Law Council
OF AUSTRALIA

6 August 2024

Senator Helen Polley
Chair, Parliamentary Joint Committee on Law Enforcement
PO Box 6100
Parliament House
Canberra ACT 2600

By email: le.committee@aph.gov.au

Dear Chair

Inquiry into the capability of law enforcement to respond to money laundering and financial crime

The Law Council appreciates the opportunity to provide this submission to the Joint Committee on Law Enforcement (the **Committee**) in relation to its inquiry into the capability of law enforcement to respond to money laundering and financial crime (the **Inquiry**).

The Committee's consideration of issues concerning law enforcement, money laundering, and financial crime is timely given the Australian Government's recent consultation on proposed 'tranche 2' reforms to extend the existing AML/CTF regime to services provided by lawyers and other professions. The Law Council has made submissions to both rounds of consultation conducted by the Australian Government, with both such submissions **attached** to this letter for the Committee's reference.

The Law Council provides this letter to the Committee to highlight several issues with respect to three of the Inquiry's terms of reference, being:

c) proposed 'tranche 2' reforms to extend the existing AML/CTF legislation to services provided by lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones and implications for law enforcement (**tranche 2 reforms**);

d) whether existing criminal offences and law enforcement powers and capabilities are appropriate to counter money laundering, including challenges and opportunities for law enforcement, such as those relating to emerging technologies (**law enforcement powers and capabilities**); and

f) the role and response of businesses and other private sector organisations, including their level of awareness, assistance to law enforcement, and initiatives to counter this crime (**private sector awareness**).

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Tranche 2 reforms

The Law Council wishes to highlight several of its positions from its submissions concerning the proposed tranche 2 reforms:

1. Any expansion of Australia's AML/CTF regime to the legal profession must be proportionate and targeted to the real risks relating to the profession, and carefully drafted.

2. The impact of compliance costs, particularly on sole practitioners, and small and regional law practices, should be carefully considered given:

    a. that 93 per cent of law firms in private practice consist of one to four partners, with almost half of those firms being sole practitioners,[1]

    b. that such practices are mostly located in the suburbs and in regional areas, and their incomes are not, on average, high. In regional and suburban communities in particular, legal practitioners regularly provide pro bono and low-cost legal services to members of their communities and frequently struggle to make a reasonable income due to overheads, including regulatory costs.

3. Existing statutory obligations and requirements imposed on legal practitioners operate to mitigate risk such that residual money laundering and terrorism financing (**ML/TF**) risk in the legal sector is generally low.

4. As outlined below, the Law Council has produced comprehensive guidance for the profession on identifying and managing ML/TF risks, and will continue to work with its constituent bodies on professional education in this area.

5. Many areas of legal practice have negligible or no ML/TF risks, and this should be reflected in any legislative AML/CTF scheme.

6. Barristers should be exempt from any expanded AML/CTF regime.

7. Law practices that do not otherwise provide designated services should not become subject to the legislation by reason only of the fact that they operate a trust account'.

8. With respect to suspicious matter reporting:

    a. By reason of their position as fiduciaries, legal practitioners should not be required to disclose non-privileged (but still confidential) information of a client as part of a suspicious matter reporting framework under an AML/CTF regime.

    b. In the alternative, if there is to be any reporting requirement applicable to legal practitioners, then such requirement should not apply in respect of privileged information. In particular, if the whole of the basis for the legal practitioner forming a 'suspicion' is privileged information, legal

[1] Urbis, *2022 National Profile of Solicitors: Final Report* (26 April 2023) p 31.

practitioners should not be obliged to file a suspicious matter report at all.

9. The profession should be allowed a minimum period of two years from the time the legislation comes into effect to implement any AML/CTF requirements.

10. Risk assessments for pre-commencement clients should be permitted to be completed within a five-year period.

Each of these points, together with other issues, are explored in greater detail in the attached submissions.[2]

Law enforcement powers and capabilities

The following comments are provided by the Financial Services Committee (the **FSC**) of the Law Council's Business Law Section.

The FSC believes that it is important to have effective law enforcement capability to prevent and deter money laundering and financial crime, as well as those criminal activities which are ultimately associated with money laundering and financial crime. The FSC has some concerns, however, about the current reporting framework, how it is being used, and questions whether it is sufficiently effective in achieving its ultimate objectives.

The FSC notes that the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) requires reporting entities to lodge suspicious matter, threshold transactions ($10,000 or more in physical currency or physical foreign currency of equivalent value) and (for some reporting entities, including financial institutions) international funds transfer instructions and electronic funds transfer instruction reports to AUSTRAC. In the case of electronic and international funds transfer instructions, the volume of transactions and corresponding reports that must be lodged is significant, as is the potential amount that a reporting entity could be fined for each individual reporting failure.

The FSC notes that:

a) reporting is ultimately only useful in the fight against money laundering and financial crime if the reports are used appropriately by law enforcement authorities; and

b) perpetrators of money laundering and financial crime will only be effectively deterred if they expect their actions to lead to adverse law enforcement consequences.

The FSC is concerned that there have been some recent cases where very hefty civil penalties were paid by reporting entities which had failed to fully comply with all of their reporting obligations, yet there is limited public visibility as to whether, and how much (if any), unlawful activity was in fact facilitated by the reporting failures.

[2] Also available online at <https://lawcouncil.au/tags/anti-money-laundering>.

The FSC therefore questions whether AUSTRAC's concentrated focus in recent years on court action relating to reporting failures of some large well known Australian businesses was:

a) sufficiently effective in:

   i. facilitating effective law enforcement against those engaged in unlawful activities, and

   ii. preventing and deterring money laundering and financial crime, and

b) the most optimal use of scarce law enforcement resources.

The FSC also notes:

a) that putting in place an appropriate compliance framework to address reporting responsibilities represents a significant cost for reporting entities, and

b) that increased compliance costs can result in customers paying more, shareholders receiving lower returns and/or diversion of resources away from other potentially more beneficial activities.

The FSC therefore encourages the Inquiry:

a) to focus on the effectiveness of law enforcement agencies' use of intelligence and enforcement methods in detecting, punishing, preventing and deterring money laundering and financial crime, and

b) to carefully consider the costs, benefits and consequences, and engage with appropriate stakeholders, before making recommendations for future law reform.

Private sector awareness

The Law Council recognises the importance of professional associations providing education and support to professions potentially affected by ML/TF and other financial crimes. Such education and support should aim to not only raise awareness of potential ML/TF risks, but also provide tools to practitioners that assist them in reducing the risks specific to their practice.

To this end, the Law Council and its constituent bodies have undertaken several steps to provide education and support to the legal profession. This includes:

a) commissioning an independent vulnerabilities analysis of the legal profession with respect to ML/TF risk,

b) the development and publication of comprehensive guidance for the profession in relation to assessing, and reducing, ML/TF risk, and

c) working with state and territory law societies on further education initiatives.

The comprehensive guidance includes: eleven guidance notes covering issues such as professional obligations, the mitigation and management of ML/TF risk, politically-exposed persons, and ascertaining source of funds; case studies, and; workshop notes. The full suite of guidance may be accessed on the Law Council website.[3]

Furthermore, the Law Council has had several meetings with the Attorney-General, the Attorney-General's Department, and the Australian Transaction Reports and Analysis Centre about the proposed tranche 2 reforms. The Law Council stands ready to provide assistance to the Government and any relevant agencies with respect to ML/TF risks in the legal profession moving forward.

If the Committee requires any further information or clarification, please contact , Senior Policy Lawyer, at

Yours sincerely

Greg McIntyre SC
President

[3] The full suite of guidance is available here: https://lawcouncil.au/resources/policies-and-guidelines/national-legal-profession-anti-money-laundering---counter-terrorism-financing-guidance

Law Council
OF AUSTRALIA

Reforming Australia's anti-money laundering and counter-terrorism financing regime

Ms Sarah Chidgey PSM
Deputy Secretary, National Security and Criminal Justice Group
Attorney-General's Department

4 July 2024

Telephone +61 2 6246 3788
Email mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council thanks the Anti-Money Laundering and Counter-Terrorism Financing (**AML/CTF**) Working Group for their assistance preparing the Response to Paper 2; the Digital Services Committee of the Business Law Section for their contribution to the Response to Paper 4; and the Financial Services Committee of the Business Law Section for preparing the Responses to Papers 4 and 5.

Response to Paper 2

1. The Law Council welcomes the opportunity to comment on the proposals set out in the Reforming Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime, and in particular, to the proposals in *Paper 2: Further Information for Professional Service Providers* (**Paper 2**). We welcome the commitment of the Attorney-General's Department (**AGD**) to risk-based and outcomes-based AML/CTF legislation.

Key points

2. Because of their unique position and demographics in Australian society, the application of AML/CTF legislation to legal practitioners must be tailored to Australian circumstances.

3. The legislation needs to be proportionate to the real risk, targeted, and carefully drafted.

4. Existing statutory obligations and requirements imposed on legal practitioners operate to mitigate risk such that residual risk in the legal sector is generally low.

5. The 2023 national legal profession vulnerabilities analysis indicated the need for heightened awareness of inadvertent exposure to financial crime.

6. The Law Council has moved to address this need by producing comprehensive Guidance Notes for the profession with input from its constituent bodies. The constituent bodies are now moving to roll out education programs for their state-based constituents.

7. The scope of services that give rise to AML/CTF obligations must be carefully considered.

8. Many areas of legal practice have negligible or no risk.

9. To avoid advisory work which has no nexus to a transaction being covered by the legislation, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**the AML/CTF Act**), there needs to be an express statutory provision for legal practitioners stating that advice work, for which there is no underlying transaction of which the practitioner has carriage, is not a designated service.

10. To avoid services provided when a transaction does not proceed being covered by the AML/CTF Act, that Act should state that where a legal practitioner has commenced to provide legal services, and later receives instructions to have carriage of a transaction that is a designated service, the requirement to have an AML/CTF program and to apply client due diligence pursuant to it arises only if and when those instructions for the transaction are received.

11. To avoid transactions that are the result of the outcome of judicial, arbitral or tribunal processes being covered, there needs to be an express statutory provision exempting those transactions from the application of the AML/CTF Act.

12. There needs to be a specific exemption for barristers from the operation of the AML/CTF Act.

13. Practices that do not otherwise provide designated services should not become subject to the legislation by reason only of the fact that they operate a trust account.

This can be dealt with by excluding the types of payments made in connection with litigation, legal assistance and advice in respect of potential legal proceedings, and legal advice work where there is no contemplated transaction of which the practice/practitioner will have carriage.

14. Conveyancing is subject to rigorous risk mitigations that operate to mitigate money laundering and terrorism financing risk, especially the rules that bind users of electronic conveyancing platforms. Government has not yet evaluated these mitigations for their AML/CTF effectiveness. There are also other regulatory tools to use without imposing entirely new obligations on small business and sole practitioners. Targeted measures within existing systems would better align with the proposed risk-based approach.

15. Legal practitioners must be exempt from any suspicious matter reporting obligation where that 'suspicion' is based upon information or documents the subject of client legal privilege.

16. Section 242 of the AML/CTF Act ought not be repealed but should be supplemented.

17. The anti-tipping off provisions need to be amended to allow legal practitioners to take instructions from clients in relation to the client's legal privilege.

18. Any AML/CTF Rules ought to be managed and put forward to be promulgated as regulations by AGD.

19. The profession should be allowed a minimum period of 2 years from the time the legislation comes into effect to implement the requirements.

20. Specific proposals are made in relation to each designated service proposed for professional service providers by AGD.

21. To require solicitors to hold significant additional client data is a cyber risk.

Introduction

22. In July 2023, the Law Council commissioned an independent vulnerabilities analysis of the legal profession, the VAR.[1] We are pleased to say that the behaviours and attitudes of the profession toward integrity, risk aversion and to fulfilling statutory and professional obligations should give the Government confidence in the profession.[2]

23. The VAR identified residual vulnerabilities including the need for further education for the profession. However, the VAR does not provide support for the profession to be characterised as a high-risk profession.[3]

[1] Russ and Associates, *Vulnerabilities Analysis: Money Laundering and Terrorism Financing – The Australian Legal Profession* (28 September 2023) (**VAR**).
[2] VAR at [52]-[54].
[3] AGD, *Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Regime – Consultation Paper on Reforms to Simplify and Modernise the Regime and Address Risks in Certain Professions* (April 2023) (**AGD Consultation Paper, April 2023**) p 3.

24. In response to the VAR, the Law Council has worked to produce comprehensive guidance[4] for the legal profession to heighten awareness as to mitigating and managing specific money-laundering (**ML**) and terrorism financing (**TF**) risk.[5]

25. The Financial Action Task Force (**FATF**) encourages a risk-based approach that is based on a combination of factors including (primarily) the level of ML/TF risk, as well as a consideration of the size and nature of the practices to be further regulated and the extent of legally binding controls already in place (which may mitigate risk). According to FATF, scarce resources are to be concentrated in the higher-risk areas and resulting obligations should be proportionate to the nature of the practice.

26. The resources to be deployed in this area are private sector resources. The burden of any new obligations should take into account both the unique and critical role of lawyers in Australian society in upholding the rule of law, the administration of justice and service to community, as well as the unique demographics of the profession in this country. It must be borne in mind that the profession is overwhelmingly comprised of small and micro-practices based outside the major CBDs. Failure to appropriately recognise these matters risks replicating some of the adverse consequences which occurred in New Zealand when legislation designed for banks but imposed on the legal profession caused some law firms to stop providing newly regulated services; some New Zealand practices closed their doors entirely as a result of the unsustainable cost of compliance.

27. Access to justice and the small-practice character of the Australian legal sector are at stake and the foreshadowed legislation must be proportionate to the real risk, targeted, and carefully drafted.

28. While the Law Council welcomes the development of outcomes-based legislation, there are key issues, including exemptions and clear definitions, which must be resolved and need to appear in the primary legislation. In turn, the subordinate legislation must not be prescriptive and must be disallowable. To avoid conflicts of interest, it should be contained in regulations and not rules made by the proposed regulator.

29. The Law Council intends to convene Pathways Workshops together with AGD, the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) and occupational groups and professions who have a role in a given transaction, to better identify potential areas of duplication of obligations. Such duplication can then be eliminated through the regulatory design process with meaningful inputs from the regulated community.

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[4] Law Council of Australia (2024) *National Legal Profession Anti-Money Laundering and Counter-Terrorism Financing Guidance*, available at https://lawcouncil.au/resources/policies-and-guidelines/national-legal-profession-anti-money-laundering---counter-terrorism-financing-guidance .

[5] The guidance is based on the findings of the VAR and on international material including cases drawn from court judgments and typologies published by the Financial Action Task Force and the Australian Transaction Reports and Analysis Centre. The guidance is now being used by the constituent bodies of the Law Council, particularly state and territory law societies, to develop training sessions and form part of regular communications to members. This outreach is intended to alert practitioners to the specific characteristics of ML/TF risks, and prompt practitioners to assess their existing risk management systems and to augment mitigation strategies within the current regulatory framework for the profession, including practitioners' existing professional obligations. An example is the Law Institute of Victoria's 'Follow the Money' seminar series: 'Follow the Money: Financial Crime, AML and Risk'.

Continued Relevance of Submissions

30. The Law Council has recently made two written submissions that continue to be relevant to the present second-phase consultation by AGD, namely submissions to:

- the Senate Legal and Constitutional Affairs References Committee inquiry, *The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing regime* (2021–2022), dated 15 September 2021 (**LCA submission to the Senate Inquiry**);[6] and
- the AGD phase one consultation, *Modernising Australia's anti-money laundering and counter-terrorism financing regime* dated 27 June 2023 (**LCA phase one submission**).[7]

Updated Information Relevant to Economic Impact

31. The gross revenue data for small firms supplied in the LCA submission to the Senate Inquiry[8] has now been reviewed based on current figures. The Law Council is unable to publish the figures in this public submission, but may separately share them with AGD on a confidential basis. The updated income figures demonstrate the extent to which the overwhelming majority of solicitors in private practice in Australia would not be able to sustain compliance costs beyond the bare minimum required. This updated data is relevant to the application of the risk-based approach insofar as that approach requires compliance to be sustainable, especially for smaller entities.

Further Information for Professional Service Providers

Timelines, Implementation and Rule-Making

32. Certainty as to the timelines for the legislation coming into force is a key concern for the profession. Last year the Law Council sought assurance that there would be an implementation grace period before which the obligations for legal practitioners would come into force.[9] We consider that this must be **a minimum of two years** from the legislation commencing. This is based on a number of considerations including that:

- The vast majority of the affected practices will be very small or micro-practices.[10] There is already significant change taking place within the profession. The proper implementation of AML/CTF changes will require significant lead time (a minimum of two years) for professional bodies to be

[6] Submission 30 available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC.
[7] Available at https://lawcouncil.au/resources/submissions/modernising-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime.
[8] At [129].
[9] In the LCA phase one submission, the Law Council described practitioners' keen desire for reassurance as to when obligations are likely to come into force. This anxiety has only grown since that submission was made in July 2023. Practitioners need to know that there will be adequate time to prepare and comply once there is certainty as to the precise nature of the obligations.
[10] The Law Council is not estimating the number of practices that will become reporting entities because the definitions of the proposed designated services have not yet been settled. However, in terms of the national profile of the profession as a whole, as at 30 June 2023 there were 97,497 practising solicitors: Legal Services Council, Annual Report (2023), p 27. 84% of private law practices in October 2022 were sole practitioner or 1-principal firms and a further 9% were law practices with 2–4 principals (altogether 93% of all private law practices in Australia): Urbis, *2022 National Profile of Solicitors: Final Report* (26 April 2023) pp 6, 29.

able to actively and effectively support law practices, and of course for law firms themselves, in developing the necessary controls.

- Time will be needed for a body of expertise (and services) to grow in this new field to enable genuine compliance.
- Legal practices will be required to reevaluate and potentially substantially redesign their business and technology systems, as well as their compliance systems, which will take time.
- Reforms currently underway to improve Australia's Digital ID System have the potential to vastly improve the efficiency of the client identification and verification processes. However, private accredited digital ID providers will not be able to enter the market under the new law until November 2026 (even though it appears that the peer-to-peer service provided by myGovID may be available to consumers from November 2024).

33. While we are pleased to see indications that practitioners will be afforded a period of assisted compliance, it is also important for AGD to publish its commitment to, and planned timeline for, phased or staged implementation once the 'grace' period expires.

34. More immediately, the design and drafting of the regulations and amendments to the draft bill will be the most complex and time-consuming part of the second tranche reform package. The Government's timetable must recognise and allow for the size of this task.

35. As to these supporting statutory instruments, the Law Council considers it vital that these take the form of regulations under the enabling legislation which are developed and managed by AGD (and not, as proposed, in amended, or new, rules made by the CEO of AUSTRAC). It is critical that the regulations are legislative instruments under section 10 of the *Legislation Act 2003* (Cth) and subject to disallowance by Parliament. In our view, it is not appropriate for the conduct-regulator, AUSTRAC, to be responsible for determining the scope of the regulatory regime. This should be the responsibility of AGD. There is, otherwise, a risk of conflicts arising between the role of regulator and the role of policy-maker.

