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

Submission: Inquiry into the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009*

1. Civil Liberties Australia welcomes the opportunity offered by the Committee to provide comment on the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 [Provisions].* The Committee may be aware that CLA has previously provided earlier comment to the Attorney Generals Department's review of the *Proceeds of Crime Act 2002.*
2. This submission argues that:
    2.1. Australia, as a signatory to the *International Convention on Civil and Political Rights* (ICCPR) and other Human Rights treaties has a moral obligation to ensure that all legislation is drafted and interpreted in accordance with those instruments;
    2.2. Legislators have a special responsibility to ensure that the procedural safeguards protected by Article 14 of the ICCPR are secured – not undermined – by legislation and that any diminution of civil rights be openly acknowledged and justified;
    2.3. While CLA does not oppose the introduction of appropriate unexplained wealth provisions the bill in its current form sets the evidentiary threshold for commencing unexplained wealth proceedings too low, relying on 'reasonable suspicion' as opposed to 'reasonable belief'.
    2.4. Amendments to the *Proceeds of Crimes Act 2002* (Cth) derogate unjustifiably from established procedural rights such as the presumption of innocence, the right against self-incrimination and the rule against double jeopardy.
    2.5. The Committee should turn its mind to whether forfeiture proceedings under the proposed bill amount to punishment and, consequently, whether the reversal of the onus of proof and the adoption of the civil standard of proof ('balance of probabilities') is inappropriate;
    2.6. Similar civil forfeiture schemes, as introduced by the states and foreign jurisdictions have been criticised as 'deliberately unfair' and a breach of fundamental human rights. Further, by providing law enforcement bodies a 'second bite of the cherry', allowing civil forfeiture proceedings to be brought

against an acquitted individual, the proposed legislation undermines the rule against double jeopardy.

2.7. Controlled operations provisions should be removed and a new, contained Controlled operations bill be produced, modelled on the ACT's *Crimes (Controlled Operations) Act 2008*; and

2.8. Parliament should consider whether it is wise to sanction lawbreaking on the part of its own officers via controlled operations and should remove the legal indemnity for police officers who conduct controlled operations which endanger members of the public. Finally, that a defence be available to an accused who, but for the inducement of an undercover officer, would never have committed an offence.

Introduction – the significance of human rights instruments in the development of legislation

3. As the Committee would be 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 in accordance with its terms. However, having ratified the ICCPR, the Commonwealth Parliament 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.

4. In this context, CLA submits that is incumbent on the Parliament 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.* CLA believes that under the proposed bill these protections are significantly weakened. CLA submits that where the Government 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. The Government has failed to do this. Moreover, CLA submits that it would not be appropriate for the Government 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'. 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.

5. Vague and imprecise terminology such as 'reasonable suspicion' may not only tempt law enforcement officers to make bald assertions and abuse the powers afforded by the proposed legislation but risk genuine investigations. As the bill concerns and purports to authorise the infringement of recognised civil liberties the courts will require express and unambiguous language before upholding those provisions.

Article 14 of the ICCPR

6. 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, *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 given to the judgments 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.

Unexplained wealth provisions

7. Schedule 1 of the Bill would amend the *Proceeds of Crime Act 2002* to include "unexplained wealth" provisions. Under these provisions, a restraining order could be obtained in respect of a person's property where the DPP '**suspects** on reasonable grounds' that a person's total wealth exceeds a person's total wealth that was lawfully acquired. Once a person's property has been restrained, the provisions would require a respondent to demonstrate, on the balance of probabilities, that their assets were lawfully acquired.

8. CLA does not oppose the introduction of unexplained wealth provisions *per se*, but believes the Bill should be amended to provide for a fairer and more balanced scheme.

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

9. 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.

10. 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."

11. 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.

12. 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.
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> 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.**
> *(bolding emphasis added)*

13. 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.

14. It should also be noted that the standard of 'reasonable suspicion' is so low that a person can acknowledge that a suspicion exists while, on balance, accepting that it unlikely that the suspected fact or state of affairs exists. For example, it is entirely possible for a judicial officer to hold a reasonable suspicion that a person's property may have been derived from illegal activities while, at the same time, accepting or being satisfied that although that suspicion exists because it cannot be discounted entirely, it is nonetheless more probable than not that the property was lawfully acquired.

