



12 May 2015

Committee Secretary
Senate Legal and Constitutional Affairs
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Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

**CRIMES LEGISLATION AMENDMENT (POWERS OFFENCES AND OTHER MEASURES) BILL 2015;
SUPPLEMENTARY SUBMISSION**

The Law Council of Australia (Law Council) appreciates the opportunity to contribute to the public consultation on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (the Bill) and is pleased to provide the following supplementary submission.

Schedule 10 of the Explanatory Memorandum to the Bill refers to proposed amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act). Two amendments are proposed. However, this part of the Law Council's submission will focus on the proposed amendment to section 169(2) (c)-(d) of the AML/CTF Act.

The effect of the amendment is to broaden the circumstances in which the protection of the privilege against self incrimination is removed. Information that a person is compelled to provide subject to coercive information gathering powers will be able to be used against that person in a broader range of civil and criminal proceedings including the offences contained at Part 5.3 terrorism and Part 10.2 Money Laundering of the *Criminal Code Act 1995*(Cth)(Criminal Code).

Concerns arise in relation to both the substance and manner by which it has been sought to advance the proposed changes.

It is the Law Council's submission that:

- the proposed amendment significantly further abrogates the common law privilege against self incrimination;
- little or no justification or reasoning is provided to substantiate any need for the proposed amendment and
- having regard for the very serious consequences for liability, insufficient consultation has been conducted.

The Explanatory Memorandum emphasises the benefit of consistency between provisions of the Act, Part 1 of this submission will consider whether section 169(2) is rendered consistent with section 205(2) by the

proposed amendment and whether such consistency is appropriate. Part 2 will consider all of the Act's self incrimination provisions. Part 3 examines the measured extent to which the privilege against self incrimination is removed by the provisions. Part 4 details the effect of the proposed amendment to section 169(2). Part 5 queries whether amendments to the Act should be entertained (other than for urgent matters), during the currency of the Statutory Review of the AML/CTF Regime. Part 6 considers the impact of the proposed amendment on the privilege against self incrimination. Part 6 will also touch on the tests that must be met for abrogation of the privilege and whether the proposed amendment can be regarded as narrow and precise in scope and whether a sufficient public benefit has been identified by the Explanatory Memorandum to justify the proposed amendment.

Part 1. A question of consistency?

The Explanatory Memorandum states that the proposed amendment to section 169 (2) (c)-(d) of the AML/CTF Act is minor in nature and would '*provide consistency with the broader exceptions that exist under section 205 (2) (c)-(d)*'. The amendment is consistent with the approach to self incrimination taken for notices issued under section 205(2) of the AML/CTF Act. However, both provisions arise within different contexts.

Section 205 (2) (c)-(d) does indeed contain broader exceptions as it represents the severest abrogation of the privilege that the regime contains. However, sections 169(2) (a) – (d) and 205 (2) (c)-(d) are not the regime's only self incrimination provisions.

The AML/CTF Act contains four provisions that explicitly abrogate the privilege against self incrimination but only the abrogation at section 205(2)(c)-(d) is located in that part of the AML/CTF Act that confers the regime's Enforcement Powers.

Any abrogation of self incrimination must be considered in the particular circumstances in which it is likely to arise. For example, section 169 arises in the 'information gathering powers context' whereas powers under section 205 are arguably more confined.

The Explanatory Memorandum does not appear to indicate why section 169(2) should mirror section 205(2) given these different contexts.

Part 2. Admissibility of Self Incriminating Evidence

The general scheme and context in which the other three self incrimination provisions (including section 169(2) (c)-(d)) presently arise is as follows.

1. Section 48 ensures that a reporting entity is not excused from **compliance reporting obligations** (created by section 47) on the basis that such a report or the fact of the giving of the report would tend to incriminate or expose to penalty.