36. This approach is consistent with the financial services regulatory model administered by the Treasury where significant exemptions and the scope of the regulatory scheme is, appropriately, set out in regulations. It also consistent with the work undertaken by the Australian Law Reform Commission in reviewing the *Corporations Act 2001* (Cth) to achieve better adherence to fundamental legislative principles.

37. We understand AGD's wish to place clear limits on the time for reporting entities to transition pre-commencement clients to the regime. The period must reflect the compliance burden of the transition, particularly upon sole practitioners. Some law practices manage large numbers of clients, including in the area of conveyancing. We consider a five-year outer limit to be appropriate.[11] We note that the pre-commencement transition is intended to take place on a risk-sensitive basis,[12] but

[11] See the Response to AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 5: Broader Reforms to Simplify, Clarify and Modernise the Regime* (May 2024) (**Paper 5**) by the Financial Services Committee, section (h).

[12] See first paragraph of AGD, Paper 2, p 26: '…extend the requirement for a customer risk rating to all pre-commencement customers to inform a risk-based transition into the regime. The Act would then require a **reporting entity to collect and verify identity information about any pre-commencement customer who is rated as medium or high risk**. Identity information that has previously been collected and verified by a reporting entity could be used for this purpose, where appropriate.' (Emphasis added).

rather than applying to medium and high-risk classes, we consider that the risk rating should be narrowed to a manageable level whereby high-risk clients are identified and the obligation to complete due diligence within the transition period applies to those clients and not those in lower categories of risk.

38. While all of these timeframes are under consideration, the Law Council is, as noted above, actively taking steps to raise awareness of ML/TF risk and to equip the profession with tools to mitigate and manage this risk.

A Framework for a Risk-Based Approach

AML/CTF Measures Must be Tailored to Australian Circumstances

39. The Law Council notes that a risk-based approach is the method by which countries and sectors should develop and apply measures to mitigate and manage ML/TF risk. The risk-based approach means that each country should design and implement an AML/CTF solution that fits **its own circumstances**. FATF recognises that:[13]

> *… Countries have diverse legal, administrative and operational frameworks and different financial systems, and so cannot all take identical measures to counter these threats. The FATF Recommendations, therefore, set an international standard, which countries should implement through measures adapted to their particular circumstances.*
>
> *…*
>
> *… Countries should first identify, assess and understand the risks of money laundering and terrorist finance that they face, and then adopt appropriate measures to mitigate the risk. The risk-based approach allows countries, within the framework of the FATF requirements, to adopt a more flexible set of measures, in order to target their resources more effectively and apply preventive measures that are commensurate to the nature of risks, in order to focus their efforts in the most effective way.*

The Unique Position of Lawyers in Australia

40. The risk-based approach applies not only to countries but to regulated sectors.[14]

41. Lawyers' special role in upholding the rule of law is a critical element in the fight against corruption, and organised crime. They have always had a special responsibility to enquire into, advise, counsel against, and not facilitate any unlawful or improper purpose a client might have (inadvertently or otherwise) in mind. This role means that, overlaid with the risk-based approach, it is appropriate to apply special provisions to lawyers recognising that their existing professional obligations are a risk-mitigation factor. FATF also accords recognition to the unique role of lawyers globally.[15]

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[13] FATF (2012–2023) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF, Paris) pp 7, 8 ('Introduction').
[14] See FATF (2019), *Guidance for a Risk-Based Approach for Legal Professionals* (FATF, Paris) at [4].
[15] FATF (2012–2023) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF, Paris) see Interpretive Note to Recommendation 23.

42. In relation our own legal profession, the Hon. Marilyn Warren AC (former Chief Justice of Victoria) has stated:[16]

> *The foundation of a lawyer's ethical obligation is the paramount duty owed to the court. The reasons for this are long-standing. It is the courts who enforce rights and protect the citizen against the state, who enforce the law on behalf of the state and who resolve disputes between citizens, and between citizens and the state.* ***It is the lawyers, through the duty owed to the court, who form the legal profession and who underpin the third arm of government, the judiciary.*** *Without the lawyers to bring the cases before the courts, who would protect the citizen? Who would enforce the law?* ***It is this inherent characteristic of the duty to the court that distinguishes the legal profession from all other professions and trades.***
>
> (emphasis added)

The Unique Demographics of Lawyers in Australia

43. Australia's small-business sectors across the economy are to be prized and maintained. In the legal profession, 93% of firms in private practice are 1–4 partner firms. Almost half of those firms are sole practitioners.[17] Most are located in the suburbs and in regional areas, and their incomes are not, on average, high. In regional and suburban communities in particular, legal practitioners regularly provide pro bono and low-cost legal services to members of their communities and frequently struggle to make a reasonable income due to overheads, including regulatory costs.

44. The high incidence of small and micro-practices throughout Australia is an advantage because it facilitates access to legal services even while increased costs of living places additional pressure on families. The pronounced dominance of tiny law practices across our vast continent is now a feature that is unique to Australia.

45. To date, we have successfully withstood pressures that have transformed the demographics of legal sectors in other countries. The United Kingdom, for example, saw its demographic profile disrupted by small firms' restricted access to insurance, limiting their viability and seeing many exit the market. In New Zealand, many experienced sole practitioners and small practices closed doors altogether, and some elected to refrain from providing designated services, specifically to avoid the high costs of AML/CTF compliance. The prospect of having to undertake prescriptive client due diligence, maintain specific categories of records, establish and maintain a compliance program, report to the financial intelligence unit and be audited for AML/CTF compliance, were a tipping point for many.[18]

Existing Statutory Mitigations of Risk to which Lawyers in Australia are Subject

46. The role of the lawyer as officer of the court and the fiduciary character of the practitioner-client relationship underpin state and territory statutory regimes that strongly mitigate ML/TF risk. Features of these regimes are listed in Appendix 1.

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[16] The Hon. Marilyn Warren AC Chief Justice of Victoria on the Occasion of Joint Law Societies Ethics Forum Melbourne (20 May 2010) at [3] (emphasis added).
[17] Urbis, *2022 National Profile of Solicitors: Final Report* (26 April 2023) p 31.
[18] Law Council of Australia, Responses to Questions on Notice to the Senate Legal and Constitutional Affairs References Committee Inquiry, *The adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing regime* (2021–2022), pp 5–6 (Document 21).

47. These are described in the VAR as 'significant existing mitigating factors reducing the ML/TF risk currently present in relation to the Profession.'[19]

The Specific Risk Profile of Lawyers in Australia

48. The VAR points to stratification as a defining national characteristic of the legal sector in Australia, as summarised here:

Small and micro law practices

(a) The ML/TF environment[20] is one of servicing rural, regional, and remote communities.

(b) Apart from conveyancing and buying and selling businesses (often involving the use of trust accounts), clients of legal practitioners are negligible users of most other proposed designated services.

(c) The client base is well-known and some elements of AML/CTF controls are in place. The most effective control at present is the client/practitioner relationship,[21] and practitioners' risk-aversion.[22] New clients and calls for provision of services not previously encountered are recognised red flags.[23]

Large law practices

(d) The ML/TF environment is one of servicing commercial, or high net wealth, clients.

(e) Clients are recipients of a range of proposed designated services.

(f) Large law practices typically already have the range of client due diligence and other AML/CTF measures in place to very high standards.

Specialist and medium-sized law practices

(g) The ML/TF environment is one of servicing clients in city, urban or large population centres.

(h) These practices are a mixture of specialist legal services providers (e.g., family law, personal injuries litigation) as well as providers of proposed designated services.

(i) As for small practices as described in [48(c)], above.[24]

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[19] VAR, Executive Summary, p 11, para (r); also [53], [163]–[169] and Appendix 1 (p 57).
[20] The 'ML/TF environment' refers to the contexts in which the given firms operate (as relevant to AML/CTF considerations).
[21] The client/practitioner relationship is governed by a duty upon the practitioner to give effect only to lawful, proper and competent instructions. See LCA submission to the Senate Inquiry at [13]–[15], [22] and [71]–[76] for other features of this relationship.
[22] The VAR characterises practitioners 'in their representation of clients and conduct of their practices' as 'risk aware, and risk averse' and finds this to be 'a significant "real world" factor leading practitioners to avoid exposure to risk, including ML/TF risk': Executive Summary, p 12, subparagraph (r)(x).
[23] VAR at [169(a)].
[24] The VAR describes this subsector or type of practice (see [15(b) and (c)] and p 25) and conducted interviews across all subsectors but interviewed a relatively greater number of sole practitioners and members of small law practices stating that this was because they are vastly more numerous, and their practice areas are diverse: at [16] ('Methodology').

49. When legal professions alongside other 'designated non-financial businesses and professions' are described internationally as high-risk,[25] this description is almost always a reference to a risk rating that has been made **before** local vulnerabilities and mitigations are taken into account in the risk assessment.

50. However, in Australia, when the residual risks associated with the proposed designated services are analysed in the context of the ML/TF environments in which the variously sized practices operate, what emerges is that of a generally **low-risk sector.** This may surprise some AML/CTF practitioners and consultants, and perhaps even some representatives of the media, but that will be because the focus is usually on inherent risk, not actual vulnerabilities and *mitigated* risk.

51. The reason legal sectors are often described in terms of inherent risk, not *mitigated* risk, is because the literature is international and aspires to have universal application, and mitigations are local (domestic) matters. Yet it is mitigated risk that is the most meaningful. There are very few empirical studies in this field[26] (a fact that scholars have noted and have critiqued for some time), but to assess actual (residual) risk requires empirical work to be done. The VAR is one such study and to our knowledge, for a profession to have commissioned such work, without being specifically AML/CTF-regulated and required by law to do so, is a world-first. For the purposes of domestic policy-making, and to apply the risk-based approach, an appreciation of this distinction is critical.[27]

52. This is not to say that the Law Council believes that nothing further should be done because only low residual risk attaches to the profession; on the contrary, the Law Council and its constituent bodies are addressing those residual risks, including through the development of professional guidance, as set out above.

Additional Measures Must be Targeted and Proportionate

53. AGD has been clear that there will be Commonwealth legislation that will operate alongside the current complex of rules of professional conduct, the common law, and the inherent jurisdiction of state and territory courts to control officers of the court. The Law Council is in favour of this legislation being outcomes-based, to give expression not only to the autonomous operation of the profession, but also the state and territory regulatory schemes already in place and its myriad present obligations under state and territory law. Specifically, outcomes-based (non-prescriptive) legislation should give autonomy to legal practitioners and regulatory bodies in the states and territories to augment and develop their existing practices to meet national AML/CTF outcomes.

54. However, it is absolutely critical that the regulatory burden and associated cost impact of AML/CTF reform on Australia's legal practices, and particularly our small and medium-sized practices, is proportionate to the relevant risks and recognises

[25] AGD Consultation Paper, April 2023, p 20. See, however, International Bar Association, *Statement in Defence of the Principle of Lawyer-Client Confidentiality* (January 2022) available at https://www.ibanet.org/document?id=/IBA-Statement-in-Defence-of-the-Principle-of-Lawyer-Client-Confidentiality

[26] Katie Benson (2021) *Lawyers and the Proceeds of Crime: The Facilitation of Money Laundering and its Control*, Routledge, p 4 (and works cited). Notable exceptions include Katie Benson's work and research by Dr David Chaikin; see also Dr Ilaria Zavoli and Dr Colin King (2021) 'The Challenges of Implementing Anti-Money Laundering Regulation: An Empirical Analysis,' *Modern Law Review* 84(4): 740–771.

[27] To this end, we note that the National Threat Assessment due to be published on 9 July 2024 is unlikely to take account of existing risk mitigations within the legal sector (or any other DNFBP sector), and its findings will need to be read with the distinction between 'inherent' and 'mitigated' risk borne in mind.

the significant extent to which legally binding obligations already operate to mitigate those risks.

Specific Areas of Practice Where ML/TF Risk is Not Appreciable or Nil—Solicitors

55. The work undertaken by solicitors is vast and varied. Their work includes important practice areas that are often worlds away from financial transactions.

56. Solicitors act for separated parents to negotiate how and when they will spend future time with their children. Criminal defence lawyers act for clients being prosecuted or fined. Suburban solicitors draft simple and complex wills and advise on estate planning and succession. Solicitors represent victims of catastrophic accidents in their pursuit of fair compensation and help local residents enforce and test planning laws.

57. Solicitors own, manage, and work in many different types of practices that are not targets for money laundering or terrorism financing, simply because the types of services they provide do not give rise to relevant typologies. Family law, personal injuries, employment law, criminal law, planning and environment law, media law, and general litigation practices should not be brought within the regime because they do not face any, or any significant, ML/TF risk. Specific considerations related to these practices are outlined in Appendix 2. There should be express statutory exclusions that will have the effect that these practitioners will not be covered by the regime.

58. Further, none of these practices ought to be brought within the regime for the sole reason that they also operate a trust account, as discussed below.

59. We set out below the mechanisms by which the Law Council considers these outcomes may be achieved.

'Transactions', Advice and Preparatory Work—An Appropriate Limiting Provision is Needed for Legal Practitioners

60. The Law Council has a fundamental concern that the concept of the ***transaction being carried out for the client*** is unclear when it is transposed from a banking sector setting to a legal sector setting. Unless this issue is resolved in the draft legislation, it will create problems at the implementation stage. If an appropriate exemption is not granted, each of the practice types described in Appendix 2 will be unnecessarily brought within the scope of the regime. The exemption should explicitly cover legal advice where there is no underlying transaction of which the practitioner has carriage and make particular provision for when preparatory work develops into such a transaction. Proposed wording is supplied in paragraph [67] below.

61. It is a **transaction** that is fundamental to ML/TF risk. Existing AML/CTF obligations to mitigate and manage risk have evolved with the transaction as the focal point.

62. Transaction monitoring is an example of one such obligation.[28] It is obvious from the way that transaction monitoring works, and from many other AML/CTF concepts,

[28] Transaction monitoring is an obligation that was designed for, and is well suited to, banks. It means placing money flows under observation and triangulating data points in relation to those money flows to try to detect unusual behaviour (for example, repeat customers, one-off customers, the same customer shifting bank

that it was banks that were first to be regulated for ML/TF risk. It is banks' business models and relationships with customers that remains the basis for the obligations. For banks, *customer accounts* are key and the *transaction* is the very reason for which the customer seeks out the bank. Banks have clarity around whether or not someone is a customer; customers either hold an account with a bank, or the account is closed. Transaction monitoring by banks is useful by virtue of the transaction flow; the enormous amount of transactions may be analysed to detect patterns and anomalies.

63. Unlike banks, lawyers' clients seek them out for legal advice and representation, not for transactions. That advice or representation might directly relate to a relevant transaction—a transaction that has gone wrong, for example, or has fallen through, or is a feature of a commercial relationship which has broken down. But the subject matter can just as often be non-transactional—who owns a given asset, for example, or when and under what conditions a separated parent may visit their child. Except when provided pro bono, these services are paid for, and payment of professional fees and associated disbursements generate a 'transaction'. The receipt and payment of fees and disbursements do not carry any appreciable ML/TF risk and, as recognised by AGD,[29] these are not the types of transactions to which AML/CTF standards are directed. This is why where trust accounts are used to accept payments of professional fees and make associated disbursements where the work is advisory or relates to representation in disputes, these 'transactions' will not be a designated service.[30]

64. With some exceptions, because the transaction is not the key to the client relationship, advice and representative services will begin and will proceed without it being necessarily contemplated that the practitioners is going to assist with actually carrying out a relevant transaction. Perhaps based on legal advice, or on receipt of initial legal services, the client may, or may not, instruct the practitioner to proceed with a transaction. An example of where they may not provide such instructions is where a practitioner undertakes due diligence on a potential counterparty. The due diligence may result in the client refraining from entering into a relationship with the counterparty instead of proceeding.

65. As presently drafted, it is not clear in what circumstances the words 'preparing for'[31] in relation to a transaction would result in AML/CTF obligations applying at all. On one view, to draw on the counterparty example above, the practitioner has prepared for a transaction, but the transaction is only notional, and never actually occurs.[32] In the alternative scenario in which the client elects to proceed, there is a transaction

accounts, customers shifting between jurisdictions, using unusual jurisdictions, depositing small amounts in large volumes, or making deposits of very large amounts).

[29] Paper 2, p 9 (exception of payments for professional fees).

[30] Legal services that are commonly provided where a transaction is at the heart of the service are the purchase of real estate, and the purchase of a business. As pointed out by the New South Wales Bar Association in its submission, transactions can also arise upon the settlement of legal proceedings where, for example, transfers of value are made after the parties' rights in relation to them (or associated matters) have been resolved. These transactions should be clearly exempted from the operation of the regime, consistent with the exclusion of litigation. In relation to solicitors, while Paper 2 refers to exempting 'representing a client in legal proceedings' (p 7) clarification that the following activities are exempt from the regime is still required: conduct of civil litigation, family law litigation, occupational discipline litigation, administrative appeals, criminal litigation and other quasi-judicial litigious processes, such as patent and trade mark appeals, and tribunal processes.

[31] As referred to in FATF Recommendation 22(d) and Paper 2, pp 8, 11 and 12.

[32] As noted in paragraph [61] above, it is a transaction that is fundamental to ML/TF risk. Paper 2 confirms that AGD does not intend to subject 'pure' advisory work to AML/CTF obligations (p 7). As set out in the LCA phase one submission, there is a strong public interest in avoiding certain foreseeable adverse consequences of clients failing to obtain legal advice in relation to complex transactions: see [168].

but at the point in time at which the practitioner undertakes the work that would be preparatory to it, the practitioner does not know that the transaction will go ahead; that is to say, *it is only in hindsight that the work becomes preparatory*. It may be that AGD considers that there is some work (that is, that there are some tasks) that are inherently preparatory to a transaction. However, that interpretation would run counter to the risk-based approach in its application to legal practitioners. If it is only in hindsight that the practitioner knows that the work constitutes preparatory work, it is untenable and unworkable to hold the practitioner accountable for the application of measures that they cannot at the relevant time know are required. It is also too remote from the flow of funds—that is, the transaction—that is at the heart of ML/TF risk.

66. The solution is not to break down into tasks work that can be (or is even typically) preparatory to, or which may be associated with, a transaction. This is the approach taken in the consultation papers and it has caused consternation. It is confusing, and probably quite misleading, as it does not align with ML/TF risk.

67. Instead, the solution Law Council proposes is to include an **express statutory provision for legal practitioners** stating that:

    (a) advice work where there is no underlying transaction of which the practitioner has carriage is not a designated service;[33] and

    (b) where a legal practitioner has commenced to provide legal services and subsequently receives instructions to have carriage of a transaction that is a designated service otherwise than on an occasional basis, the requirement to have an AML/CTF program and to apply client due diligence pursuant to it (and to that client) arises only upon receipt of those latter instructions.

