LAW SOCIETY SUBMISSION

SUBMISSION IN RESPONSE TO THE CRIMINAL JUSTICE (MONEY LAUNDERING AND TERRORIST FINANCING) (AMENDMENT) BILL 2018

Department of Justice and Equality &

Department of Finance

June 2018

Introduction

The Law Society of Ireland welcomes the opportunity to make a submission to the Department of Justice and Equality as well as the Department of Finance in relation to the Criminal Justice (Money Laundering) (Amendment) Bill 2018 ('the Bill') as initiated. The primary purpose of the Bill is the implementation of the Fourth EU Money Laundering Directive (2015/849) ('the Fourth Directive'). The Bill proposes amendments to the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 ('the 2010 Act') as amended.

The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland.

In addition to the statutory functions it exercises under the Solicitors Acts 1954 to 2015, the Society is also the competent authority for the monitoring of solicitors for the purposes of compliance with Ireland's anti-money laundering and counter-terrorist financing laws under the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013. In addition to its competent authority role, the Society:

(1) informs solicitors about their AML duties and raises awareness of money laundering and terrorist financing risks;
(2) provides both general and tailored guidance to solicitors about their AML obligations; and
(3) educates solicitors about their AML duties.

The Society wishes to make 23 recommendations in relation to a number of the Bill's provisions and these are set out in detail in this Submission. The Society views the following 10 recommendations as essential and strongly encourages their consideration:

1. An exemption for or the provision of clarity about the CDD treatment of solicitor pooled client accounts
2. A transitional period between enactment and commencement so that all designated bodies and competent authorities have adequate time to develop guidance, modify their supervision polices and deliver training
3. Clarity for legal fees lawfully earned by solicitors
4. Extend protections for non-AML regulated legal services to Business Risk Assessments
5. The facilitation of third party reliance on solicitor CDD even when they do not provide an AML-regulated legal service
6. A broadening of reliance to include all CDD obligations
7. The introduction of a number of public interest safeguards of the solicitor-client relationship when the FIU exercise far-reaching investigative powers which will be created by the Bill
8. A broadening of the 'tipping-off' offences to enable designated persons make necessary disclosures to consumer complaints bodies and the Data Protection Commissioner
9. The introduction of a requirement that designated persons document their AML Policies, Controls and Procedures in writing

10. Clarity for the application of data protection obligations of designated persons and prescribe any necessary restrictions of data controller obligations and rights of data subjects

    The Society's full 23 recommendations are set out below and, for convenience and ease of reference, are in order of their anticipated appearance in the proposed amended 2010 Act.

Executive Summary – 23 Recommendations

The Law Society would like to make the following recommendations:

1. ***Provide adequate time between enactment and commencement of the Bill to facilitate updating (1) by designated persons of their AML compliance and (2) by competent authorities of their systems for supervision*** ***6***

   Section 1(2) of the Bill

2. ***Bring clarity to legal fees lawfully earned by solicitors*** ***7***

   Sections 6 and 7 of the 2010 Act

3. ***Avoid gold-plating the extent to which the standard CDD obligation to monitor clients is necessitated by the Fourth Directive*** ***8***

   Section 4(k) definition of "monitoring" and section 14 of the Bill (amendment of section 35(3) of the 2010 Act)

4. ***Beneficial ownership and trust provisions: provide actual text for definitions*** ***9***

   Sections 6, 7, 8, 9 and 11(i) of the Bill

5. ***For business risk assessments, clarify the meaning of the word "individual"*** ***9***

   Section 10 (inserts section 30A) and section 13 (inserts section 34A)

6. ***Ensure the obligation to carry out CDD on persons acting on behalf of customers does not, unnecessarily, include co-advisors or other professional service providers*** ***10***

   Section 11(e) (inserts section 33(2A))

7. ***Avoid gold-plating the standards to which simplified due diligence can be undertaken*** ***10***

   Section 13 (inserts section 34A(5))

8. ***Extend protections for non-AML regulated legal services to Business Risk Assessments*** ***11***

   Section 14 of the Bill (amends section 35 of the 2010 Act)

9. ***Help SMEs comply with AML obligations by introducing a national centralised register of domestic PEPs*** ***12***

   Section 16 (amends section 37 of the 2010 Act)

10. ***Enable third-party reliance on CDD carried out by Irish solicitors irrespective of any legal service being provided*** ***12***

    Section 40(1)(a)(v) of the 2010 Act

11. ***Facilitate reliance available across all CDD including for (1) simplified CDD, (2) the standard CDD requirement to carry out ongoing monitoring and (3) all enhanced CDD measures*** ***13***

    Section 40(3) of the 2010 Act

12. ***Introduce safeguards to FIU powers*** ***13***

Section 21 (inserts a new Chapter 3A sections 40A, 40B, 40C, 40D and 40E)

13. ***Introduce safeguards to the powers of FIU to request additional information from any designated person who is required to make a section 42 report*** ***14***

Section 22 (inserts section 42(6A) into the 2010 Act)

14. ***Ensure the safeguards for legal professional privilege in section 46 of the 2010 Act are extended to all coercive State powers*** ***16***

Section 46 of the 2010 Act

15. ***Broaden the 'tipping off' offences to enable designated persons make necessary disclosures to consumer complaints bodies and the Data Protection Commissioner*** ***17***

Section 53 of the 2010 Act

16. ***Introduce a requirement that PCPs be documented in writing*** ***18***

Section 26 of the Bill (substitutes section 54 of the 2010 Act)

17. ***Clarify data retention obligations*** ***18***

Section 27 (amends section 55 of the 2010 Act)

18. ***Protect the confidentiality of the solicitor-client relationship from State interference*** ***19***

Section 28 (amends section 56 of the 2010 Act)

19. ***Maintain the defence of having had regard to guidelines*** ***20***

Section 33 (inserts section 107A)

20. ***Empower competent authorities to apply sanctions/fines*** ***20***

Section 35 (inserts new section 114A)

21. ***Provide a nationally maintained and publicly accessible real-time single searchable list of low and high-risk third countries*** ***20***

Sections 37 and 38 (insert Schedules 3 and 4 and repeal section 31)

