HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Crimes Legislation Amendment (Economic Disruption) Bill 2020

QoN Number: 03

Subject: Law Council of Australia Recommendations

Asked by: Amanda Stoker

Question:

The Law Council of Australia (LCA) raised six key concerns in relation to the bill.

1. The LCA recommended omitting proposed section 400.14A for a number of reasons, including that amending the fault element for criminal offences under Division 400 departed from 'long-established, fundamental principles of criminal responsibility'. The LCA suggested that such an amendment 'should not be taken 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)' (see pp. 12-14).
2. In relation to 'proceeds of general crime', the LCA recommended retaining the requirement for the prosecution to particularise at least **the type of offence** from which the money or other property was, in fact derived, based on a number of concerns including that the amendments as proposed:
    - 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;
    - May lead to error in the application of the 'only reasonable inference rule' and may therefore increase the prospect of lengthy and complex appeals against convictions; and
    - Would have the effect of making it possible to prosecute in circumstances in which any such charges against any existing offence provisions would presently fall severely short of critical requirements of particularity (see pp. 14-17).

3. The LCA recommended amending the maximum penalty for ‘proceeds of general crime offences’ as follows:

    - 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; and
    - Gradated maximum penalties for the proposed ‘proceeds of general crime’ offences in section 400.3 and 400.4 should be adjusted consequentially.

    These recommendations were proposed on the basis that the maximum penalty of life imprisonment may be disproportionate to the person’s culpability in certain circumstances and that there is a significant gap between the maximum penalties for the offences in tier 1 and tier 2 (see pp. 17-18).

4. The LCA recommended that the bill be amended to address the underlying problem in the framing of money laundering offences in Division 400 identified following the decision in *Singh v The Queen* [2016] VCSA 163 and drafting inconsistencies identified by the courts. The LCA recommended enacting 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 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.

    Further, the LCA recommended that the intended meaning of the expression ‘engages in conduct’ in the proposed ‘proceeds of general crime’ offences, be explained on the face of Division 400, or at least in the explanatory memorandum (in particular whether there is an intention to apply, or displace the definition of that term in subsection 4.1(2) of the Criminal Code) (see pp. 19-24).

5. The LCA recommended that proposed paragraph 400.2A(3)(a) should be amended to use the defined term ‘director’ rather than the variant ‘directorships’. This is on the basis that the defined term is not used in the existing provisions under Division 400 or the proposed amendments, and the explanatory memorandum does not include any intended linkage between the definition of ‘director’ and the word ‘directorship’ (see pp. 22-23).

6. The LCA also raised concerns that the national legal profession was not consulted in relation to the bill prior to its introduction (see pp. 24-25).

Can the department please respond to recommendations and concerns raised by the LCA?

Answer:

Recommendation 1 - Omitting proposed section 400.14A

The Law Council of Australia (the Law Council) has recommended that proposed section 400.14A be omitted from the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the Bill), as it departs from existing extensions of criminal liability under subsection 11.1(3) of the Criminal Code.

The Department does not support this.

Policy justification for retaining section 400.14A

The Guide to Framing Commonwealth Offences provides (at page 35) that existing extensions of criminal liability should be relied upon unless there is sound justification to depart from them.

The Law Council has suggested (at paragraph 25 of its submission) that section 400.14A appears to have been created 'for the mere reason that law enforcement agencies consider that proof of knowledge or intention is too difficult in particular circumstances'. The Department considers that this understates the extent of the problem being addressed.

Section 400.14A is required to address the systemic and ongoing exploitation by money laundering organisations of two key vulnerabilities in Commonwealth money laundering offences.

First, under existing serious money laundering offences in sections 400.3-400.8, the prosecution must prove that property was actually proceeds of crime.

Money laundering organisations, however, typically operate in a manner to intentionally make it impossible to determine whether property actually came from crime. These organisations frustrate tracing efforts by disguising the criminal origins of property behind complex legal and administrative arrangements, encrypted communication services (often with exclusively or near-exclusively criminal user bases), and other methodologies employed to severely frustrate law enforcement's efforts to identify predicate offending.

