VICTORIAN BAR

Owen Dixon Chambers East
Level 5, 205 William Street
Melbourne Victoria 3000

T: 03 9225 7111
E: vicbar@vicbar.com.au
www.vicbar.com.au
ABN 42 079 229 591

Wednesday, 6 November 2024

Senator Nita Green
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: LegCon.Sen@aph.gov.au

Dear Senator,

RE: Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2024

The Victorian Bar (**the Bar**) is grateful for the opportunity extended by the Senate Legal and Constitutional Affairs Legislation Committee (**Senate Committee**) to attend the public hearing with respect to the *Anti-Money Laundering and Counter-Terrorism Financing Bill 2024* (**the AML/CTF Bill**) on 30 October 2024, to speak to the Bar's submissions. We are also grateful for the opportunity to respond to questions on notice that were put by the Senate Committee.

Questions on notice

Unfortunately, in the time available, the Bar has not been able to prepare a direct response to all questions on notice from the Senate Committee; however, we have obtained advice from eminent counsel, the Hon. Geoffrey Nettle AC KC and Mr Angus Willoughby on the constitutional issues arising with respect to the AML/CTF Bill (enclosed).

Having regard to the opinion expressed in the memorandum, barristers should be exempt – not only for the substantive reasons set out in our previous submission and that of Fiona McLeod AO SC, but because to subject them to the scheme would be unconstitutional.

Yours sincerely,

Georgina Schoff KC
President
Victorian Bar Inc.

Encl. Opinion from the Hon. Geoffrey Nettle AC KC and Angus Willoughby dated 6 November 2024

RE: ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING AMENDMENT BILL 2024

MEMORANDUM

A. Introduction

1. The Commonwealth Parliament has introduced the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024 (the **Bill**). The Bill proposes amending the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **Act**). If enacted in its present form, the Bill will have the effect, among other things, that a barrister will become a "reporting entity" and subject to extensive reporting and non-disclosure obligations.

2. The Bill is now being considered by the Senate Legal and Constitutional Affairs Legislation Committee and the Committee has invited the Victorian Bar to comment on the constitutional validity of the Bill. The purpose of this memorandum is to identify an issue of constitutional invalidity arising from the terms of the Bill.

3. For the reasons which follow, we consider there to be a significant risk that, if enacted, the Bill would be held unconstitutional in its application to barristers. The risk of constitutional invalidity may also extend to solicitors, but this memorandum is confined to the Bill's application to barristers.

B. Summary of the relevant provisions of the Bill

4. We refer to and adopt the summary of the Bill contained in the New South Wales Bar Association's submission to the Committee dated 14 October 2024. The following features of the Bill are particularly relevant to the assessment of constitutional validity.

5. Definition of "reporting entity": the Act defines a "reporting entity" as a person who provides "designated services"[1]. Section 6(1) of the Act provides that the tables contained in that section define "designated services". The Bill proposes to insert a new "Table 6" following a new s 6(5B), entitled "Professional services". As the New South Wales Bar Association submission explains[2], Items 1, 2, 4, and 6 of Table 6 are calculated to apply to a barrister who advises clients in relation to transactions involving real property, companies, trusts, financing, and restructuring, among others – including in relation to the settlement of litigation where such transactions form part of the dispute, or form part of an agreed resolution.

6. It appears to have been intended that the definition of "designated services" should not apply to the work of counsel appearing for a client in litigation and receiving a fee for that service. That inference arises from Item 3 of Table 6, the proposed s 6(5C)(b) and the note applicable to that provision.

7. The Bill does not, however, achieve that intention. As drafted, a "reporting entity" means a person who provides a "designated service". A barrister who advises on any of the broad range of matters to which the definition of "designated service" applies is a "reporting entity". The Bill does not establish a scheme under which a barrister is a "reporting entity" only for those clients to whom the barrister provides a "designated service". Rather, the Bill treats a barrister as a "reporting entity" even if the barrister provides only but one of the relevant "designated services". That is likely to capture most barristers.

8. The Bill also fails to make clear whether or how a barrister who once becomes a "reporting entity" may cease to have the status of a "reporting entity". On one view, the Bill provides that for so long as a person is a barrister – and for so long as the services referred to in Table 6 are within the ordinary range of services provided by barristers – a barrister will almost inevitably meet the definition of a "reporting entity".