15. CLA is concerned that if enacted in its current form, the amendments would allow the restraint of property on the most flimsy and superficial briefs of evidence. The burden selected strikes an inappropriate balance between the law enforcement interests of the state on the one hand, and the interests of the individual on the other.

16. 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

17. Once a restraining order is made on the very low 'reasonable suspicion' burden, the relevant court **must** order that the respondent pay an amount (representing their 'unexplained wealth') unless the respondent can show that their total wealth was not

obtained as a result of criminal offending: see new section 179E(1)(b). The respondent bears a legal burden of proving that their wealth was not derived from criminal offending: see new section 179E(3) and (5). In essence, the DPP has no burden to bear in confiscation proceedings — all it need show is that there are reasonable grounds for suspecting that some of a person's wealth might have been derived from criminal activity. It does not have to meet a *prima facie* case, even at the civil burden of the 'balance of probabilities', and there respondent is effectively presumed to have obtained their wealth from illicit means.

18. CLA submits that this low standard is offensive to notions of basic fairness that have underpinned the civil legal system for centuries. It has always been the case, even in civil proceedings, that the party bringing an action or making an allegation should have to show a *prima facie* case on the balance of probabilities. The drafters of this Bill have shown an extraordinary level of deference to the convenience and interests of the DPP at the expense of the interests of individual respondent's in such proceedings, many of whom will invariably be innocent of wrongdoing but will nonetheless have to bear should the burden and expense of exonerating themselves.

19. In NSW, similar legislation was described by the Court of Appeal as displaying an 'element of unfairness' in *New South Wales Crime Commission v Volkard Kelaita* [2008] NSWCA 284(per Allsop P). CLA is not aware of any reason which might justify replicating such unfairness at the national level.

20. CLA would strongly encourage the Committee to recommend that the Bill be amended such that the Commonwealth DPP has an overarching burden to satisfy the relevant court, on the balance of probabilities, that their wealth was obtained through illicit means. Where the DPP has demonstrated that it has reasonable grounds to believe that the respondent has unlawfully acquired assets, the respondent should be given an opportunity to produce evidence which suggests that their wealth was lawfully acquired. Where a respondent chooses to take up this opportunity, he should only have to satisfy the court on an evidential, as opposed to legal, burden of proof. 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.

Unexplained wealth amounts

21. In calculating the "wealth" of an individual, wealth is taken to include, *inter alia,* "property that has been under the effective control of the person at any time": see clause 179G(1).

22. CLA submits that this definition is poorly developed, and may lead to draconian and unjust results. Consider the following example:

An individual (person A) lives a law abiding life, and purchases a house worth $500,000 and a car worth $20,000 though entirely lawful means. They also have $30,000 worth of savings in a bank account which as lawfully acquired. As such, their estate, which was lawful acquired, is worth approximately $550,000. Five years prior, person A's brother stole a car worth $50,000 and asked person A if they could keep it at his house for a week. Person A agrees. While at person A's house, he has the keys to the car and thus has 'effective control' over it. Some five years later, when calculating Person A's net wealth, clause 179G(1)(b) would require that car to be taken into account. Thus person A's net wealth would be calculated at $600,000, meaning they have $50,000 in unexplained wealth, even though, in reality, they do not and never had $600,000 in wealth, and their possession of the car five years ago has in no way contributed to or influenced their actual wealth.

23. Although there is no question that person A should not have helped stored his brother's stolen car for a week in that example, it would clearly be draconian to then be able to extract $50,000 from what is a completely lawfully acquired estate under the pretense that it is 'unexplained wealth'.

24. The Government or the DPP might suggest that it could be trusted not to institute proceedings in such circumstances. However, the fact would remain that the Act would allow the DPP to pursue proceedings leading to such draconian outcomes.