However, section 48(2) provides that a report provided under section 47, or the fact of the giving of the report may not be used against the person except in:

- civil proceedings under the *Proceeds of Crime Act 2002* (Cth) (POCA) that relate to the Act or
- criminal proceedings for an offence under section 136 AML/CTF Act (providing false and misleading information) or corresponding proceedings for an offence against section 137.1 *Criminal Code* (false or misleading information) that relate to section 47.

2. Section 150 provides an **authorised officer who has entered premises** under section 147, whether by consent or under a monitoring warrant, the power to question the occupier of premises and obtain documents while on the premises.

Section 150(3) makes it an offence for a person to refuse to answer questions or produce documents subject to a maximum six month imprisonment or 30 penalty units.

Section 150(4) provides the person is not excused from answering or producing on the grounds of self incrimination though section 150(5) provides the answer or document produced is not admissible against the person except in:

- civil proceedings under the *Proceeds of Crime Act 2002* that relate to the Act or

- criminal proceedings for an offence under section 136 AML/CTF Act (providing false and misleading information); section 137 (producing false or misleading documents) or corresponding offences against sections 137.1 and 137.2 of the *Criminal Code*.
3. The existing terms of section 169 provide a person is not excused from **giving information or producing a document** under section 167 on the grounds of self incrimination. Section 167 applies **where an authorised officer reasonably believes** the person is a reporting entity or category of associate of a reporting entity that has information or documents relevant to the operation of the AML regime.
- Section 167(3) creates an offence for a person who has been given a notice (under section 167(2)) to do or omit to do an act that the notice requires, subject to a maximum six month imprisonment or 30 penalty units.
- Section 169(2) provides the information or document produced is not admissible except in:
- civil proceedings under the POCA that relate to the Act or
 - criminal proceedings for failing to comply with the notice under section 167(3) or proceedings under section 136 AML/CTF Act for providing false or misleading information/documents in response to the notice or corresponding proceedings for an offence against sections 137.1 and 137.2 Criminal Code (false or misleading information) that relate to Part 14 information gathering powers of the AML/CTF Act.

In short, a person's criminal liability under the existing terms of section 169 relate to the information or documents the person pursuant to notice has been compulsorily required to provide. Namely these are offences of non compliance with the notice. However, this is to be contrasted with the proposed amendment of section 169 (2)(c)-(d) of the AML/CTF Act, the effect of which will mean that AUSTRAC can compel a person to give information or produce documents which can then be used against the person in relation to an expanded number of unspecified offences, as follows:

- Civil proceedings instituted for *any* offence against the AML/CTF Act; or
- Criminal proceedings for *any* offence against the AML/CTF Act or any offence against the Criminal Code that relates to the AML/CTF Act.

This increase in liability could potentially include Division 400 (money laundering) and Chapter 5 (the security of the Commonwealth) provisions of the Criminal Code.

4. The legislative scheme under Division 9 for the notice mechanism at section 202 differs from earlier parts of the Act to reflect a careful use of enforcement powers as follows. Section 205 (1) provides a person is not excused from complying with a section 202 notice requiring a reporting entity to provide information on the grounds the requested information or document may expose the person to liability. A failure to comply with a notice under 202(4) is a criminal offence subject to a maximum imprisonment penalty of 6 months or 30 penalty units or both.

Section 202 (3) provides a person must not give such a notice unless the person reasonably believes the notice is required to determine whether to take any action or proceedings under the Act.

Because section 205(1) removes the person's right against self incrimination section 205(2) prevents use of any information or document or thing given as evidence against the person except in:

- civil proceedings under the AML/CTF Act or *Proceeds of Crime Act 2002* that relate to the Act or
- criminal proceedings for an offence under the AML/CTF Act or the *Criminal Code* as it relates to the AML/CTF Act.

Section 206 protects the person who gives information under a section 202(2) notice from being regarded as in possession of the information for purposes of Division 400 of the Criminal Code (money laundering) and Chapter 5 of the Criminal Code (the security of the Commonwealth).