Even where law enforcement is successful in tracing the origins of property, criminal organisations can still ensure that it is impossible to prove that property was actually proceeds of crime by committing predicate offences in countries that are unwilling or unable to cooperate with Australian law enforcement. In these situations, law

enforcement often cannot obtain sufficient evidence to prove predicate offending, as all relevant evidence is contained in a jurisdiction that remains inaccessible.

Second, even if authorities pursue a prosecution for attempting to commit a money laundering offence, which does not require the prosecution to prove that property was actually proceeds of crime, they must also prove that the defendant knew or believed that the property was proceeds of crime. This is frequently impossible to prove, as money laundering organisations practice strict information compartmentalisation, ensuring that participants remain wilfully blind to predicate offending, preventing them from knowing or believing that property came from crime, even under the expanded definition of 'proceeds of general crime'.

For example, a member of a money laundering organisation may be instructed via encrypted services to take a bag of cash to a car park and deliver this bag to a person who will identify himself with a physical token. The person is instructed to subsequently destroy the device that received the encrypted instructions. This person does not know that the bag of cash was derived from crime generally, as they do not have first-hand awareness as to the actual origins of the cash (see section 5.3 of the Criminal Code). Despite the suspicious circumstances surrounding the property, the person also does not have enough information to believe that it was general proceeds of crime, as they have been deprived of the information required to reach the necessary level of certainty.

Frustrating tracing efforts, confining predicate offending to 'haven' jurisdictions and keeping participants wilfully blind as to the nature of predicate offending is the typical modus operandi of criminal groups. This behaviour does not merely make it difficult to prove knowledge or intention, as suggested by the Law Council, but makes the current offences under section 400.3-400.8 practically unworkable in their current form when applied against modern money laundering syndicates.

Proposed section 400.14A addresses these problems, as it ensures that, where authorities pursue a prosecution for attempting to commit certain money laundering offences, the prosecution will need to prove that the defendant was reckless as to whether the property was proceeds of crime. A person will be reckless as to whether property is proceeds of crime under subsection 5.4(1) of the Criminal Code where they are aware of a substantial risk that the property is proceeds of crime and, having regard to the circumstances known to them, it is unjustifiable to take the risk.

Recklessness remains one of the highest fault elements in Commonwealth criminal law and, when combined with the 'proceeds of general crime' offences, will better address modern criminal methodologies and reflect the typical awareness that a money laundering participant has regarding the criminal origins of property they deal with. While participants will often not be given sufficient information to know or believe that the property that they are dealing with is proceeds of crime, they will

often be exposed to enough circumstantial information to be aware of a substantial risk that property was generally derived from crime.

Section 400.14A is analogous with existing Commonwealth laws

The Law Council (at paragraph 29 of its submission) has suggested that section 400.14A is not analogous with section 300.6 of the Criminal Code, which made similar amendments in the context of serious drug offences. In particular, the Law Council claims that section 300.6 was designed to support a unique circumstance whereby law enforcement officials would intercept unlawful drugs in customs inspections or other covert settings, and substitute illicit substances with imitations.

The proposed amendment at section 400.14A, however, is also designed to support a very similar technique used in money laundering investigations. Commonwealth investigators may pose as customers of money laundering organisations, holding out property unconnected to criminal offending as 'proceeds of crime' to infiltrate these organisations and gather evidence on their activities.

As law enforcement does not actually use property that is 'proceeds of crime' when posing as a customer, the prosecution cannot currently make out the substantive elements of the offence when this investigative technique is used. In these cases, the suspect must be charged with an attempt to commit an offence, and the proposed amendment at section 400.14A is necessary to ensure that such a charge can be substantiated against typical money laundering organisations.

Achieving policy outcome by amending or creating new offence provisions

The Law Council (at paragraphs 26 and 27 of its submission) has suggested that the Department's policy intention could be better achieved by amending existing offences or creating new offences, rather than amending the principles of attempt under section 11.1 of the Criminal Code as they apply to particular offences.

The Department does not agree with this suggestion. The principles of attempt under section 11.1 are widely understood, and the Department's policy intent can be effectively and clearly achieved by simply amending subsection 11.1(3) of the Criminal Code as it applies to particular money laundering offences.

