Law Council
OF AUSTRALIA

Crimes Legislation Amendment (Economic Disruption) Bill 2020

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, its Anti-Money Laundering and Counter-Terrorism Financing Working Group and the Queensland Law Society in the preparation of this submission.

Executive Summary

1. The Law Council of Australia is pleased to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (**Bill**).

Focus of submission

2. This submission comments on the measures in Schedules 1 and 2 to the Bill, which respectively propose amendments to the money laundering offences in Division 400 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**); and certain investigative provisions in Part IC of the *Crimes Act 1914* (Cth) (**Crimes Act**). The Law Council would be pleased to assist the Committee with any questions it may have about the measures in Schedules 3-7, in relation to the *Proceeds of Crime Act 2002* (Cth).

Law Council position

3. The Law Council supports the intent of the Bill to ensure that Commonwealth money laundering offences and investigative powers are adapted to the contemporary *modus operandi* of groups engaged in transnational serious and organised crime.

4. The Law Council recognises that money laundering is a significant enabler of transnational, serious and organised crime because it is a mechanism through which criminal organisations realise, conceal and reinvest profits from illicit activity. The Law Council also acknowledges the significant difficulties identified in the Explanatory Memorandum to the Bill in relation to the investigation and enforcement of money laundering offences in contemporary circumstances.[1]

5. These difficulties are said to have arisen from the diffuse, opaque and dynamic nature of the legal, financial and administrative arrangements that organised crime syndicates have adopted to conceal the criminal origins of the funds and evade tracing, particularly by establishing complex distribution chains, and tightly limiting the information that is known to each person in a chain about the origins and ultimate destinations of funds. It has also been observed that serious and organised crime groups have significantly diversified their criminal activities ('predicate offences').[2]

Recommendations

6. Robust offences and investigative powers are essential to disrupting organised crime groups, particularly by cutting off their funding sources. However, such measures must be proportionate and targeted precisely to the wrongdoing sought to be addressed. Vague and overly broad offences create a risk of arbitrary criminalisation. They may also have the opposite effect to the desired outcome of increasing conviction rates for persons who launder proceeds of crime, as they increase the risk of error in drawing inferences of guilt, and the prospects of long and complex appeals.

7. The Law Council recommends amendments to Schedules 1 and 2, to ensure that:

   - offences are compatible with established principles of criminal responsibility;
   - existing statutory safeguards are retained with respect to the recording of admissions or confessions that have been elicited by undercover police; and
   - the proposed measures are drafted in clear and unambiguous terms.

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[1] Explanatory Memorandum, Crimes Legislation Amendment (Economic Disruption) Bill 2020 ('Explanatory Memorandum'), 1 at [1], 2 at [5]-[8] and 8 at [13]-[17]. See also: Department of Home Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020*, (September 2020), 3. See also the case studies at 6.

[2] Ibid.

Overview of proposed amendments

Money laundering offences (Schedule 1)

8. Schedule 1 proposes numerous, significant amendments to the money laundering offences in Division 400 of the Criminal Code. The key measures are as follows:

New 'tiers' of offences for high-value money laundering

(a) Offences for dealing with money or property that is, and is believed by the defendant to be, proceeds of crime (existing sections 400.3-400.8)

The Bill proposes to insert a new tier of offence that will apply where the money or property is valued at $10 million or more.[3] It will be punishable by a maximum penalty of life imprisonment. Presently, the most serious offences, which are in subsection 400.3(1), apply to money or property valued at $1 million or more and are punishable by a maximum penalty of 25 years' imprisonment or 1500 penalty units ($333,000) or both.[4]

(b) Offences for dealing with money or property that is reasonably suspected to be proceeds of crime (existing section 400.9)

Currently, the highest tier of offence in section 400.9 applies to money or property valued at $100,000 or more, and is punishable by a maximum penalty of three years' imprisonment or 180 penalty units ($39,960) or both.[5]

The Bill proposes to enact two new tiers of offences, which will apply to:

- money and property valued at $10 million or more, punishable by a maximum penalty of five years' imprisonment or 300 penalty units ($66,600) or both;[6] and
- money and property valued at $1 million or more, punishable by a maximum penalty of four years' imprisonment or 240 penalty units ($53,280) or both.[7]

Proof of predicate offences

(c) A new category of 'proceeds of general crime' offences, applying to the value-based tiers of offences in new section 400.2B and existing sections 400.3 and 400.4

The Bill proposes to create a new offence type that will not require the prosecution to prove that the defendant knew, or was reckless or negligent, as to whether the money or other property they dealt with was proceeds of a specific class of indictable offence (such as a drug importation offence). The existing offences in sections 400.3 to 400.8 require proof of these matters.[8]

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[3] Bill, Schedule 1, item 9 (inserting new section 400.2B in the Criminal Code).

[4] Criminal Code, subsection 400.3(1).

[5] Ibid, subsection 400.9(1).

[6] Bill, Schedule 1, item 62 (inserting new subsection 400.9(1AA) in the Criminal Code).

[7] Ibid (inserting new subsection 400.9(1AB) in the Criminal Code).

[8] Ibid, Schedule 1, item 9 (inserting new subsections 400.2B(2)-(3), (5)-(6) and (8)-(9) of the Criminal Code); and items 13,17, 21, 27, 31 and 35 (inserting new offence provisions in existing sections 400.3 and 400.4 of the Criminal Code, targeting money laundering where the value is $1 million or more, or $100,000 or more). The Bill also proposes to make consequential amendments to the offences in sections 400.3 to 400.8 to replace the term 'proceeds of crime' with the new term 'proceeds of indictable crime' to distinguish these offences from the new 'proceeds of general crime' offences. The current defined term 'proceeds of crime', as

Under the new 'proceeds of general crime' offences in new section 400.2B and existing sections 400.3 and 400.4, the prosecution need only prove the defendant's fault in relation to the circumstance that the property was 'proceeds of general crime'. (That is, the money or other property was wholly or partly derived, or realised directly or indirectly, by any person, from the commission of an offence under Australian or foreign law.)[9]

The prosecution will not be required to prove a particular predicate offence or kind of predicate offence, or to identify a particular person as the offender in relation to the predicate offence.[10]

The new category of 'proceeds of general crime' offences will apply if:

- the defendant intentionally 'engages in conduct in relation to money or other property' (which is broader than the concept of 'dealing with' that property as defined in section 400.2);
- the property is proceeds of general crime;[11]
- the defendant believed, or was reckless or negligent as to whether the money or property was proceeds of general crime (with separate tiers of offences for each of these fault elements);[12]
- the defendant's conduct concealed or disguised one or more particular aspects of the money or property (such as its nature, value, source, location or disposition) or the identity of any person who has rights in respect of the money or property or who has effective control of it. The defendant must have been reckless in relation to this result;[13] and
- the relevant monetary value for the particular tier of offence is established ($10 million or more;[14] between $1 million and $9.99 million;[15] and between $100,000 and $999,999).[16] This value can

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used in the existing offence provisions, will be repealed: Bill, Schedule 1, items 2, 3, 15, 16, 19, 20, 24-26, 29, 30, 33, 34, 38-61, 63, 64, 69, 71, 74, 77, 78, and 81-84.

[9] Bill, Schedule 1, item 3 (amending subsection 400.1(1) of the Criminal code to insert a definition of 'proceeds of general crime').

[10] Ibid, item 75 (repealing and substituting subsection 400.13(1) of the Criminal Code). This responds to a decision of the New South Wales Court of Criminal Appeal, in which it was held that existing section 400.13 requires particularisation of these matters in relation to the predicate offence, in respect of the existing offences in sections 400.3-400.8 (but not in relation to section 400.9 because of the effect of subsection 400.9(2) specifically in relation to that offence). See: *Lin v R* [2015] NSWCCA 204 (3 August 2015, Simpson, Hulme and Bellew JJ) at [21]-[28] (per Simpson J) and [30]-[31] (Hulme and Bellew JJ concurring).

[11] Bill, Schedule 1, item 9 (inserting new subsections 400.2B(2), (3), (5), (6), (8) and (9)) and items 13, 17, 21, 27, 31 and 35 (inserting new subsections (1A), (1B), (2A), (2B), (3A) and (3B) in sections 400.3 and 400.4). See the element in paragraph (b) of each of these new offences.

[12] See, for example, ibid, item 9 (inserting the three 'tiers' of offences for the laundering of proceeds of general crime where the value of the money or property is over $10m. The 'tier 1' offences in subsections 400.2B(2) and (3) apply a 'bespoke' fault element not provided for in Chapter 2 of the Criminal Code, namely, that of 'belief'. (The elements are that the money or property is, and the person **believes it to be**, proceeds of general crime.) The 'tier 2' offences in proposed subsections 400.2B(5) and (6) would require proof of recklessness as to the circumstance that the money is proceeds of general crime. The 'tier 3' offences in proposed subsections 400.2B(8) and (9) would require proof of negligence in relation to the circumstance that the money is proceeds of general crime). Items 13, 17, 21, 27, 31 and 35 of Schedule 1 to the Bill propose to repeat this formulation for the proposed 'proceeds of general crime' offences in section 400.3 (if the money/property is $1m or more) and section 400.4 (if the money/property is $100,000 or more).

[13] See, for example, Bill, Schedule 1, item 9, inserting new paragraphs 400.2B(2)(c), 400.2B(3)(c), 400.2B(5)(d), 400.2B(6)(d), 400.2B(8)(d) and 400.2B(9)(d). Subparagraphs (i)-(ix) of each provision set out the exhaustive list of matters. The prosecution must prove that the defendant concealed any, or all, of these.

[14] Proposed section 400.2B (Bill, Schedule 1, item 9).

[15] Existing section 400.3 (as amended by Schedule 1, items 13, 17 and 21).

be from conduct in relation to money or property on a single occasion,[17] or conduct in relation to money or property on two or more occasions if the sum of the values of the money or property meet the relevant thresholds for the above tiers.[18]

- As noted at measure (f) below, absolute liability applies to the circumstance of the value of the money or property,[19] but there is a partial defence in section 400.10 for a defendant who has a reasonable but mistaken belief as to the value of the money or other property.[20]

Fault elements for attempt offences in relation to Division 400

(d) Modified application of subsection 11.1(3) of the Criminal Code

The proposed amendments would modify the application of the extension of criminal liability in subsection 11.1(3) in relation to attempts to commit offences against Division 400.

Subsection 11.1(3) provides that, for each physical element of the offence that was attempted, the fault elements are intention and knowledge.

The proposed amendments would change this in relation to the physical elements of the offences in Division 400 which comprise the circumstance that the money or property was proceeds of general crime or indictable crime.

The proposed amendments would instead apply the fault element of recklessness to that circumstance.[21] This approach is said to be consistent with the modified application of subsection 11.1(3) by section 300.6, in relation to attempts to commit the serious drug offences. However, no explanation is given as to why the two types of principal offences (that is, serious drug offences and money laundering offences) are considered sufficiently analogous to make such alignment appropriate.[22]

Definition of 'deals with' in relation to money or property

(e) Expansion of the definition in section 400.2

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[16] Existing section 400.4 (as amended by Schedule 1, items 27, 31 and 35).