22. ***Maintain the exemption for CDD for solicitor pooled client accounts or provide clarity about the treatment of solicitor pooled client accounts when banks carry out customer risk assessments on law firms*** ***22***

Section 39 of the Bill (repeals section 34 of the 2010 Act) impacting section 10 (inserts section 30B), section 13 (inserts section 34A(2)), section 37 (inserts Schedule 3)

23. ***Clarify the application of Data Protection Obligations of Designated Persons and prescribe any necessary restrictions of data controller obligations and rights of data subjects when a data controller processes data in compliance with AML obligations*** ***25***

1. *Provide adequate time between enactment and commencement of the Bill to facilitate updating (1) by designated persons of their AML compliance and (2) by competent authorities of their systems for supervision*
Section 1(2) of the Bill

1.1. The Bill will introduce many new statutory requirements and bring significant changes to the current AML compliance model for solicitors when they provide AML-regulated legal services including requirements to:

- modify the approach to CDD on beneficial owners and trusts (sections 6, 7, 8, 9 and 11(i))

- carry out CDD at any time where the risk of money laundering or terrorist financing requires, in addition to the times already required (section 11(c) which amends section 33(1))

- verify identity of persons acting on behalf of customers (section 11 which inserts section 33(2A))

- conduct business risk assessments on AML-regulated legal services (section 10 which inserts section 30A)

- conduct customer risk assessments (section 10 which inserts section 30B) to help ascertain the type of CDD - standard, simplified and enhanced - which should be applied to clients and apply relevant **new** or **modified** CDD measures as required comprising:

  a) a new system of eligibility for simplified CDD (section 13 inserts new section 34A) (including the repeal of section 39 which contained an exemption from CDD for solicitor pooled client accounts)

  b) modified monitoring obligations for standard CDD (section 14 amends section 35(b) and section 4 inserts a definition of "monitoring" into section 24(1))

  c) four enhanced CDD requirements to:

     (i) in accordance with a firm's AML Policies, Controls and Procedures, examine the background and purpose of complex or unusually large transactions, and all unusual patterns of transactions, which have no apparent economic or lawful purpose (section 15 inserts section 36A)

     (ii) take steps, which are reasonably warranted by the risk of a client being involved in money laundering or terrorist financing, to determine if that client is a domestic PEP and new measures to be applied to all PEPs (section 16 amends section 37)

(iii) apply additional measures including enhanced monitoring to manage and mitigate the risk of money laundering and terrorist financing where a customer is established or resides in a high-risk third country (section 18 insets section 38A)

(iv) apply enhanced measures, additional to existing measures, to manage and mitigate the risk of money laundering or terrorist financing to business relationships which present a higher degree of risk including those listed in Schedule 4 and any others prescribed by the Minister (section 19 substitutes section 39)

- Report services and transactions connected with high-risk third countries (section 23 substitutes section 43)

- Replace existing internal polices with new internal Policies, Controls and Procedures ('PCPs') (section 26 substitutes section 54)

1.2. Competent authorities will also be required to update their approach to supervision of designated persons.

1.3. An adequate transitional period of approximately six months, or at least three months, after enactment and before commencement, to enable preparations for these very significant changes is important from a good compliance and supervision perspective.

1.4. Section 1(2) provides that the Bill, once enacted, will come into operation on a day or days appointed by the Minister. Accordingly, the Law Society recommends that adequate time be provided between enactment and commencement so that both designated bodies and their competent authorities can prepare for these significant new developments and that designated persons can prepare new systems and update CDD during a transitional period.

2. *Bring clarity to legal fees lawfully earned by solicitors*
Sections 6 and 7 of the 2010 Act

2.1. Because of the all-encompassing definitions of "criminal conduct" (section 7(1)) and "proceeds of criminal conduct" (section 6) in the 2010 Act, clarity is urgently required in relation to the payment of legal fees.

2.2. In England and Wales the defence of "adequate consideration" ensures the protection of legal fees lawfully earned and this, in turn, ensures that all clients can access legal advice and legal representation. The defence enables solicitors to lawfully provide legal services to individuals and receive payment from funds notwithstanding that, on one view, they may represent the proceeds of criminal conduct. The principle is based on the right to obtain legal advice and the legitimacy of the service provided by the lawyer because "adequate consideration" has been given. The provision is contained in section 329 of the Proceeds of

Crime Act 2002. For ease of reference, **we attach** extracts from the 2002 Act and a paper delivered by Rudi Fortson, Q.C., in April 2008 together with guidance produced by the Law Society of England and Wales for its members.

2.3. The Society has recommended for many years that a similar provision should be reflected in the Irish legislation. Accordingly, the Society recommends the urgent inclusion of a derogation from the offence of money laundering when a solicitor receives fees which they have lawfully earned, by amending sections 6 and 7 of the 2010 Act. Such a provision could reduce delay rather than solicitors having to apply to the State for payment under relevant Schemes.

3. *Avoid gold-plating the extent to which the standard CDD obligation to monitor clients is necessitated by the Fourth Directive*
Section 4(k) definition of "monitoring" and section 14 of the Bill (amendment of section 35(3) of the 2010 Act)

3.1. Section 14 will substitute section 35(3) of the 2010 Act and require a designated person to "monitor any business relationship that it has with a customer". Section 4(k) defines "monitoring" as being "the designated person, **on an on-going basis**-

> (a) **scrutinising** transactions, and **the source of wealth** or of funds for those transactions, undertaken during the relationship in order to determine if the transactions are consistent with the designated person's knowledge of—
>
> (i) the customer,
>
> (ii) the customer's business and pattern of transactions, and
>
> (iii) the customer's risk profile (as determined under section 30B), and
>
> (b) ensuring that documents, data and information on customers are kept up to date in accordance with its internal policies, controls and procedures adopted in accordance with section 54;"

3.2. This proposed definition of "monitoring", which effectively requires ongoing monitoring of the source of funds **in all circumstances**, goes beyond what is necessitated by the Fourth Directive which only requires ongoing monitoring of source of funds "**where necessary**". Article 13(1)(d) of the Fourth Directive describes ongoing monitoring as the "scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the obliged entity's knowledge of the customer, the business and risk profile, **including where necessary the source of funds** and ensuring that the documents, data or information held are kept up-to-date." Therefore, the proposed Irish implementation will impose a greater regulatory burden on designated bodies in Ireland.