9. Evidently, it would defeat the explicit purpose of the amendments proposed by the Bill to take a strict view of the definition of "reporting entity" – to the effect that a barrister is a "reporting entity" only during a period in which the barrister is providing one of the relevant "designated services". It is unclear how a distinction could be drawn

---

1 Act, s 5 (definition of "reporting entity").

2 See NSW Bar Association submission at [46]-[93].

between a period in which a barrister is providing the relevant services and when the barrister is not. But in any event, it would emasculate the various powers exercisable in respect of "reporting entities" if the validity of their exercise depended upon whether or not, at the time of exercise, the barrister happened to be providing relevant designated services.

10. Suspicious matter reporting: section 41 of the Act obliges reporting entities to report suspicious matters to the AUSTRAC CEO (the **SMR regime**).

11. The substance of the SMR regime is as follows. Section 41 provides that a reporting obligation arises for a reporting entity in respect of a person (client) where, for example, the reporting entity "suspects on reasonable grounds" that the client is not who the client says the client is[3]; where information obtained by the reporting entity may be relevant to the investigation or prosecution of any offence against any Commonwealth, State, or Territory law[4]; and where information obtained by the reporting entity may be relevant to the investigation or prosecution of specified terrorism financing or money-laundering offences[5].

12. Under the SMR regime, a reporting entity must provide the AUSTRAC CEO a "report" about the "suspicious matter" to which s 41(1) applies[6]. A civil penalty applies to a failure to comply with the SMR regime[7].

13. The conditions of the obligation to report a suspicious matter would likely be satisfied readily. The existence of a "reasonable suspicion" is a state of mind of lesser conviction than belief[8], and whether a matter *may* be "relevant" to the breadth of Commonwealth, State, and Territory criminal law is a remarkably broad conception given that a matter may often be relevant to the investigation of an offence, albeit not "relevant" in the sense defined in uniform evidence legislation.

---

3 Act, s 41(1)(d).
4 Act, s 41(1)(f)(iii).
5 Act, s 41(1)(h), (j).
6 Act, s 41(2).
7 Act, s 41(4).
8 See *Hussien v Chong Fook Kam* [1970] AC 942 at 948 per Lord Devlin.

14. Compulsory notices: section 49 of the Act authorises the AUSTRAC CEO, and other law enforcement and regulatory bodies, such as the Commissioner of the Australian Federal Police and the Commissioner of Taxation, to issue a notice to a reporting entity to give the information or documents specified in the notice.

15. The Bill proposes to insert s 49B into the Act, which would in substance authorise the AUSTRAC CEO to issue a notice to a person who may have information or a document that may assist the CEO to perform the CEO's functions under the Act. Such a notice could require a barrister who is a reporting entity to provide information or to produce documents. A recipient of a notice issued under s 49B must comply with it and a failure to do so attracts a civil penalty. The Bill also contains a proposed s 49C, which performs a related but distinct function: of enabling the AUSTRAC CEO to authorise a person possessing information or documents which may assist the CEO with the performance of the CEO's functions under the Act to provide such information or documents to the CEO. Proposed s 49C(5) provides that the CEO's authorisation applies despite any general law obligation of confidence.

16. The compulsory notice provisions of the Act, once so amended and extended by the Bill, are apt to authorise the AUSTRAC CEO to compel any barrister to provide confidential and privileged information to the CEO. The power to issue such notices does not require that the barrister be a reporting entity; it applies to all "persons".

17. Legal privilege: The various obligations imposed by the Bill to provide information or documents do not exclude information or documents subject to legal professional privilege. Instead, the Bill introduces the concept of an "LPP form", which is a mechanism for the reporting entity to claim that information or documents required to be provided to AUSTRAC are subject to legal professional privilege; and for AUSTRAC – not a court – then to determine the claim for privilege. Proposed s 242A authorises the Minister to issue guidelines in relation to the making or dealing with claims of privilege.

18. "Tipping off": the Bill proposes to substitute a new "tipping off" offence in s 123 of the Act. Relevantly, it would be an offence against s 123 for a barrister who is a reporting entity to disclose information which would or could reasonably be expected to prejudice the investigation of any Commonwealth, State, or Territory offence. That includes information about the fact that the barrister has made a suspicious matter report or provided information or documents in response to a compulsory notice issued to the barrister.