[17] See, for example, Bill, Schedule 1, item 9, inserting proposed subsections 400.2B(2), 400.2B(5) and 400.2B(8) (in relation to laundering general proceeds of crime valued at $10m or more). See also proposed subsections (1A), (2A) and (3A) of sections 400.3 and 400.4, inserted by items 13, 17, 21, 27, 31 and 35 (in relation to laundering general proceeds of crime valued at $1m or more, and $100,000 or more).

[18] See, for example, Bill, Schedule 1, item 9, inserting proposed subsections 400.2B(3), (6) and (9) (in relation to laundering general proceeds of crime valued at $10m or more). In relation to laundering general proceeds of crime valued at $1m or more, or $100,000 or more, see proposed subsections (1B), (2B) and (3B) of sections 400.3 and 400.4, inserted by items 13, 17, 21, 27 and 25).

[19] Bill, Schedule 1, item 9 (inserting new subsection 400.2B(10)), item 23 (amending existing subsection 400.3(4)); and item 37 (amending existing subsection 400.4(4)).

[20] Ibid, item 72 (amending the partial defence in section 400.10 as explained below).

[21] Ibid, item 76 (inserting new section 400.14A).

[22] Department of Home Affairs, *Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020*, (September 2020), 4. See also, Criminal Code, 300.6 (recklessness as to nature of substance or plant sufficient for offence of attempt to commit an offence against Part 9.1—serious drug offences). Section 300.6 applies the fault element of recklessness to the circumstance that the drug or plant the defendant attempted to traffic, import or export, possess or cultivated was of a particular nature, consistent with the fault elements in the completed offences.

It should be noted that the enactment of section 300.6 in 2015 was highly controversial and strongly opposed by the Law Council, among others. See: Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (May 2015), 5-7 at [12]-[22].

The proposed amendments will extend the coverage of the definition of 'deals with' (in relation to money or property) to include so-called 'controllers' who direct others to locate, move, collect or otherwise deal with property, and do not personally undertake those actions.[23]

The amendments propose that a person ('the first person') is taken to have 'dealt with' property if they engage in conduct which causes another person (whose identity need not be established) to do so, and the first person is reckless as to that result of their conduct. A person will be taken to have 'caused' another person to deal with money or property if their conduct 'substantially contributes' to the other person engaging in those dealings.[24]

Partial defence of 'mistake of fact as to value'

(f) Narrowing of the defence in section 400.10

The proposed amendments purport narrow the partial defence in section 400.10, which applies if a defendant has a reasonable, but mistaken, belief about the value of the money or property they dealt with.

The defendant bears an evidential burden in relation to section 400.10. If that burden is discharged and the prosecution fails to discharge its legal burden to negate the defence, it may be open to the jury to return an alternative verdict, which finds the person guilty of a lower tier of offence that corresponds with the believed value (not the actual value) of the money or other property, which carries a lesser maximum penalty than the higher tier of offence charged.[25]

The proposed amendments purport to respond to a decision of the Victorian Court of Appeal in 2016 on the construction of the current defence provision, in relation to a single act of dealing with money or property that continues over a period of time, as opposed to a single act that occurs only at a fixed point in time. (An example of a continuing act is the possession or concealment of money. An example of an act at a fixed point in time is receiving money).[26]

The Court of Appeal held unanimously that the partial defence in section 400.10 applied to a defendant who held a reasonable, but mistaken, **belief at or before** the time they dealt with the property, even if they discovered its true value while carrying out the act of dealing with the property and proceeded.[27]

The proposed amendments would apply where the act of dealing or engaging in conduct in relation to money or property is one which is said to continue during a period of time (such as possession or concealment).

The proposed amendments will require the defendant to discharge an evidential burden in relation to the circumstance that they held a reasonable but mistaken belief about the value of the money or property they dealt with, **throughout the entire period** of their dealing with that money or property (for example, throughout the entire period during which they possessed or concealed it).[28]

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[23] Bill, Schedule 1, item 6 (inserting new subsections 400.2(2) and (3)).

[24] Ibid item 6 (inserting new subsections 400.2(4) and (5).

[25] Criminal Code, sections 400.10 (defence) and section 414 (alternative verdicts). The ability to return an alternative verdict in these circumstances requires the trial judge to be satisfied that the defendant has been accorded procedural fairness in relation to the alternative offence (which has not been charged).

[26] *Singh v The Queen* [2016] VSCA 163 (15 July 2016, Ashley, Kyrou and Ferguson JJA).

[27] Ibid at [64]-[105] especially [94] (per Ashley, Kyrou and Ferguson JJA).

[28] Bill, Schedule 1, items 70 and 72 (inserting new paragraph 400.10(1)(aa) and new subsection 400.10(1A)).

Obligations in covert investigations (Schedule 2)

9. Schedule 2 proposes to amend Part IC of the *Crimes Act 1914* (Cth) (**Crimes Act**) so that undercover law enforcement operatives are not subject to the obligations under Division 3, when they ask questions of a suspect as part of a covert investigation.[29]

10. Schedule 2 also proposes to remove a Division 3 obligation that is specific to covert investigations, which obliges an investigating official to record an admission or confession that is made by a suspect to an undercover law enforcement operative, as part of a covert investigation, and to give the suspect access to that recording when doing so would not prejudice the covert investigation. This is a pre-condition to the evidential admissibility of the recording, subject to very limited exceptions.[30]

Money laundering offences (Schedule 1)

11. As detailed in the previous section, Schedule 1 to the Bill proposes to amend Division 400 of the Criminal Code to enact:

- **new money laundering offences**, principally in relation to dealings with:
  - 'general proceeds of crime' (in order to reduce requirements of particularisation with respect to the predicate offence, and the defendant's state of mind in relation to it); and
  - money or property valued at $10 million or higher, with the most serious offences punishable by a maximum penalty of life imprisonment (in order to make it possible to obtain higher sentences than 25 years' imprisonment for high-value money laundering operations); and
- **amendments to make it easier to prosecute Division 400 offences and the offence of attempt (including enabling people to be prosecuted for a higher tier of offence than is presently possible), namely:**
  - amending the fault elements for the offence of attempting to commit an offence against Division 400, so that a person need only be reckless, rather than know or intend, that the money or other property they dealt with was proceeds of indictable or general crime;
  - expanding the definition of 'deals with' to include 'controllers' in money laundering operations (persons who direct or otherwise cause other persons to deal with proceeds of indictable or general crime);
  - expanding proceeds of general crime offences to cover persons who 'engage in conduct' that disguises or conceals the origins, movements or identities of persons in control of money or property;
  - expanding the Division 400 offences so that the values for each tier of offence can be determined by the total sum of conduct on multiple occasions, rather than a single act (thereby facilitating prosecution of a single count for a higher value offence, rather than multiple counts of lower value offences); and
  - narrowing the defence of 'mistake of fact as to value' to require a person to hold the mistaken belief that the money or property was of a lower value through the entirety of their act of dealing with it (where that act is one which is said to continue over a period of time).

[29] Bill, Schedule 2, items 1-5 (primarily amending the definition of 'investigating official' in section 23B of the Crimes Act, and making other consequential amendments).

[30] Crimes Act, section 23V, especially subsections 23V(1)-(3) and (5)-(7). The proposed repeal is contained in item 6 of Schedule 2 to the Bill.

Amendments to which the Law Council does not object

Discrete offences for money or property valued at $10 million or above

12. The Law Council notes that the proposal to enact a discrete tier of offence to cover money or property valued at $10 million or more (with a higher maximum penalty than is presently available for the existing Division 400 offences) is preferable to simply increasing the maximum penalties for the existing offences.[31]

13. This is because courts have held that a sharp increase in a maximum sentence for an existing offence may be interpreted as a Parliamentary signal to sentencing courts that penalties across the board should increase, thereby exposing lower level offending to higher sentences.[32]

14. The structure of the proposed amendments, in inserting new section 400.2B rather than amending section 400.3 (which is currently the highest value-based tier of offence) to increase the maximum penalties, will avoid this unintended consequence in relation to sentencing for offences against section 400.3.

15. For these reasons, the Law Council also does not object to the proposed enactment of further tiers of offences in section 400.9,[33] in preference to increasing maximum penalties for the existing offences in that section.

16. However, as explained below, the Law Council does not consider the proposed maximum penalty of life imprisonment to be proportionate to the wrongdoing sought to be addressed by the proposed 'proceeds of general crime' offences in proposed subsections 400.2B(2) and (3) (in item 9 of Schedule 1 to the Bill).

Issues of concern to the Law Council

17. The Law Council has six key concerns in relation to Schedule 1 to the Bill. Five of these are directed to substantive measures in that Schedule, namely:

- the proposed amendment to the fault elements for the offence of attempt in relation to Division 400 offences is fundamentally inconsistent with the long-established character of the offence of attempt, as codified in subsection 11.1(3) of the Criminal Code;

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[31] Bill, Schedule 1, item 9 (inserting new section 400.2B). See also, item 62 (inserting new subsections 400.9(1AA) and (1AB)).

[32] See, for example: *Muldrock v The Queen* (2011) 244 CLR 120, [2011] HCA 39 at [31] 'The maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence. An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased' (per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also: *R v Slattery* (1996) 90 A Crim R 519 at 524: 'The action of the Legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of that offence, and the courts are required to give effect to the obvious intention of the Legislature that the existing sentencing patterns are to move in a sharply upward manner' (per Hunt CJ).

[33] These offences are unconventional, in that they do not attach criminal liability to the actions of a defendant (that is, conduct, a result of conduct, or circumstances in which conduct occurs) and the defendant's state of mind in relation to those physical elements. Rather, they attach liability to an external factor. Namely, an objective finding by the trier of fact that it was 'reasonable to suspect' that the money or property a person dealt with was proceeds of crime. (See, for example: *Singh v The Queen* [2016] VSCA 163 at [52] per Ashley, Kyrou and Ferguson JJA.) However, the Law Council acknowledges that this type of money laundering offence has a substantial history. Its predecessor was contained in section 82 of the *Proceeds of Crime Act 1987* (Cth) and was endorsed by the Australian Law Reform Commission (**ALRC**) in its 1999 review of that Act. As the ALRC noted, it is based on the offence of possession of goods reasonably suspected of being stolen: ALRC, *Confiscation that Counts: a review of the Proceeds of Crime Act 1987* (Cth), ALRC Report 87, (March 1999), 128-141, especially 129 and 131. See also: *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth), Sch 1 (inserting Div 400 of the Criminal Code, including s 400.9).