3.3. It is noteworthy that the current section 35(3) is a standard CDD provision yet monitoring of the source of funds is envisaged as a measure of a more enhanced nature in the 2018 Bill.

For example, monitoring of the source of funds is one of the enhanced CDD measures for PEPs in section 16 which substitutes section 37(4)(c).

3.4. Accordingly, the Society recommends the avoidance of unnecessary gold-plating of standard CDD obligations by the insertion of ", where necessary," after "the source of wealth" in section 14 of the Bill.

4. *Beneficial ownership and trust provisions: provide actual text for definitions*
Sections 6, 7, 8, 9 and 11(i) of the Bill

4.1. The Society understands that the beneficial ownership and trust registers will be introduced by way of Statutory Instrument. The Society will make detailed submissions once we have sight of the draft Statutory Instruments.

4.2. For clarity and legal certainty, the Society recommends that section 6 of the Bill, which will substitute section 26 of the 2010 Act, should provide an actual definition of "beneficial owner" instead of a reference to a definition in Article 3(6)(a) of the Fourth Directive.

5. *For business risk assessments, clarify the meaning of the word "individual"*
Section 10 (inserts section 30A) and section 13 (inserts section 34A)

5.1. Section 10 (inserts section 30A(3)) contains a derogation from documenting a business risk assessment if a competent authority decides that an individual documented risk assessment is not required under Article 8 of the Fourth Directive and has notified the designated person. The Society recommends the provision of more information about the manner in which the inclusion of the word "individual" in this section will operate in practice. For example, it is unclear whether it would enable a competent authority to indicate that a documented business risk assessment is not required for individual clients or for individual types of clients.

5.2. In addition, section 13 (inserts section 34A(3)(a)) requires that records be kept by designated persons where they apply simplified due diligence measures about the reasons for their determination and evidence on which the determination was based. A derogation from a documented risk assessment issued by a competent authority under section 30A(3) (as inserted by section 10 of the 2018 Bill) will likely inhibit compliance with the record retention obligation in section 34A(3)(a) and the inclusion of an exemption from that obligation where a derogation is issued is consequently recommended by the Law Society.

6. *Ensure the obligation to carry out CDD on persons acting on behalf of customers does not, unnecessarily, include co-advisors or other professional service providers*
Section 11(e) (inserts section 33(2A))

6.1. Section 11(e) will insert section 33(2A) which, similar to Head 13(2) of the General Scheme, will introduce a new obligation to verify the identity of a person acting on behalf of a customer and confirm that the person is so authorised to act on behalf of the customer. The Law Society recommends ensuring that this new requirement does not unnecessarily include co-advisors and, therefore, become a costly regulatory burden.

6.2. For example, if interpreted broadly, it could introduce a requirement for a solicitor to require ID and verification from another solicitor who approaches the first solicitor to perform an AML-regulated legal service on behalf of their client. The Departments should be conscious that it is not uncommon to have tax, property, corporate finance, and/or other co-advisors working in tandem with a solicitor for a mutual client.

6.3. Accordingly, the Law Society recommends that the obligation be confined to agents to ensure that it does not introduce an obligation to identify co-advisors or other professional service providers who are not in the chain of instruction between client and solicitor.

6.4. In addition, the Society recommends an amendment of the definition of "customer" at section 24(1) at (b) of the 2010 Act to include solicitor-to-solicitor advices and not just barrister-to-solicitor advices. Often, a solicitor will seek advice from another solicitor, particularly in relation to specialist areas of law or practice. Both the legal advice barrister and legal advice solicitor are not involved in the transaction and therefore are not a risk. Accordingly, the Society suggests the following amendment of the definition of "customer" and has indicated in bold new text:

> "in relation to a relevant independent legal professional, includes, in the case of the provision of **[legal advice]** services by a barrister **[or solicitor]**, a person who is a client of a solicitor seeking advice from the barrister **[or the solicitor]** for or on behalf of the client and does not, in that case, include the **[second]** solicitor [**or barrister providing legal advice services]**, or…"

7. *Avoid gold-plating the standards to which simplified due diligence can be undertaken*
Section 13 (inserts section 34A(5))

7.1. Under the Fourth Directive, Article 15(2) requires an obliged entity to ascertain that a business relationship or a transaction presents a lower degree of risk before applying simplified customer due diligence (SCDD).

7.2. The Bill goes a lot further than the Directive, by introducing an objective test in proposed subsection 34A(5). The new subsection specifies that a lower degree of risk must be assessed by reference to specified matters and the test to be applied is that of a reasonable person.

7.3. This objective test needs to be read in line with subsections 30A(3) and 30B(2), requiring risk assessments to be documented.

7.4. The effect of introducing a reasonable person test is that a designated person will be required to complete a documented risk assessment for every transaction and business relationship. The risk assessment would have to justify why the designated person has decided to use SCDD. When combined with the ongoing monitoring obligations, the addition of a 'reasonable person' test will undermine the very concept of SCDD.

7.5. For example, under the proposed legislation, a designated person in a business relationship with a State body will no longer be able to automatically apply SCDD to that relationship or to the individual transactions. Instead, the designated person will be obliged to outline, through a documented risk assessment, the reasons why SCDD should be applied to the business relationship and each individual transaction. The added costs incurred by the designated person would be passed on to the State body, making each transaction and the overall business relationship more expensive for that State body. This will unnecessarily increase the costs of doing business for State bodies.

7.6. The Law Society recommends deleting the words "a reasonable person" from the proposed subsection 34A(5). This amendment would bring the wording of the proposed subsection in line with the Fourth Directive and allow for a more subjective risk assessment, reducing AML compliance costs for low risk institutions and State bodies.