19. The Bill also proposes to insert s 123(6), which provides that, except where it is necessary for the purpose of giving effect to the Act, a person is not to be compelled to disclose to a court or tribunal the information s 123(2), which refers to the provision of information under the SMR regime and compulsory notices, amongst other categories.

20. The effect of these amendments would be to prohibit a barrister from disclosing to the barrister's client the fact that the barrister had made a suspicious matter report or provided information or disclosed documents relating to the client; prohibit the barrister from informing the court why, because of consequent conflict of interest, the barrister should cease to act for the client in the matter to which the report, documents or information relates; and prohibit the barrister (even when defending a claim that might be made against the barrister by the client or legal services regulator in connection with the barrister's conduct of the client's case or the termination of the retainer) from invoking as the barrister's defence that the barrister had been required to make the suspicious matter report or provide information or documents relating to the client and was prohibited from disclosing those facts to the client or the court.

Summary of the effect of the provisions

21. In summary, the effects of the provisions of the Bill adumbrated above are that:

    (i) almost every barrister is sooner or later likely to meet the definition of a "reporting entity";

    (ii) once a barrister meets the definition of "reporting entity", the barrister retains that status for the purposes of all of his or her retainers;

    (iii) as a reporting entity, a barrister must give AUSTRAC reports of suspicious matters under the SMR regime;

(iv) a barrister must comply with compulsory notices by giving information and documents pertaining to the barrister's client;

(v) a barrister may provide an LPP form where the information or documents are privileged, but the claim will be determined by AUSTRAC – not the court – by reference to guidelines yet to be issued that are to be promulgated by the executive;

(vi) a barrister will effectively be prohibited from communicating to anyone that he or she has provided information or documents under the processes summarised above, including to the client concerned and the court before which the barrister may be appearing, and including in the defence of any claims made against the barrister; and

(vii) relatedly, the barrister may be required to continue to act in a matter – despite the serious conflict of interest that will arise by reason of the barrister having made an undisclosed suspicious matter report or provided information or documents relating to the client – because ceasing to act may constitute a tipping off offence[9].

C. Applicable constitutional principles

22. The significant risk that the amendments proposed in the current formulation of the Bill would be unconstitutional in their application to barristers inheres the following principles.

23. Courts established by or under Chapter III of the *Constitution* can only be invested with federal judicial power and powers that are auxiliary or incidental thereto[10].

---

9 See NSW Bar Association submission at [113].

10 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271-272 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

24. "Judicial power" within the meaning of s 71 of the *Constitution* is not susceptible of exhaustive definition[11]. Judicial power has been held, however, to include "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called to take action."[12]

25. Whether a power constitutes the judicial power of the Commonwealth requires analysis of the substance of the power to be exercised and the manner in which it is to be exercised. "Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process."[13] It is not sufficient to conceive of judicial power "in terms of the nature and subject matter of determinations made in exercise of that power. It must also be defined in terms that recognise it is a power exercised by courts and exercised by them in accordance with the judicial process."[14]

26. The majority in *Bass v Permanent Trustee Co Ltd*[15] recognised that the judicial process has certain features, and thus that it "is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case."

27. Upon the same principle, in *Thomas v Mowbray*[16] Gummow and Crennan JJ observed that "legislation which requires a court exercising federal jurisdiction to depart to a significant degree from the methods and standards which have characterised judicial activities in the past may be repugnant to Ch III."

---

11 See *Gypsy Joker Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [10] per Gummow, Hayne, Heydon and Kiefel JJ, citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [30] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

12 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

13 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

14 *Nicholas v The Queen* (1998) 193 CLR 173 at 208 [73] per Gaudron J, see also at 188 [20] per Brennan CJ, 202 [53]-[54] per Toohey J, 225-226 per McHugh J, 258-259 per Kirby J.

15 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

16 (2007) 233 CLR 307 at 355 [111].