- overbreadth and vagueness in the concept of 'proceeds of general crime', and the absence of any requirement for the prosecution to establish that the money or property was, in fact, the proceeds of a particular type of offence (quite apart from the defendant's state of mind in relation to the connection between the money or property and a particular offence or offence type);
- the imposition of a disproportionately harsh maximum penalty of life imprisonment for the 'tier 1' offences in the 'proceeds of general' crime offences in proposed subsections 400.2B(2) and (3), having regard to the dilution of requirements of proof and particularity in relation to the predicate offending and the application of absolute liability to the value of the money;
- the proposed amendments to the partial defence of 'mistake of fact as to value' in section 400.10 highlight an existing problem in the definition of 'deals with' in section 400.2, to the extent that it purports to deem passive possession of money or other property as a form of 'dealing' that is criminalised by the Division 400 offences. Given the significant expansions of criminal liability proposed in the Bill, it would be appropriate to address this difficulty as part of the proposed tranche of amendments to Division 400, namely by creating separate possession offences;
- technical drafting issues concerning the proposed definition of 'exercises control' (as used in the proceeds of general crime offences) in which there is a need to improve clarity of legislative expression.

18. The Law Council's sixth concern is a procedural issue, being the absence of consultation on the proposed legislation, despite this Committee's express endorsement in 2015 of the Law Council's calls for improved consultation on proposals for highly technical and significant amendments to the criminal law, before such Bills are introduced to Parliament.[34] The legislation that prompted these calls in 2015 contained, among other measures, amendments to the fault elements for the offence of attempting to commit other offences commonly associated with transnational serious and organised crime (namely, serious drug offences).[35]

Fault elements for attempt offences in relation to Division 400

19. The Law Council does not support the proposed amendment in item 76 of Schedule 1, to insert new section 400.14A in the Criminal Code. As noted above, this section proposes to vary the fault elements for the offence of attempting to commit certain proceeds of general and indictable crime offences, so that the prosecution need only prove that the defendant was reckless as to whether the money or property was proceeds of crime.

20. This a significant diminution of the long-established requirements of proof for attempt offences, which require proof, to the criminal standard, that a person had knowledge or intention in relation to the physical elements of the principal offence.

21. Currently, the general offence of attempt is governed by subsection 11.1(3) of the Criminal Code, which codifies the longstanding position at common law. Namely, an attempt to commit an offence necessarily requires intention or knowledge, because purposiveness is the essence of an attempted crime. If a defendant has not committed (or conspired to commit) the principal offence, then a fault element of intention or knowledge is required to make them criminally liable for attempt.

22. As noted by Justice Blockland in *The Queen v BW* [2012] NTSC 29:

[34] Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (July 2015), 31-32 at [2.80]-[2.81].

[35] *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth), Schedule 1, item 2 (inserting section 300.6 in the Criminal Code).

> *The need to prove only an incomplete actus reus* [the physical elements of an offence] *was to some degree balanced by the requirement to prove a high level of culpability in order to constitute mens rea* [the fault elements of an offence] *for attempts.* [36]

23. Subsection 11.1(3) of the Criminal Code was the product of extensive public consultation (including with the legal profession) and thorough review by the Model Criminal Code Officers' Committee (**MCCOC**) of the (then) Standing Committee of Attorneys-General (now the Committee of Attorneys-General).

24. In its 1993 report on the general principles of criminal responsibility, now enacted in Chapter 2 of the Criminal Code, the MCCOC reported that it had considered, but did not support, applying the fault element of recklessness to the offence of attempt. Rather it concluded that, for the offence of attempt, the accused must act intentionally or knowingly with respect to each physical element of the offence attempted.[37] This was on the basis that:

    - both the common law and the Griffith Codes always required intent;
    - several submissions to the MCCOC on its discussion paper opposed the proposal, principally because purposiveness is the essence of attempt; and
    - recklessness would widen the extensions of criminal responsibility too far.[38]

25. Such a radical departure from long-established, fundamental principles of criminal responsibility should not be undertaken lightly, and certainly not for the mere reason that law enforcement agencies consider that proof of knowledge or intention is too difficult in particular circumstances (which appears to be the extent of the limited justification offered in the Explanatory Memorandum to the present Bill).[39]

26. If there are concerns that the existing inchoate and ancillary offences in Chapter 2 of the Criminal Code are not adequately adapted to particular crime types, the preferable course would be to consider amendments to the elements of the relevant principal offences or the enactment of new principal offences (such as the Division 400 money laundering offences). This would ensure that the wrongdoing sought to be criminalised is identified with precision, an appropriate maximum penalty is fashioned, and there is no distortion of the offence of attempt in section 11.1.

27. Commonwealth criminal law contains considerable precedent for such an approach, where a principled justification is available for targeting perceived wrongdoing, which is not presently covered by the extensions of criminal liability in Chapter 2. The terrorism and foreign incursions offences in Chapter 5 of the Criminal Code are prominent examples of the practice of fashioning discrete principal offences, rather than distorting the application of the extensions of criminal liability, as is proposed in the present Bill.[40]

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[36] *The Queen v BW* [2012] NTSC 29 (17 April 2012), [11] per Blockland J.

[37] Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Final Report on the Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1993), 78-79.

[38] Ibid.

[39] Explanatory Memorandum, [181]-[184].

[40] For example, the attempt offence in section 11.1 of the Criminal Code excludes conduct that is 'merely preparatory' to the commission of a principal offence. In 2001, the Australian Government identified a need to criminalise merely preparatory acts in relation to terrorism, because of the fast-moving nature of plots, and their extremely dangerous effects. However, policy this **was not** given effect by amending the application of the fault elements of attempt in section 11.1 of the Criminal Code in relation to terrorist acts. Rather, Part 5.3 of the Criminal Code enacts discrete principal offences for acts of preparation and planning for a terrorist act.

28. The Law Council notes that a similar amendment to proposed section 400.14A was enacted in 2015 in relation to serious drug offences, in section 300.6. The Law Council opposed that amendment for the reasons of principle outlined above.[41]

29. In any event, section 300.6 of the Criminal Code is not a suitable precedent for replication in other offence provisions, including the money laundering offences in Division 400. The enactment of section 300.6, in relation to the serious drug offences in Division 300, was said to reflect a unique circumstance in drug investigations, whereby law enforcement officials would intercept unlawful drugs in customs inspections or other covert settings, and substitute illicit substances with imitations. The Senate Legal and Constitutional Affairs Committee reported that the Commonwealth Director of Public Prosecutions argued that this practice of substitution was the key factor necessitating a fault element of recklessness in relation to attempt offences for drug importation, because it made it more difficult to establish the requisite knowledge or intention under subsection 11.1(3) of the Criminal Code.[42]

30. While the Law Council did not agree with that reasoning in relation to attempts to commit the relevant serious drug offences in Division 300,[43] considerations regarding the interception and substitution of drugs do not attend the investigation of money laundering offences in Division 400.

31. In addition to this distinguishing factor, and the significant reasons of principle noted above, proposed section 400.14A will operate in combination with the proposals to reduce the requirements of proof in relation to the physical elements of the offence, through the creation of 'proceeds of general crime' offences. This heightens the risk that proposed section 400.14A will create nebulous offences, whose practical enforcement will be reliant largely on executive discretion, rather than clear and certain statutory parameters to delineate the scope of criminal liability.

Recommendation 1— fault elements for attempt offences

- **Proposed section 400.14A (item 76 of Schedule 1) should be omitted.**
- **The applicable fault elements for the offence of attempt in relation to Division 400 should be governed exclusively by subsection 11.1(3) of the Criminal Code (that is, intention and knowledge).**

Vagueness and overbreadth in the concept of 'proceeds of general crime'

32. The Law Council is concerned that the combination of the proposed 'proceeds of general crime' offences in proposed section 400.2B and existing sections 400.3 and 400.4, and the removal of particularisation requirements in proposed subsection 400.13(1), will create nebulous offences that effectively criminalise conduct that is generally suspicious or dubious, rather than demonstrably connected with criminal offending by serious and organised crime groups.

[41] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (May 2015), 5-7 at [12]-[22].

[42] Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (July 2015), 11-12 at [2.11], citing the evidence of the then Commonwealth Director of Public Prosecutions, Mr Robert Bromwich (now the Hon Justice Bromwich of the Federal Court of Australia).

[43] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (May 2015), 7 at [18]-[19].

33. This arises because the definition of 'proceeds of general crime' (essentially, any offence against any Australian or foreign law)[44] no longer requires the prosecution to establish even the general type of offence from which the money or other property was wholly or partly derived, whether directly or indirectly (for example, a drug offence). This is likely to require juries to draw complex inferences from circumstantial evidence about an organised crime operation, and the accused's conduct and the circumstances in which it occurred, to establish the following matters beyond reasonable doubt:

    - the money or other property was, in fact, proceeds of general crime (that is, it was wholly or partly derived or realised directly or indirectly from the commission of any offence, against any law, anywhere in the world); and
    - the accused person believed that the money was proceeds of general crime, or was reckless or negligent in relation to this circumstance (as applicable to the particular tier of offence charged).

34. While the criminal rules of proof require that an inference of guilt may only be drawn if it is the only reasonable inference open on the evidence,[45] this rule may not provide a significant degree of protection in view of the vagueness of the physical elements of the offence in relation to 'proceeds of general crime'.

35. Further, the vagueness of the concept of 'proceeds of general crime' may have the opposite effect to the intended outcome of increasing conviction rates for persons involved in the distribution chain or network for laundering the proceeds of crime. It may lead to error in the application of the 'only reasonable inference rule' and may therefore increase the prospects of lengthy and complex appeals against convictions.

36. The Law Council acknowledges that the practices of organised crime groups, in tightly limiting the flow of information to persons in their distribution chains or networks, present significant challenges for law enforcement agencies to meet the standard of proof required in relation to a particular offence (for example, trafficking a particular illicit substance) or a particular offence type (for example, drug offences generally). However, the proposed 'proceeds of general crime' offences do not merely reduce the requirements of proof in relation to an accused person's state of mind with respect to the criminal origins of the money or other property which they have dealt with.

37. Rather, the new offences also propose to relieve the prosecution of the requirement to establish, beyond reasonable doubt, that the money or other property is, **in fact,** the proceeds of an identified type of offence (if not a specific offence).[46] The Explanatory Memorandum does not offer a coherent justification for the proposed dilution of the existing requirements of proof about this fact. It simply states that it is presently difficult to identify a type of **indictable offence** because of the use of encrypted communications and complex distribution chains through multiple jurisdictions. It does not explain why it is impossible to identify **any type** of offence.[47] In an era where it is increasingly possible to manipulate the records and accounts of unwitting or peripheral third parties who may come to be charged with possession of stolen property or money and face very significant prison sentences, this is a significant issue.

[44] Bill, Schedule 1, item 3 (inserting a definition of 'proceeds of general crime' in subsection 400.1(1)).

[45] *Shepherd v R* (1990) 170 CLR 573 at 578 (per Dawson J).

[46] See, for example, proposed paragraphs 400.2B(1)(b), 400.2B(5)(b) and (6)(b), and 400.2B(8)(b) and (9)(b) (inserted by item 9 of Schedule 1 to the Bill). Equivalent offences are inserted in sections 400.3 and 400.4 by items 13, 17, 21, 27, 31 and 35 of Schedule 1 to the Bill.

[47] Explanatory Memorandum, 9 at [20].