If the principles in section 11.1, as amended by proposed section 400.14A, were replicated in each offence provision or extracted into new offences, the length of Division 400 would increase significantly and unnecessarily. Section 400.14A applies to 26 separate offence provisions and, if a separate 'attempt' offence provision was created for each one of these offences, the total number of offences in Division 400 would rise from 43 to 69.

Recommendation 2 – Amending 'proceeds of general crime offences'

The Law Council has recommended that the proposed 'proceeds of general crime offences' in Schedule 1 to the Bill be amended to require the prosecution to prove a physical element that money or other property was, in fact, the proceeds of a specific offence or a specific type of offence.

The Department notes that the Law Council has not raised an objection to the breadth of the term 'proceeds of general crime' as it applies to the fault elements that the accused person believed that the money or other property was proceeds of general crime, or was reckless or negligent in relation to this circumstance.

The Law Council has not recommended that these fault elements be changed, and the Department agrees with this aspect of the recommendation.

Recommendation would undermine the policy aims of the offences

The Law Council's recommendation would undermine the policy aims of 'proceeds of general crime offences', allowing criminal syndicates to avoid criminal liability by committing predicate offences in 'haven' jurisdictions that are unwilling or unable to cooperate with Australian law enforcement.

Money laundering can be differentiated from other offence types as the predicate offence, which is the offence from which illicit funds are generated, can be strategically distanced to hide the offending from the jurisdiction that ultimately receives these funds. Criminal organisations intentionally structure themselves so that predicate offending occurs in jurisdictions that are unwilling or unequipped to both gather the evidence necessary to prove predicate offending beyond reasonable doubt and to cooperate with foreign jurisdictions to share this evidence.

Law enforcement experience indicates that, even if proceeds of crime can be traced to a 'haven jurisdiction' in which predicate offending occurred, the evidence required to prove that these proceeds came from a specific type of crime will either be solely contained within this 'haven jurisdiction' or won't be held at all. Major expansions in domestic investigative powers (as referred to by the Law Council at paragraph 42) do not sufficiently address this issue, as 'haven jurisdictions' either have not accrued relevant evidence or do not consent to these powers being exercised within their jurisdiction.

The proposed 'proceeds of general crime' offences, by requiring the prosecution to only prove that property was derived from crime generally, overcome this barrier by

allowing a finder of fact to find that property was actually proceeds of crime without relying on evidence from 'haven jurisdictions', and instead relying on circumstantial or indirect evidence outside these jurisdictions. The finder of fact may rely on all relevant evidence, including evidence obtained from law enforcement's tracing efforts (outlining how money was moved between jurisdictions) and regarding the manner in which property was dealt with in Australia.

The 'proceeds of general crime offences' are not nebulous

The Law Council has raised concerns (at paragraph 32 of its submission) that the 'proceeds of general crime offences' will effectively criminalise conduct that is generally suspicious or dubious, rather than demonstrably connected with criminal offending by serious and organised crime groups.

The Department does not agree with this assessment.

The proposed 'proceeds of general crime offences' are defined by reference to principles of criminal responsibility that are well understood and effectively applied by finders of fact.

All elements of these offences must be proven beyond reasonable doubt, and circumstances that are merely 'suspicious or dubious' will not be sufficient to establish that property is actually 'proceeds of general crime'. In practice, finders of fact will be required to examine all relevant evidence to determine whether it gives rise to an irresistible inference that property is wholly or partly derived or realised, directly or indirectly, from crime generally.

Relevant circumstances may include, but not be limited to, those outlined in the Explanatory Memorandum to the Bill. The Law Council has pointed out (at paragraph 41 of its submission) that some of these circumstances merely indicate sound security practices, such as the use of encrypted messaging services.

However, in this context it should be noted that there is a differentiation between standard security practices, such as utilising normal encrypted messaging services (such as WhatsApp, Signal), and dedicated criminal communication devices. It is accepted that criminals likely use both, however, the latter would give a stronger indication the user is engaged in criminality of some form. It is also worth noting that other circumstances outlined in the Explanatory Memorandum depart from these standards (such as exchanging tokens as a means of identification).

The Department agrees that the presence of <u>one of these circumstances alone</u> would generally not be sufficient to find beyond reasonable doubt that property is 'proceeds of general crime'. When these circumstances arise in the context of

overwhelming indirect or circumstantial evidence of criminality, however, they may contribute to such a finding being made.

