Klugman OAM
President,
Civil Liberties Australia

ADDENDUM:

Minister may approve funding for community benefit programs (Recommendation J4)

Further to its response (above) to this section, CLA submits:

In 2008, in discussion with the Attorney-General in his Parliament House office, CLA explained that it had undertaken a detailed analysis but could find no source of funds in the Australian Government's normal, annual allocations designed to support 'community service' activity that civil liberties/human rights (CL/HR) groups could access for their efforts aimed at bettering the Australian community and Australia's national and international interests. This work includes making submissions to the Australian Parliament and Government on legal and allied matters, researching where gaps exists in laws or regulations, analysing local and international comparisons of police/security/emergency services activity, comparing and contrasting civil society approaches internationally to common questions, identifying and proposing remedies to individual and group inequity in the system, and the like.

The Attorney-General asked his two A-G's advisers present at the meeting to check through A-G's and other government department community funding allocations to see which were amenable to providing CL/HR funds for worthwhile projects. After six months of searching, the A-G's advisers could find no source of funds, other than the 'Proceeds of Crime' scheme, which was at best peripheral because of the way s298 is expressed, so that legitimate CL/HR projects require considerable 'bending' or 'tilting' to fit – and then only just – within the s298 "purposes".

CLA believes the department's proposed change to making the purpose for 'the benefit of the community' would allow CL/HR groups to legitimately access the Proceeds of Crime funds. We strongly support the Department's proposal.

However, should this proposal not be accepted for any reason, CLA proposes a simple, one-line addition to s298 - clause (c) below – as follows:

PROCEEDS OF CRIME ACT 2002 - SECT 298
Programs for expenditure on law enforcement, drug treatment etc.

(1) The Minister may, in writing, approve a program for the expenditure in a particular financial year of money standing to the credit of the * Confiscated Assets Account.

(2) The expenditure is to be approved for one or more of the following purposes:

(a) crime prevention measures;

(b) law enforcement measures;

(c) civil liberties and human rights measures;

(d) measures relating to treatment of drug addiction;

(e) diversionary measures relating to illegal use of drugs.

CLA provided this proposal to the Minister for Home Affairs, Mr Bob Debus, by Civil Liberties Australia in September 2008, as requested by him after follow-up discussion in his office on how CL/HR groups could access already-available government funds to support their work for the Australian community.