38. The High Court has emphasised repeatedly the critical importance of particularity in criminal charges.[48] If a charge under the existing Division 400 offence provisions (and any other offence provision requiring proof of predicate offending)[49] were laid on such a vague basis, it would likely be subject to a stay for want of particulars. In other words, the proposal to enact 'proceeds of general crime' offences would have the effect of making it possible to prosecute in circumstances in which any such charges against any existing offence provision would presently fall severely short of critical requirements of particularity.

39. This underscores the drastic nature of the proposed 'proceeds of general crime' offences, and emphasises the need for a rigorous policy justification of all aspects of the proposal to effectively dilute requirements of particularity and proof of predicate offending. (That is, a rigorous justification is needed for the dual proposal to relieve the prosecution of the requirement to particularise to least the type of predicate offending from which the money or other property was in fact, derived; **in addition to** the proposal to also relieve the prosecution of the requirement to prove the defendant's fault in relation to the type of predicate offence.)

40. It has not been demonstrated that the proposal to relieve the prosecution of any requirement to particularise the type of predicate offence from which the money or property was, in fact, derived is rationally connected with, and is necessary for and proportionate to achieving, the stated objective of 'addressing wilful blindness'[50] by those who deal with proceeds of crime as part of organised crime syndicates.

41. As a matter of practicality, it appears to the Law Council that a money laundering offence is highly unlikely to be capable of being prosecuted unless the money or property involved can be connected with a type of offending, since there would otherwise be no evidence of a predicate offence. (Rather, all that would exist is the 'supposition' or 'intuition' of investigating police about some kind of possible illegality against a law somewhere in the world, on the basis of the circumstances of particular conduct—such as the methods of communication and interaction used by suspects, and the suspected value of money or other property involved in particular transactions).[51] Indeed, several of the circumstances identified in the Explanatory Memorandum to the Bill as potentially being capable of supporting an inference of guilt are merely sound, and ubiquitous, security practices—such as the use of encrypted messaging devices or platforms (which is standard on most smartphones) and the use of authentication measures to verify the identity of each party to a transaction.[52]

42. It should also be noted that extremely significant expansions have recently been made to law enforcement agencies' powers to access encrypted communications and to access computers remotely.[53] Even further expansions are presently before the Parliament that would enable law enforcement agencies to directly access electronic communications content stored offshore, without the need to rely on mutual assistance.[54] The Explanatory Memorandum does not offer any explanation of why it

[48] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531, [2010] HCA 1 (3 February 2010) at [26] and the authorities cited therein (per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[49] Such as money laundering offences under State or Territory laws. See, for example, *Crimes Act 1900* (NSW), Part 4AC, especially sections 193B-193D and the definition of 'proceeds of crime' in section 193A.

[50] Ibid, 2 at [7] and 9 at [18] (paragraph and heading).

[51] See further, Explanatory Memorandum, 14-15 at [48].

[52] Ibid.

[53] Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2019 (Cth) Schedule 1 (amending the *Telecommunications Act 1997* (Cth) to insert the industry assistance scheme in Part 14) and Schedule 2 (amending the *Surveillance Devices Act 2004* (Cth) to establish warrant-based remote computer access powers)

[54] Telecommunications Legislation Amendment (International Production Orders) Bill 2020.

appears that these major expansions of investigative powers are considered inadequate to meet existing thresholds, and require a further dilution of legal requirements of proof, which will relieve the prosecution of any meaningful requirements of particularisation in relation to the criminal origins of money or other property.

43. In the absence of compelling evidence, the Law Council opposes the proposed removal of the requirement for the prosecution to particularise at least the **type of offence** from which the money or other property was, in fact, derived.

44. Given the novel nature of the proposed offences, the Law Council also suggests that consideration should be given to allocating resources to an independent body, such as the Australasian Institute of Judicial Administration or the National Judicial College of Australia, to develop guidance materials to assist trial judges in directing juries about drawing of inferences in the context of 'general proceeds of crime' offences.

Recommendation 2—elements of 'proceeds of general crime' offences

- **All of the proposed 'proceeds of general crime offences' in Schedule 1 to the Bill should be amended to require the prosecution to prove that:**
  - **the money or other property was, in fact, the proceeds of a specific offence or a specific type of offence; and**
  - **the defendant believed the money or property to be proceeds of general crime, or was reckless or negligent in relation to this circumstance (as applicable to the tier of offence charged).**

Maximum penalty of life imprisonment: proposed section 400.2B

45. Proposed subsections 400.2B(2) and (3) (item 7 of Schedule 1 to the Bill) contain 'proceeds of general crime' offences covering money or property valued at $10 million or more, where the defendant believes that money to be proceeds of general crime. The proposed maximum penalty is life imprisonment.

46. As noted above, the Law Council is supportive of the practice of enacting discrete offences to specifically target wrongdoing at the higher end of objective seriousness, rather than merely increasing the maximum penalty for an existing offence that is capable of covering the relevant conduct. This will ensure that sentences for the existing offence, particularly for lower-level offending, are not inadvertently inflated.

47. However, the proposed maximum penalty of life imprisonment for the offences in proposed subsections 400.2B(2) and (3) is disproportionate to the criminal conduct covered by those offences. This is in view of the following factors:

- as explained above, the proposed concept of 'proceeds of general crime' significantly dilutes the requirements of particularity and proof in relation to predicate offending, and risk creating nebulous offences that merely require the money or property to have derived from an unparticularised offence, against any law of any jurisdiction, without requirements to prove even the type of predicate offence (for example, a drug trafficking offence);
- the application of strict liability to the physical element that the money or other property was valued at $10 million or more; and
- no justification is offered for equating these offences with the maximum penalty for offences like murder or terrorism offences.

48. These factors increase the risk that people who are very low in the chain of distribution for a money laundering operation will be exposed to a maximum penalty

of life imprisonment for conduct that may be relatively benign. For example, a person who is little more than a courier in a distribution network may be fundamentally mistaken as to the seriousness of the predicate offence in respect of which the money or property was in fact derived, and may have no idea as to the value of the money or property they are dealing with. For example, such information may be deliberately withheld from them, and rather than being 'wilfully blind' they may have no practical means to ascertain or predict the value (which may be the case if physical currency or other property is securely concealed for transport).

49. While the Law Council agrees that such actions are meritorious of criminal sanction, a maximum penalty of life imprisonment is disproportionate to the person's culpability in such circumstances. This could lead to the anomalous result where people who are at the lowest levels of a distribution chain in a money laundering operation, from whom information is deliberately withheld, are exposed to a maximum penalty that is considerably higher than the maximum penalty for the predicate offences from which the money or property was derived.

50. This creates a risk that a low-level participant in a money laundering operation who is convicted of an offence against subsection 400.2B(2) or (3) could be given a higher sentence than a person who is convicted of the predicate offence. This anomalous and arbitrary result could occur even though:

- the 'predicate offender' was knowingly and intentionally involved in the criminal activity through which the proceeds were obtained, and was fully aware of the amount of those proceeds, whereas
- the person who was convicted of the money laundering offence may have only held a general belief that an amount of money (the quantum of which was unknown to them) which they dealt with only fleetingly was derived from an unspecified, unparticularised offence of any kind, anywhere in the world.

51. Further, the 'tier 2' offences in proposed subsections 400.2B(5) and (6) impose a maximum penalty of 15 years' imprisonment for persons who deal with 'proceeds of general crime' valued at $10 million or above, if they are reckless as to the circumstance that the relevant money or property was 'proceeds of general crime'. Consequently, there is a very significant gap between the maximum penalties for the offences in tier 1 (life imprisonment) and tier 2 (15 years' imprisonment) of the 'proceeds of general crime' offences in proposed section 400.2B.

52. The Law Council considers that the gap should be narrowed, for example, via a further gradation of the 'tier 1' offences that applies the current highest maximum penalty of 20 years' imprisonment. This would likely also require consequential reductions to the maximum penalties for the proposed 'proceeds of general crime' offences' in section 400.3 (money or property between $1 million and $9.9 million) and section 400.4 (money or property between $100, 000 and $999, 999).

Recommendation 3—maximum penalties for proceeds of general crime offences

- **Item 7 of Schedule 1 to the Bill should be amended so that the 'tier 1' 'proceeds of general crime' offences in proposed subsections 400.2B(2) and 400.2B(3) are subject to a maximum penalty of 20 years' imprisonment, not life imprisonment.**
- **The gradated maximum penalties for the proposed 'proceeds of general crime offences' in sections 400.3 and 400.4 should be adjusted consequentially.**

Underlying problems in defining 'possession' of money or property as a form of 'dealing' for the purpose of money laundering offences

53. The proposed amendments to the partial defence of 'mistake of fact as to value' in section 400.10 were prompted by a 2016 decision of the Victorian Court of Appeal in *Singh v The Queen* [2016] VSCA 163 (***Singh***).[55]

54. For the reasons explained below, the Law Council considers that the factual circumstances in *Singh* highlight an underlying problem in the framing of the money laundering offences in Division 400 of the Criminal Code. The Bill should be further amended to address this underlying problem. This would be entirely consistent with the overarching policy intent of the measures in Schedule 1, to ensure that the Division 400 offences are adapted to contemporary circumstances.

The statutory concept of 'dealing with' money or property in section 400.2

55. Most of the Division 400 offences contain a physical element that the person 'deals with' money or other property. The expression 'deals with' is a defined form of conduct in section 400.2. This is more specific than the general definition of 'conduct' in subsection 4.1(2) of the Criminal Code (which is an act, an omission or a state of affairs).[56] Relevantly, paragraph 400.2(1)(a) states that a person 'deals with' money or other property if that person 'receives, possesses, conceals or disposes' of it.

56. Paragraph 400.2(1)(a) appears to expand the ordinary meaning of the expression 'deals with' from a positive act of some kind (such as receiving or disposing of money or property) to also include a defined state of affairs, in the form of 'possession' of money or property. (The concept of 'possession' denotes the state of affairs that the money or property is within the person's custody or control.)

57. Because of this coverage of the definition of 'deals with', it appears that the offences in Division 400 that apply to a person who 'deals with' money or other property have the dual character of being:

- 'status offences' which apply to a state of affairs (namely, possession of money or other property);[57] and
- offences that apply to a variety of 'positive acts' (such as receiving money or other property, or disposing of it).

58. The Law Council does not dispute that a 'state of affairs' is a form of conduct, as is recognised in subsection 4.1(2) of the Criminal Code, and can legitimately be criminalised. This is provided that the relevant 'state of affairs' to be criminalised in a particular offence provision meets the requirements of voluntariness in subsection 4.2(5) (the person must be capable of exercising control over that state of affairs).