68. In relation to subparagraph (b) above, we recognise that if a practice does not have an AML/CTF program in place (because it does not usually undertake transactional work of the nature sought by the client), the time, commitment, and cost involved in developing an AML/CTF program will be a factor that the practice is likely to take into account in deciding whether to accept the instructions, or refer the client to another practitioner.

69. Given that ML/TF risks can attach to transactions, guidance provided by professional bodies should emphasise that if practitioners provide legal services that involve a transaction on a one-off or initial basis, practitioners should apply the full range of client due diligence measures that are appropriate to the client circumstances and the features of the transaction, alert to ML/TF risk. Under state and territory regulatory regimes and the common law, practitioners are already subject to professional obligations to know their client,[34] to deliver legal services competently and diligently,[35] and to only follow the client's lawful and proper instructions.[36]

[33] Due to the low or non-existent ML/TF risk.
[34] See solicitors' common law obligations described in *Guidance Note No 3 – What Are My Professional Obligations?* (p 3) in Law Council of Australia (2024) *National Legal Profession Anti-Money Laundering and Counter-Terrorism Financing Guidance*, available at https://lawcouncil.au/resources/policies-and-guidelines/national-legal-profession-anti-money-laundering---counter-terrorism-financing-guidance .
[35] Rule 4 of the Australian Solicitors' Conduct Rules (**ASCR**).
[36] Rule 8 ASCR.

70. There are other areas where the Law Council considers that there should be specific exemptions. These relate to carve-outs for transactions that are a result of a court order/settlement of proceedings and certain matters relating to trust accounts. These are discussed below.

Specific Exemptions Required for the Legal Profession—Transactions the Result of a Court Order

71. We note that the activity of 'representing a client in legal proceedings' is not proposed to be a designated service.[37] However, it should be made clear in an explicit statutory exemption that this extends to transactions that are a result of a court, arbitral, or tribunal order. Transactions that are given effect because a court, arbitrator, or tribunal has ordered parties to a dispute to take certain steps do not pose a ML/TF risk. We have seen no evidence whatsoever that sham litigation is a known typology in Australia and court, arbitral, and tribunal supervision in this country militates against it. These transactions should be excluded from the application of the AML/CTF Act.

72. Further detail is supplied in Appendix 3.

73. Further clarification is also needed to account for the way that legal instructions typically develop. While a client may seek legal advice in connection with a matter that could involve legal proceedings, commencement of proceedings is often the last resort. To be workable, the exception for legal proceedings should include legal assistance or legal advice in respect of potential legal proceedings.

Specific Exemptions Required for the Legal Profession—Trust Accounts

74. Legal practitioners typically conduct far fewer transactions than other reporting entities such as banks or other financial institutions. However even so, client monies and other payments are made through a solicitor's trust account. Solicitors' trust accounts are highly regulated and subject to strict oversight with 'significant uniformity across Australia.'[38] These accounts are only held with Approved Deposit Institutions (**ADIs**) authorised by legal profession regulatory authorities. These ADIs have their own AML/CTF programs in place.

75. The stringent, legally binding rules that govern solicitors' trust accounts have been described at length in both the LCA submission to the Senate Inquiry[39] and the LCA phase one submission.[40] The VAR finds that 'trust accounts are highly regulated and are typically monitored on an ongoing basis'[41] noting that '[c]riminal consequences may be applied for serious breach in relation to the handling of trust money.'[42] Solicitors' trusts accounts are 'commonly used' not only to facilitate commercial and conveyancing transactions, but for 'holding funds on account of fees and disbursements.'[43]

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[37] AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 2: Further information for professional service providers* (May 2024) (**Paper 2**) p 7.
[38] GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co: 2021, 7th ed) at [9.05].
[39] At [11]–[12].
[40] At [81]–[85].
[41] VAR at [56].
[42] VAR at [163(c)].
[43] VAR at [56].

76. In light of the strict controls in place governing trust accounts and their common usage, it is vital that any proposed amended legislation should contain additional statutory exemptions in relation to the use of trust accounts in addition to the statutory exemption for advice work for legal practitioners. The effect of the trust account exemption should be to exclude law practices that operate trust accounts where the practice, but for proposed designated service 3, would not be a reporting entity under the AML/CTF Act because the practice does not provide any other designated service.

77. The means proposed by AGD to give effect to such an exemption is to comprehensively list the kinds of payments made by such practices in the course of their services as exempted payments in a regulation made under the legislation, so that the trust accounts operated by these types of practices do not fall within the ambit of the legislation and the practices themselves do not become subject to the regime.

78. Such an exemption is only logical because, with very few exceptions, these firms do not carry out transactions for their clients. The exemption is also consistent with the risk-based approach in that it takes account of actual ML/TF risk, as well being proportionate to the size and nature of the practices.

79. We refer to our submissions in paragraphs [122]–[127] below in relation to proposed designated service 3. In addition, the exemption must apply to barristers' trust money accounts, which are very limited in use[44] but fulfill the important function of supplying security for money paid in advance for legal costs, for services provided by barristers. As stated previously, because of the statutory restrictions on the nature of the work that a barrister is permitted to undertake, this money will always be a payment (in advance) for the provision of legal advice, or legal representation in litigation. As such, the ML/TF risk is nil or negligible and the exemption of these accounts (or payments made into and from these accounts) is a corollary of the exemption that is sought for barristers.

Specific Areas of Practice Where ML/TF Risk is Not Appreciable or Nil—Barristers

80. For convenience, we set out in Appendix 4 what we said in the LCA phase one submission.[45]

81. The professional limitations on barristers' scope of practice, which precludes them from providing services that carry ML/TF risk, warrants recognition, clearly stated, that barristers' work—that class of work to which they are restricted by their practising certificates—does not overlap with designated services. This aligns with a genuine application of the risk-based approach.

82. Based on their research, including an analysis of barristers' rules of professional conduct, a comparative analysis of the role of barristers in New Zealand and Australia and meetings held with members and representatives of the Australian Bar, the authors of the VAR concluded that there is 'little to no AML/CTF risk

[44] For example, statistics provided by the New South Wales Bar Association in their submission to AGD dated 8 June 2023 indicated that 1.5% of barristers in NSW had notified that they maintain trust money accounts in accordance with the *Legal Profession Uniform Law Application Regulation 2015* (NSW). It should be noted that these accounts are known by different names in other jurisdictions. They are a very limited feature of the Bars of the states and territories where they are regulated under the Uniform Law or relevant legal profession statute for the same general purpose as just described.
[45] LCA phase one submission, pp 29–31. See also p 5 [7], p 21 [7] and p 25 [26.1].

associated with the activities of practitioners performing only the activities of barristers.'[46] Consistently with the application of a risk-based approach and the VAR finding, and noting the statement in Paper 2 that work undertaken by barristers would not be captured,[47] we welcome the recognition that AGD does not intend the work of barristers to be regulated as designated services under an amended AML/CTF Act.[48] This is also consistent with AGD's stated intention not to include within the scope of the regime:

- pure advisory work where there is no underlying transaction; or
- representing a client in a legal proceeding.

83. However, the descriptions of the proposed designated services in the present consultation documents are expressed in a way that may be understood as encompassing advisory work by a barrister that relates to a proposed or contemplated transaction, the actual preparation and implementation of which will be done by the client or another professional person engaged by the client.[49] We note that these matters have been raised with you by the New South Wales Bar Association in its submissions dated 3 June 2024 and 8 June 2023. We share those concerns.

84. Specific and troubling examples of definitional uncertainty include:

- whether advice in respect of documents that bring about the settlement of legal proceedings, including the drafting of proposed terms of settlement, would fall within proposed designated services 1, 2 4 or 5 where settlement of the proceedings involves aspects of the transactions described by those proposed designated services; and
- whether a barrister's advice in a non-litigious matter on some aspect of a proposed or contemplated transaction, or a barrister's review of proposed transaction documents, might be thought to fall within descriptions proposed designated services 2, 4 or 5, although—as a result of the limitations on barristers' work—the barrister does not have the professional carriage or implementation of the transaction. A factual scenario (as provided to you by the New South Wales Bar Association) may be where counsel is briefed to advise on the operation of a specific proposed clause in a transaction document in large commercial matters in the course of negotiations as to the terms of those documents, but is otherwise uninvolved with the mechanics of the transaction as a whole. Similarly, a barrister may be briefed to review or propose a legal structure or to draft certain provisions of a proposed instrument, drawing on the barrister's specific skill to ensure that the intended legal effect will be achieved.

85. The caution published in Paper 2 that 'businesses that provide 'designated services' in the course of carrying on a business would be regulated under the regime regardless of how they brand their business or identify themselves'[50] compounds the uncertainty by its generality.

[46] VAR at [23] and see analysis at [20]-[23].
[47] AGD, *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Consultation Paper 1: Further information for real estate professionals* (May 2024) (**Paper 1**); Paper 2**,** p 7.
[48] Paper 2, p 7.
[49] See our submissions in [60]–[69] and [128]–[131].
[50] p 7.

86. It would undermine the application of the risk-based approach if barristers, with whom no or negligible ML/TF risk is associated, are put in a position as a matter of professional prudence of having to analyse the terms of the designated services under the AML/CTF Act against the risk that some of their work may be technically captured. This could mean, for example, that barristers are reluctant to participate in facilitating settlement proceedings, to the detriment of their clients.

87. The definitions of the proposed designated services have not yet been settled. However, based on what appears to be a speedy recent consultation timetable and legislation development timetable, and based on experience in New Zealand and, over a longer period, in the United Kingdom, we are concerned that issues of interpretation will cause costly confusion and have the potential to endure for lengthy periods before they are resolved, with avoidable adverse consequences in the meantime for barristers and their clients.

88. We acknowledge that the chief design feature of the AML/CTF Act is an activities-based regulatory structure; that is, if one undertakes an activity on more than an occasional basis that amounts to a designated service, one is thereby brought within the ambit of the Act.

89. During our roundtable discussions, AGD indicated in a preliminary manner that, as a matter of drafting or structure, the AML/CTF Act's focus on activities precludes barristers from being subject to an exemption as a category or class. A kind of neutrality is sought to be preserved within the statute as between 'entities' and sectors.

90. While this is an unobjectionable starting point, it does not hold true at present.[51] For example, the entities 'financial institution' and 'qualified accountant,' the term 'trustee' and other offices and entities are specifically defined under the AML/CTF Act.[52] Special provision is made for entities such as building societies, insurers, trustees, providers of a pension, holders of an Australian financial services licence, and more, as providers of designated services in s 6 of the Act where they are described as providing services 'in the capacity of…'. Other formulations already in use within the Act include where particular entities are described as providing a designated service in the course of carrying on a particular business/activity (such as a gambling business). Any of these formulations could be readily adapted to clearly exclude legal practitioners practising exclusively as, or in the manner of, barristers from the scope of the given designated service. The Law Council supports the submission of the New South Wales Bar Association that appropriate ways to give effect to the exemption may include exclusion from the proposed designated services pursuant to s 247, or in the way in which some exemptions in the AML/CTF Rules will be transposed into the Act as outlined on p 31 of Paper 5, or in the manner proposed for prescribed disbursements in relation to proposed designated service 3.[53]

91. If barristers are not excluded explicitly from the operation of the AML/CTF Act, the statutory descriptions or definitions of proposed designated services 1, 2, 3 and 5, for example, would need to exclude the provision of legal advice by a practitioner who is not responsible for the general preparation or the implementation of the

[51] The submissions of the New South Wales Bar Association describe the unique role of barristers and the manner in which they serve the public interest in the representation of clients in legal proceedings, including the facilitation of dispute settlements, and by providing legal advice.
[52] Section 5.
[53] Submission of the New South Wales Bar Association to AGD dated 3 June 2024 at [9].

transaction, or would need to be expressed in such a way as clearly to have that effect.

Issues Specific to Real Estate

92. Criminals have in the past used real estate as an asset for the storage of value. There is evidence that this was the case in Australia and that criminals used real estate in Australia to enrich or reward themselves, and/or to launder money. More recently, however, electronic conveyancing offered by commercial providers and subject to legally binding client identification and verification standards developed by the Australian Registrars' National Electronic Conveyancing Council (**ARNECC**) have come to dominate the practice of the sale and purchase of real estate in every state and territory except Tasmania and the Northern Territory.[54] According to one electronic conveyancing provider, PEXA, Australia is unique in the world in that (at least in relation to its own platform) the electronic exchange plays a critical role in almost 90% of all property transactions undertaken across the country.[55] As such, the 'subscribers' who use the platform are subject to the ARNECC regulatory customer ID and verification requirements.

93. The trend to achieving this state of affairs is relatively recent. What effect, if any, has it had on inhibiting the ability of criminals to use illicit funds in Australia to store value in real estate? Is it too early to know? Has the work been done to establish whether electronic conveyancing is already making a significant difference? Would this tool be the appropriate tool, with necessary augmentation, that could push criminals out of real estate without imposing a whole separate raft of obligations (see paragraph [95], below) on agents, conveyancers, accountants and solicitors?

94. The questions that follow are how well are current regulatory tools working to mitigate risk associated with real estate? What is the baseline against which improvements in the future will be measured? What constitutes improvement?

95. The policy response currently under consultation is to add buying and selling real estate to the list of designated services in s 6 of the AML/CTF Act. This would mean that all businesses and professionals who prepare for or carry out real estate transactions are obliged to: screen employees; train staff; appoint an officer to be responsible for AML/CTF compliance; develop a mitigation and management program based on a risk assessment (of their sector and of their business or practice and its clientele); delineate across a range of circumstances the extent of information that they will be requiring their customers or clients to supply to prove the legitimacy of their corporate or other type of legal structure where they are not individuals; verify the identity of their owners, partners or beneficiaries; delineate when and how they will seek proof of their customer or clients' sources of wealth and particular funds; and to register with AUSTRAC and report to AUSTRAC any matters of suspicion.

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[54] Electronic conveyancing was established by adoption of the Electronic Conveyancing National Law. As PEXA has advised in its submission to AGD dated 13 June 2024, electronic conveyancing is likely to be activated in Tasmania in the 2025 financial year and in the Northern Territory in 2026. In both jurisdictions, robust Verification of Identity standards have been implemented paper-based transactions ahead of commencement. These commenced in March 2024. In Tasmania, these were Directions issued by the Recorder of Titles under the *Land Titles Act 1980* (Tas) and in the Territory, they are Registrar-General's Verification of Identity Guidelines made under the *Land Title Act 2000* (NT). The standards align with the ARNECC Model Participation Rules requirements for electronic conveyancing and require practitioners to take reasonable steps to verify identity.

[55] PEXA, Investor Presentation Commentary, 23 February 2023 at https://www.pexa-group.com/staticly-media/2024/02/PEXA-Group-H1-FY24-Investor-Presentation-Commentary-sm-1708654167.pdf

96. These obligations are extensive and in some cases will require large numbers of small and micro-practices to develop and adopt new processes. But regardless of the potential regulatory burden, the fundamental question raised by the proposed policy response is: to what degree is it likely to be effective, and what alternatives are available? Indeed, how is effectiveness being measured?

97. It cannot simply be that the FATF Standards will be legislated and implemented. The Standards pre-date electronic conveyancing by many years. The Standards are designed to be implemented subject to a risk-based approach and should be (within certain limits stated by FATF) tailored to each jurisdiction's existing regulatory environment and specific national and sector threat profiles. This is the task for Australia in the important area of real estate.

98. We expressed in the LCA phase one submission as 'a matter of grave concern that recent figures show real estate to constitute 57% of assets confiscated as proceeds of crime in Australia.' The Law Council noted that 'it would be of enormous assistance to the profession to know which of these transactions, if any, involved legal practitioners and under what circumstances' and the Law Council asked whether this figure pre-dates the introduction of e-conveyancing.[56] Analysing the significance of confiscation of assets statistics is complex, not least because there can be a considerable time lag between the acquisition of the asset by the criminal and its confiscation by the state. The effectiveness of the regulatory regime needs to be measured at the time the criminal acquires the property. It is not straightforward to extrapolate findings to evaluate the effectiveness of the present regulatory regime without taking this lag into account as well as other potentially complicating factors. Instead, the figures and cases must be broken down and case-by-case analyses undertaken.

99. Another area that does not appear to have been evaluated for AML/CTF effectiveness in the formulation of policy to prevent the criminal misuse of real estate is the gatekeeping role of the Foreign Investment Review Board. Of course, the sale of narcotics to Australian consumers generates illicit funds *within* the country that needs to be 'washed', and here the transactions are presumably domestic or outward-bound. Yet concern has also been expressed about funds from off-shore being routed through Australia to launder money[57] including through real estate.

100. Yet how are these concerning, off-shore funds first passing unnoticed through banks? After all, if a dubious foreign entity is the purchaser or sits behind an intermediary, there are avenues presently available for banks to detect and report their suspicions. Further, foreign entities and foreign individuals must obtain the approval of the Foreign Investment Review Board before they can acquire apparently legitimate Australian real estate. Much concern has been expressed in the media about foreign funds inflating property prices in Australia. Yet such purchases are subject to Foreign Investment Review Board approval. How effective, or ineffective, is this approvals process? How effective could it be, to detect and deter criminals?

101. These are all existing regulatory tools that could potentially be leveraged without imposing entirely new obligations on small business and sole practitioners, but which do not appear to have been explored and subjected to any, or any robust, or publicly available, evaluation for their AML/CTF effectiveness. Yet in the VAR, it was

[56] At [89].
[57] For example, by a panel presenter for the Australian Federal Police (Assistant Commissioner Eastern Command) 'Crime Washing Ashore: New Developments in Organised Crime', ACAMS Australasian Assembly, Hilton Sydney (17 June 2024).

found that in the jurisdictions in which it is used (currently all bar the Northern Territory and Tasmania), electronic conveyancing and associated verification of identity requirements pursuant to ARNECC Participation Rules are a significant mitigating factor reducing ML/TF risk.[58] While the VAR found that residual vulnerabilities do exist, these were held to be associated with paper transactions and cheques, and transactions that fall outside of the electronic conveyancing system (such as in Queensland where self-represented buyers and sellers do not have access to electronic conveyancing).[59] Source of funds and source of wealth enquiries do not form part of the electronic conveyancing system, and such enquiries are not necessarily made routinely by legal practitioners. Targeted measures where higher risk situations warranted it could, however, be provided for within existing systems that operate to facilitate the buying and selling of real estate.

102. AGD has indicated that to show compliance with the Act, businesses and professionals will be permitted to leverage their existing obligations; that is, they may rely on their existing protocols, practices and professional obligations, as well as profession or sector-wide features that mitigate ML/TF risk. This commitment to ensuring existing obligations can be leveraged is consistent with the application of a risk-based approach and it is a welcome commitment. However, for practices that are exclusively conveyancing practices to be required to adopt costly obligations, the effectiveness of current levers (such as the interventions of banks, the effect of e-conveyancing and the Foreign Investment Review Board approvals process) should be carefully evaluated.

103. Nevertheless, if AGD rejects exempting legal practitioners from proposed designated service 1, we make the submissions below in relation to it.