For example, the relevant threshold could be met if, in addition to the defendant communicating with money laundering controllers via encrypted services, the following circumstantial or indirect evidence also exists:

- the property, in practice, does not stem from any identifiable legal source (e.g., an inheritance, a loan, a gift)
- the property is linked to unjustified increases of assets and movements of assets which are indicative of money laundering and cannot be explained by reference to legal activities
- the defendant meets with a member of a known money laundering network to exchange the property for cash in a car park and uses a token as a means of identification, and
- there is a close nexus between the defendant and a number of criminal groups responsible for perpetrating a range of serious offences.

In these circumstances, a finder of fact may find that, while it cannot be proven that the proceeds were actually derived from a specific predicate offence or specific type of predicate offence, there is an irresistible inference that the property was derived from crime generally.

Error in application

The Law Council (at paragraph 35) has raised concerns that the vagueness of the concept of 'proceeds of general crime' 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.

This has not been the experience of foreign jurisdictions that have adopted similar offences.

The United Kingdom adopted similar money laundering offences when the *Proceeds of Crime Act 2002 (UK)* came into force. Property will be 'criminal property' under these offences if evidence of the circumstances in which the property is handled are such as to give rise to the irresistible inference that it can only be derived from crime, without the need to specify a specific crime or type of crime.[1]

[1] See Part 7 of the *Proceeds of Crime Act 2002* (UK); *R v. Anwoir and others* [2008] EWCA Crim 1354, at paragraph 21; *R v F and B* (2008) EWCA Crim 1868.

These offences have been effectively applied to overcome the difficulties previously faced by prosecutors in proving that property was actually derived from a specific predicate offence or type of predicate offence. The United Kingdom experience strongly supports the argument that the 'proceeds of general crime offences', despite their breadth, can be properly understood and effectively used in a similar manner.

Particularity requirements

The Law Council has also stated (at paragraphs 38 and 39 of its submission) that the proposed 'proceeds of general crime offences' will have the effect of diluting existing requirements to particularise predicate offending, making it possible to prosecute these offences in circumstances in which charges under existing offence provisions would presently fall severely short of particularity requirements.

The Department does not see this as a persuasive argument against adoption of the 'proceeds of general crime offences'.

Practically, the Commonwealth Director of Prosecutions does not anticipate there being any difficulty in identifying the necessary particulars of 'proceeds of general crime offences' including details of the particular offence with which the defendant is charged and the time, place and manner of the defendant's acts or omissions that supported the charge. The prosecution is required under common law in all prosecutions, to provide sufficient particulars of the acts, matter or thing alleged as the foundation of the charge.

From a policy perspective, departing from the existing requirement to particularise a specific predicate offence or type of predicate offence is also justifiable.

There is no clear moral justification for allowing a person to knowingly deal with property that is derived from crime generally or for confining money laundering offences only to situations in which a person deals with property derived from a specific type of indictable offending. Particularising predicate offending on this basis is out of step with the agile nature of modern globalised criminal networks, which are not confined to particular kinds of predicate offending, and instead shift their offending to avoid detection and maximise profit.

Recommendation 3 – Maximum penalties for 'proceeds of general crime offences'

The Law Council have recommended that the maximum sentences under the new 'proceeds of general crime offences' in subsections 400.2B(2) and 400.2B(3) be reduced from life imprisonment to 20 years' imprisonment, and that the graduated maximum penalties for 'proceeds of general crime offences' in sections 400.3 and 400.4 be adjusted consequentially.

The Department does not agree with this recommendation.

The high maximum penalties imposed under the 'proceeds of general crime offences' are necessary to deter global money laundering organisations and reduce their devastating impact on Australia. These maximum penalties can also be justified by reference to existing money laundering offences and offences of similar seriousness.

General justification

Part 3.1.1 of the *Guide to Framing Commonwealth Offences* (the Guide) provides that a high maximum penalty will be justified where there are strong incentives to commit the offence or where the consequences of the commission of the offence are particularly dangerous or damaging.