28. In *International Finance Trust Company Ltd v New South Wales Crime Commission*[17], a majority of the High Court struck down New South Wales legislation which sought to engage the Supreme Court of New South Wales in an activity repugnant to the judicial process. French CJ reasoned that the relevant legislation was invalid because it purported to require a court capable of exercising federal jurisdiction to hear and determine an application on an ex parte basis, thus denying the court the ability to require notice to be given to the other party, despite any assessment by the court that notice was necessary to ensure fairness between the parties[18]. The Chief Justice made the following observations about the legislation in issue[19]:

> It deprives the Court of the power to determine whether procedural fairness, judged by reference to practical considerations of the kind usually relevant to applications for interlocutory freezing orders, requires that notice be given to the party affected before an order is made. *It deprives the Court of an essential incident of the judicial function. In that way, directing the Court as to the manner of the exercise of its jurisdiction, it distorts the institutional integrity of the Court and affects its capacity as a repository of federal jurisdiction.* (emphasis added)

Gummow and Bell JJ[20], and Heydon J[21], who made up the majority, reasoned to similar effect.

29. The principle at work in *International Finance Trust Company* derives from the meaning to be given to the term "court" in Chapter III of the *Constitution*[22].

---

17 (2009) 240 CLR 319.

18 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354-355 [54]-[55].

19 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 355 [56].

20 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 365-367 [93]-[98].

21 *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 386-388.

22 See also *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[59], 219-220 [68]-[69] per French CJ and Kiefel J, 225-226 [94], 228-230 [104]-[109] per Gummow, Hayne, Crennan and Bell JJ.

30. The term "court" in Chapter III of the *Constitution* is not a meaningless label, it designates that "those 'courts' exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of the curial process, including the obligation to act judicially."[23] For that reason, it is beyond the legislative power of the Commonwealth to invest in a court powers of a kind that would cause it to cease to answer the description of a "court" within the meaning of Chapter III. The same essential principle applies to State parliaments and State courts[24]. In both cases, "the relevant principle hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies"[25].

31. As Gaudron J observed in *Leeth v The Commonwealth*[26], "[i]t is an essential feature of judicial power that it should be exercised in accordance with the judicial process. *A legislative direction which would require a power vested in a court to be exercised other than in accordance with that process is necessarily invalid*. Its effect would be to take the power outside the concept of 'judicial power'. And a conferral of a power of that kind would infringe the prohibition deriving from s 71 which limits the powers which may be conferred on a court to those which are judicial or ancillary or incidental to judicial power." (emphasis added)

---

23 *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 per Deane and Toohey JJ.

24 See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

25 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ.

26 (1992) 174 CLR 455 at 502, see also at 470 per Mason CJ, Dawson and McHugh JJ.

32. To similar effect, Professor Harrison Moore observed[27]:

> [T]he power to adjudicate possessed by a Court imports the observance of principles of legal administration essential to the judicial office. The full extent of these principles cannot be easily determined; but whatever they are, they may not be interfered with by the Legislature. The Constitution empowers the Legislature to regulate the *incidents* of judicature – this power is expressly conferred in sec 51(xxxix) – but any interference with the essentials of judicial administration is a deprivation of judicial power and an attempt to require the Court to act in a non-judicial way.

33. In *Forge v Australian Securities and Investments Commission*[28], Gummow, Hayne and Crennan JJ, with whom Gleeson CJ agreed, observed that "[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. … *An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial*. Essential to that system is the conduct of trial by an independent and impartial tribunal." (emphasis added)

34. The institutional characteristic of a court that is affected by the Bill is a superior court's inherent power to regulate the proceedings submitted to its jurisdiction and to prevent abuses of the court's processes. In *R v Forbes; Ex parte Bevan*[29], Menzies J said "'[i]nherent jurisdiction' is the power which a court has simply because it is a court of a particular description. Thus, the Courts of Common Law without the aid of any authorising provision had inherent jurisdiction to prevent abuse of their processes and to punish for contempt."

---

27 Harrison Moore, *The Constitution of the Commonwealth of Australia* (1910), 2nd ed at 323.
28 (2006) 228 CLR 45 at 76 [64].
29 (1972) 127 CLR 1 at 7.

35. Similarly, in *PT Bayan TBK v BCBC Singapore Pte Ltd*[30], French CJ, Kiefel, Bell, Gageler and Gordon JJ observed that:

> "It is well established by decisions of this Court that the inherent power of the Supreme Court of a State includes the power to make such orders as that Court may determine to be appropriate 'to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction'."

36. The same essential principle applies to Chapter III courts.

37. Superior courts have an inherent power to restrain their officers from representing parties to litigation wherever necessary to protect the proper administration of justice. Relevantly, that includes where an officer has a conflict of duty or interest[31]. Where the conflict is grave, and strikes at the core of counsel's obligations to the court and to the client, it is to be expected that a court will take such steps as are necessary to maintain the integrity of its processes[32].