The proposed designated services

Proposed designated service 1

> *Preparing for or carrying out transactions on behalf of a person, to buy, sell or transfer real property, in the course of carrying on a business. The customer is the person.*

104. The Law Council opposes the proposed inclusion of 'transfer' in addition to the activities of buying and selling (real property) on the basis that its inclusion runs counter to the risk-based approach. We note that the receipt of property from a deceased estate would not require exclusion if the language of FATF Recommendation 22(d) was strictly adopted. The FATF language suggests that a transfer (without consideration) is not intended to be a regulated activity. We are not persuaded that ML/TF risk attaches to transfers without consideration to any degree that is sufficient to warrant its inclusion for the profession as a trigger for new AML/CTF obligations.

105. As presently drafted, transfers between litigants would be caught under this proposed designated service including, in family law proceedings, transfers of matrimonial property made pursuant to consent orders and other court orders. Should the current language remain, transfers between litigant parties should be exempted. We note a concern was stated by AUSTRAC at a roundtable regarding sham litigation, however no evidence has been presented to us that sham litigation is a prevalent ML typology in Australia and we are not aware of any such evidence. In contrast, transfers in family law proceedings and other litigation are routine (and

[58] VAR, Executive summary (r)(vii), and at [79(f)], [152].
[59] VAR at [79(f)], [126], [152].

litigation is not sought to be captured under this regime).[60] The reasons for this latter exclusion have long been settled at a global level in acknowledgment of the special role of the courts and tribunals in democratic systems and the importance of access to justice as a cornerstone of the rule of law. To reintroduce tasks associated with litigation including transfers of property made in connection with legal proceedings would undermine the sound basis for excluding litigation, without justification based on risk.

106. As we have pointed out to AGD, the words 'It is intended to trigger AML/CTF obligations for businesses that do the following for a client:'[61] have caused extreme concern. The words in the consultation paper were widely interpreted to mean that, on their own, the listed tasks could trigger the obligation to enrol as a reporting entity. The words were read to mean that undertaking a land titles search could amount to providing a designated service. For instance, preparing a contract (of any kind) on its face could be held to amount to providing a designated service. The same applies in relation to undertaking a zoning permit search on its own. This would of course lead to manifestly absurd results.

107. We understand from our discussions during our roundtable that there is no intention for the listed tasks to themselves trigger obligations under the AML/CTF Act. The obligation-trigger is to be the proposed designated service.

108. To avoid future confusion, a provision based on the reg 24AB(1)(e) ancillary services exemption of the *Anti-Money Laundering and Countering the Financing of Terrorism (Exemptions) Regulations 2011* (NZ) (**NZ AML/CFT (Exemptions) Regulations**) should be adopted in the legislation. It should be clearly stated that any relevant service that is wholly ancillary to the provision of a designated service provided by a designated non-financial business or profession is exempt from the operation of the AML/CTF Act. Further, if a list such as that which appears in Paper 2 on p 8 is to be used by AGD for illustrative purposes as part of future consultation documents or in explanatory memoranda, we suggest preceding it with an explicit statement referring to the ancillary services exemption and explaining that the tasks are not independent triggers but may be components of an entity's overall service offering when *preparing for or carrying out transactions for their client to buy or sell real property*.

109. We also agree with the ML/TF risk assessment in relation to (and welcome the exclusion of):

- the receipt of property from a deceased estate;
- services related to residential tenancies;
- services related to property management; and
- services related to leasing of commercial real estate.

110. In relation to deceased estates, the removal of the word 'transfer' as urged above would be consistent with this exclusion.

111. We note that residential tenancies and commercial leases are to be excluded. For clarity (and because there would not appear to be any appreciable adverse ML/TF consequences)[62] leasing itself should simply be excluded.

[60] Paper 2, p 7 and see [71] of this submission.
[61] Paper 2, p 8.
[62] A (short-term) holiday caravan park lease, for example, might not be either a residential tenancy or a commercial lease but poses no appreciable ML/TF risk.

112. Licences should also be excluded along with leases. Leases and licences are kindred property rights with licences only less commonly issued. They tend to be used for less significant assets where, for example, a lease would not necessarily be the appropriate legal vehicle to achieve a client's aims. Rights over a car space are an example of a proper subject of a licence. On balance, we consider that if any risk attaches to leasing (which we do not consider to be the case), still less does it attach to the grant of a licence and any exemption for leases should be extended to licences.

113. In addition, and on the same risk-sensitive basis, services related to grants of easements, covenants, profit a prendre, and exclusive use by-laws should be excluded.

114. Additional, appropriate risk-based exemptions are transactions already enumerated in the LCA phase one submission. These include where the purchase is fully funded by a licensed financial institution or settlement funds are solely coming from within the Australian banking system, and for transactions where the incoming proprietor:

    (a) is the Commonwealth, state or local government, or a statutory authority;

    (b) is a member of an entity already regulated under the AML/CTF Act (for example, a mortgagee financial institution taking possession of a property); or

    (c) is a listed domestic company.

115. The exemptions above are consistent with the exemptions in the NZ AML/CFT (Exemptions) Regulations. New Zealand has recently concluded a statutory review of its primary AML/CFT statute and is working hard to tailor its provisions (especially for newly regulated sectors) to apply a genuinely risk-based approach. Other exemptions of the NZ AML/CFT (Exemptions) Regulations, and particularly reg 24AB and reg 24AD, should be adopted at a minimum. More generally, the lessons from New Zealand's calibrated exemptions (which followed upon and sought to remediate the effects of rushed, blanket legislation) should be carefully understood and applied.

116. Finally, we refer to our observations in paragraph [65] above. The regime should not apply to an entity when a transaction does not proceed. In particular, it should be clarified that advice given to a client who is intending to attend an auction (which could be urgently required) does not constitute preparing for a transaction and so does not fall within this proposed designated service. This is because while the client is preparing to bid the preparation *for the transaction* will crystallise only once the bid is successful (and will not so crystallise where the client is unsuccessful). Once it crystallises, the practitioners' due diligence obligations will commence. The provision proposed in paragraph [67] would cover this scenario.

Proposed designated service 2

> *Preparing for or carrying out transactions on behalf of a person, to buy, sell or transfer legal entities in the course of carrying on a business. The customer is the person.*

117. The VAR found that the transactions contemplated in proposed designated service 2 typically involve a financial institution and/or the use of a solicitor's trust account.[63] As such, this proposed designated service represents a significantly mitigated activity. In the LCA phase one submission[64] the Law Council proposed that the definition be modified so that the sale of an individual business for threshold consideration of less than $20,000 does not amount to a designated service. The manner in which the service is defined would need to be adjusted to reflect the difference between a business and the legal entity that operates it. However, without the introduction of a monetary threshold, the small end of the market will be made subject to the full suite of AML/CTF obligations at a disproportionately high cost. As with the other exemptions sought in accordance with a risk-based approach, the threshold exemption must be clearly articulated in the statute as part of the definition of the service itself. This mechanism aligns with the current policy intention to move many existing exemptions from the AML/CTF Rules to the AML/CTF Act. It would also provide appropriately strong legislative support for the risk-based approach.

118. AGD's proposed drafting, set out for reference above, departs from the FATF Recommendation in two respects. The Law Council has no principled objection to departing from the words of the FATF Standards provided the reasons are clear and sound. The two differences are: the replacement of business entities (in the FATF Standards) with legal entities; and the addition of 'transfer', where FATF specifies only buying and selling. We understand from helpful clarifications made during roundtable discussions that the term legal entities has been proposed as a replacement for companies (in proposed designated service 4) in order to encompass trusts, partnerships and other legal entities (to which a similar ML/TF risk may attach for the purposes of that activity). AUSTRAC personnel have explained that 'person' is defined in the AML/CTF Act to include an individual. In order to exclude individuals but still capture other legal persons, the term 'legal entity' has been introduced. We assume that the same rationale applies equally to the substitution of the term in this proposed designated service.

119. The net result of these changes however in the context of proposed designated service 2, is that while the FATF Recommendation contemplates mitigation of the risk of a *commercial* activity, the inclusion of 'transfer' together with 'legal entity' could mean that a wide range of entities transferred for no consideration would appear to bring a solicitor within the regime. For example, a legal entity could be transferred pursuant to the settlement of legal proceedings or in administration of an estate. As the VAR noted, buying and selling business entities was a 'commonly reported activity' including where the practice type involved estate administration.[65] A legal practitioner who acts for the client to ensure a transaction is lawful and takes effect in order to settle legal proceedings or in the administration of an estate faces

[63] The VAR found that buying and selling business entities is 'a commonly reported activity for law practices of all sizes and in all 8 jurisdictions where the practice type involved a general practitioner, a commercial specialty or estate administration. Transactions often involved use of solicitors' trust accounts' at [99]–[100]; and banks at [60].
[64] At [61].
[65] VAR at [99].

no measurable ML/TF risk. The activity should not be a designated service in these contexts.

120. If the FATF Standard is to be transposed into legislation, we suggest reversion to the wording used in the Standard and, at a minimum, the omission of 'transfer'. We note further that the examples provided on p 9 of Paper 2 read on their own could capture advisory work as distinct from acting in a manner which assist with actually giving effect to a transfer (for example, valuations 'prior to a transfer'). We refer to and reiterate the suggestion in paragraph [67] as to how to deal with work that may (or may not be) preparatory to a transaction, for legal practitioners.

121. If 'transfer' is not removed, clear statutory exemptions are warranted on a risk-based approach, to ensure that transfers undertaken in connection with legal proceedings, in estate planning, and in the administration of an estate are not captured.

Proposed designated service 3

Receiving, holding and controlling or disbursing

- *money (other than sums paid as fees for professional services)*
- *accounts*
- *securities or securities accounts*
- *digital assets (including private keys), or*
- *property*

on behalf another person, in the course of carrying on a business, but excluding:

- *pre-payment for good and services provided by the business*
- *property management activity, and*
- *prescribed disbursements.*

The customer is the person.

122. We noted in the LCA phase one submission that the prefatory phrase on p 22 of the 2023 Consultation Paper, 'lawyers when they prepare or carry out transactions for clients …' implied the need for an underlying transaction separate from a trust account inflow and payment. In that submission, we sought clarification that the mere fact of maintaining a trust account would not bring a law practice into the scope of the AML/CTF Act if it did not otherwise provide any designated service.[66]

123. That clarity appears to have been provided, as the proposed designated service makes no reference to the need for a separate transaction. Instead, AGD is seeking to give effect to the position set out above by listing the payments (currently termed 'prescribed disbursements') that are made into and out of trust accounts of firms whose ML/TF exposure is nil or effectively nil, because they are not transactional lawyers. This would include employment law firms, personal injuries and other litigation firms, boutique planning and environment practices, estate planning and administration practices and media law firms.[67]

[66] At [47].
[67] Many general practices and sole practitioners provide services across a range of practice areas so that references to these practice areas above should also be taken to be a reference to a part of a law practice.

124. So that it has the intended effect, we strongly support the incorporation of the list of prescribed disbursements in a regulation and urge AGD to ensure that the list is comprehensive. In addition:

(a) Payment for goods and services provided by the business should not be limited to pre-payment. Professional fees may be paid on the conclusion of work and upon issue of an invoice.[68] While payment in arrears in this way does not require that a trust account is used, practices do commonly use the trust account rather than the general account for this purpose, which is entirely appropriate. The proposed exclusion, accordingly (for legal practitioners), should refer to payment in place of pre-payment.[69] 'Prescribed payments' may be a simple alternative. The bullet-point list of entities on p 11 of Paper 2 could be preceded by 'payments to and from' rather than simply 'to'. This would correctly capture licensed insurers, for example, from whom payments are *received* upon resolution of personal injuries proceedings (not disbursed to).

(b) The phrasing of the exclusion should make clear that it applies even when it is not necessarily the client (or 'customer') making the payment. It is common for law firms to receive money from third parties, including insurers, in satisfaction of a liability to the client (for example, a costs order in litigation) and to then use that money to pay the firm's existing or future professional fees and/or disbursements in accordance with the instructions of the client. AML/CTF obligations should not be triggered in these circumstances.

(c) The proposed inclusion of payments that are wholly ancillary to a service that is not a (proposed) designated service is sensible and proportionate except for the proposed criterion whereby the exempted service-provider payer (or payee) must carry out business in Australia. If this limitation were retained, overseas experts, consultants and suppliers of outsourced services from other countries would be excluded apparently without any justification based on the level of ML/TF risk. The condition is unnecessarily limiting and does not reflect the global nature of practice, especially that of larger law firms in Australia whose practices are often international and whose AML/CTF mitigation controls are strong.[70] We seek that the geographical limitation be removed.

(d) Other payments to be included are:

- escrow service payments;
- mediation costs (including to a third-party mediator);
- arbitration costs;
- costs for consultants to set up and run paperless hearings;

[68] We are aware that false invoicing exists in other contexts as a money-laundering typology. We do not, however, consider this to be a real risk in the context of the legal profession. False invoicing assumes a witting accomplice and a practice that is designed to hoodwink a lawyer (or other target) whereas it is the lawyer who issues the invoice in the legal profession.

[69] The term 'prescribed disbursements' will need to be reconsidered because in order to give effect to the intended outcome, payments made into as well as out of (disbursed from) a trust account will need to be excluded.

[70] VAR, Executive Summary at paragraph (r)(ix) finding that '[i]n very large law practices, sophisticated client due diligence and approval processes have been established and are applied, up to the levels of CDD required by European countries, as part of a global standardisation of policies, processes and controls to identify and manage financial and compliance risk, to manage conflicts of interest, assist with business strategy and to manage reputational risk'.

- class action fees, such as fees to issue notices to class members;
- witness and expert fees and associated outlays (including where greater than $1,000);
- payments from litigation funders;
- money held in connection with a dispute, pending settlement of the dispute;
- all other payments made in connection with, including preparatory to, the institution, carriage or resolution of legal proceedings;
- money held as a deposit under a contract for the sale of land or option agreement;
- charges for title searches and other property and legal entity search fees;
- other payments to local councils (for example, application fees for town planning/development applications);
- money held in connection with a final payment in a sale of business;[71]
- amounts retained in relation to a contractual warranty; and
- payments made by and to reporting entities under the AML/CTF Act.

125. The Law Council will continue to work on providing listed payments in the coming fortnight in consultation with constituent bodies, but notes that given the consequences that will flow from the inadvertent omission of a category of payment, reference should in any case be made to payments by category along the lines of 'money held in connection with' or 'payments made in connection with', to limit the risk of unintended consequences.

126. The VAR found that legal practitioners appear to hold client assets only 'in very limited circumstances, typically in connection with the administration of estates, or as a special arrangement for a long-standing client, for a limited period of time'.[72] We note, as to managing client 'valuables' as a class of assets, legal practitioners are reluctant to and generally avoid holding cash or valuables[73] and comply with reporting requirements in relation to cash. However, estate planning and the administration of estates is a core practice area for many small and medium-sized practices, with little to no ML/TF risk posed by these services.[74]

127. In the same way that 'property management activity' is to be defined and excluded, estate planning and administration should also be excluded (for the reasons set out above and in paragraphs [119] and [123] above) as follows:

- on behalf another person, in the course of carrying on a business, but excluding:
  - pre-payment for good and services provided by the business;
  - <u>payment for services provided by a law practice;</u>
  - property management activity;
  - <u>estate planning and administration undertaken by a law practice; and</u>
  - prescribed disbursements.

[71] For example, a final stock valuation.
[72] VAR, Executive Summary at (i), see detail at [82].
[73] VAR, see [82] for details.
[74] 'Deceased estates offer limited scope for ML/TF typologies due to the necessity of a death having occurred': VAR, Executive Summary, subparagraph (g)(iii) (p 9 n 34) and see [96].

Proposed designated service 4

> *Preparing for, or carrying out, or organising transactions for contributions for the creation, operation or management of legal entities, on behalf of a person in the course of carrying out a business. The customer is the person.*

128. In the LCA phase one submission,[75] we highlighted the risk of inadvertently capturing the following activities which would be highly disproportionate to the ML/TF risks they pose:

    (a) court-supervised schemes of arrangement under the Corporations Act;

    (b) capital raising, merger or acquisition by a domestic listed corporation;

    (c) advising directors on their legal obligations and duties;

    (d) holding company meetings;

    (e) auditing accounts and financial reporting;

    (f) taxation advice;

    (g) reporting and compliance obligations; and

    (h) acting in relation to workplace health and safety and workers' compensation obligations.

129. Paper 2 notes that 'the determining factor of this proposed designated service is whether the reporting entity has control over the flow of client money, accounts, securities or security accounts, other assets or property.'[76] This is reassuring, but this clarification needs to be given statutory force to create an environment of certainty.

130. As was the case for proposed designated services 1 and 2, many readers of the consultation papers have expressed concern lest the tasks mentioned on p 12 of Paper 2 (for example, to assist clients by advising on loans) should independently constitute the provision of this designated service (without the practitioner having carriage of the transaction). We reiterate submissions made in paragraphs [60]–[69] above as to the need to ensure a direct link to the transaction, by excluding advice work and clarifying that, where a legal practitioner has commenced to provide legal services and subsequently receives instructions to have carriage of a transaction that is a designated service (otherwise than on an occasional basis), the requirement to have an AML/CTF program and to apply client due diligence pursuant to it arises only upon receipt of those latter instructions.

131. If the practitioner does have instructions to give effect to the transaction, and the transaction is not in cash, a risk-based measure that could appropriately allocate the regulatory burden would be to introduce to this proposed designated service a monetary threshold of $5,000 for the value of the transaction. Such a threshold would deal with circumstances for the profession where not only would the ML/TF risk be low, but the legal fees received by the practice for these smaller transactions would be minimal. For the cost of undertaking the AML/CTF due diligence on the

[75] At [56].
[76] p 10.

transaction to exceed the fees earned would be to risk creating an access to justice deficit and adversely affecting communities that may already be underserviced.

Proposed designated service 5

> *Formation, creation, operation or management of a legal entity (excluding a testamentary trust), on behalf of a person, in the course of carrying out a business. The customer is the person.*

132. We note and welcome the exclusion of testamentary trusts on the grounds of low or nil ML/TF risk.

133. In the context of a slightly different formulation of this designated service, the LCA phase one submission[77] highlighted the risk that this proposed designated service may inadvertently capture:

    (a) advising trustees on their legal obligations and duties;

    (b) holding meetings of members;

    (c) auditing accounts and financial reporting;

    (d) providing taxation advice;

    (e) reporting and compliance obligations; and

    (f) changing trustees.

134. Unfortunately, this uncertainty has not been dispelled. In fact, further confusion has arisen as a result of the commentary that now accompanies the formulation of the service. For example, the references to 'drafting' and 'reviewing' in the first and second example points on p 12 of Paper 2 are so wide as to potentially capture pure advisory work performed by solicitors or barristers. Together with the uncertainty in relation to the activities listed above, this only underscores the need for a clearly stated statutory exemption for advisory work performed by legal practitioners. The word 'preparing for' should also be omitted from the relevant designated services. Attention to this matter is now urgently required as we note that the designated service has been redrafted following last year's consultation without addressing these concerns.