The high maximum penalties under the 'proceeds of general crime offences' are necessary to overcome the strong incentives that currently exist to commit money laundering. Transnational serious and organised crime (TSOC) groups are primarily motivated by profit, and money laundering is an essential component of their criminal business model. These groups are no longer confined to a particular crime-type or association, but have evolved into sophisticated multinational businesses, constantly shifting their operations to create, maintain and disguise illicit financial flows.

In this profit-focused environment, demand for money laundering services has increased dramatically, creating financial incentives that have fuelled the proliferation of professional global laundering organisations. Money laundering remains extremely profitable within the illicit economy, and organisations are able to charge high commissions to move money around the world in a manner that is incredibly difficult to trace.

Australian law enforcement experience indicates that these commissions are generally five to ten per cent of the value of the money laundered. This is a considerable sum when one considers the total value of money laundered globally, which the United Nations estimates to be 2-5% of global GDP, or approximately $800 billion - $2 trillion in current US dollars.[2]

The high maximum penalties imposed under the 'proceeds of general crime offences' can also be justified as money laundering has a particularly dangerous and damaging impact on society.

Money laundering remains a fundamental enabler of almost all TSOC activity, allowing profits from crime to be realised, concealed and reinvested in further criminal activity, or used to fund corruption and lavish lifestyles. Money laundering systematically devastates the health, wealth and safety of Australia's citizens through the conduct it enables, such as illicit drug trafficking, terrorism, tax evasion, people smuggling, theft, fraud, corruption and child exploitation. The Australian Institute of Criminology estimates that overall TSOC activity costs Australia up to AUD47.4 billion per year.

Money laundering also directly impacts on Australia's economic wellbeing, distorting markets, generating price instability and damaging the credibility of Australia's institutions and economy. These consequences can deter foreign investors and impede economic growth. Money laundering also diminishes the tax revenue collected by the Australian Government, causing indirect harm to millions of Australians that would otherwise benefit from Government programs funded through this revenue.

Justification by reference to 'proceeds of indictable offence' provisions

The Law Council (at paragraph 47 of its submission) has raised concerns that the 'proceeds of general crime offences' and 'proceeds of indictable crime offences' are punishable by the same maximum penalty, despite the 'proceeds of general crime offences' diluting requirements of particularity and proof in relation to predicate offending.

Imposing the same penalty under each offence-type can be justified as the conduct that a defendant must engage in under 'proceeds of general crime offences' is far more serious than that required to satisfy the 'proceeds of indictable crime' offences.

[2] See UNODC – Money Laundering and Globalisation, available on line at https://www.unodc.org/unodc/en/money-laundering/globalization.html

‘Proceeds of indictable crime offences’ require a defendant to intentionally deal with property. The ‘proceeds of general crime offences’, on the other hand, require the prosecution to prove the following beyond reasonable doubt:

- the defendant intentionally engaged in conduct in relation to money or property on one or more occasion
- on each occasion, the defendant’s conduct had the result of concealing or disguising any or all of the following:
    - the nature of the money or property;
    - the value of the money or property;
    - the source of the money or property;
    - the location of the money or property;
    - any disposition of the money or property;
    - any movement of the money or property;
    - any rights in respect of the money or property;
    - the identity of any person who has rights in respect of the money or property;
    - the identity of any person who has effective control of the money or property; and
- on each occasion, the defendant was reckless as to whether their conduct would produce this result.

A person who engages in conduct to conceal or disguise information relating to property, while believing, or being reckless or negligent as to whether, this property is proceeds of crime, is far more culpable and complicit in the underlying offending than a person who merely deals with these proceeds.

Concealing or disguising information of relevance to illicitly obtained property is the primary aim of money laundering, and frustrates law enforcement’s ability to trace proceeds of crime and identify its criminal origins. This conduct is the key to enabling the cycle of serious offending that supports TSOC groups, as it constructs a veil of legitimacy under which they can realise profits from criminal activity, hide and accumulate wealth, avoid prosecution, evade taxes and fund further criminal activity.