38. In Canada, the Supreme Court of Canada recognised that a lawyer's duty to the lawyer's client and court is a constitutionally protected principle of justice and that the State cannot impose duties on lawyers that undermine their duty of commitment to their clients' causes[33]. On that basis, the Court held that provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act SC 2000, c. 17* must be read down to exclude legal counsel and law firms from the operation of that Act. The decision rested in part on s 7 of the *Canadian Charter of Rights and Freedoms* but also critically upon the recognition[34] that it is a normative principle and a basic tenet of the common law legal system that counsel are bound by a duty of loyalty and commitment to their clients' causes. It is fundamental to how the State and the citizen interact in legal matters and it is essential to maintaining confidence in the administration of justice.

---

30 (2015) 258 CLR 1 at 18 [43], citing *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 per Deane J.

31 See *Davies v Clough* (1837) 8 Sim 262 at 267 per Shadwell VC [59 ER 105 at 107]; see also *State of Western Australia v Ward* (1997) 145 ALR 512 at 518-519 per Hill and Sundberg JJ.

32 See and compare *AB (a pseudonym v CD (a pseudonym)* (2018) 362 ALR 1.

33 *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401.

34 See *Canada (Attorney General) v Federation of Law Societies of Canada* [2015] 1 SCR 401 at [84]-[117].

39. Likewise in this country, it is a defining characteristic and fundamental tenet of the justice system that counsel are bound by duties of loyalty and confidence to their clients and the court. The court demands that those duties be observed, and assumed compliance is the basis on which justice is dispensed. If, therefore, counsel breaches those duties, there is a miscarriage of justice which distorts the institutional integrity of the court and the consequences of it must be annulled. As the High Court of Australia has held[35], counsel's actions in purporting to act for a client while covertly informing against them are a fundamental and appalling breach of counsel's obligations to the client and the court which are productive of a miscarriage of justice.

D. Principles applied

40. The Bill distorts the institutional integrity of Chapter III courts and State courts. It negates a compound, fundamental assumption upon which the exercise of judicial power proceeds: that parties to litigation will be represented by officers of the court bound by duties of loyalty and confidence to their clients and the court, free from any conflict of interest and duty, and that, as and when necessary, the court may exercise its powers to restrain a conflicted representative from acting in breach of duty and thereby maintain the institutional integrity of the court.

41. The Bill undermines those assumptions because it creates the conditions for the conflict of interest and duty to arise between a barrister and a client, and it prevents the resolution of that conflict by preventing the barrister from informing the client and court why the barrister must cease to act, or by requiring the barrister to continue to act lest the termination of the retainer constitute a tipping-off offence.

42. The result is a situation in which a court is required to hear and determine a case in which a barrister may be forced to continue to act despite the presence of a serious conflict, and where the court is unaware of the conflict and so cannot address consequent damage to the integrity of the proceeding; as the court otherwise might by giving the barrister leave to cease acting or by restraining the barrister from acting.

---

35 *AB (a pseudonym v CD (a pseudonym)* (2018) 362 ALR 1 at 4 [10] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.

43. Moreover, the practical consequences of the conflict of interest are infinite and imponderable. Critically, it cannot ever be known, and yet the possibility cannot ever be excluded, that the conflict between barrister and client will have caused the barrister to vary the presentation of the client's case to the detriment of the client and thus to the prejudice of justice.

44. Hence, by modifying the manner in which court proceedings are to be conducted by a barrister who is a reporting entity, and by excluding the capacity of the court to monitor and control its own procedures to ensure adherence to a fundamental tenet of justice, the Bill purports fundamentally to alter the nature and manner of exercise of the powers required to be exercised by courts and thereby distorts the institutional integrity of those courts.

45. In our opinion, the Bill so impairs the defining characteristics of the court[36] that the court may cease to answer the constitutional description.

Dated: 6 November 2024

G. A. A. Nettle KC

A. G. Willoughby

[36] See and compare *Wainohu v New South Wales* (2011) 243 CLR 181 at 213-215 [54]-[59], 219-220 [68]-[69] per French CJ and Kiefel J, 225-226 [94], 228-230 [104]-[109] per Gummow, Hayne, Crennan and Bell JJ.