Proposed designated service 6

> *Acting as, or arranging for a third person to act as*
>
> - *a director or secretary of a company,*
> - *a power of attorney for a legal entity,*
> - *a partner of a partnership,*
> - *a trustee of an express trust, or performing the equivalent function for another form of legal entity, but excluding the executor or administrator of a deceased estate, or*
> - *a similar position in relation to other legal entities*
>
> *on behalf of another person in the course of carrying out a business. The customer is the person.*

[77] At [57].

135. We explained our concern in the LCA phase one submission that the phrase 'arranging for a third person to act' might capture drafting or reviewing of documentation in connection with this designated service, such as the drafting of a power of attorney or a document appointing someone as director or secretary. We sought further clarification as to the breadth of this proposed designated service to ensure that documents that solicitors draft and review daily are not inadvertently caught.

136. We reiterate this request for clarification and an appropriately drafted statutory exclusion for any ancillary work.

Proposed designated service 8

> *Providing a registered office address, principal place of business address, correspondence address or administrative address for a:*
>
> - *company*
> - *partnership, or*
> - *any other legal entity*
> - *on behalf of another person, in the course of carrying out a business.*

137. As to this proposed designated service, we raise the following question (noting that this is an activity infrequently undertaken by practitioners for their clients):[78] if a law practice were to permit its address to be used as the business address, correspondence address or administrative address for a family company or the trustee company of a family trust associated with one of the solicitors who owns or is employed in the law practice—not for reward, but reflecting the association of that person with the address—would that law practice be held to be providing this designated service? Would a barrister's chambers, in similar circumstances, be brought within the regime? While we assume that this type of private use of an address is not intended to be caught, clarification on this point is sought.

Other Issues Raised by the Proposed Preventative Measures

Data Collection and Retention

138. Depending on the detail of the rules and how prescriptive they are in the result, the tranche two package of reforms may require law practices to obtain and retain client data on a potentially significant scale. The retention of personal information such as identification documents is a serious data security concern for the profession, particularly in light of the growing prevalence of cyber-crime and the risk of data breaches.

139. As mentioned in paragraph [34] above, accredited private providers may not be permitted to enter the Digital ID market until November 2026. Given the sheer volume of data legal practitioners may be required to retain as part of their new obligations, consideration might be given to a process where such documents are only retained in the case of high-risk clients (as suitably defined). A complementary (or alternative) provision might be to relieve firms from the obligation to retain verification of identity documents.[79] Instead, the AML/CTF Act could stipulate that a document could be signed by a practitioner, or the firm could otherwise attest to the fact that the identity was verified, on a particular date, for a particular transaction. This would be consistent with the philosophy behind the new Digital ID laws and the

[78] VAR at [97].
[79] The retention of documents can generate a risk of cyber-attack.

sharing of information only on a selective basis rather than generating new repositories of data.

140. Clarity and consistency are important if records of client identity must be retained. Seven years corresponds rule 14.2 of the ASCR and is consistent with obligations to retain records under the electronic conveyancing framework.[80]

Enrolment with AUSTRAC

141. Legal practitioners who become providers of designated services under the reforms will need assistance to understand and navigate the requirements for AUSTRAC enrolment. The introduction of another regulator into an already complex regulatory framework will particularly affect smaller firms with fewer resources available to manage the change.

Education and Guidance Specifically Targeted to the Needs of the Legal Profession

142. Many small- to medium-sized firms will have to make nuanced decisions as to what constitutes their 'senior management' and the qualities and resources an AML/CTF Compliance Officer will need to effectively carry out their role. It will be imperative that AUSTRAC and AGD produce detailed, legal profession-specific compliance guidance, education, and templates to assist legal professionals—and especially, sole practitioners and small- to medium-sized firms—to meet their obligations. Continuing professional development will also need to be delivered to the profession well in advance of the regime being extended to the profession. Particular focus areas will include support for firms to develop appropriate risk assessment protocols and understand triggers for re-assessment of risk while the client relationship is on foot. Risk-ratings can be indicative rather than extensive in certain contexts. For example, a client incorporated in a jurisdiction where significant sanctions are imposed would be a high risk but it would be helpful to better understand in advance the degree to which AUSTRAC will issue guidance around risk parameters, or how legal practices should assess these and other risks in a manner that is deemed compliant.

143. Considerations particular to the legal profession will include making allowance for the fact that practitioners sometimes need to commence work or give preliminary advice prior to the matter being formally opened. There should be guidance provided to the profession on how to manage compliance including timing of client due diligence while still conducting an effective and competitive legal business.

AML/CTF Programs

AML/CTF Programs—Further Consultation is Required

144. AML/CTF Programs may be the key mechanism by which practitioners will demonstrate compliance with the outcomes stated in the amended AML/CTF Act. It will be critical to dedicate time and separate consultation to the potential content of such programs.

AML/CTF Programs—KYC

145. Based on the consultation papers and our roundtable discussions, we anticipate that Know Your Client (**KYC**) processes will be a feature of individual AML/CTF programs. We understand that reporting entities will be required set out in their

[80] ARNECC Model Participation Rules 'Guidance Note – Retention of Evidence,' p 2 https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-5-retention-of-evidence.pdf

programs how they intend to respond to the risks that their particular practices face. We understand that the features of such programs will be flexibility and an ability to give expression to existing mitigating factors in place, and to the practice's own risk appetite. Paper 2 has, however, alluded to a potential pitfall by singling out as an example the ARNECC Model Participation Rules Verification of Identity Standard as a way to meet one's client due diligence outcome. It may be that this is simply illustrative of one possible method envisaged by AGD to meet KYC outcomes. However, we point out that solicitors (for example, in New South Wales) undertaking a conveyancing matter may choose to satisfy the verification obligations under Rule 6.5.2 of the NSW Participation Rules[81] by taking 'reasonable steps' to identify the client, rather than applying the Verification of Identity Standard. The criteria for what constitutes a compliant program must be sufficiently flexible to allow means other than the ARNECC Verification of Identity Standard to satisfy AML/CTF requirements, if the solicitor so chooses in accordance with robust practices. In this example, it is important to also note that the Verification of Identity Standard has limitations, including that the verification must be conducted face-to-face and cannot be conducted over an audio-visual link. The Verification of Identity Standard for electronic conveyancing also requires the solicitor to retain copies of the client identification documents. The AML/CTF customer due diligence requirements (whether set out in a regulation, rules or in compliance guides to AML/CTF Programs) need to be cognisant of these and similar limitations and ensure that an overly prescriptive approach is avoided.[82]

146. It will also be necessary to ensure a solicitor is able to use the services of a reputable third-party such as Australia Post or MyGovID, to satisfy verification of identity requirements and other client due diligence obligations under the AML/CTF regime.

AML/CTF Programs—Cross-Border Consistency

147. We note that Paper 2 states that all members of business groups remain responsible for fulfilling their own obligations,[83] but suggest that the legislation should ensure that firms operating AML/CTF-compliant operations in jurisdictions outside of Australia should be able to use those same processes to be compliant under the Australian regime. Having a different approach for the same legal firm in every jurisdiction would create an additional and unnecessary administrative burden.

Confidentiality, Client Legal Privilege, Suspicious Matter Reporting and Tipping Off

148. Recognising that the Law Council and AGD have been engaged in discussions in relation to client confidentiality and client legal privilege during the phase two consultation period, we refer to paragraphs [95]–[173] of the LCA phase one submission and rely on those detailed submissions without reproducing them here.

[81] NSW Participation Rules for Electronic Conveyancing, Version 7 https://www.registrargeneral.nsw.gov.au/__data/assets/pdf_file/0003/1286751/NSW-Participation-Rules-Version-7.pdf.
[82] While we appreciate the importance of client identity verification, we note that, occasionally, clients have difficulties in producing sufficient identity documentation or being able to present this documentation in person to a solicitor, particularly in rural or regional areas. This may pose a problem, particularly for small law practices in those areas.
[83] Paper 2, p 17.

149. The cornerstone of our concern arises from the fiduciary nature of the relationship between the legal practitioner and their client. To require the practitioner to report on their client and not to tell the client, but to continue to act for them, as proposed, is an untenable disruption to the fiduciary relationship. To protect the lawyer-client relationship, and to address this issue, the Law Council submits as set out below.

150. Legal practitioners should not be required to disclose confidential or privileged information.[84] To avoid any doubt, an express statutory protection should be introduced to the following effect:

> *Legal practitioners and law practices are exempt from obligations under this Act to provide information or documents which are the subject of client legal privilege, or which are confidential to a client and acquired by the legal practitioner or law practice during the client's engagement.*

151. AUSTRAC must not be permitted to collect confidential information from legal practices or share such information with other agencies.

152. Legal practitioners should be exempt from the suspicious matter reporting obligation.[85]

153. In the alternative, and for consistency with AGD's assurance that the AML/CTF Act will not abrogate client legal privilege,[86] if a suspicious matter reporting obligation is to be introduced for legal practitioners, the Act must expressly state that it does not apply where client legal privilege applies. While the exemption set out in paragraph [150] above would have this effect, if it is not adopted, an exemption with specific reference to the suspicious matter reporting obligation to state that it does not apply where the suspicion arises from information or communications that are subject to client legal privilege, is necessary. In these circumstances, a practitioner's normal professional obligations with respect to declining or ceasing to act would apply. An exemption from s 123 of the AML/CTF Act is also required so that practitioners can fully comply with their professional obligations (for example, terminating the retainer) without risking committing the offence of tipping off.

154. In addition to the point in paragraph [153] above, if a suspicious matter reporting obligation is to apply at all, it is necessary for an obligation to be specially drafted to take account of the existing professional obligations that apply to legal practitioners. In particular, it should be drafted so that:

    (a) the degree of concern that currently triggers (permissive) provisions for reporting information under state and territory professional obligations is mirrored by the definition of the suspicious matter reporting obligation trigger. A mere suspicion on reasonable grounds is too low a threshold to be workable for legal practitioners. This is because legal practitioners have a very important duty to counsel their client to dissuade them from pursuing a course of conduct that is likely to be unlawful, and this duty is inconsistent with the obligation to report on a mere suspicion on reasonable grounds (and continue to act, if only in the attempt to dissuade the client and seek lawful instructions);

[84] LCA phase one submission at [154]–[169].
[85] LCA phase one submission at [95]–[173].
[86] Paper 2, p 23.

(b) in contrast to the threshold provisions in s 41(1) of the AML/CTF, which are broadly drafted, the obligation would need to be drafted so that it could not apply merely to contact made by a person before engagement as a client (for example, where a person emails a legal practitioner 'cold' in a spamming fashion which raises suspicion); and

(c) if the obligation to report is to be mandatory, if would be inappropriate for it to be a civil penalty provision.

155. Section 242 should not be repealed. It should be retained and supplemented by the express provision sought in paragraph [150] above and also with specific protections that reference ss 148, 167 and 170 (or their equivalents) as set out in the LCA phase one submission.[87]

156. AGD's proposed definitional approach that would 'simultaneously allow the concept of LPP under the regime to develop alongside common law without being constrained by its treatment under the Act' assumes the 'development' of client legal privilege 'under the regime' (that is, parallel to) or 'alongside' the common law.[88] On reflection, the Law Council considers that it is necessary to entirely eliminate any risk of a new concept of client legal privilege emerging that diverges from the common law and state, territory and Commonwealth Evidence Acts. The Act should not seek to define client legal privilege.

157. A provision to the effect of s 77 of the *Anti-Money Laundering and Countering Financing of Terrorism Act* 2009 (NZ) should be introduced:

> **Section 77 Protection for reporting entities, officers etc, acting in compliance with this Act**
>
> 77 No reporting entity, or person who is, or has been, an officer, an employee, or a member of the governing body of the reporting entity, or person appointed under section 56(3) is criminally or civilly liable for any action taken in order to comply with this Act or regulations if the action—
>
> (a) was taken in good faith; and
>
> (b) was reasonable in the circumstances.

158. The Law Council does not consider that there is any need for a mechanism to resolve disputes over claims of privilege and in particular, the mechanism outlined on p 22 of Consultation Paper 2 has the potential to place pressure upon legal practitioners to unintentionally waive their client's legal privilege. This has been outlined in detail in the LCA phase one submission. There has been no suggestion that legal practitioners generally make spurious claims of client legal privilege and there is no evidence at all to that effect. Regulators may not always agree with a claim made by a practitioner. But that does not mean either that the claim is spurious or that the practitioner has done anything other than take proper steps to protect their client's interests. The proposed AML/CTF regime is not directed to 'bad actors' in the legal profession but to prevent those who are at risk of being unwittingly exploited from being so misused.

[87] At [135(b)] and [135(d)].
[88] Paper 2, p 21.

159. The LCA phase one submission did raise the prospect of a mechanism (not a general disputes mechanism) to deal with circumstances where the legal practitioner faced with a warrant may inadvertently waive privilege.[89] The mechanism suggested by the Law Council was expressly intended to be limited to searches under warrants and would have these features:

    (a) all documentation seized pursuant to a search power under a monitoring warrant would be 'sealed';

    (b) a legal practitioner would be given a reasonable opportunity to review the seized material and obtain client instructions in order to determine whether to make a claim of legal professional privilege;

    (c) any material subject to a claim of privilege would be provided to a court for determination of whether the material is in fact privileged; and

    (d) no copies or examination of that material would be permitted prior to the court making that determination.

160. In contrast, the mechanism that has been proposed in the consultation paper is mandatory, extends beyond the circumstances of compulsion under warrant, pre-empts a court's determination, and may itself place pressure on a practitioner to waive their client's privilege. It is also inconsistent with other government agencies' approaches to client legal privilege. The Law Council is participating in a whole of government review of the management of claims of client legal privilege led by Treasury and AGD. Any disputes mechanism, should one be required, should be limited to AUSTRAC's exercise of its audit and investigation functions and be consistent with the whole-of-government review.

161. As mentioned above, an exemption from s 123 is required for legal practitioners. The terms of s 123 are so wide as to include circumstances where a person has not filed a suspicious matter report but is required to do so. It does not matter why they didn't file a report (it could be as a result of an error made in good faith). In turn, the conduct that constitutes tipping off under s 123 could include conduct from which the person (who should have been the subject of the report) could reasonably infer that a report was required. It is not clear, but there is a risk, that practitioners who advised their client (in accordance with their duty) that their proposed (or previous) conduct is unlawful in order to counsel them to take lawful action, could, in so doing, commit the offence of tipping off. Legal practitioners are officers of the court and the ability to freely communicate with their client in relation to the lawfulness of their client's conduct is fundamental to their role. The terms of s 123 are inconsistent with the ability of legal practitioners to discharge their professional responsibilities, and with the important role that legal practitioners play in upholding the administration of justice.

Response to Paper 5 – As to Impacts upon the Legal Profession

Defining the Business Relationship

162. We note the observations made by the Financial Services Committee in paragraph (g) of its submission. For legal practitioners, the definition requires more clarity as the 'element of duration' is typically associated with an engagement for legal service. Accordingly, this does not provide much guidance—yet the concepts have

[89] LCA phase one submission at [144].

important consequences for when obligations arise and potentially the level of due diligence required.

163. If the definition is seeking to emphasise a distinction between enduring relationships and one-off transactions or single matter, then this aspect of the definition should be strengthened.

164. Legal practices provide diverse services, particularly in more remote communities and it should be a policy intention that practices should continue to be able to offer a range of services especially in regional communities, sometimes on an occasional basis.

The Requirement for Independent Audit—Avoiding Duplication Where There is Overlap

165. Legal practices are subject to regular audits[90] for compliance with stringent rules that are particular to the legal profession, including the audit of trust accounts. The Consultation Paper foreshadows a requirement for a further audit with a frequency determined by the entity's risk profile (with a potential minimum frequency of every four years).[91] For legal professionals, this should be able to be incorporated in trust account audits at appropriate intervals.

'Keep Open Notices' Should Not Be Capable of Being Issued to Legal Practices

166. Paper 2 proposes that an eligible law enforcement agency could issue a 'keep open notice' without requiring approval from AUSTRAC in circumstances where a senior delegate within the relevant agency reasonably believes that maintaining the provision of a designated service to the client would assist the investigation of a serious offence.

167. It is totally inappropriate to issue a 'keep open notice' to a legal practitioner, an officer of the court. We note AUSTRAC's observations made during our roundtable meeting to clarify the fact that keep open notices offer permission rather than imposing an obligation. This is not a distinction that matters in these circumstances because the invitation would act to place pressure on the practitioner to continue to represent the client in circumstances where the lawfulness of the client's conduct is being questioned. The ethical decisions facing a practitioner in these circumstances are exacerbated, relative to other potential reporting entities, by their strict duty to maintain client confidentiality and not to waive the legal privilege of the client. This dilemma plays out in circumstances where the client's legal privilege potentially remains in place given that the threshold of suspicion has, conceivably, not been exceeded.

168. Keep open notices should not be able to be issued to a legal practice.

[90] See Appendix 1, paragraph (c); VAR, Executive Summary at paragraph (e) and see [105]ff.
[91] Paper 5, p 11.

Response to Paper 4

169. This part of the submission is in response to the questions posed in Paper 4. It has been prepared by the following Committees of the Business Law Section of the Law Council of Australia:

- Digital Commerce Committee (responses to questions b., c. and d. only); and
- Financial Services Committee (responses to all questions).

170. The Digital Commerce Committee focuses on commercial and government/regulatory transactions with business and consumers using digital and related technologies and platforms including digital marketing, procurement, supply and service delivery, contracting, authentication, signing and consents and monitors associated emerging legal issues.

171. The Financial Services Committee monitors developments in the laws and regulations governing providers of financial services including banks and other financial institutions, wealth management advisers, fund managers, payment service providers and other intermediaries in the financial system.

172. Each of the Committees monitors developments in Australian anti-money laundering laws impacting their respective industries.

173. A reference in this document to the "Law Council" reflects the views of the Financial Services Committee or both of the above Committees, as relevant.

Expanding the range of regulated digital currency related services

a.	**Do you consider that the current term and associated definition of 'digital currency' is appropriate? What alternative terms outside of 'digital asset' might be considered, and why?**

174. The Law Council considers that the current definition of "digital currency" in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (the **AML/CTF Act**) is not fit for purpose and ought to be changed because the current definition:

(a) does not accommodate the requirement of being capable of being used "for payment or investment purposes" in accordance with the Financial Action Task Force (**FATF**) definition of "virtual asset"; and

(b) is too narrow because the attribute of being "interchangeable with money" may not capture all types of digital assets that ought to be captured by the definition.

175. The Law Council agrees that the term "digital asset" would be more appropriate than "digital currency".

176. The Law Council recognises that policy drivers of certain aspects of AML/CTF regulation and financial services regulation will not necessarily be the same in every instance. However, the close connection between AML/CTF regulation and financial services regulation more generally is specifically recognised in paragraph 4 of the Interpretive Note to Recommendation 15 of the FATF Recommendations (New Technologies). The Law Council submits that it would be desirable for key definitions utilised in AML/CTF regulation to mirror the definitions proposed to be

used in financial services regulation, to the fullest extent that this is consistent with the policy underlying AML/CTF regulation. In particular, when defining "digital asset" for AML/CTF purposes, it would be helpful to have regard to the work being done by Treasury and the federal government generally on the definition of "digital asset" for the purposes of regulating digital asset platforms under the *Corporations Act 2001* (Cth) (the **Corporations Act**).