Justification by reference to penalty thresholds in Division 400 of the Criminal Code

The Law Council (at paragraph 51 of its submission) has also questioned why there is a significant gap between the maximum penalties for the following offences:

- Subsection 400.2B(2)(3) (**punishable by a maximum sentence of life imprisonment**) – engaging in conduct in relation to 'proceeds of general crime' valued at $10,000,000 or more while believing that it was 'proceeds of general crime', and

- Subsection 400.2B(5)(6) (**punishable by a maximum sentence of 15 years imprisonment**) – engaging in conduct in relation to 'proceeds of general crime' valued at $10,000,000 or more while being reckless as to whether it was 'proceeds of general crime'.

The Law Council (at paragraph 52 of its submission) recommended that this gap be narrowed. The Department does not support this recommendation, as the maximum sentences of the offences proposed under the Bill accord with the existing penalty structure of money laundering offences in Division 400 of the Criminal Code.

As outlined in the table below, the maximum penalty of the existing offences (highlighted in blue) and proposed offences (highlighted in green) reflect: the level of awareness a defendant has as to the link between property (which includes money) and criminal activity; the seriousness of their conduct in relation to this property; and the value of the property.

	$10 million or more	$1 million or more	$100,000 or more
Believes property is proceeds of indictable crime or intends that property will become an instrument of indictable crime	Life imprisonment and/or 2,000 penalty units (**pu**)	25 years' imprisonment and/or 1500 pu	20 years' imprisonment and/or 1200 pu
Believes property is proceeds of general crime and concealed or disguised it	Life imprisonment and/or 2,000 pu	25 years' imprisonment and/or 1500 pu	20 years' imprisonment and/or 1200 pu
Reckless as to whether property is proceeds of indictable crime or the risk that property will become an instrument of indictable crime	15 years' imprisonment and/or 900 pu	12 years' imprisonment and/or 720 pu	10 years' imprisonment and/or 600 pu
Reckless as to whether property is proceeds of general crime and concealed or disguised property	15 years' imprisonment and/or 900 pu	12 years' imprisonment and/or 720 pu	10 years' imprisonment and/or 600 pu
Negligent as to whether property is proceeds of indictable crime or the risk that property will become an instrument of indictable crime	6 years' imprisonment and/or 360 pu	5 years' imprisonment and/or 300 pu	4 years' imprisonment and/or 240 pu
Negligent as to whether property is proceeds of general crime and	6 years' imprisonment	5 years' imprisonment	4 years' imprisonment

concealed or disguised property	and/or 360 pu	and/or 300 pu	and/or 240 pu
Reasonable grounds to suspect that property is proceeds of indictable crime	5 years' imprisonment and/or 300 pu	4 years' imprisonment and/or 240 pu	3 years' imprisonment and/or 180 pu

Offences of similar seriousness

The Law Council (at paragraph 48 of its submission) raised concerns that the most serious 'proceeds of general crime offences' under subsections 400.2B(2) and (3) will subject individuals to a maximum penalty of imprisonment for life for relatively benign conduct.

On the contrary, these offences will only be triggered by the most serious forms of money laundering conduct. In order to prove an offence under these subsections, the prosecution must prove the following elements beyond reasonable doubt:

- the defendant intentionally engaged in conduct in relation to property (including money) on one or more occasions
- for each occasion, the property was actually 'proceeds of general crime'
- for each occasion, the defendant believed that this property was 'proceeds of general crime'
- for each occasion, the defendant's conduct had the result of concealing or disguising a particular kind of information related to the property
- for each occasion, the defendant was reckless as to whether their conduct would produce this result, and
- the sum of the values of the property from each occasion was $10,000,000 or more.

While the prosecution does not need to prove that the defendant was aware of the actual value of the property, the defendant can only be prosecuted for a lower value offence under proposed subsection 400.10(1A) if:

- at or before engaging in the conduct they had considered the value of the property and were under a mistaken but reasonable belief that the property was of this lower value, and
- this belief continued throughout the period in which their conduct occurred.

These offences will therefore only apply where a person has a high degree of awareness as to the criminal origins of the property, but nevertheless chooses to engage in conduct to conceal and disguise relevant information in relation to the property and either does not make reasonable inquiries as to the value of this property or is aware of its true value.

The Law Council (at paragraph 47 of its submission) also states that no justification has been offered for equating the 'proceeds of general crime' offences under subsections 400.2B(2) and (3) with other offences punishable by life imprisonment. In addition, the Law Council (at paragraph 50 of its submission) has stated that there is a risk that a defendant could be given a higher sentence than a person who is convicted of the predicate offence.

