



BAR ASSOCIATION
OF QUEENSLAND

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

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

The Association appreciates the opportunity to make submissions in respect of the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024* (**the Bill**), which amends the *Anti-Money Laundering Counter-Terrorism Financing Act 2006* (**the Act**). The Association is concerned that language contained in the Bill, which deviates from the language in the consultation material, has the consequence of including barristers within the operation of the Act.

The Association supports measures to disrupt money laundering and the crimes connected with it. However, the expansion of the Act to include barristers would detract from the primary overarching obligations of a barrister, being independence, the paramount duty to the administration of justice and the centrality of trust and confidence to the client/practitioner relationship. “*Barristers’ work*” as that phrase is relevantly defined for Queensland barristers in rule 15 of the *2011 Barristers’ Rule (as amended)* (**Barristers’ Conduct Rules**) does not include the actual execution of transactions and expressly does not include the ability to “*hold, invest or disburse any funds for any person*”.

The Association is also concerned about the significant extra regulatory costs of the proposed reforms, and its impact on the cost of the delivery of legal services which are “*barristers’ work*” and the viability of sole practitioner barristers. Barristers are already one of the most regulated professions in Australia.

The Association is one of the constituent bodies of the Law Council of Australia, and has had the benefit of seeing, in draft, the Law Council’s submission to the Committee.

The Association supports the Law Council’s submission. In addition, the Association provides the following submission in respect of the Bill, how it is likely to impact upon barristers and a proposed amendment to the Bill.

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A. The Association's Previous Submission

The Association previously made submissions on 9 July 2024 in response to consultation material which was published by the Attorney-General's Department in May 2024 (**the Consultation Paper**). A copy of the Association's previous submission is **enclosed**.

The Consultation Paper stated, in respect of the expansion of the Act to Tranche 2 entities that *"the work undertaken by barristers, as well as general advice on matters such as directors' duties or employment law would not be captured"*.

In its submission dated 9 July 2024, the Association considered that the *"designated service"* (**Designated Services**), as they were described in the Consultation Paper, did not include *"barristers' work"*. Having reviewed the Bill, the Association no longer holds that view.

B. Changes in description of Designated Services

The Association is now of the view that Designated Services as described in the Bill includes *"barristers' work"*. That concern arises because of the expansive change in language, which now includes *"assisting a person in the planning"*, *"assisting a person in organising, planning ..."* and *"assists a person to plan ..."* contained in the description of Designated Services 1, 2, 4 and 6, a description which has changed since the issue of the Consultation Paper. Such language would include advice work.

The Consultation Paper described proposed designated services 1 and 2 as *"preparing for or carrying out a transaction on behalf of a person"* to buy, sell or transfer real estate or legal entities, respectively. The proposed designated services are now contained in Designated Services 1 and 2 in the Bill, which are expanded and place obligations on a person who is *"assisting a person in the planning or execution of a transaction"* to sell, buy, or transfer, real estate or a body corporate or *"legal arrangement"* (a term broadly defined within the Bill).

Designated Service 4 of the Bill places obligations on a person *"assisting a person in organising, planning ..."* a transaction for equity or debt financing relating to a body corporate or legal arrangement (or proposed body corporate or legal arrangement).

Designated Services 6 of the Bill places obligations on a person who *"assists a person to plan or execute, or otherwise acting on behalf of a person in the creation or restructuring of a body corporate"* or a *"legal arrangement"*. Although this Designated Service most closely resembles proposed designated service 5 of the Consultation Paper, it was previously (differently) described as *"formation, creation, operation or management of a legal entity"*.

The broad language of *"assisting a person in the planning ..."*, or *"assists a person to plan ..."* or *"assisting a person in organising, planning ..."* captures more than the previously considered *"preparing for or carrying out..."*, which has the consequence of including *"barristers' work"*.

C. Potential Application to Barristers

Designated Services of Concern

The phrases *"assisting a person in the planning"*, *"assisting a person in organising, planning ..."* and *"assists a person to plan ..."* of Designated Services 1, 2, 4 and 6, are so broad that it is likely to capture work undertaken by barristers, particularly advice work.

This very well may include any commercial advice work regarding the broadly defined “*real estate*”, “*equity or debt financing*”, “*body corporate*”, or “*legal arrangement*”.

Furthermore, for instance, if a barrister gave advice to a person in anticipation of separation (in a family law context) about their ownership rights in respect of commercial real property before the commencement of family law proceedings, that advice may fall within Designated Service 1, as it would assist a person to plan future transactions involving that property. This then places obligations on the barrister giving advice to comply with the Act, regardless of their future involvement in proceedings or otherwise.

By way of another example, a barrister advising a client about potential taxation implications of a contemplated sale, purchase or transfer of a body corporate or legal arrangement may fall within Designated Service 2 or 4. It is reasonably foreseeable that a person may seek and rely on the barrister’s advice about the taxation consequences of such a proposed transaction, when making decisions regarding the transaction, having had the assistance of the barrister’s advice in the planning of that transaction.

Designated Service 4 places obligations on professionals who assist a person to plan about equity or debt financing relating to a body corporate or legal arrangement (or proposed body corporate or legal arrangement).

Designated Service 6 places obligations on professionals who assist a person to plan about the creation or restructure a body corporate or legal arrangement (the broad definition of which captures many entities (noting that trusts are entities for taxation purposes)). If a barrister was to give advice about such creation or restructuring, that would likely be captured by Designated Service 6.

If the Bill was enacted in its current form, Designated Services 1, 2, 4 and 6 may place obligations on barristers giving advice and require them to comply with the Act.