177. In line with the comments made above, the Law Council recommends that "digital assets" for AML/CTF purposes be defined as digital representations of value which:

    (a) are treated as financial products under the Corporations Act; or

    (b) represent non-financial entitlements (e.g., to tangible and intangible collectibles) which are "financialised" by being available via a digital asset facility that engages in activities, and create risks that mirror those of existing financial services, as described in Treasury's October 2023 Proposal Paper on Regulating Digital Asset Platforms[92].

178. If ultimately, contrary to the Law Council's recommendation above, the respective definitions of "digital asset" for AML/CTF purposes and the Corporations Act are not aligned, then the Law Council considers that it may be more appropriate to use a distinct term (such as "virtual assets", in line with the FATF expectation) to avoid confusion which could arise if the term "digital assets" was used for both Corporations Act and AML/CTF purposes yet had a different meaning in each respective context.

b. How should the scope of NFTs subject to AML/CTF regulation be clarified?

179. The Law Council notes that NFTs can record entitlements to anything.

180. The Law Council believes it is important to ensure that AML/CTF regulation extends only to those NFTs which operate as a means of payment or are an investment instrument. In essence this would involve applying a test as to whether the NFT:

    (a) functions as if it were money; or

    (b) is characterised as a financial product.

181. The Law Council further notes that, if the FATF Recommendation 15 definition ("a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes") were to be adopted for this purpose, then most NFTs would not be subject to AML/CTF regulation, as unique digital assets are not primarily used for payment or investment. It is important, however, to note that payment used to acquire/dispose NFTs will be covered.

182. If the above FATF definition is not adopted, then the Law Council submits that care should be taken to avoid regulatory duplication (e.g., NFTs representing real-world assets, where the payment for those assets is already covered) and imposing regulatory constraints on functional use (e.g., NFTs for 'back end' applications such as supply chain management platforms).

[92] See https://treasury.gov.au/consultation/c2023-427004

c. Are there any services that may be covered by the term 'making arrangements for the exchange…' that should not be regulated for AML/CTF purposes?

183. The Law Council notes that there is a proposed amendment to the existing designated service under item 50A of table 1 of section 6 of the AML/CTF Act. The proposed change is that the existing designated service would be expanded to include "making arrangements ….".

184. Paper 4 states that "making arrangements …" is intended to capture "the participation in, and provision of, financial services related to an issuer's offer and sale of a digital asset".

185. The Law Council does not believe that there is sufficient clarity in Paper 4 as to the scope of additional activities which are intended to be regulated. In particular, "making arrangements for the exchange" is very broad. The Law Council notes that, based on the definition of "arrangements" in section 5 of the AML/CTF Act, "making arrangements" would appear to cover "a scheme, plan, proposal, action, course of action or course of conduct to enable a customer to receive a designated service".

186. The Law Council is concerned that the lack of clarity and unnecessary breadth could have unintentional consequences, including regulating activities which were not intended to be within scope.

187. For example, while Paper 4 suggests that the change is in respect of the "issuer's" offer and sale, by including this in item 50A, the proposed amendment appears to have the consequence of regulating the arranging of secondary sales of digital assets, whereas the FATF expectation only covers the issuer's offer and issuance (and would be covered in the proposed new designated service described below).

188. The Law Council therefore recommends that the wording be revised to ensure that only those activities which are intended to be regulated fall within the scope of the item 50A designated service.

d. Is the proposed language around custody of digital assets or private keys clear?

189. In the current AML/CTF Act the concept of a custodial or depository service includes, but is not limited to, custody of financial products under the Corporations Act, and it excludes those custody services which are excluded from being a custodial or depository service under the Corporations Act.

190. To the extent that, in the future, a digital asset constitutes a financial product for the purposes of the Corporations Act, then the Law Council considers that a custodial service for the digital asset should be subject to the AML/CTF Act. If, in the future, there is a new custody arrangement for digital assets proposed to be regulated as a financial product in the Treasury consultation mentioned in the response to question a. above, then the Law Council submits that the definition in the AML/CTF Act should also capture that custody arrangement.

191. If a private key were property (which is doubtful) then it would also be captured by the existing definition of custodial or depository service in the AML/CTF Act. It is unclear that an intangible key is property and so, if custody of the key is intended to be a designated service, then it will be necessary to revise the definition of "custodial or depository service" in the AML/CTF Act to achieve this.

192. Further, the Law Council submits that the clarity in the drafting with respect to custody should be improved to ensure that:

    (a) arrangements under which a customer is merely provided with the technological means to take custody of their own digital assets are excluded; and

    (b) it takes into account situations where multiple actors may have an influence on the application of private keys to change the state of a blockchain, for example where a private key is "sharded" or a "multisig" arrangement is in place.

e. Does limiting proposed designated service 4 to businesses 'participating' in an issuer's offer or sale of a digital asset clarify the scope of included services?

193. It is proposed that designated service 4 would cover any service which is defined as a designated service in Table 1 of subsection 6(2) of the AML/CTF Act where the service is provided in the course of carrying on a digital asset business participating in the offer or sale.

194. The Law Council considers that:

    (a) the designated service should not be defined by reference to any other designated service in Table 1, because these may be difficult to apply to digital assets and such difficulty could cause confusion—rather, the relevant designated service should cover specified activities relating to digital assets); and

    (b) referring to a digital asset business *participating* in an offer or sale exacerbates this issue by failing to identify particular activities.

Streamlining value transfer regulation

f. Are there any services currently provided by financial institutions that fall outside the definition of 'electronic funds transfer instruction', but would be captured by the 'value transfer' concept?

195. The Law Council notes that, at present, a service that did not involve a transfer of "money" would fall outside the current definition of an "electronic funds transfer instruction". The current scope of the term "money" is unclear, but the Law Council considers that it is likely to be limited to something that is generally accepted as being used to discharge a debt or as a mechanism for payment. Even if a financial institution currently provides a means to transfer digital assets, the Law Council considers that it is unlikely to be a transfer of "money" except (arguably) for a small number of digital assets, such as Bitcoin or Ethereum, which may be accepted for payment of a debt.

196. The Law Council notes that, on one view, any asset that has a market value and is capable of transfer could, if transferred, involve a "transfer of value". It will therefore be important to specify which asset classes are excluded for this purpose.

197. The Law Council further notes that, as things currently stand, a service that did not involve a transfer of money "controlled" by the payer would fall outside the current definition of an "electronic funds transfer instruction". The Law Council considers that it is likely that, in the case of a direction by a borrower for disbursement of a loan or for payment from an account for which the ordering institution is not

contractually obliged to accept instructions for payment, money is not "controlled" by the payer. There does not appear to be any similar limitation in the proposed concept of a "transfer of value".

g. Is the terminology of ordering, intermediary and beneficiary institutions clear for businesses working in the remittance and digital asset service provider sectors?

198. The Law Council considers that the terms "ordering", "intermediary" and "beneficiary" institutions may not be clear for businesses working in the remittance and digital asset service provider sectors, but these are simply roles which need some form of definition.

199. The Law Council submits that, in the proposed new regime, whilst retaining the term "intermediary institution" for want of a better term, it might be clearer to replace the other terms as follows:

(a) replace "ordering institution" with "payer's institution"; and

(b) replace "beneficiary institution" with "recipient's institution".

h. Is the introduction of a limited designated service with appropriate exemptions the simplest way to clarify the transaction monitoring and risk mitigation and management expectations for intermediary institutions?

200. The Law Council considers that, if an intermediary institution is expected to:

(a) enrol with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**);

(b) adopt and apply an AML/CTF Program;

(c) conduct transaction monitoring; and

(d) report suspicious matters,

201. then the introduction of a limited designated service with appropriate exemptions is the most obvious feasible way to implement the obligations that the intermediary institution is expected to perform.

Updates to the travel rule

i. What flexibility should be permitted to address the sunrise issue or where a financial institution or digital asset service provider has doubts about an overseas counterparty's implementation of adequate data security and privacy protections? What risk mitigation measures should be required?

202. The Law Council considers that it is appropriate to require digital asset service providers to take a risk-based approach to determining whether to make value available to the payee for incoming transfers lacking travel rule information.

203. The Law Council submits that it would be helpful for AUSTRAC to:

(a) establish a materiality threshold for transfers in this category; and

(b) publish guidance, presumably based on FATF ratings, which would flag particular jurisdictions of concern, to guide digital asset service providers in making their risk-based determinations.

j. Do you consider that the existing exemptions for the travel rule are appropriately balanced?

204. The Law Council considers that the travel rule will need to be uniquely crafted to be fit for purpose in relation to transfers of digital assets. The balance of existing exemptions for the travel rule for payments seem unlikely to be relevant to digital assets.

k. Are there challenges for financial institutions reporting cross-border transfers of digital assets, including stablecoins, on behalf of customers?

205. The Law Council believes that institutions involved in cross border transfers of digital assets may struggle to report the information presently required for IFTIs because transfers to, say, a payee may require no more than a wallet identifier. In such circumstances:

(a) the identity of the payee may be difficult to ascertain; and

(b) it may not even be possible to tell that the payee is outside Australia.

l. Should the travel rule apply when transferring value incidental to a foreign exchange or gambling service?

206. The Law Council considers that, having regard to the nature of gambling services and the risks associated with them, the travel rule should apply to a transfer of value incidental to a gambling service.

Reforms to IFTI reports

m. What is the anticipated regulatory impact for smaller financial institutions and remittance providers in giving them primary responsibility to report IFTIs sent or received by their customers? Could this impact be offset by continuing to allow intermediary institutions to submit IFTI reports on behalf of smaller reporting entities, but with requirements for appropriate safeguards to ensure the accuracy and completeness of reports?

207. In the view of the Law Council, if a smaller financial institution has primary responsibility to submit IFTIs, the impact on the smaller financial institution can be offset by continuing to allow intermediary institutions to submit IFTI reports on behalf of smaller reporting entities. The Law Council considers that it would be reasonable to apply requirements for appropriate safeguards to ensure the accuracy and completeness of reports.

n. What should be the 'trigger' for reporting IFTIs? At what point is a reporting entity reasonably certain that the value transfer message will not be cancelled or refused and the value transferred?

208. The Law Council considers that, the payer's institution has taken steps to carry out a value transfer, and the value transfer is not cancelled or refused within a specified period, the IFTI reporting obligation should arise. The Law Council believes it would be helpful for both AUSTRAC and for industry if there was a straightforward mechanism provided within the IFTI lodgement platform to enable the party lodging the IFTI report to update its report at a later point if there was any subsequent change to any part of the information relating to it (e.g., corrected recipient account details).

o. What information should be required to be reported in a unified IFTI reporting template, covering both IFTI-Es and IFTI-DRAs?

209. The Law Council considers that a unified IFTI reporting template should have functionality to enable a lodging party to correct any information that is received about an IFTI after a report of the IFTI has been lodged.

p. Are there challenges with digital asset service providers reporting IFTIs to AUSTRAC as proposed?

210. The Law Council envisages that there will be some challenges with the proposal for digital asset service providers to report ITFIs to AUSTRAC because:

(a) necessarily the reports will refer to a number of digital assets rather than to monetary value;

(b) where the designated service is accepting an instruction to transfer digital assets, the beneficiary institution in another jurisdiction may not be regulated, and therefore it may be difficult for the digital asset service provider to assess and verify the beneficiary institution; and

(c) where the designated service is receiving a transfer of digital assets, the ordering institution in another jurisdiction may not be regulated and similarly it may be difficult for the digital asset service provider to assess and verify the ordering institution.

q. Would the proposed amendments to the BNI definition in the Act reduce the volume of reportable BNIs and regulatory impost on business?

211. The Law Council considers that the proposed amendments to the definition of BNI (bearer negotiable instrument) are helpful.

212. It would also be helpful to clarify that where there is an issue or transfer of rights to notes or bonds that are recorded only on an electronic register maintained in Australia by the issuer and:

(a) there is no physical instrument that is capable of delivery which evidences the rights; and

(b) rights could be transferred to a person offshore by the giving of instructions to the issuer by a subscriber or holder,

then there is no cross-border movement of a BNI.

Response to Paper 5

213. This part of the submission is in response to questions posed in Paper 5. It has been prepared by the Financial Services Committee within the Law Council's Business Law Section (the **Committee**) and reflects the views of the Committee.

AML/CTF programs

a.	**Under the outlined proposal, a business group head would ensure that the AML/CTF program applies to all branches and subsidiaries. Responsibility for some obligations (such as certain customer due diligence requirements) could also be delegated to an entity within the group where appropriate. For example, a franchisor could take responsibility for overseeing the implementation of transaction monitoring in line with a group-wide risk assessment. Would this proposal assist in alleviating some of the initial costs for smaller entities?**

214. The Committee generally supports the proposal to replace the concept of designated business group (**DBG**) with a concept that better reflects the various types of business structures in the financial services industry and submits that:

(a) simplifying the business group concept will facilitate greater information sharing between members of the business group and allow for appropriate group-wide risk management and sharing of AML/CTF obligations;

(b) the definition of "business group" will need to be carefully drafted to ensure that it is not confused with the well-established definition of "related entities'" in the *Corporations Act 2001* (Cth) or similar concepts;

(c) to the extent that the concept of franchisees is included in the definition of "business group", it should be made clear that this is only for the purposes of allowing for information and resource sharing between entities that support the purpose of the AML/CTF legislation; and

(d) liability under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (the **AML/CTF Act**)] and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (Cth) (the **AML/CTF Rules**) must only attach to reporting entities and must not be extended (deliberately or otherwise) to non-reporting entities in the business group, even if they are privy to suspicious matter reporting information or provide AML/CTF risk management related support.

b.	**The streamlined AML/CTF program requirement outlined provides that the board or equivalent senior management of a reporting entity should ensure the entity's AML/CTF program is effectively identifying and mitigating risk. To what extent would this streamlined approach to oversight allow for a more flexible approach to changes in circumstance?**

215. The Committee generally supports the proposal to streamline the AML/CTF program requirements and clarify the respective roles of the board, senior management and AML/CTF compliance officer.

216. With respect to the proposed clarification of the requirement to conduct a risk assessment, the Committee recommends that the requirement closely reflect the judgment of Perram J in *CEO of AUSTRAC v TAB Limited (No 3)* [2017] FCA 1296

as this is already a well-established industry practice. While having clarity on the role of a risk assessment and internal controls will benefit smaller reporting entities, having regard to the diverse and complex range of activities carried out by reporting entities, the Committee submits that care should be taken to ensure that the AML/CTF Act maintains a principles-based approach and avoid imposing overly prescriptive requirements.

c. Many modern business groups use structures that differ from the traditional parent- subsidiary company arrangement. What forms and structures of groups should be captured by the group-wide AML/CTF program framework?

217. The Committee notes that the Statutory Review of the AML/CTF Act conducted by the Attorney General's Department in 2016 found that the DBG structure does not align with how businesses structure themselves, particularly in relation to offshore operations, but retained a focus on corporate groups. The Consultation Paper proposes a broader concept, which would automatically extend to all related entities in a corporate group or other structure, including franchise arrangements. The heads of such business groups would be required to provide for:

    (a) the sharing of customer due diligence and other information between group members; and

    (b) arrangements whereby one member of the group may fulfill AML/CTF obligations on behalf of other members of the group.

218. The Committee supports the proposal to replace the current DBG concept with a concept of this nature. While this consultation question focuses on form and structure as the means to define the scope of a "business group", the Committee notes that the tools and techniques that may be used to structure business ventures are almost unlimited. The Committee submits that the "group" concept should be delineated using the concept of control rather than, or as an alternative to, ownership. For example, the current definition of "beneficial ownership", which relies on the concepts of ownership and control in tandem.

219. While this approach would mean the "group" concept is potentially very wide, the concept is enabling and would lead to a net reduction in the compliance impact on grouped enterprises by allowing for the AML/CTF Program implemented by the group to be designed to meet the needs of its members.

220. The Committee further notes that, if this proposed reform was implemented, the calculation of the AUSTRAC industry contribution levy ought to be revisited. The Committee considers that the current methodology under the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011* (Cth) (the **Industry Contribution Act**) does not sufficiently reflect the extent to which a leviable entity engages in the provision of designated services. Under the current arrangements, leviable entities with a large revenue base, of which only a small fraction may in fact derived from designated services, are required to make a financial contribution to the funding of AUSTRAC's operations which is significant, yet may be disproportionate to the designated services they provide (which may be limited in their scope and nature). This proposed reform, in extending the reach of a corporate group for this purpose, would serve to exacerbate this concern. Therefore, the Committee submits that the Industry Contribution Act should be amended to narrow the definition of "earnings" in the AUSTRAC annual determination to only cover earnings which are derived from the provision of designated services.

221. The Committee has made a related point in its response to question g. below, which notes circumstances in which the regime can apply to an entity which may only ever provide a designated service on a single occasion.

Customer due diligence

d. To what extent do the proposed core obligations clarify the AML/CTF CDD framework?

222. The Committee's response to previous consultation relating to the existing customer due diligence (**CDD**) framework supported the shift from prescriptive requirements set out in the AML/CTF Rules to a risk-based approach to these obligations. The proposals acknowledge that this remains a focus for the proposed reforms, however it remains unclear whether this has been sufficiently achieved.

223. The Committee notes that the proposed "standard CDD" process still appears to rely heavily on underlying rules, so to the extent that a reporting entity is unable to apply the simplified CDD process, it appears to the Committee the "standard CDD" process may not be materially less prescriptive than it is in the current framework. The Committee submits that a principled approach should be taken both when drafting the rules for the standard CDD process and for determining when a reporting entity may use the simplified CDD process.

224. The Committee notes the proposals which indicate a requirement to consider the risk profile of each individual customer and submits that this will not be appropriate in all circumstances. While provision has been made for consideration of classes of customers, it appears to the Committee to be presented on an exceptions basis. The Committee submits that the requirements should not be overly prescriptive, and that a reporting entity should be allowed to self-determine and justify the risk profiling approach to its body of customers.

e. What circumstances should support consideration of simplified due diligence measures?

225. The Committee submits that:

(a) the factors that a reporting entity is required to consider when determining which CDD approach to adopt for a customer or customer type should be principles based rather than prescriptive;

(b) the principles-based approach should not be limited to the required identification requirements;

(c) a reporting entity's risk assessment and adoption of appropriate risk-based measures should include determining the relevant risk level and corresponding identification requirements that suit its business;

(d) a reporting entity should be required to justify its initial and ongoing assessment by factors they consider relevant to its business; and

(e) industry groups should be encouraged to assist reporting entities by establishing factors and circumstances that support a simplified approach.

f. What guidance should AUSTRAC produce to assist reporting entities to meet the expectations of an outcomes-focused approach to CDD?

