

16 September 2020

Our ref: WD-LP

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email: [REDACTED]

Dear Mr Tidball

Crimes Legislation Amendment (Economic Disruption) Bill 2020

Thank you for the opportunity to provide feedback on the Crimes Legislation Amendment (Economic Disruption) Bill 2020 (the **Bill**) as part of the inquiry being conducted by the Senate Legal and Constitutional Affairs Committee. The Queensland Law Society (**QLS**) appreciates being consulted on this legislation.

QLS agrees, as foreshadowed in your memorandum of 7 September 2020, that the Bill raises several concerns in relation to the compliance with rule of law principles by the amended and new offences targeting money laundering, including the departure from established principles of criminal responsibility, the presumption of innocence and sentencing principles. QLS supports the Law Council Australia directly raising these concerns on its response

QLS also raises the following issues for consideration by the Law Council in its response to the inquiry.

Possible impact on law firms

QLS expects that the proposed amendments to the drafting of sections 400.2, 402.AA and 402.B of the *Criminal Code Act 1995* (Cth) will have the effect, if not the specific intent, of applying to law firms and legal practitioners.

As the Law Council of Australia is well aware solicitors, in the course of practice, have significant legal and ethical obligations regarding money and property held in trust for clients. Further, solicitors must facilitate and give effect to the transfer of money and property held in trust in accordance with client's instructions.

The effect of the Bill is that these common practices will be in the nature of dealing with money or engaging in conduct in relation to money, in such a way that these activities will generally meet the first "element" of the new offences proposed.

It is of significant concern that the new offences impose criminal liability on a person who:

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- deals with money that is the proceeds of general crime;
- in circumstances where a person is reckless or negligent as to identifying the source of the money; and
- the conduct concealed or disguised certain facts such as the nature, value, source, location, disposition or movement of the money.

The offence provisions contained in section 402.B relating to a person being reckless, negligent or wilfully blind in relation to money or other property being the proceeds of crime, if applicable to law firms, will overlap with the legal profession's existing regulatory framework. The *Legal Profession Act 2007* (Qld) (and jurisdictional equivalents in other States and Territories) sets out the regulatory procedures with which practitioners must comply when handling money held in trust.

The LCA must clarify the potential operation of this legislation with respect to legal practices and legal practitioners, as the legal profession will need to be attuned to these additional provisions and consequences in the event the Bill is passed in this form.

Presumption of innocence, absolute liability and altering the mistake of fact threshold

Amendments to section 400.10 have the effect that a defendant who wishes to rely on the partial exemption afforded by raising a mistaken belief excuse would be required to establish they maintained that mistaken but reasonable belief about the value of the money or other property for the duration of the conduct or the dealing.

This amendment is in response to the decision of *Singh v the Queen* [2016] VSCA 163. As outlined in the Explanatory Memorandum, in *Singh*, the court found that a person could rely on this partial exemption where they had a mistaken but reasonable belief as to the value of money or other property at or before the time they dealt with this property. If the person discovered that the true value of the money or other property was higher than their original belief during their dealing and continued to deal with the property, they could still rely on the exemption to ensure that they are only liable for dealing with the lower value of property that they originally believed, rather than the true value they discovered during the dealing.

The Society appreciates the intent of the amendments to make the prosecution of those engaged in financial crime more efficient. However, the Society is concerned that the amendments to the criminal offences designed to assist law enforcement are accompanied by an increase in the evidential threshold a defendant must meet to raise a defence to those offences, particularly where the existing offence already includes absolute liability for the physical element relating to the value of money or other property for each offence. This means that it is not necessary for the prosecution to prove that the defendant knew, or was aware of, the value of the dealing for him or her to be convicted of the offence, but if the offence is amended as proposed, the defendant will then be put to a higher evidential threshold to rely on the defence.

Any changes to defences and excuses, or threshold standards should not be taken lightly, and only enacted when absolutely necessary.

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Official Trustee powers

QLS is concerned that the amendments to the *Proceeds of Crime Act 2002* (Cth) may have an impact on a solicitor's capability to discharge their legal and ethical obligations owed to a client.

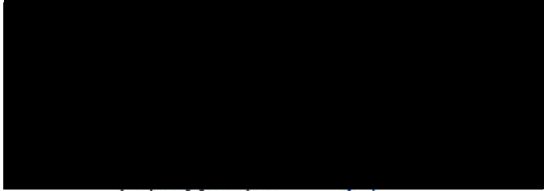
The proposed amendments to sections 270(1)(a),(b) and (2) appear to grant the Official Trustee powers to compel people to provide information and give evidence under oath or affirmation.

QLS is concerned about the scenario where money held in trust by a solicitor is subject to the powers of the Official Trustee and as a result, the solicitor in control of the trust account is compelled to provide information or give evidence which would otherwise be subject to confidentiality or client professional privilege.

QLS acknowledges that confidential client information can be disclosed when the solicitor is permitted or compelled by law to do so.¹ However, amendments such as these that dispel or disregard obligations of confidentiality or client professional privilege both fundamental cornerstone principles upon which the effective efficient operation of our legal system has been based for centuries may create barriers which will prevent clients from being open and honest with their legal representation and should only be considered justifiable in the rarest of circumstances.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully,



Luke Murphy
President

¹ *Australian Solicitors Conduct Rules 2012* r 9.2.2 [https://www.qls.com.au/files/2403d618-5c7c-445c-a191-a42200ad0cd4/QLS Australian Solicitors Conduct Rules 2012.pdf](https://www.qls.com.au/files/2403d618-5c7c-445c-a191-a42200ad0cd4/QLS%20Australian%20Solicitors%20Conduct%20Rules%202012.pdf)