25. If legislation has the potential to create abuse, it is not sufficient to retain it on the strength of government assurances that they can be trusted not to abuse it. The best way to prevent abuse is to remove the legislative provisions that provide for it in the first place. In this respect, CLA notes the comments of Justice Thomas in *Re Gold Cost City Council By-Laws* {1994] 1 Qd R when he stated that:

> I am unimpressed with governmental authorities which create unreasonably wide prohibitions and justify them with the statement "trust us". Wills J expressed a similar sentiment in 1904: "I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that is as bad a ground for defending legislation as one could well have. (*Stiles v Galinski* [1904] 1 KB 615 at 625).

26. CLA recommends that the definition of "wealth" in clause 179G be amended such property can only be considered in an assessment of a person's wealth if it has contributed, influenced or otherwise has some bearing on the value of property under a person's control at the time the assessment is made.

Forfeiture of instruments of crime

The nature of proceeds of crime proceedings

27. It is often argued by those who introduce civil forfeiture legislation that they are not 'punishing' an individual in the traditional sense of criminal punishment. Former NSW Premier Nick Griener's 2nd reading speech was quoted in *New South Wales Crime Commission v Volkard Kelaita* where he said:

> No doubt some people will contend that this legislation is unfair – that it amounts to convicting people of offences on a lower standard of proof and without the protection of the criminal law. I have already said that this legislation is all about the accounting of profits in

> civil proceedings, not imposition of criminal sanctions in criminal courts. The object or focus of the proceedings is recovery of assets and profits, not putting people in gaol.

28. Likewise, the New Zealand *Proceeds of Crimes Act 1991* – based upon the former Commonwealth *Proceeds of Crimes Act 1987* – has been characterised as preventing 'unjust enrichment' which does not rise to the level of punishment or penalty.

29. With respect, these statements are disingenuous, or misguided as to the true effect of civil forfeiture legislation. In parliament the laws are described as tough but just: in the media they presented as punitive powers to ruin criminals.

30. 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.

31. The European Court of Human Rights has previously had occasion to consider whether the confiscation of lawfully acquired property used in relation to the commission of an offence can be characterised as a penalty within the meaning of Article 6 of the European Convention on Human Rights. It has held that it can: *Welch v United Kingdom* (1995) 20 EHRR 247. In *Austin v United States* 509 U.S. 602 (1993) the U.S. Supreme Court observed that:

> …this court… has consistently recognized that forfeiture serves, at least in part, to punish the owner… More recently, we have noted that forfeiture serves "punitive and deterrent purposes," *Calero Toledo*, 416 U. S., at 686, and "impos[es] an economic penalty," *id.*, at 687. We conclude, therefore, that forfeiture generally and statutory *in rem* forfeiture in particular historically has been understood, at least in part, as punishment.

32. 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.

33. Unlike comparable legislation in the United Kingdom, 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. Under all criminal sentencing laws in Australia a court is required to consider the appropriateness of any sentence with regards to: general deterrence (to the community at large), specific deterrence (to the accused), denunciation of the accused conduct and retribution, among others. Australian and New Zealand Courts have, at times, considered that the 'penalty' of a forfeiture order can be taken into account in sentencing, thus implying its punitive nature: *R v Allen* (1989) 41 A Crim R 51; *R v Rintel* (1990) 3 WAR 527; *Fang Chinn Fa v Puffett* (1978) 22 ALR 149; *R v McDermott* (1990) 49 A Crim R 105; *R v Brough* (1994) 12 CRNZ 634.

34. Moreover, the New Zealand case of *Solicitor-General v Pedersen* (1994) 12 CRNZ 224 suggests that forfeiture orders are more about punishing an offender than depriving them of their unjust riches. In *Pedersen* the defendant sold a total of NZ$8,800 worth of Cannabis to an undercover police officer. As a middle-man however, the Court accepted that he would have only made a 'net' profit of NZ$240. Nonetheless, the court set a pecuniary penalty – as allowed under the *Proceeds of Crime Act 1991* (NZ) – of

NZ$8,800, representing the 'gross' profits of the crime. This was justified as it gave "maximum effect to the clear policy of the Act" which is a "penal statute".