The proposed offences under subsections 400.2B(2) and (3) are of similar seriousness to existing offences punishable by life imprisonment, including potential predicate offences such as drug trafficking, as the consequences of committing these offences are often just as, if not more, damaging.

For example, a known criminal syndicate operating out of a foreign 'haven' jurisdiction may provide a person in Australia with $11,000,000 that has actually been derived from crime, and that the person believes has been derived from crime. The syndicate engages a professional money laundering organisation, instructing their representative to 'clean' this money, in exchange for 10 percent of the money laundered, and to return the remaining $10,000,000 to bank accounts specified by the syndicate.

The person will not be liable under the 'proceeds of indictable crime' offence at subsection 400.2B(1). Law enforcement cannot obtain information from the 'haven' jurisdiction, and therefore cannot prove that the $11,000,000 was actually derived from a specified type of indictable offence. The person has also kept themselves wilfully blind as to the specific activities of the criminal syndicate, and is therefore unaware of any specific indictable crime types they are known for engaging in.

Nevertheless, the person will be liable under subsection 400.2B(2), as they believe that the $11,000,000 has been derived from crime, and knowingly took steps to conceal or disguise its criminal origins. Through their actions, the person may have concealed, and thereby allowed the syndicate to profit from, multiple profit-motivated offences, including abhorrent crimes such as illicit drug trafficking, tax evasion, people smuggling, fraud, corruption and child exploitation.

In providing $10,000,000 of 'clean' money to the syndicate, the person is enabling this syndicate to reinvest in their criminal enterprise, allowing them to potentially commit multiple offences punishable by life imprisonment. For example, $10,000,000 would enable the syndicate to purchase approximately 33 to 110 kilograms of cocaine. Even on the most conservative estimates, the commission of the 'proceeds of general crime offence' will have allowed the syndicate to possess and sell sixteen times the 'commercial quantity' of cocaine required to attract a maximum sentence of life imprisonment.[3]

[3] See item 43 of table 1 of Schedule 2 to the Criminal Code Regulations 2019 and section 304.1 of the Criminal Code.

In laundering $11,000,000, the person has perpetrated a cycle by which the criminal syndicate can continue to commit, and profit from, serious offending. The person's key role in recklessly perpetrating this cycle underpins the seriousness of the offences in subsections 400.2B(2) and (3). The fact that a specific type of predicate offence cannot be identified does not decrease the considerable damage caused through the person's actions.

Recommendation 4 – Possession of property as a form of 'dealing'

The Law Council has recommended that proposed amendments to section 400.10 be omitted and instead the offences in Division 400 should be restructured to enact specific offences for 'possession' and separate offences for 'positive acts'.

The Department does not support these recommendations.

Creating separate 'possession' and 'positive acts' offences

The Department believes that substantially revising Division 400 in this fashion would be premature, as the operation of section 400.10 in the context of the mere possession of money or property has not yet been determined by the courts, and was only considered in obiter in *Singh v The Queen* [2016] VSCA 163 (Singh).

The inclusion of the concept of 'possession' in the definition of 'deals with money or other property' in section 400.2 has been a feature of the money laundering offences under the Criminal Code since they came into force in 2002 and implements key recommendations of the Australian Law Reform Commission.[4] Departing from this long-standing precedent in the absence of a judicial ruling on the issue is therefore questionable and could possibly prove counter-productive.

The Bill addresses vulnerabilities in asset confiscation laws, money laundering offences and laws relating to undercover operations that are either currently being exploited by TSOC actors or are likely to be exploited in the near future. If the Bill is delayed to incorporate the Law Council's proposed amendments (which are significant in scope) this would, in effect, allow TSOC groups to continue to exploit real vulnerabilities in exchange for developing amendments that may address possible vulnerabilities that otherwise could have been resolved through judicial clarification.

Amendments to section 400.10 should be retained

The Law Council has suggested that the proposed amendments at paragraphs 400.10(1)(aa) and (1A)(b) be omitted due to concerns that they will introduce more uncertainty at trial.