59. However, criminalising 'possession' a 'state of affairs' (which is commonly described as creating a 'status offence')[58] is an extraordinary step. The difficulties, risks and

[55] In *Singh,* the Victorian Court of Appeal considered the construction of an application provision in paragraph 400.10(1)(a). Ashley, Kyrou and Ferguson JJA held, at [91]-[96], that the expression 'at or before the time of dealing with the property' in paragraph 400.10(1)(a) is a composite expression that covers 'any time up to and including the time of the act of dealing upon which the prosecution relies' (for example, receipt). Hence, if a mistaken belief existed before commencing to deal with the money or property, or upon commencement of that dealing, the defence is established. It is not negated by any subsequent discovery by the defendant of the true value while the person is still engaging in the act that constitutes the alleged dealing, because section 400.10 makes no provision for this. See also the list of scenarios discussed at [103]-[104].

[56] *Ansari v The Queen* (2010) 241 CLR 299, [2010] HCA 18 at [50] (per Gummow, Hayne, Heydon, Crennan, Kiefel, Bell JJ).

[57] As to 'possession' constituting a state of affairs, see: *Muslimin v The Queen* (2010) 240 CLR 470, 479; *R v Tang* (2008) 237 CLR 1; *He Kaw Teh v The Queen* (1984) 157 CLR 523, 564; *Beckwith v The Queen* (1976) 135 CLR 569 at 575.

[58] See, for example, *R v Saensai-Or* (2004) 61 NSWLR 135, [2004] NSWCCA 108 at [58] (Bell J).

complexities associated with possession offences are considerable, as has been recognised by the High Court in other contexts, including offences in the nature of possessing drugs and stolen property[59] Innocent receipt of money or other property followed by notification at some later stage that it was stolen or mistakenly transferred is very different from stealing it.

60. Consequently, rather than creating offences that apply to an amorphous concept of 'dealing' that variously covers an assortment of prescribed 'positive acts' and 'states of affairs' as set out in section 400.2, the Law Council would prefer to see possession offences in relation to proceeds of crime criminalised as separate offences within Division 400. This approach would enable:

- the elements of the offences and the maximum penalties to be fashioned to the specific context of the possession offence; and
- the offence to be prosecuted on the standard principles applicable to possession offences.[60].

The difficulties highlighted by the facts in Singh v The Queen

61. The issue set out in the second dot point above was one of the major difficulties that arose from the factual scenario in *Singh*, that is, a lack of clarity about how the defence in section 400.10 would apply to a 'dealing offence' that is comprised by the mere possession of the relevant money or property.

62. Ultimately, the Victorian Court of Appeal did not need to resolve that difficult question of law, because of the particular facts in *Singh*. This was because, at trial, the prosecution had failed particularise the act of dealing that was alleged to constitute the money laundering offence being prosecuted. Evidence was admitted of both the defendant's receipt (a positive act) and possession (a state of affairs) of the money.[61]

63. The Victorian Court of Appeal proceeded on the basis that the offence was completed on the defendant's 'positive act' of receiving money. This meant that the defence of 'mistake of fact as to value' in section 400.10 was only to be assessed by reference to the defendant's state of mind about the value of the money at the time he collected the suitcase containing that money, and at the time he collected the suitcase. It was not relevant that the defendant had counted the money after collecting the suitcase, while it was in his possession for approximately seven minutes as he drove home, before being arrested in his driveway upon arrival. The offence with which he was charged was complete upon receiving the suitcase, and the defence was similarly limited to that period of time.[62]

64. Consequently, the Victorian Court of Appeal held that the trial judge erred in directing the jury to assess the defendant's state of mind from the period before he received the suitcase, through to the time of his arrest (which occurred when he arrived home after he had collected the suitcase). Rather, for the defendant's state of mind after he

[59] See, for example, *He Kaw Teh v The Queen* (1984) 157 CLR 523 at [32] per Gibbs CJ: 'It is rather regrettable that a statutory provision [namely, a possession offence] which has assumed so great an importance in law enforcement in Australia should present such difficulties of interpretation'. See further: Ian Leader Elliott, Commonwealth Criminal Code: Practitioners' Guide, (March 2002), 27.

[60] Ibid.

[61] In *Singh*, the prosecution failed to particularise the 'dealing' (within the meaning of section 400.2) that constituted the alleged offence. The facts were that the defendant had received a suitcase of money (by collecting it from another person, who loaded it into the defendant's vehicle while the defendant was sitting in that vehicle) and had held that suitcase of money in his physical possession for seven minutes afterwards (namely, by driving home with the suitcase in his vehicle) before he was arrested in his driveway. At some point after receiving the money and before arriving home, he was alleged to have counted the money and learned of its true value, which was higher than what he had believed before collecting the suitcase of money. (See the summary of the circumstances of offending at [16] per Ashley, Kyrou and Ferguson JJA.)

[62] Ibid, [71], [90]-[97] and [101]-[102] per Ashley, Kyrou and Ferguson JJA.

had collected the suitcase to have had any relevance, it would have been necessary for the prosecution to have particularised 'possession' as the form of dealing constituting the offence charged.[63]

65. The Victorian Court of Appeal criticised the drafting of section 400.10 and the underlying money laundering offence (in this case, section 400.9). In addition to identifying several inconsistencies in different forms of words within, and between, those provisions, the Court also commented that neither the defence in section 400.10 nor the offences to which it applied gave 'appropriate recognition to the fact that, under s 400.2, a person may deal with money or other property by committing a number of discrete acts either alone or in combination'.[64]

The proposed amendments to section 400.10

66. It appears that the proposed amendments to section 400.10 in items 70 and 72 of Schedule 1 to the Bill are an attempt to resolve the difficulty identified in *Singh* in relation to 'dealing' offences that are constituted by 'possession' (noting that, as explained above, this matter did not ultimately require a decision in *Singh*).

67. However, the Law Council is concerned that the approach proposed in the Bill will introduce more uncertainty into a provision that has already been criticised by the Victorian Court of Appeal in *Singh* as being 'badly drafted' and a likely cause of the interpretive errors made at trial.[65]

68. Namely, the proposed amendments would insert into section 400.10 the vague and potentially arbitrary concept of a 'dealing' which 'continued during a period'. The expression 'continued during a period' is undefined. It does not clearly identify which forms of 'dealing' within the meaning of section 400.2 are considered capable of 'continuing during a period'. There appears to be an intention that such forms of dealing should include 'possession' because of the repeated references to *Singh* in the relevant parts of the Explanatory Memorandum that address the proposed amendments to section 400.10.

69. Nor do the proposed amendments provide any meaningful indication of the intended meaning of 'a period' during which a dealing 'continues'. On the literal meaning of the words 'a period', all increments of time could be characterised as 'a period'. It is not clear precisely how, if at all, the word 'continued' is intended to qualify the meaning of the previous words 'a period'. The Explanatory Memorandum does not provide guidance on the policy intention in relation to these matters.

Law Council's preferred solution

70. Given all of the uncertainties outlined above, the Law Council considers that the preferable solution would be to address their underlying cause. This underlying cause appears to be the way in which 'possession' is covered by the substantive offence provisions in Division 400. (That is, the concept of 'deals with' conflates conduct constituted by acts with conduct constituted by states of affairs, and each Division 400 offence criminalises these discrete forms of conduct in a single offence.)

71. Addressing this underlying cause would be much more effective in achieving clarity than attempting to modify the application of the related offence-specific defence in section 400.10, in an oblique way that is likely to introduce even more uncertainty.

[63] Ibid, [96]-[97]. See also the seven scenarios set out at [103] per Ashley, Kyrou and Ferguson JJA.

[64] Ibid at [98].

[65] Ibid at [98]: 'it is understandable that the judge erred, as ss 400.9 and 400.10 of the Code are badly drafted and replete with internal inconsistencies and inconsistencies between the two provisions'.

72. The Law Council would therefore support the enactment of discrete money laundering offences covering:

- conduct that is a 'positive act' (that is, conduct which is an 'act' within the meaning of the term 'conduct' in section 4.1 of the Criminal Code), and
- conduct that is 'possession' as a 'state of affairs' within the meaning of the term 'conduct' in section 4.1 of the Criminal Code.

73. The elements of those offences, and applicable offence-specific defences, should then be tailored specifically to each of these two different types of conduct.

74. The Law Council acknowledges that the concept of 'dealing with' money or property for the purpose of the current Division 400 offences appears to have conflated conduct consisting of 'positive acts' with conduct consisting of 'states of affairs' since the enactment of that Division in 2002.[66] That is, there are no specific 'possession offences' in Division 400 (in contrast to the longstanding existence of discrete offences for drug possession and possession of stolen property). However, the significant amendments to Division 400 proposed in the Bill make it important that this longstanding issue is now corrected.

75. Such correction is particularly important in view of the proposals to enact new offences targeting high value money laundering, punishable by a maximum penalty of life imprisonment. A proposal to apply the highest possible maximum penalty makes it critical that there is complete clarity in the drafting and coverage of those offences, and associated defences.

76. Correction is also important because it is highly likely that the uncertainties identified from the factual scenario in *Singh* will continue to arise in future investigations and prosecutions. This is especially in view of the proposals in the Bill to dilute particularity requirements to make it easier to enforce money laundering offences.

77. The proposed amendments to section 400.10 in the Bill create a significant risk of introducing even more uncertainty into Division 400, rather than resolving the existing difficulties are caused by the framing of the underlying offence provisions.

Recommendation 4—treatment of 'possession' in Div 400 (offences & defences)

- **Items 70 and 72 of Schedule 1 to the Bill (proposed amendments to section 400.10) should be omitted. Instead, the offences in Division 400 should be re-structured to enact specific offences for possession (as form of conduct constituted by a 'state of affairs', within the meaning of section 4.1) and specific offences for 'positive acts'.**
- **The Government should explain the intended meaning of the expression 'engages in conduct' in the proposed 'proceeds of general crime' offences, and in particular whether there is an intention to apply, or displace, the definition of that term in subsection 4.1(2). The intended meaning should be made clear on the face of Division 400, or at least in the Explanatory Memorandum to the Bill.**

Technical drafting matters concerning the new definition of 'director'

78. Item 1 of Schedule 1 to the Bill proposes to insert a definition of the term 'director' in subsection 400.1(1). However, this term is not presently used in Division 400, and is not used, in that form, in the proposed amendments.

[66] See: *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* (Cth), Schedule 1. Importantly, however, the predecessor offences, in the *Proceeds of Crime Act 1987* (Cth) (which were consolidated into Division 400 of the Criminal Code, with some amendments) pre-dated the enactment of the Commonwealth Criminal Code.

79. Rather, the definition of the term 'effective control' in proposed section 400.2AA (item 6) refers to a person who holds **'directorships'** in a company that has an interest in the relevant property or money. The term 'effective control' is used in the proposed 'proceeds of general crime' offences, which apply to persons who, among other things, disguise or conceal the identity of a person with effective control over the property or money in question.[67]

80. Section 18A of the Acts Interpretation Act provides that, where a word is given a particular meaning in a statute, then different grammatical forms of that word may be given a corresponding meaning. This is provided that it is clear that the latter word (in a different grammatical form) has derived from the defined provision.