Designated Services which will not apply to barristers
(as these are beyond “*barristers’ work*”)

As to Designated Service 3, barristers cannot hold, invest, or disburse any fund for any other person and so cannot perform Designated Service 3.

In respect of Designated Service 5, barristers cannot incorporate companies or provide shelf companies for any other person, and so cannot perform Designated Service 5.

In respect of Designated Services 7 and 8, barristers cannot act as a person’s general agent or attorney in that person’s business or dealings with orders, and so cannot perform Designated Services 7 or 8.

As for Designated Service 9, a barrister cannot be the address for service of any document or accept service of any document.

Barristers at the private bar must be sole practitioners, who cannot work in partnership with other legal practitioners and employ very few, if any, support staff compared to other professional service providers now brought within Tranche 2. The administrative burden of compliance with the Act is disproportionate upon a proper consideration of the restricted nature of “*barristers’ work*”. Barristers and the nature of the work undertaken by a barrister poses a very low risk of money laundering and terrorism financing, because a barrister cannot

be involved beyond a preliminary stage of the performance of those designated services because of rule 17 of the Barristers' Conduct Rules.

D. Application of Rule 17 of the Barristers' Conduct Rules

While a barrister is capable of giving advice which assists a person to plan a transaction of the kind mentioned in Designated Services 1, 2, 4 and 6, the barrister cannot be further involved in transactions about which they have given advice as it is not "*barristers' work*".

Rule 17 of the Barristers' Conduct Rules (Qld) relevantly provides that a barrister must not:

- (a) act as a person's general agent or attorney in that person's business or dealings with others;
...
- (e) be the address for service of any document or accept service of any document;
...
- (g) conduct the conveyance of any property for any other person;
- (h) administer any trust estate or fund for any other person;
...
- (j) incorporate companies or provide shelf companies for another person;
...
- (l) hold, invest or disburse any fund for any other person.

In the example of a barrister giving advice in a family law context, if the property is eventually sold or transferred, the barrister cannot draw up any of the transaction documents, cannot handle or direct any money, and cannot correspond with the purchasing party. Unless proceedings are commenced and the barrister is briefed to act in that litigation, the barrister will take no further role in a future transaction.

Where the focus of the Act is placed on the work performed by a professional, and requirements for compliance are significant, it is disproportionate for those obligations to be placed on barristers when the work performed is limited to preliminary advice work, noting the other restrictions placed on "*barristers' work*".

The Association appreciates that there may be good reasons for the expansion of the description of the Designated Services as they appear in the Bill compared to how such services appeared in the Consultation Paper. However, the Association submits that, where barristers can only be involved in preliminary stages of Designated Services, do not conduct transactional work, do not hold money for their clients and represent a significantly lower risk of money laundering and terrorism financing, the administrative burden of compliance with the Act and the consequences of non-compliance are a disproportionate legislative response to the low risk that barristers pose.

Furthermore, pro bono work including court and tribunal referred pro bono schemes are likely to be affected and thereby reducing, access to justice.

The Association submits that in all of the circumstances it is appropriate for “*barristers’ work*” to be exempt from the Act.

E. Exemption for Barristers’ Work

The Association submits that Schedule 10 of the Bill should be amended to create an exemption for “*barristers’ work*”, that is not by way of instructions directly from a client. Each of the relevant barristers’ conduct rules (except for South Australia) permit a barrister (with certain conditions) to accept instructions from a person who is not a solicitor or other professional acting as such or officer of a government department who usually engages lawyers. However, given the purpose of the Bill, a balanced approach can be met by exempting “*barristers’ work*” where it is undertaken not by way of a direct brief.

On this basis then the Association provides the following proposed amendment to the Bill, to be included in Schedule 10 – Exemptions, of the Bill:

233L Exemption – performing barristers’ work

If and only if, subsections (a) – (d) are satisfied, then this Act does not apply and the professional services will be exempt.

- (a) the professional services were provided by a natural person; and
- (b) the natural person is a barrister holding a current practising certificate issued under the law of a State or Territory which entitles that person to engage in legal practice exclusively as or in the manner of a barrister;
- (c) the professional services provided is barristers’ work; and
- (d) the barrister is providing the professional services on the instructions of a solicitor, accountant or an Australian government body.

Note: In this section, *barristers’ work* has the same meaning as is in the relevant conduct rules or legislation in the State or Territory in which the barrister practices.

It would assist to have the definitions in section 5 also include the following:

accountant means a person who provides professional accounting services and is a reporting entity.

To assist in making the reference in the notes clear, the explanatory memorandum could refer to the current versions of the relevant rules or legislation, being:

- (i) *2011 Barristers’ Rule (as amended)* (Qld);
- (ii) Part B of the *South Australian Legal Practitioners Conduct Rules 2022* (SA);
- (iii) *Legal Profession (Barristers) Rules 2014* (ACT);
- (iv) *Legal Profession (Barristers) Rules 2016* (Tas);
- (v) *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW);
- (vi) *Legal Profession Uniform Conduct (Barristers) Rules 2015* (VIC);
- (vii) *Legal Profession Uniform Conduct (Barristers) Rules 2015* (WA);
- (viii) *Northern Territory Bar Association, Barristers’ Conduct Rules 2020* (NT).

Therefore, it is submitted that making “*barristers’ work*” exempt where the barrister is briefed by a solicitor, an Australian government body or an accounting reporting entity (and

hence would not include matters where instructions were provided directly from a client) delivers a principled and proportionate solution.

The Association is grateful for the opportunity to make submissions in respect of the Bill and would be glad to answer any queries.

Yours faithfully

Damien O'Brien KC
President

Encl.