[4] See the Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 and recommendation 22 and 23 of the Australian Law Reform Commission's *report Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* (ALRC Report 87) .

The Department does not agree, as these paragraphs are necessary to address the vulnerabilities in section 400.10 that were directly identified in the Victorian Court of Appeal's verdict in Singh.

This verdict found 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 continued dealing with the property.

This may raise significant issues in cases involving possession of proceeds of crime. For example, a defendant may hold a mistaken but reasonable belief that a suitcase contained $10,000 at the time it came into their possession, despite the fact it actually contained $1,000,000. Under the current law, the defendant may still be able to rely on the partial defence under section 400.10 even if, while the suitcase was in their possession, they opened it, discovered its true value and nevertheless decided to continue possessing it.

Paragraphs 400.10(1)(aa) and (1A)(b) address this issue by providing that, for the purposes of the reasonable mistake as to value exemption under section 400.10, a person must maintain their mistaken belief for the duration of their dealing with the property, or conduct in relation to the property, to rely on the exemption. These words will be given their ordinary meaning, essentially requiring a person to maintain their belief for the duration of time it takes to complete the dealing or conduct.

Using the example above, the person will not be able to rely on the partial defence under section 400.10, as he did not hold his mistaken but reasonable belief as to the value of property for the duration of the time it was in his possession. As a result, the person may be prosecuted for dealing with proceeds of crime valued at $1,000,000 rather than $10,000.

This will better achieve the underlying aims of the offences, which are designed to impose maximum sentences depending on the value of property dealt with, noting that laundering high value property generally causes greater harm than low value property. It will still be important for the prosecution to appropriately particularise conduct or dealing that extends for a period (such as 'possession') to ensure that the amended defence works as intended.

Clarifying the term 'engages in conduct'

The Law Council has recommended that the Government explain the intended meaning of the expression 'engages in conduct'.

This term is intended to have its meaning under subsection 4.1(2) of the Criminal Code, meaning to 'do an act or omit to perform an act'. The Department's policy intention was that the ordinary meaning of 'an act' should extend to possession, despite possession being a state of affairs. The Macquarie Dictionary relevantly defines "an act" as "anything done or performed".

Recommendation 5 –The new definition of 'director'

The Law Council has recommended that, to ensure consistency and clarity, either:

- the term 'directorships' in the definition of 'effective control' at proposed section 400.2AA be changed to 'director' to align with the proposed definition of this term in subsection 400.1(1), or
- the definition of 'director' be omitted and substituted with a definition of 'directorships'.

The Department does not view these amendments as necessary.

The definition of 'effective control', including the use of the word 'directorships' in section 400.2AA and the definition of 'director' in subsection 400.1(1), has been taken directly from sections 337 and 338 of the Proceeds of Crime Act 2002 and is intended to be interpreted pursuant to existing judicial interpretation of these terms. The term 'directorship' is simply a grammatical expression of the act of being a 'director' or holding the position of a 'director', and will therefore be interpreted pursuant to this defined term.

While there is some inconsistency between the word 'directorship' and the defined term 'director', this has not adversely affected the operation of the term 'effective control' in the *Proceeds of Crime Act 2002* since this term came into force on 1 January 2003.[5]

Recommendation 6 – Consultation with Law Council on new offences

The Law Council has recommended that the Government routinely consult with the legal profession, and other civil society stakeholders, on proposed amendments to criminal law that would depart significantly from established principles of criminal responsibility, as codified in Chapter 2 of the Criminal Code. It is recommended that such consultation occur before Bills are introduced to Parliament.

In developing the Bill, the Department of Home Affairs consulted extensively with qualified members of the legal profession within the Commonwealth, including the Commonwealth Director of Public Prosecutions, the Australian Government Solicitor and specialists within the Australian Federal Police, Australian Transaction Reports and Analysis Centre and the Australian Criminal Intelligence Commission.

The Bill deals with highly sensitive matters, including ongoing vulnerabilities with Australia's money laundering laws. The Department was not of the view that it was

[5] These terms were introduced in the *Proceeds of Crime Bill 2002*.

appropriate to engage in public consultation in relation to these vulnerabilities before the Bill was introduced, as to do so would likely draw further attention to these vulnerabilities, exacerbating their exploitation by criminal groups.