81. However, this interpretive rule is generally applied as a 'fallback' when a defined term is used in the grammatical form in which it is drafted in the definition in multiple places in a statute, but a smaller number of provisions use that term in a different grammatical form (for example, if it is necessary to draft those provisions in a different tense). In contrast, in the present Bill, the defined term 'director' is not used anywhere in the existing provisions of Division 400 or the proposed amendments. The Explanatory Memorandum to the Bill also does not comment on any intended linkage between the definition of 'director' and the word 'directorship' as used in proposed section 400.2AA.

82. The Law Council is conscious that courts have previously commented critically on inconsistencies in drafting expressions in Division 400 that used different grammatical forms of defined terms (such as variously using the defined term in section 400.2, 'deals with', and later using the expression 'the dealing') which were identified as apt to create confusion or error.[68] In view of such judicial criticism on inconsistent grammatical forms of terms in existing section 400.10 and 400.9, and to avoid introducing further ambiguity or doubt, the Law Council suggests that amendments should be made to the drafting expression used in the definition of 'effective control' in proposed section 400.2AA, so that it uses the defined term 'director' in the proposed amendments to subsection 400.1(1). Alternatively, the defined term 'director' in the latter provision should be substituted with 'directorship'.

Recommendation 5—term 'directorship' in proceeds of general crime offences

- **To avoid doubt, proposed paragraph 400.2A(3)(a) (item 7) should be amended to use the defined term 'director' rather than the variant 'directorships'. Alternatively, the defined term 'director' (item 1) should be omitted and substituted with 'directorship'.**

Absence of consultation with the national legal profession

83. Finally in relation to Schedule 1, the Law Council is concerned that there does not appear to have been any non-government stakeholder consultation, including with the legal profession, on the proposals contained in the Bill, prior to its introduction.

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[67] To avoid confusion or doubt, the Law Council acknowledges that the proposed amendments do not deem a director of a company to have effective control of money or property, or criminalise such a director on that basis. Rather, the proposed definition of 'effective control' in proposed section 402.AA (item 7) provides that regard may be had to various factual matters to determine whether a person was in 'effective control' of money or property. This includes an assessment of whether or not a person held 'directorships of a company that has an interest (whether direct or indirect) in the money or property' that is alleged to have been laundered: per proposed paragraph 402.AA(3)(a). As a practical matter, the Law Council cautions against placing determinative weight on the mere fact that a person held a directorship, or seeking to draw inferences from the mere fact of a directorship. (For example, the mere fact of a person's appointment as a company director is not sufficient to establish complicity in the commission of an offence.) The proposed amendments should not, in substance or application by investigating police, depart from this.

[68] Ibid at [98] (per Ashley, Kyrou and Ferguson JJA).

84. In 2015, this Committee made the following comments on the Crime Legislation Amendment (Powers, Offences and Other Measures) Bill 2015 (Act No. 153 of 2015), which also contained a proposal to alter the fault elements of the offence of attempt, in relation to serious drug offences (now contained in section 300.6, noted above):

> *The committee is concerned about the apparent lack of consultation between the government and stakeholders prior to the drafting of this Bill. The committee is of the view that, due to the technical nature of the amendments proposed in the Bill … it would have been beneficial had the government engaged in a consultation process with stakeholders …*
>
> *The committee believes there is value in the government consulting with relevant stakeholders during the development of proposed legislation. This is particularly so with technical amendments such as those in the Bill where the considerable expertise and practical experience of legal practitioners and specialist legal bodies could have assisted with identifying and resolving potential issues prior to the Bill's introduction and passage. The committee therefore welcomes the suggestion of the LCA* [Law Council] *that, in future, such consultation could be undertaken by the relevant department or the* [then] *Law, Crime and Community Safety Council* [now the Council of Attorneys-General and the Ministerial Council for Police and Emergency Management].[69]

85. Regrettably, the actions that prompted the Committee's concerns in 2015 appear to have been repeated in the development of the present Bill. The Law Council continues to support meaningful consultations with the legal profession in the development of proposals to amend highly technical offence provisions. This is especially important in the case of proposals to depart from the established principles of criminal responsibility in the Criminal Code.

Recommendation 6—consultation with the legal profession on draft legislation

- **Consistent with the views expressed by the Committee in 2015, the Government should routinely consult with the legal profession, and other civil society stakeholders, on proposed amendments to the criminal law that would depart significantly from established principles of criminal responsibility, as codified in Chapter 2 of the Criminal Code. Such consultation should occur before Bills are introduced to Parliament.**

Investigation of Commonwealth offences (Schedule 2)

86. Schedule 2 to the Bill proposes to effectively limit the circumstances in which law enforcement officers, who are currently defined as 'investigating officials',[70] are subject to the obligations under Division 3 of Part IC of the Crimes Act (**'Division 3**

[69] Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015*, (June 2015), 31-32 at [2.80]-[2.81].

[70] Crimes Act, subsection 23B(1). This covers members and special members of the AFP; members of the police force of a State or Territory; and persons who hold an office the functions of which include the investigation of Commonwealth offences, and has power to make arrests in respect of such offences.

obligations') in relation to 'the questioning of a person'[71] who is a 'protected suspect'.[72]

87. The Division 3 obligations cover significant matters, including:

- administering cautions;[73]
- enabling people to communicate with friends, relatives and legal practitioners;[74]
- special obligations in relation to children and Aboriginal and Torres Strait Islander persons;[75]
- the provision of interpreters, if required, for the conduct of questioning;[76] and
- requirements to provide or make available copies of recordings of admissions and confessions to the person (which are also a precondition to their admissibility in subsequent criminal proceedings against the person).[77]

88. The Bill proposes to achieve this result primarily by amending the definition of an 'investigating official' in subsection 23B(1) of the Crimes Act to expressly exclude officers who are 'engaged in covert investigations under the orders of a superior'.[78]

89. The Bill also proposes other amendments to reflect the more limited definition of an 'investigating official' for the purpose of the Division 3 obligations, namely:

- ***creating the new defined term 'designated official'***—this covers law enforcement officials acting in an overt or a covert capacity. The new term is applied to the existing rule in subsection 23B(4) which prescribes when a person ceases to become a protected suspect. (Namely, a person who is otherwise a protected suspect will cease to hold that status if they are in the company of a 'designated official' and are voluntarily assisting a covert investigation into the potential commission of an offence by a third party). The effect is to preserve the existing application of subsection 23B(4);[79] and

- ***repealing a Division specific obligation in relation to covert investigations***—the Bill proposes to repeal the obligation on investigating officials in subsection 23V(3) to provide suspects with recordings of admissions or confessions that were obtained as part of a covert investigation,

[71] Ibid, subsection 23B(6). 'Questioning of a person' for the purpose of Division 3 of Part IC of the Crimes Act is 'a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest)'. It expressly excludes carrying out forensic procedures.

[72] Ibid, subsection 23B(2). A 'protected suspect' is a person who is not under arrest, but is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence, and the investigating official believes there is sufficient evidence to establish that the person has committed the offence; or the investigating official would not allow the person to leave if they wished to do so; or has given the person reasonable grounds for believing the person would not be free to leave if they wished to do so. The definition expressly excludes a person who the investigating official believes is participating voluntarily in a covert investigation into a third party.

[73] Ibid, section 23F.

[74] Ibid, section 23G. See also: section 23M.

[75] Ibid, sections 23K and 23H.

[76] Ibid, section 23N.

[77] Ibid, sections 23U and 23V.

[78] Bill, Schedule 2, items 2-4.

[79] Ibid, Schedule 2, items 1 and 5.

at a time when this can be done without prejudicing a covert investigation, rather than the within seven-day time limit that applies to overt investigations.[80]

Under subsection 23V(1), compliance with the recording and access obligations is a pre-requisite to the admissibility of evidence of the admission or confession, unless the trial judge is satisfied that compliance was not possible. In this event, the trial judge must explain the non-compliance to the jury and issue any warnings that the judge considers appropriate.[81] The effect of subsection 23V(3) is to create a special rule for admissions and confessions made during questioning by undercover officers, which defers the time at which the subsection 23V(1) recording and access obligations must be met.

Policy objective

90. The apparent policy objective of the measures in Schedule 2 to the Bill is to make explicit that a law enforcement official who is acting covertly in the course of, and as part of, an authorised covert investigation is not required to caution a person in respect of questions asked in the official's covert capacity, or to discharge any other Division 3 obligations.

91. Other than the proposed repeal of the Division 3 obligation in subsection 23V(3), this appears to reflect a desire to avoid any scope for argument or doubt as to whether a person who is a suspect in covert investigation will fall within the statutory definition of a 'protected suspect' if:

- they are in the company of a law enforcement official who is covertly investigating the person for a Commonwealth offence (namely, by asking the person questions for the purpose of investigating their involvement in that offence, which may include actively attempting to elicit an admission or confession from the person); and
- that law enforcement official believes that there is sufficient evidence to establish that the person has committed a Commonwealth offence.[82]

92. An argument in favour of such an interpretation may have limited prospects of success, with respect to its application to those Division 3 obligations that would necessarily require the suspect to be informed of a covert investigation into their actions, and therefore frustrate that investigation. (For example, administering cautions, providing interpreters and enabling contact with certain third parties.)

93. However, if such an interpretation were accepted, it would mean that the Division 3 obligations would apply to undercover investigations, even though:

- the suspect was unaware of the true identity of the law enforcement official with whom they were interacting, and did not know that the real purpose of questioning was to investigate them for a Commonwealth offence; and
- compliance by the relevant investigating official with the vast majority of the Division 3 obligations would necessarily require disclosure of these matters to the suspect, thereby unavoidably frustrating the covert investigation.

94. The Explanatory Memorandum expresses a concern that non-compliance by an undercover law enforcement operative with the Division 3 obligations may provide a

[80] Ibid, Schedule 2, item 6.

[81] Crimes Act, subsections 23V(6) and (7).

[82] Crimes Act, subparagraph 23B(2)(c)(i) (definition of 'protected suspect') and subsection 23B(6) (definition of 'questioning of a person').

basis for a defendant who is later charged with an offence to challenge the admissibility of their responses to covert investigative questioning.[83]

95. That is, it might be argued that non-compliance with the Division 3 obligations meant that the evidence was unlawfully obtained, and therefore liable to exclusion, unless the court determined that the desirability of admitting this evidence outweighed the undesirability of admitting unlawfully obtained evidence.[84]

96. The Explanatory Memorandum describes the proposed amendments as clarifying the scope of application of the Division 3 obligations, to put the matter beyond argument and avoid any risk of challenge to evidence during a prosecution, rather than making substantive amendments.[85]

Grounds for excluding evidence obtained in covert operations

97. If the proposed amendments in Schedule 2 to the Bill are enacted, it would nonetheless remain open to a court to exercise its discretion to exclude evidence obtained from the covert questioning of a suspect on other grounds, which include:

- unfairness or prejudice to a defendant (including specific rules with respect to the exclusion of admissions);[86]
- that the making of the admission was influenced by, among other things, violent or oppressive conduct or a threat of such conduct;[87]
- broader public policy considerations relevant to the exclusion of improperly obtained evidence;[88] and
- any grounds of illegality apart from allegations of non-compliance with the Division 3 obligations (such as any engagement by the operative in conduct that constitutes an offence, other than as part of a controlled operation authorised under Part IAB).[89]

98. For example, the High Court has upheld the exclusion of an admission made by a defendant to an undercover police officer who asked questions of that person, in circumstances in which the defendant had previously exercised their right to silence in a prior police interview (conducted overtly, including the administration of a caution) in relation to the same offence. The court placed weight on the fact that the defendant had previously exercised their right to silence, and that the questioning by the covert law enforcement operative amounted to an 'interrogation' that deliberately and actively elicited an admission.[90]

99. However, such assessments are necessarily fact-specific, and different conclusions have been reached in other cases concerning admissions made to undercover law enforcement operatives, or other persons acting covertly at the behest of police; and

[83] Explanatory Memorandum, 39 at [200].