35. The above case demonstrates how pecuniary penalties, while described as non-punitive, can leave a defendant significantly worse of and, thus, have a punitive effect. Likewise, the definition under the proposed bill could see further punitive outcomes not where criminal conduct is established 'beyond reasonable doubt', but on the lower civil standard. The harshness of a potential forfeiture order made under the proposed bill is set out below.

36. Consider:

> 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 forfeited.

37. 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.

38. 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 non-governing Territories."

39. 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, or, the court being satisfied on the balance of probabilities that a person has engaged in conduct constituting a 'serious criminal offence'. Such a finding necessarily entails a finding of 'blameworthiness' or 'culpability' on the part of the respondent.

40. 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.

41. 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.

42. 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 and involve the imposition of a penalty 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).

The forfeiture of instruments of crime and the rule against double jeopardy

43. Given that confiscation proceedings relating to the instruments of crime are criminal proceedings for the purposes of Article 14(2) of the ICCPRI, 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. CLA notes that the Explanatory Memorandum to the Bill justifies these amendments, *inter alia,* on the basis 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.

50. We also note that the Explanatory Memorandum 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.

Controlled Operations

51. The Bill will introduce a detailed regime to the *Crimes Act 1914* allowing police to conduct undercover operations. These provisions are complex and, given the limited amount of time the Committee has allowed for submissions on this Bill, CLA has not been able to asses these provisions in detail.

52. As a preliminary comment, CLA recommends that this scheme be introduced by way a new, discrete Act. The manner in which new regimes are continually being added to the *Crimes Act 1914* (Cth) is now farcical. The Act has become an unnecessarily lengthy and complicated document which is difficult enough for experienced criminal law practitioners to navigate through, let alone a lay person. The ACT's *Crimes (Controlled Operations) Act 2008* provides a good example of how a discrete legislative regime for controlled operations can be enacted through a simple, concise piece of legislation.

53. In considering these amendments, it is worth bearing in mind the torrid history of

controlled operations at a state level in Australia to date. The case of *Gedeon v NSW Crime Commissioner* [2008] HCA 43 provides a good example of the perverse outcomes that controlled operations can lead to. In the controlled operation at issue in that case In that case, the NSW Crime Commission managed to release almost 4kg of cocaine, or between 70,000 and 100,000 dosage units, onto the streets of Australia. None of this has ever been recovered. The NSW Court of Appeal rightly pointed out that this seriously endangered the health and safety of the community. What was even more perverse is the fact that, after endangering the public's health in such a considerable way, the NSW Crime Commission had the audacity to charge two individuals who were the target of the operation with drug offences over a quantity of drugs which pails in comparison to the quantity that the Crime Commission released into the community.

54. Of particular interest are the provisions which indemnify police officers from criminal or civil liability for offence committed under the auspices of a controlled operation authorization: see, for example, clause 15HA. It must be remembered that the controlled operations scheme is, in effect, a licence for police to break the law and commit criminal offences. In this context, the opinion of Clark J of the United States Supreme Court in *Mapp v Ohio*3, 67 US 643, 658 (1961) is apposite:

> [n]othing can destroy a government more quickly than its failure to observe its own laws... As Mr Justice Brandeis, dissenting, said in *Olmes v The United States:*
>
> > Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches its whole people by its example... If the Government becomes a lawbreaker, it breads contempt for the law; it invites every man to become a law unto himself; it invites anarchy".

55. As such, any provisions which allow police to break the law and commit crimes need to be assessed with scrupulous care.

56. CLA is seriously concerned that the scheme may allow police to induce people to commit offences which they were otherwise not disposed to have committed. CLA notes that clause 15HA(2)(c) provides that a police officer will not be liable provided that they did not intentionally induce a person to commit an offence. In this respect, the issue of inducement turns on the police officer's state of mind, not that of the subject of a controlled operation.

57. In light of clause 15GA of the Bill, if a police officer unintentionally induces a person to commit an offence that they would not have committed but for the police officer's inducement, that person might arguably be precluded from making a submission that the evidence should be excluded under section 138 of the *Evidence Act 1995* (Cth) on the basis that it has been improperly obtained.