8. *Extend protections for non-AML regulated legal services to Business Risk Assessments*
Section 14 of the Bill (amends section 35 of the 2010 Act)

8.1. The Law Society had sought important safeguards in its Submission on the General Scheme of a person's right of access to legal services in Ireland which would ensure that statutory AML compliance obligations could only arise for legal services vulnerable to money laundering or terrorist financing, because of the public interest merit in doing so. Accordingly, the Society welcomes the following three important safeguards which the Bill will introduce to protect a person's access to legal services:

1. Confirmation that statutory AML obligations **only** arise when a solicitor provides specific legal services vulnerable to money laundering - Section 5(a)(i) and (b) (amends section 25 of the 2010 Act)

2. Empowering solicitors to continue to provide specific legal services not vulnerable to money laundering even when a client fails to provide CDD documentation - section 11(k) (which inserts section 33(8A)). Such legal services include ascertaining the legal position of a person or performing the task of defending or representing a person in, or in relation to, civil or criminal proceedings, including the provision of advice on instituting or avoiding such proceedings.

3. Enabling the continued provision of legal services not vulnerable to money laundering when a client fails to provide information on the purpose and intended nature of a business relationship - section 14 which amends the standard CDD requirement in section 35).

8.2. The Society also notes that Business Risk Assessments required by section 10 (inserts 30A(1)) may not be adequately confined to AML-regulated legal services because of the inclusion of the phrase "business activities." Accordingly, the Society recommends clarification by the inclusion of a reference to section 5(a)(i) and (b) (amends section 25 of the 2010 Act) and section 11(k) (inserts section 33(8A) into the 2010 Act).

9. *Help SMEs comply with AML obligations by introducing a national centralised register of domestic PEPs*
Section 16 (amends section 37 of the 2010 Act)

9.1. Section 16 of the Bill will amend section 37 of the 2010 Act in a similar manner as proposed by Head 21 of the 2017 General Scheme. Primarily, it will remove the foreign residency requirement and this will incorporate domestic PEPS: something which is required by the Directive.

9.2. Without a national centralised register of domestic PEPs, compliance will be a challenge for small firms and sole practitioners.

9.3. Questions also arise as to what meaning will be ascribed to "international organisation" in the proposed section 37(h)(iii) as inserted by section 16 of the Bill.

9.4. Accordingly, the Law Society recommends that a national centralised register of Irish domestic PEPs be introduced and that a definition of "international organisation", or even a categorisation of such organisations, be included in the Bill.

10. *Enable third-party reliance on CDD carried out by Irish solicitors irrespective of any legal service being provided*
Section 40(1)(a)(v) of the 2010 Act

10.1. Currently, designated persons cannot rely on a solicitor's CDD if the solicitor is not providing that client with an AML-regulated legal service, i.e. a legal service not referred to in the definition of "relevant independent legal professional". This is because section 40(1)(a)(v) restricts the definition of "relevant third party" reliance to a designated person who is a "relevant independent legal professional", providing those legal services that can be vulnerable to money laundering. However, sections 40(b)(iii) and 40(c)(iii) use the undefined phrase "legal professional" and could enable reliance on CDD carried out by a solicitor outside the State regardless of the nature of the legal service being provided by that solicitor.

10.2. The Society recommends an amendment to the Bill to enable the same level of third party reliance on CDD carried out by Irish solicitors as is enabled for solicitors in other jurisdictions, i.e. with no restriction on the type of legal service being provided. Therefore, the Society recommends that the Bill substitute "relevant independent legal professional" in section 40(1)(a)(v) of the 2010 Act with "solicitor".

11. *Facilitate reliance available across all CDD including for (1) simplified CDD, (2) the standard CDD requirement to carry out ongoing monitoring and (3) all enhanced CDD measures*
Section 40(3) of the 2010 Act

11.1. Section 40(3) restricts third party reliance arrangements to section 33 or 35(1) requirements. This encompasses just three of the four standard CDD requirements because it does not encompass the obligation to carry out ongoing monitoring.

11.2. In addition, third party reliance is not available for any of existing or new enhanced CDD measures nor for simplified CDD.

11.3. The Society recommends that reliance be facilitated across all CDD obligations and suggests that section 40(3) of the 2010 Act be broadened by section 20 of the Bill to accommodate third party reliance.

12. *Introduce safeguards to FIU powers*
Section 21 (inserts a new Chapter 3A sections 40A, 40B, 40C, 40D and 40E)

12.1. The proposed subsection 40A(1) provides that FIU Ireland may carry out all the functions of a European FIU under 4AMLD.

12.2. The Law Society is concerned that framing the scope of FIU Ireland's powers by reference to an EU Directive will lead to a level of legal uncertainty and may lead to increased legal challenges in situations where FIU Ireland is perceived to have acted outside its remit.

12.3. The Law Society recommends that, in order to promote legal certainty and minimise the possibility of tensions arising between the two sources of law, the scope of FIU Ireland's powers are transposed in full by the Bill.

12.4. The proposed section 40C provides new powers to any member of the Garda Síochána who is a member of FIU Ireland. The proposed subsection 40C(2) empowers the garda to request from a person information relating to beneficial ownership held by that person. The proposed subsection 40C(3) provides a new power. The garda may make a written request for any financial, administrative or law enforcement information. Under proposed subsection 40C(4), a failure to comply with such a request will amount to an offence.

12.5. The Law Society is concerned about the wide scope of these powers, which could be open to abuse. As there is no restriction on the type of information that may be requested, these information-gathering powers could be used to justify 'fishing expeditions' or even allow for the targeting of individual legal professionals. The powers derive from article 33(i)(b) of 4AMLD, which uses the term "necessary information" to qualify the type of information that may be requested.

12.6. To promote the consistent use of language and ensure appropriate safeguards, the Law Society recommends that the proposed section 40C should be amended as follows:

- In subsection 40C(2), substitute the phrase "information held" with the phrase "necessary information about business relationships held".

- In subsection 40C(3), substitute the word "information" with the phrase "necessary information about business relationships held".

- Either insert the words "as soon as practicable" after the phrase "request for information" in subsection 40C(4) or delete the phrase "as soon as practicable" from subsection 40D(1).