226. The Committee submits that AUSTRAC guidance should encourage reporting entities and industry groups to develop factors and risk frameworks that meet their risk profile. This will enable reporting entities to adopt measures appropriate for their industry in line with their peers.

227. While the Committee also supports the inclusion of safe harbour provisions, it should be noted that this can lead to reporting entities adopting these standards as their default (and prescriptive) position. The Committee considers that it would be preferable for industry groups to develop appropriate standards using a risk-based approach, allowing reporting entities to adopt an approach that corresponds with their risk profile.

g. When do you think should be considered the conclusion of a 'business relationship'?

228. The Committee notes that the concept of a "business" is an important element of a number of designated services. For example, making a loan is a designated service when the loan is made "in the course of carrying on a loans business". The concept of carrying on a business has a well-established meaning under the general law, generally incorporating elements such as those of repetition and continuity.

229. The AML/CTF Act modifies the general law to extend the concept of a business to a "venture or concern in trade or commerce whether or not conducted on a regular, repetitive or continuous basis". While the Explanatory Memorandum to the Act indicates that ancillary activities to the core business would be excluded from the meaning of "carrying on a business" when deciding what business was being "carried on", in AUSTRAC's view, the making of a single loan in trade or commerce will be considered a loans business, and an entity wishing to do so must therefore implement an AML/CTF Program. The Committee notes that this circumstance is common. Many corporate finance business structures involve the incorporation of a special purpose vehicle with the sole purpose of making as few as one large loan for the purposes of a single transaction. These entities do not trade, have no employees and do not carry out any other activities, yet they are treated as carrying on a loans business for the purposes of the AML/CTF Act.

230. See also the Committee's response to question c. above, which notes the potential disconnect between the amount of the industry contribution levy payable and the relative significance of the provision of designated services to a reporting entity's business operations.

231. The consultation paper states that the term "business relationship" is not defined, and proposes the following definition:

> *"a relationship between a reporting entity and a customer involving the provision of a designated service that has, or is expected to have, an element of duration".*

232. The Committee notes that a reporting entity would, on the one hand, be specifically brought into the AML/CTF regime on the basis that it is a "carrying on a business" even though it may only provide a designated service on a single occasion, while at the same time that business would not be subject to CDD requirements if the requisite element of "duration" is lacking. The Committee submits that this could create significant confusion because the scope of a business relationship may or

may not differ from the scope of a business transaction. A company may, for example have a single loan with a particular bank which embodies the bank's relationship with that customer. Transactions will be conducted in relation to the loan, and the loan is itself a transaction. Another company may not have any ongoing banking relationship with a particular bank but nevertheless have a regular practice of exchanging currency or carrying out some other banking transaction.

233. The Committee submits that the meaning of "carrying on a business" and the related concept of a "business relationship" should be consistent throughout the Act. The Committee notes that the Financial Action Task Force recommends looking at the substance of the entity's purpose. The end or conclusion of a business relationship should be defined sufficiently broadly to capture both the end of a formal legal relationship (such as the closure of an account) and the less formal systemic or repetitive practices that are sufficiently frequent and familiar to generate a mutual expectation between the parties to the relationship that the encounters or transactions on which the relationship is founded will continue. In the latter case, a relationship that lacks any formal legal foundation such as a contract could be said to end when the patterns of behaviour on which it is based change (i.e., become less frequent or regular) to the extent they lead one party or the other to reasonably conclude that further encounters or transactions are unlikely (or that any that do occur are motivated by other reasons) and accordingly that the relationship has ended.

h. What timeframe would be suitable for reporting entities to give a risk rating to all pre--commencement customers?

234. The Committee submits that five years would be a reasonable period.

Tipping off offence

i. Are there situations where SMR or section 49 related information may need to be disclosed for legitimate purposes but would still be prevented by the proposed framing of the offence?

235. The Committee generally supports the proposal to reframe the tipping off prohibition to clarify that reporting entities can disclose information for legitimate purposes and for private sharing of information in future. The Committee acknowledges that, on a practical level, it will be essential for a reporting entity to have appropriate controls in place to ensure that information is only shared for legitimate purposes. The Committee submits that it would be useful for the drafting to provide some context and/or examples of what constitutes a "legitimate purpose"—e.g., to mitigate fraud risk.

j. Are there any unintended consequences that could arise due to the proposed changes to the tipping off offence?

236. The Committee notes that the proposed new framing of the tipping off prohibition focuses on the prevention of sharing information that is likely to prejudice an investigation or potential investigation. It appears to the Committee that the relevant reporting entity or entities within the business group would need to have knowledge of a real or potential investigation to ensure that they didn't breach the prohibition. The Committee submits that the circumstances in which a reporting entity or entities within the business group would have knowledge or would reasonably be considered to have such knowledge ought to be clarified in the legislation.

Appendix 1: Existing statutory mitigations of risk, which are the subject of legally binding obligations upon lawyers in Australia

(a) A **nationally consistent statutory regime** that establishes integrated standards[93] for:

(i) the issue of practising certificates and conditions;

(ii) legal practice management including trust accounting, fee/costs arrangements;

(iii) continuing professional development;

(iv) professional disciplinary rules; and

(v) regulatory oversight and interventions.

(b) **Strict statutory rules** that tightly control funds moving in and out of **trust accounts**.[94]

(c) **Continual reinforcement of professional obligations** and legal practice rules through initial preadmission training in ethics, trust accounting and practice management, as well as through supervision, ongoing professional training, continuing duties of strict record-keeping and record retention (for 7 years) and subjection to regular audit and sanctions imposed by statutory regulatory bodies and courts, with rule breaches enforced with utmost seriousness (especially trust account rule breaches).[95]

(d) **The Australian Solicitors Conduct Rules and Barristers' Rules**, which have statutory force, and strengthen practitioners' **paramount duty to the administration of justice**. Relevantly to AML/CTF, these rules include obligations to act only where instructions are lawful, to avoid compromises to one's integrity as a practitioner and to consider the true purpose of a client's activities.[96]

(e) Principals' obligations to supervise employed solicitors.[97]

(f) **Disciplinary action** that centres around the concepts of unsatisfactory professional conduct and professional misconduct encapsulating all of the above duties. Sanctions can include conditions on a practitioner's licence to practise, fines and disbarment. The regulator must report to police/state authority if it suspects that a practitioner has committed a serious offence.[98]

[93] LCA submission to the Senate Inquiry at [9], [10].
[94] LCA submission to the Senate Inquiry at [11].
[95] LCA submission to the Senate Inquiry at [12].
[96] LCA submission to the Senate Inquiry at [13]–[15].
[97] LCA submission to the Senate Inquiry at [16]–[20].
[98] LCA submission to the Senate Inquiry at [23].

(g) **Admissions prerequisites** that control entry to the legal profession. All practitioners must pass the **fit and proper** person test and demonstrate that they are of **good fame and character**, the meaning of which extends to the personal qualities of practitioner, beyond direct connection to practice. If a practitioner is no longer a fit and proper person they will be disqualified.[99]

(h) **Legal education at a tertiary level**, followed by **Practical Legal Training** and annual **Continuing Legal Education** (CLE) requirements for qualified professionals. Ethical competence is considered upon admission. Practitioners are required to undertake an hour of annual mandatory CLE in ethics/professional responsibility.[100]

(i) **Professional indemnity insurance** adds a layer of risk management that is tailored to legal practice.[101] Insurers are an important provider of education and training with a particular focus on risk.

(j) **Legal practitioners undertake client due diligence**. The threshold issue before practitioners may act is to ascertain the instructions are proper, lawful, and competently provided. Reasonable measures to ascertain (true) identity are to be taken as soon as practicable before acting.[102] Conveyancing has still tighter verification rules and processes.[103]

(k) Practitioners and legal profession regulators give notice of irregularities. These include:

  (i) rules that are carefully monitored and enforced in connection with trust account transactions;[104]

  (ii) continuous (and annual) disclosure obligations by legal practitioners of matters that bear directly on whether they continue to be a fit and proper person to hold a practising certificate; and

  (iii) cash transactions of $10,000 or more must be reported to AUSTRAC under s 3 of the *Financial Transactions Reports Act 1988* (Cth).[105]

[99] LCA submission to the Senate Inquiry at [30]–[36].
[100] LCA submission to the Senate Inquiry at [37]–[38].
[101] LCA submission to the Senate Inquiry at [39]–[42], [55].
[102] LCA submission to the Senate Inquiry at [43]–[48].
[103] LCA submission to the Senate Inquiry at [49]–[53].
[104] LCA submission to the Senate Inquiry at [65]–[66].
[105] LCA submission to the Senate Inquiry at [67].

Appendix 2: Specific areas of the legal practice of solicitors where ML/TF risk is not appreciable or nil

- **Family law practices** do not pose any, or any appreciable, ML/TF risk. Family lawyers represent parties to matrimonial/family law disputes, often related to the care of children. Property is transferred exclusively in the context of such matrimonial/family law disputes. The manufacture of such a dispute for ML/TF purposes is not an accepted typology. Assets are transferred pursuant to a highly supervised court process including by court order or consent (also requiring court supervision).

- **Personal injuries law practices** do not pose any ML/TF risk. Personal injuries practices provide litigation services and legal advice. Most transactions flowing from the litigation services they provide are subject to court orders. Their advisory work focuses on the rights of a plaintiff or defendant in relation to an injury, the nature of the compensation entitlements that arise at law, and the steps in the litigation process. Payments upon settlement are typically made by licensed insurers who undertake their own rigorous due diligence, including to always verify the identity of the plaintiff. This verification is also undertaken by a legal practice acting on the other side of a dispute. Refunds deducted from compensation payments are paid to hospitals, Medicare, and other licensed and government providers, as well as to the successful plaintiff. Further, courts dedicate significant resources to the close supervision of these claims because, due to their volume, courts are obliged to manage them efficiently. The process is accordingly subject to legally binding, prescriptive case management rules articulated in state and territory civil procedure legislation. Expert witnesses are typically involved at early stages of claims and their evidence is tested in the adversarial process by solicitors and barristers (who are officers of the court and whose paramount duty is to the administration of justice). To manufacture an injury claim to receive a false settlement would be an exceedingly rare ML/TF typology if it is a typology at all and, in Australia, would be quickly detected and eliminated due to the strong controls in place, including the close involvement of lawyers in an adversarial setting and tight court supervision.[106]

- **Employment law practices** do not pose a ML/TF risk. Through litigation and the provision of legal advice, employment law firms assist employers of all types, employees and subcontractors, to resolve a range of disputes. Most transactions (settlements) flowing from the litigation services they provide are subject to court or tribunal orders. The types of disputes handled include claims of discrimination, bullying and harassment, unfair and unlawful dismissal, union rights of entry to work sites, negotiation of enterprise agreements and employment contracts, workplace health and safety issues, and matters related to large and small industrial relations disputes that can include industrial action. These disputes often have a personal, psychological, or psychosocial dimension. Terms of settlement commonly relate to repairing or permanently severing relationships and other (non-financial) terms including alterations to the conditions of employment, or the resolution of wider workplace issues that have given rise to the dispute. Where individual claims are handled and result in financial settlements, these are typically negotiated against the backdrop of court and tribunal procedures and are conducted by skilled lawyers who are, of course, officers of the court. Employment disputes by their nature are difficult to manufacture on any scale due to the often personal/psychological dimensions of the narratives behind these claims, the requirement for evidence, and the scrutiny of such

[106] No or very low ML/TF risk is associated with these practices and the operation of their trust accounts: VAR at [81].

claims by lawyers, tribunal members and judicial officers. Sham, employment-related disputes are not a ML/TF typology in Australia.

- **Criminal law practices** do not pose a ML/TF risk. In the LCA phase one submission, by way of example, the Law Council reported on a shortage of litigation and criminal lawyers in north-western Tasmania.[107] This is far from unique to Tasmania (although there, it is particularly acute), yet criminal defence lawyers are indispensable to the protection of individual rights and freedoms. These are lawyers who often provide their services when individuals are in highly vulnerable states. While abrogations of the rights of accused persons are experienced concretely by individuals, the work of criminal lawyers is also critical to maintaining the broader balance between the power of the state and the individual in society. Criminal lawyers appear in proceedings before magistrates and judges, and negotiate with police prosecutors and departments of public prosecution to represent their clients. They do not handle transactional work. In relation to funds passing from accused persons to lawyers, the Commonwealth has appropriately enacted special statutory protections against prosecution for the receipt of funds in payment of professional fees, due to the social need to ensure legal representation for accused persons.[108]

- **Planning and environment law practices** do not pose a ML/TF risk. These firms are often specialised ('boutique') practices or teams within practices that provide legal advice and conduct litigation. Most transactions flowing from the litigation services they provide are subject to court orders. Planning and environment law practitioners represent clients to ensure compliance with planning laws, including when: seeking or objecting to development approvals; advising on tree-cutting and heritage listings; advising on land contamination, air pollution and other environmental harm; acting in relation to impact assessments, the presence of endangered species, and biodiversity issues; and representing neighbours in disputes over noise and obstructed views. While legal advice in this field can relate indirectly to the value of an asset, legal advice is provided by independent legal practitioners subject to a duty to act only on a client's lawful instruction. Rezonings or approvals for improved use-rights or other potential improvements that can affect asset values are complex statutory processes subject to mandatory community consultation and which involve the active engagement of, and approval, by municipal and state authorities. These practitioners do not carry out transactions for their clients and there is no associated known or appreciable ML/TF risk.

- **Media law practices** do not pose a ML/TF risk. The transactions flowing from the litigation services they provide are often subject to court orders. Media lawyers' work spans: defamation advice and litigation; acting to register patents and trademark (and in relation to associated disputes); advising in relation to intellectual property and copyright matters; advising on contracts for film production; advice in relation to book publishing and associated contracts and disputes; and providing advice in relation to large commercial deals between communications providers. Media lawyers do not carry out transactions for their clients. They are litigation and advice lawyers focused largely on intellectual property with the exception of large media deals. The latter are scrutinised by public authorities because of their implications for market competition, Australian content, and the public interest. There are no ML/TF typologies associated with these legal services.

[107] LCA phase one submission at [22].
[108] See for example *Proceeds of Crimes Act 2002* (Cth), s 330(4)(c) (where property ceases to be proceeds of an offence where it is 'acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal charge').

- **Succession law practices** do not pose a ML/TF risk. Succession lawyers do not typically carry out transactions but instead advise in relation to matters that can result in transactions. However, these are within the context of a death either having occurred, or mortality being planned for, and it is primarily for this reason that the ML/TF risk is, at most, extremely low. Legal services in estate administration include obtaining probate and acting in relation to disputes between potential beneficiaries under a will. Estate planning includes preparing for succession within the context of a functioning enterprise as well as planning for distributions of assets under a will or through trusts or other entities. Again, a death is always in contemplation. The assets must already form part of the client's asset pool, and the lawyer is obliged to closely examine the intentions of the client, the business and personal rationales for the manner in which the assets are structured at the time of receiving instructions, and assess those against the (lawful and proper) objectives the client is seeking to achieve. In any complex estate planning matter, an accountant is typically also advising the client. Sometimes cash is received and obliged to be held by a legal practitioner acting as an executor after the death of a testator, but this has been found to be limited to small 'finds', particularly in regional and rural areas,[109] and are not associated with any ML/TF risk.[110]

- **Litigation practices** do not pose an appreciable ML/TF risk. See Appendix 3.

[109] VAR at [151].
[110] VAR, Executive Summary at (g)(iii); see also [82]–[83].

Appendix 3: Specific exemption—transactions the result of a court order

Litigation practitioners act for plaintiffs and defendants in adversarial processes involving courts and tribunals, arbitrators, mediators, regulators, and the like where special ethical obligations upon the solicitor with conduct of the matter come into play. These include in some circumstances requirements to certify that proceedings have a reasonable basis in fact and law.[111] These requirements underscore the level of highly detailed scrutiny to which every claim is subjected, both in terms of legal analysis and an analysis of the facts. To certify as to the merits of the case, practitioners need to know where there are gaps and other weaknesses in the evidence. The legal practitioner consequently has to scrupulously test potential evidence that the client presents to them or that is provided by an independent witness, often with advice from, and assistance provided by, a barrister. We have seen no evidence whatsoever that sham litigation to achieve an illegal transaction is a known typology in Australia. As well as deceiving the solicitors and any barristers acting for each of the parties to a dispute, sham litigation also needs to deceive a judicial officer making the order for the transaction. Case management and the close involvement by judicial officers in the steps of litigation mean that, in Australia, this is not a realistic method for criminals to launder money.

[111] For example, see Item 4 in Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* (NSW) ('Restrictions on commencing proceedings without reasonable prospects of success'); *Civil Procedure Act 2010* (Vic), s 42 ('Proper basis certification'); and *Civil Law (Wrongs) Act 2002* (ACT), s 188(2) ('Certificate that claim or defence has reasonable prospects of success').

Appendix 4: Barristers' legal practice

As we said in the LCA phase one submission:[112]

35. *The independent bar in each Australian jurisdiction is made up of legal practitioners who practise solely as or in the manner of barristers and whose practising certificates are specific to that manner and form of practice. They provide advocacy and related services in the conduct of litigation and alternative dispute resolution; some also provide legal advice; but significantly, they do not represent their clients other than in litigation or alternative dispute resolution, they do not carry out transactions for their clients, they do not set up legal entities or provide company or trust services, and they do not administer or manage their clients' entities, money or investments.*[113]

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[112] LCA phase one submission, pp 29–31. See also pp 5 [7], 21 [7] and 25 [26.1]. Footnotes in the following quotation are renumbered for continuity with the present text.

[113] These positive and negative elements of legal practice are exemplified by rules 11 and 13 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, applicable to the holder of a barrister's practising certificate under the *Legal Profession Uniform Law* (NSW, Vic, WA):

'11 Work of a barrister

Barristers' work consists of:

(a) appearing as an advocate,
(b) preparing to appear as an advocate,
(c) negotiating for a client with an opponent to compromise a case,
(d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,
(e) giving legal advice,
(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,
(g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and
(h) such other work as is from time to time commonly carried out by barristers.

…

13 A barrister must not, subject to rules 14 and 15:

(a) act as a person's general agent or attorney in that person's business or dealings with others,
(b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent,
(c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
  (i) conferring with the client, the instructing solicitor, prospective witnesses or experts,
  (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court,
  (iii) viewing a place or things by arrangement with the instructing solicitor or the client, or
  (iv) library research,
(d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate,
(e) be the address for service of any document or accept service of any document,
(f) commence proceedings or file (other than file in court) or serve any process of any court,
(g) conduct the conveyance of any property for any other person,
(h) administer any trust estate or fund for any other person,
(i) obtain probate or letters of administration for any other person,
(j) incorporate companies or provide shelf companies for any other person,
(k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation, or
(l) hold, invest or disburse any funds for any other person.'

Rule 14 excludes things done 'without fee and as a private person not as a barrister or legal practitioner'. Rule 15 exempts conduct 'as a private person and not as a barrister or legal practitioner' that would otherwise offend rule 13(a), (h) or (l).