Part 3. Direct use Immunity but no derivative use immunity

All four of the AML/CTF Act's self incrimination provisions provide direct use immunity. However these provisions are exceptional in that they do not also provide derivative use immunity.

Direct use immunity allows information or documents provided by a person to be used in evidence against the unlawful conduct of other persons but not the person who provided it, subject to limited exceptions. However, if the information obtained from the person leads an investigator to other evidence of an offence, derivative immunity would be necessary to prevent that other information from being used in prosecution against the person.

The four self incrimination provisions (Sections 48; 150; 169 and 205) do not extend immunity to derivative use because (according to the 2006 Explanatory Memorandum¹ to the AML/CTF Act), to do so would unacceptably fetter the effective investigation and prosecution of offences under the AML/CTF Act.

Indeed, the Scrutiny of Bills Committee has approved legislative provisions that contain 'use' immunity where there is not also a 'derivative use' immunity.² However, it has done so only in limited circumstances, generally where the offences for which the evidence would be used are very serious and where providing 'derivative use' immunity would significantly undermine investigatory functions carried out under the relevant legislation.³

The point to note is that the extent of the abrogation of the privilege against self incrimination is already at an exceptional level under the existing terms of section 169 and indeed each one of the AML/CTF Act self incrimination provisions.

It is difficult to accept that any further abrogation as proposed can be sustained to promote consistency with the terms of the more onerous enforcement provision at section 205. If such action were justifiable, it could only be on the strength of cogent and compelling reasons why an individuals common law rights should further be diminished in favour of compliance with the regulatory scheme. Such reasons have not been advanced.

Part 4. Effect of the proposed amendment to subparagraph 169(2) (c) – (d)

The Explanatory Memorandum mentions that the proposed amendment merely renders the exceptions to the immunity that are provided at section 169(2) (c)-(d) consistent with those at section 205 of the AML/CTF Act. Two observations can be made about this claim. The first is that the amendment would also make the exceptions to the abrogation of the right against self incrimination contained at section 169(2) (c)-(d) less consistent with those at sections 48 and 150, all three of which were statutorily provided for purposes of the AML/CTF Act other than for enforcement purposes.

Further and more concerning, the proposed amendment has the potential practical effect of compelling a person responding to AUSTRAC under its information gathering powers to expose him/herself to onerous criminal offences that Parliament intended AUSTRAC to be able to use only in discharging its statutory enforcement functions.

AUSTRAC is possessed of substantial enforcement powers which include, for example:

- monitoring warrants to access reporting entities' premises;
- infringement notices requiring the payment of a pecuniary penalty; and
- power to refer criminal matters to the Australian Federal Police or the Commonwealth Director of Public Prosecutions.

¹ Australian Government Replacement Explanatory Memorandum, Anti Money Laundering and Counter Terrorism Financing Bill 2006 (Cth) at page 89,161-162

² Attorney General's Department *A Guide to Framing Commonwealth Offences* September 2011 at page 97 available at

<http://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>

³ *Ibid* at page 96

The Law Council agrees that AUSTRAC appropriately uses enforcement action where... *'necessary to remedy breaches and uphold the integrity of the regime, [or to] deter lapses in compliance....'*⁴

However, the Law Council cannot agree that the proposed amendment to subparagraph 169 (2) (c)-(d) merely *'...mirrors the existing approach to self incrimination taken in subparagraph 205(2) of the AML/CTF Act and provides greater consistency in the operation and interpretation of the Act'*

Part 5. Statutory Review of the AML/CTF Regime on foot

The AML/CTF Act is presently undergoing statutory review pursuant to section 251 of the AML/CTF Act under the process that began in December 2013. The Statutory Review is intended to extend to the whole of the legislative regime's operation and the Attorney General's Department and AUSTRAC are expected to table in Parliament a report of the Statutory Review sometime in 2015.

It is concerning that the proposed amendments will have the effect of circumventing the Review process particularly as AUSTRAC's functions and powers are specifically raised for consideration by the Issues Paper to the Statutory Review.