12.7. It is accepted that the proposed section 40D infers that a request for information will only be rejected on objective grounds or in exceptional circumstances, to protect the subject's right to privacy or where disclosure would negatively impact an ongoing investigation. However, in reality, no level of oversight has been built into this subsection and therefore the power to share information by FIU Ireland remains highly discretionary.

12.8. To avoid the possibility that an information request by a competent authority could be rejected out-of-hand, the Law Society recommends that the Bill should require FIU Ireland to establish an internal review mechanism, to allow for a review of a decision rejecting an information request. The internal review procedure could be similar to that found in section 21(2) of the Freedom of Information Act 2014.

13. *Introduce safeguards to the powers of FIU to request additional information from any designated person who is required to make a section 42 report*
Section 22 (inserts section 42(6A) into the 2010 Act)

13.1. Section 22 of the Bill, which is similar to Head 24 of the General Scheme, empowers gardaí to make enquiries of a designated person where a money laundering suspicious transaction has been made. According to the Notes to the General Scheme, this is in line with Article 32(3) of the Fourth Directive which provides that FIUs "shall be able to obtain additional information from obliged entities".

13.2. The Law Society believes that the operation of section 42(6A) merits careful consideration in the context of potential damage to the solicitor-client relationship. This is because section 42(6A) will enable extensive State access to **any** information and failure to comply with a request will be a criminal offence (section 42(9)). Accordingly, the Society recommends the insertion of the word “relevant” before “additional” in section 42(6A). In addition, the Society recommends that “subject to the protections contained in section 46” be inserted at the start of section 42(6A).

13.3. The Society also notes that section 21 (inserts section 40C(3)) will allow the FIU to request any financial, administrative or law enforcement information it requires.

13.4. The Society believes that, from a legal certainty perspective, the creation of several similar FIU powers is undesirable. Consequently, the Society recommends that all FIU powers to require information from designated persons be consolidated into the one provision for legal certainty.

13.5. In addition, the Society recommends that, in the public interest, at a minimum, the application of section 42(6A) be restricted to the AML-regulated legal services i.e. those services vulnerable to money laundering.

13.6. It may also be in the public interest that any requests for additional information following a report or a suspicion that a report is required by any designated person, and in particular a solicitor, be overseen by the District Court. Accordingly, it may be that section 42(6A) should be supplemented by a search warrant procedure which could ensure the legality of any evidence obtained and, in particular, ensure the independence of the legal profession from State interference where any information is sought by State authorities about a solicitor’s clients. The provisions which enable the Criminal Assets Bureau to obtain warrants and orders to make material available provide a template upon which the State can lawfully apply to the District Court for powers to obtain information between client and solicitor.

13.7. Even with the inclusion of a facility whereby the FIU would be required to obtain a search warrant/production order, the Society is mindful that what is being proposed is the exercise of a coercive legal power by the State of a type which the Supreme Court recently considered in Criminal Assets Bureau -v- Murphy & anor [2018] IESC 12. The Court emphasised the importance of the State complying strictly with the terms of a search warrant even in the context of civil forfeiture proceedings. The decision highlights the extent to which the exclusionary rule of evidence has a “broader purpose…to protect important constitutional rights and values…the common themes are the integrity of the administration of justice, the need to encourage agents of the State to comply with the law or deter them from breaking it, and the constitutional obligation to protect and vindicate the rights of individuals. These are all concepts of high constitutional importance. Each of them, or a combination thereof, has been seen as sufficient to ground a principle that is capable of denying to the State or its agents the benefit of a violation of rights carried out in the course of the exercise of a coercive legal power.”

13.8. In addition, clarity could also be provided about the extent to which section 46 will be able to adequately protect the confidentiality of the solicitor-client relationship given the extensive nature of section 42(6A). Section 46 states that disclosures are not required in the following circumstances:

> *"(1) Nothing in this Chapter requires the disclosure of information that is subject to legal privilege.*
>
> *(2) Nothing in this Chapter requires a relevant professional adviser to disclose information that he or she has received from or obtained in relation to a client in the course of ascertaining the legal position of the client.*
>
> *(3) Subsection (2) does not apply to information received from or obtained in relation to a client with the intention of furthering a criminal purpose."*

14. *Ensure the safeguards for legal professional privilege in section 46 of the 2010 Act are extended to all coercive State powers*
Section 46 of the 2010 Act

14.1. Section 46 contains vital legal professional privilege and legal advice safeguards for obligations falling within Chapter 4 of the 2010 Act. This Chapter contains the reporting obligation. However, the privilege and advice safeguards do not currently apply to any duties falling outside of Chapter 4. Therefore, the newly created Chapter 3A FIU powers will contain no legal privilege or advice protections which is of concern.

14.2. In addition, the requirement that a credit or financial institution have systems in place to enable it to respond to State enquiries in section 56 will be extended by section 28 of the 2018 Bill to all designated bodies. This power to require responses to enquiries will also fall outside of the Chapter 4 section 46 safeguards for privilege and advice within the solicitor-client relationship.

14.3. The Society strongly encourages an urgent review of section 46 to ensure it is extended throughout the Act to protect the public interest and, in particular, to ensure it applies to:

- Chapter 3A (to be inserted by section 21 of the 2018 Bill)
- Section 56 (to be amended by section 28 of the 2018 Bill) (please see also paragraph 18.10)

14.4. The Law Society also recommends the insertion of ", Chapter 3A and section 56" after "Chapter" so as to safeguard legal professional privilege.

15. *Broaden the 'tipping off' offences to enable designated persons make necessary disclosures to consumer complaints bodies and the Data Protection Commissioner*
Section 53 of the 2010 Act

15.1. The Society recommends that section 53 is broadened to include, among the statutory defences to the offence of 'tipping off', responses to statute-based enquiries from consumer complaints bodies and the Data Protection Commissioner. Business practicalities could require a designated person to engage with their regulator, consumer complaints bodies, the Courts or the Data Protection Commissioner on foot of complaints about the designated person when the cause of the complaint may be a report about a customer or a decision to cease to provide a service because of inadequate AML CDD or unhappiness with a customer risk assessment.