[84] For example, *Evidence Act 1995* (Cth), section 138.

[85] Explanatory Memorandum, 39 at [199].

[86] For example, *Evidence Act 1995* (Cth), section 90 (admissions) and sections 135 and 137 (general discretions). See also section 136 (discretion to limit the use of evidence).

[87] Ibid, section 84.

[88] Ibid, section 138.

[89] Ibid.

[90] *Swaffield v R; Pavic v R* (1998) 192 CLR 159, [1998] HCA 1 at [33]-[37] per Brennan CJ; [94]-[98] and [100]-[101] per Toohey, Gaudron and Gummow JJ; and [155] and [165] per Kirby J.

covert recordings of admissions made directly to police who were acting overtly, but were not in a formal interview setting.[91]

Law Council views

Proposed amendments to the definition of an 'investigating official'

100. The Law Council does not object, in principle, to the proposed amendments to the definition of an 'investigating official' in the Crimes Act. They have the potential to improve clarity and consistency in the interpretation of the obligations of investigating officials in Division 3 of Part IC of the Crimes Act, in relation to undercover investigations into Commonwealth offences.

101. However, this is only to extent that the proposed amendments would make explicit that an undercover law enforcement operative is not obliged to comply with those of the Division 3 obligations that would necessarily require that operative to disclose the existence of the investigation, and thereby frustrate it (for example, by administering cautions). As noted below, one of the Division 3 obligations, in subsection 23V(3), applies specifically to admissions or confessions made in covert investigations, and the Law Council supports its preservation.

102. To the extent that the proposed amendments to the definition of an 'investigating official' would merely confirm that there is no requirement to comply with the other Division 3 obligations that are not specific to covert investigations (particularly cautions), the Law Council notes that there are comparable exclusions in the criminal procedure laws of some States.[92]

103. Additionally, the proposed amendment to the definition of an 'investigating official' in the Crimes Act would provide consistency with the definition of that term in the uniform evidence law,[93] which also excludes an official who is 'engaged in covert investigations under the orders of a superior'.[94] Given the interaction of evidence and criminal procedure laws, the Law Council acknowledges the interest in attaining greater consistency, provided that this does not create any reduction in, or removal of, existing safeguards.

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[91] See, for example: *Em v The Queen* (2007) 232 CLR 67, [2007] HCA 46; and *Tofilau v The Queen* (2007) 231 CLR 396, [2007] HCA 39. See further the discussion of authorities in CR Williams, 'An Analysis of Discretionary Rejection in Relation to Confessions' (2008) 32(1) *Melbourne University Law Review* 302.

[92] However, it should be acknowledged that there are some differences in drafting. See, for example, *Law Enforcement Powers and Responsibilities Act 2002* (NSW), section 110 (a 'protected suspect' is defined as a person who has been informed that they are entitled to leave at will) and *Criminal Procedure Act 1986* (NSW), s 281(4) (an 'investigating official' is defined to exclude a police officer or other person 'who is engaged in covert investigations under the orders of a superior'). See also: *Crimes Act 1958* (Vic), s 464(2) (an 'investigating official' is defined as 'a police officer or other person 'other than a police officer or person who is engaged in covert investigations under the orders of a superior'; and *Police Powers and Responsibilities Act 2000* (Qld), section 396 (the investigative powers and procedural obligations in Chapter 15 'do not apply to the functions of a police officer performed in a covert way').

[93] See, for example, *Evidence Act 1995* (Cth), section 3 and the definition of 'investigating official' in the Dictionary at the end of the Act.

[94] The effect of excluding undercover operatives from the evidence law definition of an 'investigating official' is that evidence obtained by undercover operatives is not subject to the general rules in the uniform evidence law with respect to the admissibility of admissions or confessions obtained by investigating officers. See, for example: *Evidence Act 1995* (Cth), sections 85 (unless paragraph (1)(b) applies in the circumstances), 86 and 89. Further, the rules deeming evidence to have been improperly obtained, and therefore liable to exclusion, because a person who has been arrested or is a protected suspect has not been cautioned before questioning, do not apply to questioning that is conducted as part of a covert investigation. See, for example, *Evidence Act 1995* (Cth), sections 138 and 139.

Proposed removal of the obligations in subsection 23V(3)

104. The Law Council has reservations about the proposal in item 6 of Schedule 2 to the Bill to repeal the sole Division 3 obligation that is specific to covert investigations.

105. This is subsection 23V(3), which obliges an investigating official to provide or make available recordings of admissions or confessions made by a protected suspect, at a time when disclosure or access will not cause prejudice to a covert investigation.

106. As mentioned above, the evidentiary rules in subsection 23V(1), which are additional to general evidence laws, will apply to exclude evidence of such an admission or confession if subsection 23V(3) is not complied with, unless the trial judge is satisfied that compliance was not practicable.[95]

107. In the absence of a compelling justification for removing the obligations in subsection 23V(3), the Law Council supports their retention, and the attendant exclusionary rules in section 23V.

108. As explained below, the Law Council also supports the development of measures to strengthen the legislative framework governing undercover investigative techniques that seek to actively elicit an admission or confession from the subject.

Legislative history of section 23V

109. Section 23V, including the specific obligation in subsection 23V(3) for admissions or confessions in covert investigations, was enacted in 1991,[96] as part of 'a system of safeguards to ensure that the introduction of a reasonable period of pre-charge detention [also contained in that legislation and now in Part IC] is not subject to abuse'. The recording and access obligations in section 23V, in their entirety, were identified as the 'major safeguard'.[97]

110. Other States and Territories have similar provisions to subsections 23V(1) and (2) requiring the recording of evidence of admissions in relation to the investigation of State and Territory offences, and disclosure of those recordings to the suspect, as a pre-condition to their admissibility in a subsequent prosecution. However, they do not appear to have adopted an equivalent safeguard to that in subsection 23V(3), which applies specifically to confessions made to undercover law enforcement operatives in covert investigations.[98]

111. The obligation in subsection 23V(3) is therefore a unique, additional safeguard that the Australian Parliament considered to be necessary in relation to the undercover investigation of Commonwealth offences.

112. The Law Council considers that this provision continues to perform an important protective function, which actively promotes propriety by law enforcement officials in obtaining (especially by actively eliciting) admissions and confessions in undercover investigations. It helps to reduce scope for suspicion or doubt about fabricated confessions or inaccurate recollections of unrecorded admissions or confessions to

[95] Crimes Act, subsections 25V(6) and (7). See also subsection 25V(5). (It should be noted that failure to comply with the obligation in subsection 23V(3) enlivens the exclusionary rule in subsection 23V(1), which applies on the basis of non-compliance with the obligations in subsection 23V(2). This is because subsection 23V(3) explicitly operates to modify the application of subsection 23V(2) in respect of covert investigations.)

[96] *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* (Cth).

[97] Explanatory Memorandum, Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990, 3.

[98] *Criminal Procedure Act 1986* (NSW), section 281; *Crimes Act 1958* (Vic), section 464H; *Police Powers and Responsibilities Act 2000* (Qld), section 436; *Criminal Investigation Act 2006* (WA), section 118; *Summary Offences Act 1953* (SA), sections 74C–74G; *Evidence Act 2001* (Tas), section 85A; *Police Administration Act 1978* (NT), section 142. See the discussion below for the position in the ACT.

undercover officers. The potential risk for abuse or other impropriety, to which the Australian Parliament was very evidently alive in 1991, remains as real now as it was then. The events that prompted the establishment of the Victorian Royal Commission into the Management of Police Informants ('Lawyer X Royal Commission') are a salient reminder of such risks.

The effect of repealing subsection 23V(3)

113. The effect of repealing subsection 23V(3) will be to displace the evidentiary rules in subsections 23V(1) and 23V(5)-(7) in respect of admissions or confessions that are obtained in covert investigations of persons who would be protected suspects, but for the proposed amendments to the definition of 'investigating official'.

114. The Explanatory Memorandum describes the repeal of subsection 23V(3) as merely consequential to the amendment of the definition of an 'investigating official' in section 23B, and states that the provision will 'no longer have any practical effect'.[99]

115. The Law Council considers that it is inaccurate to characterise the proposed amendment in item 6 of Schedule 2 to the Bill as a purely consequential amendment, which simply removes a provision that has become spent due to the amendments to the definition of 'investigating official' in items 2-4 of Schedule 2.

116. In fact, the proposed repeal of subsection 23V(3) would remove a substantive safeguard that has been fashioned specifically for circumstances in which:

- a person (**'suspect'**) who has not been arrested is in the presence of a police officer or another law enforcement officer who is acting as an undercover operative **('operative'**) in a covert investigation into whether the suspect has committed a Commonwealth offence;
- the operative is asking the suspect questions[100] about their involvement (or otherwise) in the commission of that offence, which may include attempts to actively elicit an admission or confession;
- the operative believes that the suspect has committed the offence; and
- the suspect makes an admission or confession to the law enforcement officer.

Specific impacts on the laws of the Australian Capital Territory

117. The extrinsic materials to the Bill do not acknowledge that the proposed amendments in Schedule 2 to the Bill will also impact directly on the criminal investigation laws of the Australia Capital Territory (**ACT**) in relation to offences against ACT laws.

118. This is because section 23A of the Commonwealth Crimes Act provides that, with respect to the investigation of offences against laws of the ACT that are punishable by a maximum penalty of 12 months' imprisonment (or more) by a member or special member of the AFP,[101] Part IC of the Commonwealth Crimes Act will apply as if references in that Part to Commonwealth offences and Commonwealth laws included references to ACT offences and ACT laws.

119. Section 187 of the *Crimes Act 1900* (ACT) also applies the provisions of Part IC of the Commonwealth Crimes Act to offences that are punishable by a maximum penalty of

[99] Explanatory Memorandum, 40-41 at [209].

[100] Within the meaning of the definition in subsection 23B(6) (the express terms of which do not differentiate between covert and overt investigations, and therefore appear capable of covering both).

[101] This will be the case wherever ACT offences are being investigated by police. Arrangements for the provision of policing services to the ACT are made under the *Australian Federal Police Act 1979* (Cth) (**AFP Act**) and involve the AFP making available members and special members of the AFP to perform the functions of ACT policing, as specified in section 8 of the AFP Act.

less than 12 months imprisonment, and offences that are not punishable by a penalty of imprisonment.