Introducing proposed amendments that decrease common law rights conferred by the privilege against self incrimination as part of an omnibus package and during the currency of a Statutory Review arguably diminishes the Review's capacity to meaningfully consider stakeholders' views on improving the AML/CTF legislative scheme.

Further, as a practical matter; the Law Council is concerned that the proposed piece meal amendment of the provisions of the AML/CTF Act will further compound the not insignificant definitional, construction and consistency issues that plague the efficient effective operation of the regime.

Part 6. The privilege against self incrimination

The Law Council opposes financial criminality and acknowledges the need for robust laws to combat money laundering and the enabling of terrorism financing. However, an appropriate balance must be always be struck between the desire for effective laws and the need to protect the rights of individuals that fall subject to coercive powers particularly when such powers are complemented by sanctions for non compliance.

As a general proposition it is the Law Council's view that the exercise of coercive information gathering powers should be regarded as exceptional, particularly when used in executive rather than judicial processes because of the intrusive impact on individual rights. The Law Council's position is that the use of such powers is justified only when necessary to achieve a legitimate purpose and only when accompanied by sufficient protection against overuse or misuse and by provisions that mitigate their potentially adverse impact on individual rights.

In determining whether an abrogation of the privilege against self incrimination is justified, consideration should be given to the following:

- The common law principle that a person ought not be required to answer questions or produce material which may tend to incriminate the person of a criminal offence or expose the person to a civil penalty⁵
- The privilege has legislative expression preserved by sections 128(1) and (4) of the Uniform Evidence Acts which allows a witness to object to giving particular evidence that 'may tend to prove' that he/she may have committed an offence or is liable to a civil penalty (subject to the court's discretion to allow the evidence); and
- Principles of international law including Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) which safeguard an accused in criminal proceedings *'not to be compelled to testify against himself or herself, or to confess guilt'*.

⁴ Attorney General's Department and Australian Transaction Reports and Analysis Centre, *Statutory Review of Australia's AML/CTF Regime Issues Paper*, December 2013

<http://www.ag.gov.au/Consultations/Documents/issues-paper-review-aml-ctf-regime-20131202.doc>

⁵ *Sorby v The Commonwealth* (1983) 152 CLR 281; see also *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328

Precise and Narrow

The Explanatory Memorandum mentions that the proposed amendment to section 169(2) (c)-(d) is precise and narrowly extend the range of proceedings from which the right is excluded. Two observations can be made about this claim. The extension cannot be regarded as precise because it cannot be readily determined which particular offences against the *Criminal Code* relate to the AML/CTF Act.

This is to be contrasted with the present drafting of the provisions at sections 48, 150 and 169 which specifically reference particular offence provisions. The proposed amendment to section 169 (2) (c)-(d) extends to all offences under the AML/CTF Act and *Criminal Code* and potentially exposes a person acting under compulsion to the severest offences and penalties that the statutory regime allows for.

Public benefit

The Explanatory Memorandum mentions that the public benefit derived from the proposed amendment to section 169(2) (c)-(d) outweighs any potential harm to individual rights.

With respect, absent any justification, it is unclear how such an assessment can be made.

The Law Council cannot accept that the increased consistency with the approach in section 205(2) is justifiable in the circumstances, particularly given the amendment appears to decrease consistency with two other, arguably more similar provisions.

Recommendation

The Law Council recommends:

- the Bill be withdrawn or the proposal to amend section 169(2)(c)-(d) be suspended unless and until the Committee obtains clarification from the Government about the aim sought to be achieved and why the further abrogation of the privilege against self incrimination is reasonable and proportionate to this aim; and
- the proposed amendment because it affects a person's rights, should be subject to more detailed consultation. As it is topically within scope, such further consultation should take place within the breadth of the Statutory Review so that interested parties who have already provided submissions have the opportunity to consider the proposed changes.

Thank you again for the opportunity to provide these observations.

Yours sincerely,

**MARTYN HAGAN
SECRETARY- GENERAL**