15.2. While section 53 provides a defence from the 'tipping off' offence when a designated person discloses information to their competent authority or the competent authority responsible for the person to whom the disclosure is made, no defence is available when a designated person discloses information to a regulator or complaints body who is not also their competent authority for money laundering.

15.3. The following scenario demonstrates the issue in the context of a solicitor. Unknown to the client, the solicitor formed a suspicion of money laundering and, following the making of a report, followed professional guidance and decided against continuing with the legal service. Or, the solicitor was unhappy with a customer risk assessment and decided, for business and risk management reasons, not to proceed with the legal service. However, the solicitor is prohibited from informing the client that a report has been made. The solicitor may hold customer funds in their client account about which they are suspicious but they could not return the funds to the client without written instructions from State investigative authorities for fear of committing the substantive offence of money laundering. The client makes a complaint to the Legal Services Regulatory Authority because their solicitor refuses to proceed with a transaction or legal service. The solicitor would not be in a position to fully respond to an LSRA investigation because there is no defence to the offence of 'tipping-off' when a solicitor makes a disclosure to the LSRA. Section 53 currently only enables the solicitor to disclose the report to the Law Society as the competent authority for solicitors. This scenario is probably not limited to solicitors and will likely apply across a variety of designated bodies whose competent authority does not also investigate consumer complaints.

15.4. In addition, a defence to the offence of 'tipping off' for disclosures made by a designated person in response to a Data Protection Commissioner investigation may also be necessary.

16. *Introduce a requirement that PCPs be documented in writing* Section 26 of the Bill (substitutes section 54 of the 2010 Act)

16.1. The Society's experience, as a competent authority, is that a statutory requirement that internal policies be in writing is necessary so that competent authorities can supervise and enforce compliance with the requirement to have internal policies. In addition, a written policy greatly informs a competent authority's assessment of a designated person's AML CDD compliance.

16.2. During the course of an inspection of a solicitor's firm, one of the Society's investigating accountants requested a copy of the firm's AML policies. However, as there was no written policy it could not be furnished. When this was referred to a regulatory committee, Senior Counsel noted that the current statutory requirement in section 54(2) is to adopt policies and procedures and that there was no requirement that they be in writing.

16.3. From a good compliance perspective and to assist with monitoring of designated persons, the Society recommends the insertion of the word "written" after "adopt" in section 54(1) and section 54(2) of the 2010 Act as substituted by section 26 of the 2018 Bill.

17. *Clarify data retention obligations* Section 27 (amends section 55 of the 2010 Act)

17.1. The Society welcomes the removal from the Bill of the maximum data retention period which had been proposed in the General Scheme. The Law Society had highlighted serious concerns, in its Submission in 2017 on the General Scheme at Recommendation12, about the manner in which a proposed maximum data retention period of 5 years would impact upon the ability to retain coincidental AML data. Therefore, the Society supports the current wording of the retention obligation in section 55 of the 2010 Act which is to retain for a period of "not less than 5 years".

17.2. Section 55(4A) will empower gardaí, "having carried out a thorough assessment of the necessity and proportionality of further retention", to direct longer retention up to a further 5 years. The Society recommends the inclusion of the following safeguards:

1. A clarification that "having carried out a thorough assessment" does not of itself empower inspection of client files to ascertain whether lengthier retention might be required without a pre-existing investigative power such as a search warrant or an FIU/Garda power being exercised under section 40B(2) or 40B(3) as inserted by section 21 of the 2018 Bill, or, under section 56 of the 2010 Act as amended by section 28 of the 2018 Bill,

2. A restriction of this section's application to material covered by legal professional privilege by extending section 46 beyond Chapter 4 to section 55(4A),

3. A safeguard that garda directions for lengthier retention periods be in writing.

18. *Protect the confidentiality of the solicitor-client relationship from State interference* Section 28 (amends section 56 of the 2010 Act)

18.1. Section 28 of the 2018 Bill, which replicates Head 32 of the General Scheme, will extend section 56 to solicitors for the first time. This will mean that a solicitor's firm will need to "have systems in place to enable" them "to respond fully and promptly to enquiries from the Garda Síochána-

(a) as to whether or not it has, or has had, a business relationship, within the previous 6 years, with a person specified by the Garda Síochána and,

(b) the nature of any such relationship with that person."

18.2. The Law Society notes that it will be an offence for a solicitor to fail to comply with section 56.

18.3. The Society's serious concerns about the impact of the amended section 56 on the solicitor-client relationship were outlined at Recommendation 13 of our Submission to the General Scheme in 2017 and they are repeated here for convenience.

18.4. The Society is concerned about the manner in which the amended section 56 could damage the confidentiality of the solicitor-client relationship beyond what is necessary to prevent money laundering or the financing of terrorism. It considerably extends State powers in section 22 of the Bill which will insert section 42(6A) of the 2010 Act and, crucially, may even include clients about whom a solicitor has not made a report.

18.5. In addition, the Society is concerned that the fact that section 56 of the 2010 Act contains the phrase "business relationship", the amendments proposed by section 28 could extend State powers unnecessarily beyond the AML-regulated legal services as defined by "relevant independent legal professional" in section 24(1).

18.6. The Law Society believes that the relationship between client and solicitor must be independent from State oversight or interference and a facet of this is the fact that the solicitor-client relationship is confidential.

18.7. The broad sweeping powers with which an extended section 56 of the Act will allow the State to question solicitors about the identity of clients and the nature of relationships with clients are too extensive and threaten the independence and confidentiality of the solicitor-client relationship.

18.8. The Law Society recommends that solicitors be exempted from complying with section 56.

18.9. Failing that, safeguards must be included in section 56 to protect against intrusion into the privacy of the solicitor-client relationship beyond anything necessitated by EU legislation to prevent money laundering and terrorist financing.

18.10. The Society also notes that the safeguards for legal professional privilege and advice in section 46 of the 2010 Act are not extended beyond Chapter 4, however, section 56 appears in Chapter 7. The Society, therefore, also recommends the extension of section 46 to section 56 (see also Recommendation 14).

19. *Maintain the defence of having had regard to guidelines* Section 33 (inserts section 107A)

19.1. Section 33 provides a defence of having taken all reasonable steps to avoid the commission of an offence. The Society notes that it is proposed to repeal section 107(3) which envisaged the defence of having relied on guidelines approved by the Minister.