120. This impact is far removed from the stated policy intent of the Bill, to aid the investigation and enforcement of money laundering offences which are connected with transnational serious and organised crime.

121. The Explanatory Memorandum does not document how the impacts of these proposed amendments on undercover investigations of offences against ACT laws was taken into consideration, and why amendments to section 23A of the Commonwealth Crimes Act were evidently not considered necessary.

The significance of the requirements in subsection 23V(3)

122. The existing requirements in subsection 23V(3), which enliven the exclusionary rules in subsection 23V(1), reflect the importance of making recordings of an admission or confession made in a covert investigation; and ensuring that a suspect has timely access to such a recording as soon as this would not be prejudicial to an extant covert investigation.

123. Given the extraordinary nature of covert investigations that are established to actively elicit a confession from a suspect, without the normal safeguard of a caution that would apply in an overt context, it is critical that a person who is ultimately charged with an offence is given a full opportunity to challenge its admissibility, especially on the basis of unfairness, or impropriety in obtaining that evidence. The access obligations in subsection 23V(3) help to provide this opportunity.

124. The safeguards afforded by subsection 23V(3) may be particularly important in covert investigations that utilise 'scenario evidence' techniques, including so-called 'Mr Big operations', in which undercover law enforcement operatives deploy extraordinary measures to actively and deliberately elicit an admission or confession from the suspect of the investigation.

125. Such techniques generally involve undercover police officers posing as leaders of a fictitious criminal gang, and acting in that covert capacity to require a suspect to make a confession to a serious crime (which is the subject of investigation) as a condition of the suspect gaining membership of the fictitious gang or syndicate. The scenario may involve staged inquiries from real police, acting overtly; and promised assistance from fictitious 'corrupt' police to protect the suspect from exposure to liability in relation to the crimes to which they are requested to confess. These investigations generally culminate in a detailed, recorded interview with the 'leader' of the fictitious gang, in which the suspect makes a confession in relation to an offence and is thereafter arrested.[102]

126. These techniques have been described judicially as 'the functional equivalent of a police interrogation'.[103] Members of the High Court have identified that such techniques 'sit uncomfortably with the accusatorial character of criminal proceedings in Australia' and could 'undermine special features of the administration of criminal justice that comprise an important check on the power of the state and on its intrusion into the lives of all persons'.[104] This is primarily because the use of such techniques

[102] See, for example, *Tofilau v The Queen* (2007) 231 CLR 396, [2007] HCA 39 at [74]-[78] (per Gummow and Hayne JJ) and [152]-[153] (per Kirby J). (The High Court overturned a non-publication order in respect evidence given at trial about this technique: *Re Chief Commissioner of Police (Vic)* [2005] HCA 18.)

[103] *Tofilau v The Queen* (2007) 231 CLR 396, [2007] HCA 39 at [152] (per Kirby J).

[104] Ibid at [148](3) (per Kirby J).

effectively 'allows undercover police officers to circumvent ... requirements that [they] would be expected to observe if wearing their uniforms'.[105]

127. It has further been judicially noted that such techniques present multiple risks, which mean that any confessional evidence they elicit requires careful scrutiny if it is sought to be admitted in a subsequent prosecution. These risks include that the circumstances in which the confessional evidence was obtained may:

- undermine the reliability of that evidence, and the credibility of an accused person;
- deprive persons of access to lawyers before providing incriminating confessional evidence; and
- constitute an 'arguable misuse of state power by persons [namely, police and any other law enforcement officials responsible for investigating an offence] who are expected to behave in an impeccable manner'.[106]

Absence of justification for removing the obligations in subsection 23V(3)

128. The Explanatory Memorandum to the Bill does not give any substantive justification for removing an existing statutory safeguard that would otherwise apply in such circumstances, in addition to exclusionary rules under general evidence law (such as sections 90 and 138 of the uniform evidence law). It does not identify any perceived detriment to covert law enforcement investigations that would arise from the retention of the requirement in subsection 23V(3).

129. Nor does the Explanatory Memorandum outline how any perceived benefit to law enforcement from the proposed repeal of the safeguard in subsection 23V(3) would outweigh the potential detriment to the rights and interests of an accused person, and potential damage to broader interests in preserving the basic principles observed in the system of criminal justice.

130. The Law Council submits that, in the absence of cogent explanation, the obligation on covert law enforcement operatives in subsection 23V(3) should be preserved. This obligation recognises the extraordinary nature of covert investigations that seek to extract an admission or confession by engaging in deception, through bypassing the ordinary obligations to warn a suspect before interrogation.

131. The following remarks of Kirby J in the High Court's 2007 decision in *Tofilau v The Queen*, concerning a challenge to the admissibility of a confession obtained in a 'Mr Big investigation', highlight the need for strong legal safeguards in this context:

> *The securing of convictions … must comply with the law, which reflects fundamental notions of justice and fairness. The state is a great teacher in society. If it sets debased standards for itself, there is a risk that such standards will proliferate and result in a lowering of confidence in the state and its officials and of respect for the rule of law.*[107]

Possible intention to make greater use of 'scenario evidence' techniques

132. In addition, the Explanatory Memorandum does not clearly identify why the proposed amendments contained in Schedule 2 have been included in a Bill that is directed to the enforcement of money laundering offences against persons who are involved in, or associated with, transnational serious and organised crime.

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[105] Ibid.

[106] Ibid at [148](1)-(9) (per Kirby J).

[107] *Tofilau v The Queen* (2007) 231 CLR 396, [2007] HCA 39 at [149] (per Kirby J).

133. It is plausible that the inclusion of the Schedule 2 measures in the Bill signifies an operational intention to make greater use of covert investigations, including 'scenario evidence' techniques and potentially 'Mr Big operations', in the investigation of Commonwealth money laundering and predicate offences in connection with transnational serious and organised crime. There is otherwise no direct connection between Schedule 2 and the stated policy objectives of the Bill in relation to disrupting money laundering by organised criminal enterprises.

134. However, it should be borne in mind that sections 23B and 23V of the Crimes Act are not limited to the investigation of specific types of offences, or the activities of persons, involved in or associated with serious and organised crime. The proposed amendments will therefore have a far broader application than to covert investigations in the circumstances to which the present Bill is directed.

Recommendations

Retention of subsection 23V(3)

135. For the reasons discussed above, the Law Council considers that, if a law enforcement official is acting covertly, and is actively eliciting an admission or a confession from a suspect in an investigation, that official should remain subject to a statutory requirement to make a recording of the admission or confession, and to make this available to the suspect as soon as it is possible to do so without causing prejudice to the covert investigation. (For example, the access obligation in subsection 23V(3) may crystalise if the person is arrested after making a confession to an undercover operative, as the investigation will become overt at this point.)

136. Where the requirements in subsections 23V(1) and (2), as applied to covert investigations by subsection 23V(3), cannot be met for reasons of practicality, reliance should be placed on the existing exception in subsection 23V(6) to admit the relevant confessional evidence, in preference to repealing subsection 23V(3).

137. If the trial judge upholds a claim for an exception in subsection 23V(6), they would be obliged under subsection 23V(7) to alert the jury and issue a warning in relation to that evidence, if considered appropriate. Judicial supervision over the enlivenment of the exception, and requirements to give judicial guidance to the trier of fact if the exception is upheld, are important safeguards that should remain in force.

Recommendation 7—preservation of the requirements in subsection 23V(3)

- **Item 6 of Schedule 2 to the Bill should be omitted and substituted with amendments to section 23V that preserve the existing obligation on law enforcement officials in subsection 23V(3) to provide or make available records made of an admission or confession, which is elicited by a law enforcement official who is acting covertly.**
- **The obligation to provide these records to a suspect or their lawyer should apply as soon as it is possible to do so without causing prejudice to the covert investigation in relation to the suspect.**

Strengthening the legislative framework governing the use of 'scenario evidence' techniques in undercover investigations

138. Further, given the realistic possibility that the measures in Schedule 2 to the Bill reflect an intention to increase the use of covert investigations in the nature of 'scenario evidence' techniques (potentially including so-called 'Mr Big operations'), it would be desirable to consider ways to strengthen the governing legal framework for the conduct of such investigations, and for those improvements to be included in this Bill, or a separate Bill to be introduced promptly.

139. This should include consideration of a dedicated legislative framework prescribing specific authorisation requirements; parameters for the conduct of such investigations; and oversight, record-keeping, audit and reporting requirements.[108]

140. Consideration might also be given to the question of whether specific rules of evidence should be developed in respect of confessional evidence obtained in such investigations;[109] or whether such evidence should continue to be regulated by a combination of existing exclusionary rules of general application, such as those in sections 84, 90, 137 and 138 of the uniform evidence law. (Noting that the rules in sections 85, 86 and 89 of the uniform evidence law governing the exclusion of admissions and confessions do not apply to undercover operations, because of the exclusion in the definition of an 'investigating official' under that law.)

Recommendation 8—improved safeguards for 'scenario evidence' techniques

- **The Committee should seek an explanation from the Government about why the Schedule 2 measures have been included in the present Bill. Such enquiries should examine:**
  - **whether the proposed amendments reflect an intention to make greater use of covert investigations (especially 'scenario evidence' techniques, including 'Mr Big operations') in the investigation of transnational serious and organised crime, or any other Commonwealth offences; and**
  - **in any event, whether the proposed amendments may facilitate greater use of such techniques in the investigation of Commonwealth offences including, but not limited to, offences directed to transnational serious and organised crime.**
- **Consideration should be given to strengthening safeguards and oversight arrangements applicable to the use of 'scenario evidence' techniques in the investigation of Commonwealth offences, especially in the context of transnational serious and organised crime.**
- **This should include consideration of specific legislative requirements for the authorisation, conduct, independent oversight and reporting on such investigations, as is presently the case for controlled operations.**

[108] Such requirements already apply to controlled operations under Part IAB of the Crimes Act, which immunise conduct that would otherwise constitute an offence, indemnify authorised participants from civil liability, and prevent the exclusion of evidence obtained from those operations merely because the authorised conduct is unlawful (that is, it breaches an applicable Australian law).

[109] In this regard, it is worth noting developments in the common law of Canada. In 2014, the majority of the Supreme Court of Canada recognised a new, two-limbed rule of evidence for confessions obtained in 'Mr Big investigations'. The first limb applies a presumption of inadmissibility to such evidence, unless the Crown can establish, on the balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. The second limb requires the prosecution to establish that the collection and proposed admission of the relevant confessional evidence did not contravene the common law doctrine of 'abuse of process'. The majority judgment stated that the Court had fashioned this test because 'the law as it stands provides insufficient protection to accused persons who confess during Mr Big operations' noting especially the risks for abuse of process and wrongful conviction: *R v Hart* [2014] 2 SCR 544 at [10] (McLachlin CJ and LeBel, Abella, Moldaver and Wagner JJ). See also: John Anderson and Brendon Murphy, 'Confessions to Mr Big: A New Rule of Evidence?' (2016) 20(1) *International Journal of Evidence and Proof*, 1.