58. Whether a police officer intends to induce a person to commit an offence should be besides the point in assessing whether a person has been inappropriately induced or entrapped into committing an offence that they would not have committed but for the actions of police. The focus should be on the accused's state of mind, not the police officer's. Such an approach is taken by other superior foreign courts which have considered the issue of entrapment in a human rights context. In *Mack v The Queen* [1988] 2 SCR 903, the Canadian Supreme Court determined that:

> to determine whether police conduct gives rise to this concern, it is useful to consider whether the conduct of the police would have induced the average person in the position of the accused, i.e., a person with both strengths and weaknesses, into committing the crime. I

> believe such a test is useful not only as an analytical mechanism that is consistent with objective analysis, but also because it corresponds to one of the reasons why the defence is thought desirable. In other words, it may be inevitable that, when apprised of the factual context of an entrapment case, members of the community will put themselves in the position of the accused; if a common response would be that anyone could have been induced by such conduct, this is a valuable sign that the police have exceeded the bounds of propriety. The reasoning does not go so far as to imply that the accused is therefore less blameworthy; rather, it suggests that the state is involved in the manufacture as opposed to the detection of crime.

59. Lamer J, writing for the majority, went on to hold that:

> I agree that there is a danger of convicting "lambs" or people who have a particular vulnerability such as a mental handicap or who are suffering from an addiction. In those situations, it is desirable for the purposes of analysis to consider whether the conduct was likely to induce criminal conduct in those people who share the characteristic which appears to have been exploited by the police.

60. His Honour also stated that:

> I am not… in agreement with the assertion that it is fair for the police in the general run of cases to abuse a close relationship between friends or family members as compared to that between acquaintances, contacts or associates, for the purpose of inducing someone into the commission of an offence, and thus I do not consider this a valid criticism of the hypothetical person test. The nature of the relationship at issue is relevant and in certain cases it may be that the police have exploited confidence and trust between people in such a manner as to offend the value society places on maintaining the dignity and privacy of interpersonal relationships.

61. It s CLA's position that if a person would not have committed the offence but for the actions of police, they should not be liable for prosecution. As the United States Supreme Court made clear in *Jacobson v United States,* 503 U.S. 540 (1992):

> In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.

62. Similarly, the Court has held that:

> Law enforcement officials go too far when they "implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

63. To remove any doubt, CLA recommends that the Bill be amended to include a specific provision to the effect that a person is not to be held criminally responsible for an offence where:

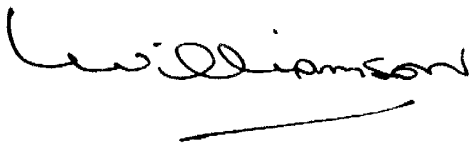
- A police officer has induced the commission of the crime (intentionally or otherwise); and
- the defendants had a lack of predisposition to engage in the criminal conduct other than that instilled by the police officer's conduct.

64. This test mirrors the defence of entrapment as enunciated by the United States Supreme Court: *Mathews v United States*, 485 U.S. 58, 63 (1988). Under the Court's jurisprudence inducement is the threshold issue in the entrapment defence. Inducement requires a

showing of at least persuasion or mild coercion. The courts have taken similar, but varying approaches in when exactly inducement has occurred. Some courts have said that "inducement shown only if government's behaviour was such that „a law-abiding citizen's will to obey the law ***could*** have been overborne": *United States v Kelly*, 748 F.2d 691, 698 (D.C. Cir. 1984). Other courts have held that inducement occurs "if government created a substantial ***risk*** that an offence would be committed by a person other than one ready to commit it": *United States v. Johnson*, 872 F.2d 612, 620 (5th Cir. 1989) This has been held to include pleas based on need, sympathy, or friendship, or extraordinary promises of the sort "that would blind the ordinary person to his legal duties": *United States v Evans*, 924 F.2d 714, 717 (7th Cir. 1991)

65. If you have any questions in relation to this submission, please do not hesitate to contact Civil Liberties Australia on (02) 6288 6137.

Yours sincerely



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