19.2. The Law Society believes that it is important that a court can have reference to the fact that a designated person followed professional guidelines.

19.3. Consequently, the Law Society recommends that section 33 include a reference to having followed industry or professional guidelines or guidelines issued by an individual's competent authority.

20. *Empower competent authorities to apply sanctions/fines* Section 35 (inserts new section 114A)

20.1. Section 35 inserts a new section 114A which prescribes amounts which the Central Bank can sanction/fine banks for contraventions of the Act. The Society recommends that consideration be given to affording the power to apply monetary fines for contraventions of the Act to other competent authorities. For solicitors, it is suggested that the Solicitors Disciplinary Tribunal (or its successor the Legal Practitioners Disciplinary Tribunal) might be the best placed body to apply monetary fines for contraventions of statutory AML obligations on foot of an application by the Society.

21. *Provide a nationally maintained and publicly accessible real-time single searchable list of low and high-risk third countries* Sections 37 and 38 (insert Schedules 3 and 4 and repeal section 31)

21.1. Section 4(i) of the Bill inserts a new definition of "high-risk third country" at section 24(1) of the 2010 Act as meaning a jurisdiction identified by the European Commission in accordance with Article 9 of the Fourth Money Laundering Directive." The list is subject to change and the current version is available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2016.254.01.0001.01.ENG. The definition is part of a replacement of the concept of designated high-risk countries in the 2010 Act in section 32 which will be repealed and new Fourth Directive requirements introduced.

21.2. This new definition will have an affect across the following sections of the 2010 Act:

1. Section 18 which inserts a new section 38A – Enhanced CDD high risk third countries

2. Section 23 substitution of section 43 – reporting requirement for transactions connected with high-risk third countries

3. Section 25 amendment of section 52(2)(c) – defence of tipping off if criteria met and not a high-risk third country

21.3. Section 31 of the 2010 Act, which provided for the designation of countries with equivalent AML obligations, will be repealed by section 39 of the 2018 Bill. Instead, a system of low-risk geographic factors for consideration during risk assessments will be introduced at Schedule 3, Section 34A(3) including;

> "(b) third countries having effective anti-money laundering (AML) or combating financing of terrorism (CFT) systems;
>
> (c) third countries identified by credible sources as having a low level of corruption or other criminal activity;
>
> (d) third countries which, on the basis of credible sources such as mutual evaluations, detailed assessment reports or published follow-up reports, have requirements to combat money laundering and terrorist financing consistent with the revised Financial Action Task Force (FATF) recommendations and effectively implement these requirements."

21.4. Similarly in Schedule 4, section 39(3) a system of high-risk geographic factors for consideration during risk assessments will be introduced including:

> "(a) countries identified by credible sources, such as mutual evaluations, detailed assessment reports or published follow up reports, as not having effective AML/CFT systems;
>
> (a) countries identified by credible sources as having significant levels of corruption or other criminal activity;
>
> (b) countries subject to sanctions, embargos or similar measures issued by organisations such as, for example, the European Union or the United Nations;
>
> (c) countries (or geographical areas) providing funding or support for terrorist activities, or that have designated terrorist organisations operating within their country."

21.5. The Law Society believes that the effectiveness of assessing geographic risk factors will in large measure depend on the availability in real time of a single current list of both low and high-risk third countries to be maintained by Irish authorities and made available to the public, including solicitors and other designated bodies. Such a list would afford all concerned with the opportunity of ensuring that they were in compliance and conversely with a means of objectively establishing the extent of CDD which will be required. A publicly accessible and searchable list will be a greater deterrent to money launderers who might wish to take advantage of busy or under-informed designated bodies, whether solicitors or others.

21.6. An up-to-date list of low and high-risk countries would greatly benefit all designated persons when complying with the new requirements to carry out risk assessments and would considerably reduce and ameliorate the impact of this new regulatory burden on businesses.

21.7. The Society recommends that a single up-to-date list of countries falling into Schedule 3(3) (b), (c) and (d) or Schedule 4(3) (a), (b), (c) or (d) should be maintained by a State body such as the FIU, Central Bank or the AML/CTF Compliance Unit and that this should be provided for in the Act.

22. *Maintain the exemption for CDD for solicitor pooled client accounts or provide clarity about the treatment of solicitor pooled client accounts when banks carry out customer risk assessments on law firms*
Section 39 of the Bill (repeals section 34 of the 2010 Act) impacting section 10 (inserts section 30B), section 13 (inserts section 34A(2)), section 37 (inserts Schedule 3)

22.1. Section 39 will repeal section 34 of the 2010 Act which, at section 34(2)(a), specifically exempted solicitor pooled client accounts from any customer due diligence measures by banks. This repeal, therefore, introduces considerable uncertainty about the treatment of client monies held in solicitor pooled client accounts. The repeal of section 39 could, overnight, render funds in transition non-compliant with AML CDD. This would have considerable impact on vital transactions in the process of taking place at the time legislation commences and there could be significant impact for people doing business in and with Ireland.

22.2. The Society recommends the provision of clarity about the treatment of solicitor pooled client accounts alongside the introduction of a transitional period between enactment and commencement of the Bill to allow adequate time for any new CDD to be carried out on solicitor pooled client accounts and, in particular, in situ funds in solicitor pooled client accounts.

22.3. Primarily, the Law Society believes that solicitor pooled client accounts should continue to be exempted from customer due diligence by banks because a solicitor will already have carried out all necessary customer due diligence. Accordingly, the Society recommends that section 34(2)(a) of the 2010 Act should not be repealed by section 39 of the 2018 Bill.

22.4. Alternatively, if section 34(2)(a) must be repealed, solicitor pooled client accounts should be explicitly defined as eligible for treatment as low-risk in the 2018 Bill. Accordingly, the Society recommends that solicitor pooled client accounts be listed as a low-risk factor in Schedule 3 as inserted by section 37. Another option would be for the Minister, under section 34A(4) which will be inserted by section 13, to prescribe solicitor pooled client accounts as a low-risk factor to which banks could have regard.

22.5. The Law Society considers that solicitor client accounts should continue to be explicitly treated as low risk for the following reasons:

- There have been no changes in the nature of these accounts, and there have been no events or data to suggest that they constitute a high risk of money laundering;

- As per the FATF standards, which essentially provide the basis for the 4AMLD, solicitor client accounts should continue to be seen as low risk. The change in FATF standards is only that these accounts now fall within a *wider low risk* category instead of there being an explicit pooled client account exemption. The new low risk criteria provides that, where an entity is subject to and has implemented money laundering requirements and is effectively supervised in accordance with the FATF Recommendations, it can be treated as low risk;

- In Ireland, a legal professional is an obliged entity required to have anti-money laundering systems in place and is supervised in accordance with the FATF Recommendations;

- Solicitors are required by the Solicitors Acts 1954 to 2015 to have a separate client account to hold client monies. The purpose of these accounts is to hold client monies for a purpose designated by the client. Only funds received, held or controlled by a solicitor in connection with his or her practice as a solicitor are permitted to pass through a client account. The use and management of solicitor client accounts are subject to regulation by the Law Society. Solicitors are designated for AML and are supervised by the Law Society for AML compliance.

22.6. The Society has written to the Department of Justice and Equality previously on this issue and that letter, dated 26 August 2016, is **attached.**

22.7. The Departments may wish to consider recent developments in England and Wales, where the Money Laundering Regulations 2017 facilitate the eligibility of solicitor pooled client accounts for simplified due diligence on a risk-based approach.

22.8. Regulations 37(5), (6) and (7) provide as follows:

> (5) A relevant person may apply simplified customer due diligence measures where the customer is a person to whom paragraph (6) applies and the product is an account into which monies are pooled (the "pooled account"), provided that—
>
> > (a) the business relationship with the holder of the pooled account presents a low degree of risk of money laundering and terrorist financing; and
> >
> > (b) information on the identity of the persons on whose behalf monies are held in the pooled account is available, on request to the relevant person where the pooled account is held.
>
> (6) This paragraph applies to—
>
> > (a) a relevant person who is subject to these Regulations under regulation 8;

(b) a person who carries on business in an EEA state other than the United Kingdom who is—

(i) subject to the requirements in national legislation implementing the fourth money laundering directive as an obliged entity (within the meaning of that directive), and

(ii) supervised for compliance with those requirements in accordance with section 2 of Chapter VI of the fourth money laundering directive.

(7) In determining what simplified customer due diligence measures to take, and the extent of those measures, when paragraph (1) applies, credit institutions and financial institutions must also take account of any guidelines issued by the European Supervisory Authorities under Article 17 of the fourth money laundering directive."

22.9. In addition, ESA Guidelines contain well-developed guidance for banks when applying simplified due diligence to pooled client accounts, at paragraphs 109 to 112 as follows:

"Pooled accounts

109. Where a bank's customer opens a 'pooled account' in order to administer funds that belong to the customer's own clients, the bank should apply full CDD measures, including treating the customer's clients as the beneficial owners of funds held in the pooled account and verifying their identities.

110. Where there are indications that the risk associated with the business relationship is high, banks must apply EDD measures as appropriate.

111. However, to the extent permitted by national legislation, where the risk associated with the business relationship is low and subject to the conditions set out below, a bank may apply SDD measures provided that:

- The customer is a firm that is subject to AML/CFT obligations in an EEA state or a third country with an AML/CFT regime that is not less robust than that required by Directive (EU) 2015/849, and is supervised effectively for compliance with these requirements.

- The customer is not a firm but another obliged entity that is subject to AML/CFT obligations in an EEA state and is supervised effectively for compliance with these requirements.

- The ML/TF risk associated with the business relationship is low, based on the bank's assessment of its customer's business, the types of clients the customer's business serves and the jurisdictions the customer's business is exposed to, among other considerations;

- the bank is satisfied that the customer applies robust and risk-sensitive CDD measures to its own clients and its clients' beneficial owners (it may be appropriate for the bank to take risk-sensitive measures to assess the adequacy of its customer's CDD policies and procedures, for example by liaising directly with the customer); and

- the bank has taken risk-sensitive steps to be satisfied that the customer will provide CDD information and documents on its underlying clients that are the beneficial owners of funds held in the pooled account immediately upon request, for example by including relevant provisions in a contract with the customer or by sample-testing the customer's ability to provide CDD information upon request.

112. Where the conditions for the application of SDD to pooled accounts are met, SDD measures may consist of the bank:

- identifying and verifying the identity of the customer, including the customer's beneficial owners (but not the customer's underlying clients);
- assessing the purpose and intended nature of the business relationship; and
- conducting ongoing monitoring of the business relationship."

22.10. Given the treatment of solicitor pooled client accounts in England and Wales, their likely treatment by ESA Guidelines which make specific reference to national legislation and the consumer interest and Irish business benefits of not unnecessarily subjecting people and businesses to double due diligence, the Society recommends that all possible steps be taken now to ensure that solicitor pooled client accounts are either exempted from CDD or, at a minimum, explicitly made eligible for simplified due diligence in the Bill due to their low-risk nature.

23. *Clarify the application of Data Protection Obligations of Designated Persons and prescribe any necessary restrictions of data controller obligations and rights of data subjects when a data controller processes data in compliance with AML obligations*

23.1. The Society recommends that clarity be provided for designated bodies and competent authorities about the nature of their obligations as data controllers under the Data Protection Act 2018. Regulations may need to be issued by the Minister under section 60 of the Data Protection Act 2018 to create specific restrictions within the meaning of the Data Protection Act 2018 for designated persons when their AML compliance activities fall within the remit of the Data Protection Act 2018. A restriction will likely be required for designated person from their data protection obligations as a data controller. Restrictions are also required for data subjects rights when their data is being processed by a designated person for AML compliance.

23.2. In addition, the Society also recommends that the Minister prescribe any necessary restrictions required under the Data Protection Act 2018 for competent and State competent

authorities when they process data in compliance with their statutory functions and obligations together with a corresponding limitation of data subject rights.

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