36. The services that have been identified as involving sufficient risk to warrant classification as designated services under tranche 2 all involve transactional work.[114] A legal practitioner who practises solely as or in the manner of a barrister provides litigious and advisory services but does not provide transactional services. This remains a fundamental distinction between lawyers practising solely as or in the manner of barristers and other legal practitioners.

37. Ordinarily, barristers' fees are paid only after performing the work for which they have been retained, often out of funds in the instructing solicitor's trust account. In some but not all jurisdictions, it is possible for a barrister to receive funds for payment of his or her fees in advance of performing that work.[115] If the fees turn out to be less than the amount received, the excess will be repayable. This is the only context in which a barrister may end up paying money back to a client.

38. The particular characteristics of barristers' practice and the ethos and regulation of the bar are discussed in greater detail inter alia in the submission of the NSW Bar Association of 8 June 2023. In summary, the money laundering and terrorism financing risks associated with the independent bar are extremely low.

39. The best and clearest way to deal with the position of barristers in the tranche 2 legislation would be to provide expressly that a legal practitioner practising solely as or in the manner of a barrister is not thereby a reporting entity or, if the design preference is to focus on designated services, to make clear that a practitioner practising solely as or in the manner of a barrister does not thereby provide designated services.

40. If lawyers practising solely as or in the manner of barristers were treated as reporting entities, the administrative burden would be disproportionately onerous, the public's access to justice would be consequently impaired, and any resulting public benefit would be disproportionately low. Barristers as such are sole practitioners and sole traders, and cannot engage in any trade or profession that is inconsistent with their role as barristers. These points are made clear inter alia in the submission of the NSW Bar Association of 8 June 2023.

[114] AGD Consultation Paper, April 2023, p 22.
[115] See, for example, the *Legal Profession Uniform Law Application Regulation 2015* (NSW) cl 15. This allows direct access clients to provide and barristers to receive funds into a dedicated and independently examined 'trust money account', thereby providing effective security for the payment of the barrister's fees. The NSW Bar Association reports that only 1.5% of barristers make use of the facility. It does not involve the management of clients' money in a conventional sense. It also seems fairly clear that such arrangements do not present a realistic risk of money laundering or terrorism financing.

Law Council
OF AUSTRALIA

Modernising Australia's anti-money laundering and counter terrorism financing regime

Response to the 'Consultation paper on reforms to simplify and modernise the regime and address risks in certain professions' (April 2023) Phase 1 consultation

Mr Andrew Warnes, First Assistant Secretary, Criminal Justice Division

27 June 2023

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra. The Law Council's website is www.lawcouncil.au.

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The Law Council acknowledges the work of the Financial Services Committee of the Business Law Section for preparing part 1 of this submission, in response to part 1 of the consultation paper, *Modernising Australia's anti-money laundering and counter-terrorism financing regime.*

Part 2 of the submission responds to part 2 of the consultation paper. The Law Council acknowledges the work of the members of the Anti-Money Laundering and Counter-Terrorism Financing Working Group in the preparation of this response. The members of the Working Group are:

- Mr Luke Murphy (Chair)
- Mr Shannon Adams
- Mr Adam Awty
- Ms Pip Bell
- Dr Mark Brabazon SC
- Ms Simone Carton
- Mr Des Crowe
- Mr Ross Drinnan
- Mr Matt Dunn
- Ms Shannon Finch
- Mr Simon Gates
- Ms Clarissa Huegill
- Mr Jeremy Moller
- Ms Lana Nadj
- Ms Elizabeth Ong
- Mr Craig Slater
- Mr Steven Stevens
- Ms Bobbie Wan
- Mr Marco Zanon.

Overview

1. The Law Council supports the elimination of money laundering and terrorism financing, and is committed to engaging with the Australian Government to implement a cost-effective, risk-based and proportionate response by the profession to the task.

2. The Law Council has commissioned an independent vulnerabilities analysis of the national legal profession. This is expected to identify any areas of significant residual risk. The findings are expected to inform the second phase of the consultation and the nature of any additional obligations that may be found to be required. The Law Council is now working to raise awareness of risk, and will publish nationally consistent guidance for the profession in the second half of 2023.

3. A key concern of the Law Council is that sole practitioners and small practices, particularly those in regional and remote areas, are not burdened with excessive obligations and are properly supported to effect any necessary augmentation of their existing risk management practices.

4. The Law Council considers proportionality, effectiveness and a risk-based foundation for policy to be critical principles to guide reform.

5. The Law Council is unable to comment definitively at this stage on the regulatory model proposed by the Government that sees AUSTRAC as the sole AML/CTF regulator. When the designated services are more clearly defined, and the scope and character of the intended tranche 2 regime clarified, these views will be provided in light of the numerous regulatory models in place in other jurisdictions internationally. Nevertheless, the Law Council has supplied detailed feedback in response to the proposed designated services and looks forward to examples and information being provided by the Department in the consultation paper for phase 2 of these consultations.

6. The Law Council proposes that 'pathways' workshops be held with participation of the legal profession, the accounting profession and the Government to map how service delivery works in practice. This pathways project would identify risk points as well as redundant administrative burden. Such a project would greatly assist policy development by:

   (a) providing a thorough understanding of daily legal practice;

   (b) providing a forensic basis for identifying gaps;

   (c) facilitating discussion about how those gaps may be filled; and

   (d) ensuring that existing obligations are recognised as far as possible.

7. The Law Council asks that the legislation clearly exclude from tranche 2 regulation those legal practitioners who are employees of government entities or of non-legal businesses. The Law Council asks that the legislation provide certainty that legal practitioners practising solely as, or in the manner of, a barrister will not be reporting entities—this could be done by explicit exemption, or by clear legislative recognition that the litigation services and legal advisory services that barristers provide (in contradistinction to transactional services) are outside the scope of designated services. The use of exemptions and deemed compliance as mechanisms to recognise existing risk mitigation practices are also proposed, should the present framework be retained.

8. The Law Council has provided detailed analysis of protections afforded to legal professional privilege in New Zealand and the United Kingdom. In order to give substance to the protection of legal professional privilege, the protection of confidentiality is also required across a range of settings. New Zealand and the United Kingdom furnish examples that go some way to showing how legal professional privilege and confidentiality

may be protected. Yet risks will remain, including, in particular, to the legal practitioner–client relationship itself. An analysis of these protections highlights the limited extent to which information is likely to be made available to the financial intelligence unit if protections are to be robust. In circumstances where other jurisdictions around the world operate under a range of different models, the analysis raises the question as to whether more effective protection for legal professional privilege and confidentiality might not be more simply achieved by the augmentation of existing obligations, affording a strong and tailored response to money laundering and terrorism financing risk.

Part 1 Response

Executive Summary

In principle, the Financial Services Committee of the Business Law Section of the Law Council of Australia (the **Committee**) generally supports the policy intention of reducing complexity, removing ambiguity, and increasing flexibility within the current regime with a view to making the compliance burden associated with some of the problematic aspects of the regime more manageable for reporting entities.

The Committee broadly agrees with the proposals set out in Part 1 of the consultation paper to:

- include express obligations that focus on the critical nature of the risk assessment;
- broaden the scope of circumstances in which a number of different reporting entities may form a designated business group;
- align customer due diligence obligations with the associated level of money laundering or terrorism financing risk;
- introduce an exemption for assisting in the investigation of a serious offence; and
- modernise the “tipping off” offence.

In its submission, the Committee has sought to:

- highlight some of the practical difficulties associated with the current regime, as well as some of the reform proposals (most notably, the proposed changes to the “travel rule”); and
- make suggestions as to how some of the proposals might be enhanced to deliver more fair, efficient and effective regulatory outcomes.

The Committee also notes that the effectiveness of the implementation of the proposals will depend upon the drafting of the relevant amending legislation, and looks forward to commenting on the associated exposure draft legislation at the appropriate time.

Submission to Part 1

General comments on Part 1

1. The Committee firstly wishes to share the following general observations.

2. It has proved to be a challenge for the Committee to make detailed comments on the legal aspects of the various proposals, because they are conceptual in nature. Where the Committee gives its support, this is in respect of the high-level proposal, and the Committee reserves the right to further comment on the draft legislation.

3. The Committee broadly supports the intended outcome of Part 1. The Committee considers that the current AML/CTF Act and the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth) (the **AML/CTF Rules**) are in some respects complex and difficult for reporting entities to implement and operationalise in the current business and technological environment.

4. The Committee supports the intent to streamline Part A and Part B of the AML-CTF program. However, the Committee cautions against the proposed requirement for Part B Applicable Customer Identification Procedures (**ACIP**) to be approved by the reporting entity's governing body. The Committee notes that formal approval for Part B is not currently required in rule 8.4.1 of the AML/CTF Act. Rather, Part B, like Part A, is required to be adopted under the AML/CTF Act (see subsection 81(1)).

5. The Committee further notes that, as identified in the consultation paper, 'obligations [are] dispersed throughout the Act and the Rules'. If the AML/CTF program is to be streamlined to reduce complexity and enhance understanding, the Committee recommends that the higher-level obligations be captured within the AML/CTF Act, with the AML/CTF Rules providing more detail and guidance in support of the primary obligations. Likewise, where obligations in the AML/CTF Act reference exemptions within, or compliance with, the AML/CTF Rules, some cross-referencing to relevant Chapters would assist in reducing the complexity and improving the navigability of the legislation.

6. The Committee supports the proposed express requirement for a reporting entity to identify, assess and understand the money laundering and terrorism financing risks it faces, prior to the implementation of its AML/CTF program with rules and guidance to support how that occurs. The Committee notes that sufficient flexibility will need to be built into such rules to allow for the different size, complexity and nature of reporting entities, and to allow for adaptation in the face of emerging risks.

7. To reflect modern business operations, both local and global, the Committee supports the broadening in scope of which entities are able to "opt-in" to designated business groups (**DBGs**). In particular, extending the circumstances under which members of the same corporate group etc. can place 'reliance' on one another for AML/CTF compliance related activities is likely to be of great assistance to reporting entities which sit within

   such structures. The Committee believes that this should provide more opportunity for reporting entities to create centralised AML/CTF compliance functions within a broader corporate group.

8. However, the Committee cautions against the proposed requirement for non-reporting entities to submit to compliance with AML/CTF legal obligations (via their membership of the DBG), which would otherwise not apply to such entities. If the Government is of the view that certain key AML/CTF obligations must be applied to such entities, the Committee recommends that this be provided for explicitly within a dedicated Part/Chapter in the AML/CTF Act and the AML/CTF Rules.

9. The Committee supports:

   (a) the proposal to align customer due diligence procedures with customer risk, thereby allowing reporting entities more flexibility to meet the overarching obligation to "know the customer" as defined. The methods of verification, particularly around simplified due diligence, could be detailed in guidance instead of the AML/CTF Rules; and

(b) the proposed model with respect to exemptions for assisting an investigation of a serious offence; and

(c) the proposed model to modernise the "tipping-off" offence.

10. The Committee has used the same headings as the consultation paper to comment on specific aspects below.

AML/CTF programs

11. The proposed model covers:

(a) streamlining Parts A and B into a single program;

(b) stating that money laundering and terrorism financing risks must be assessed;

(c) requiring processes, systems, procedures, and controls to be designed and implemented to identify, assess, understand, manage and mitigate risk;

(d) a requirement to identify, mitigate and manage proliferation financing risk; and

(e) simplification and consolidation of obligations for foreign branches and subsidiaries.

12. The Committee broadly supports the policy aims, subject to the following comments.

Streamlining Parts A & B into a single program

13. The Committee considers that the current system is generally well understood by reporting entities, notwithstanding the inconsistencies between elements of Part A and Part B, and the complexity of Part B. However the new cohort of reporting entities (covered in Part 2 of the consultation paper) may struggle.

14. In principle, the Committee supports the objective of making an AML-CTF program less complex.

15. The Committee has the following suggestions:

(a) use a definition of "AML-CTF program" which includes both the written program document and the operational processes, systems, and controls which are reflected in the written document;

(b) introduce flexibility to allow an AML-CTF program to be captured within one document or a series of related Policies, Controls, Procedures (PCPs);

(c) allow current AML-CTF programs which consist of Parts A and B to continue to be used by existing reporting entities (to mitigate compliance costs and minimise operational systems changes which would be associated with combining Parts A and B); and

(d) allow ACIPs to be changed without the need for formal approval at the board or senior management level.

16. The Committee notes that some reporting entities are familiar and relatively comfortable with the existing AML/CTF compliance program, and cautions against forcing existing reporting entities to make changes which are likely to involve significant compliance costs and operational change without any clear, demonstrable regulatory benefit.

17. Further, the linkages between having and complying with an AML/CTF program and the civil penalties which may arise from non-compliance would need to be outlined before the Committee could make further comment on this proposal.

Assessing risk

18. The Committee agrees that the current obligations are unclear as to:

(a) when it is necessary for a reporting entity to undertake a formal ML/TF risk assessment;

(b) the extent to which an AML-CTF program must be based upon the ML/TF risk assessment; and

(c) the content of the ML/TF risk assessment.

19. Subject to comments made below, the Committee agrees with the proposed model with respect to the ML/TF risk assessment. It is akin to the New Zealand model which has proven to work well, as there is clear link between the ML/TF risk assessment and the AML/CTF program (including processes and controls), and an explicit obligation to review a ML/TF risk assessment.

20. However, the Committee cautions against creating inflexibility in the risk assessment and resulting internal controls by mandating elements of the risk assessment in the AML/CTF Rules which must be followed irrespective of the nature, size, and complexity of the reporting entity. The Committee suggests that detailed guidance would be the more appropriate place for the methodology of the ML/TF risk assessment and resulting controls. The Committee believes that the current risk-based system should be preserved.

Group wide risk management for designated business groups

21. The Committee agrees that the current definition of DBGs does not meet modern business legal and operational structures. Currently, there are many perfectly legitimate business structures that technically fall outside of the current definitions to allow for the formation, or joining, of a DBG. The Committee supports a broader definition of DBG including widening which entities, reporting entities, or entities related to reporting entities, are allowed to elect to join a DBG.

22. The Committee also suggests that the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) implement a fast-track process for approving the establishment of potential DBGs which fall outside the updated definition. This will mitigate against the legal expenses, and regulatory risks, that any updated definition may present.

Proliferation financing risk

23. According to the consultation paper:

> 'Proliferation financing risks refer to the potential breach, non-implementation or evasion of targeted financial sanctions obligations related to the prevention, suppression and disruption of proliferation of weapons of mass destruction and its financing. Australia does not currently explicitly require regulated entities to consider and mitigate these risks, although such risks are indirectly included in certain requirements in the regime.
>
> The Department is considering potential reforms to clarify the requirement for regulated entities to manage their proliferation financing risks as part of their AML/CTF programs…'

24. While Australia may not currently require reporting entities to consider and mitigate these risks as part of their AML/CTF obligations, the Committee notes that there is an entire body of separate legislation applicable to relevant persons and entities, which requires compliance with such sanctions and imposes penalties for breaches or evasion of such requirements.

25. Rather than creating a further 'risk assessment' obligation in relation to this risk, which may be the subject of prosecutions and penalties in addition to the consequences of breaches which may arise under the Australian sanctions legislation, the Committee recommends that this category of risk be identified as one to be taken into account by reporting entities as part of their broader ML/TF risk assessment process. If this approach is taken, then those reporting entities which face this risk can naturally include it as one of many factors they consider as part of the broader risk assessment exercise, while those reporting entities to which it is irrelevant will not be subjected to an additional obligation which is of little or no relevance to their operations.

26. The Committee notes that the overwhelming majority of current, and future, reporting entities are unlikely to face proliferation risk. The Committee therefore submits that any extension of the obligation to identify, mitigate, and manage proliferation risk must be

targeted at reporting entities, or sectors, which have more than an insignificant proliferation risk, based on an up-to-date national proliferation risk assessment.

27. The Committee considers that adopting the model suggested above would accommodate such differences.

Foreign branches and subsidiaries

28. At present, each of the following must enrol with AUSTRAC:

    (a) an Australian resident with a foreign branch; and

    (b) a foreign subsidiary of an Australian resident.

29. Each reporting entity must have a Part A Program but, if the law of the foreign place is comparable, the reporting entity need only consider minimal additional systems and controls: see rules 8.8.3 and 9.8.3 of the AML/CTF Rules. The requirements for an ACIP do not apply (subsection 39(5) of the AML/CTF Act).

30. In practice this often means that the reporting entity need not do more than provide for governance or oversight in the AML/CTF program it creates for Australia, with the emphasis being on ensuring compliance with local laws in the other jurisdiction. In the view of the Committee, this strikes an appropriate balance.

31. The Committee does not object to measures to simplify and consolidate obligations, but is uncertain as to whether the proposal would involve imposing a greater degree of regulation.

32. In the consultation paper, under the stated purpose of simplifying obligations, it is proposed that Australian businesses operating overseas should apply measures consistent with their AML/CTF programs in their overseas operations, to the extent permitted by local law (in those overseas places). Members of the Committee have expressed concerns that:

    (a) the extent to which this is meant to represent a departure from the approach under the current law is unclear; and

    (b) to the extent that a different approach is being proposed, the perceived policy benefits this approach would achieve, for operations that are regulated according to local laws in another jurisdiction which is compliant with the standards of the Financial Action Task Force, have not been sufficiently articulated.

33. The Committee considers that, if it is the intention that processes from two jurisdictions would become mandatory in the overseas jurisdiction then, rather than simplifying obligations, the proposal may complicate compliance for some Australian businesses and would therefore appear to have an unwarranted anti-competitive effect by potentially making the Australian business more complex for customers to deal with, as well as adding a cost burden through regulatory duplication.

Customer due diligence

Understanding customer risk

34. The Committee supports the overarching obligation to assess and understand the risk for each new and ongoing business relationship with a customer based on the stated risk factors. However, the Committee is concerned that the obligation to undertake a discrete and individual ML/TF risk assessment would be a significant compliance burden and regulatory risk for the vast majority of current and future reporting entities which generally do not have many higher risk customers.

35. The Committee suggests that a reporting entity should be required to risk assess its customer base and then only apply a discrete individual customer risk rating to those customers who are in the higher risk rating cohort. If a customer who is not initially in that cohort but is later re-rated as higher risk, then the obligation to conduct enhanced customer due diligence would apply. The Committee notes that AUSTRAC will not be able

to provide appropriate guidance on each and every potential customer for each reporting entity.

Know your customer

36. The Committee agrees that:

    (a) the AML/CTF Act should set high-level obligations with the effect that a reporting entity must be reasonably satisfied of certain characteristics about a customer; and

    (b) the AML/CTF Rules should set high-level standards for how those obligations should be met.

37. The Committee submits that guidance, rather than the AML/CTF Rules, should be used to outline the various methods for identification and verification to meet the overarching obligations, which might be reflected in the form of policies, procedures, systems and controls of the reporting entity.

38. It is important to recognise that guidance does not have the force of law and it is not an exhaustive statement on the ways in which a reporting entity may comply with the law. Therefore non-adherence to published guidance, as opposed to contraventions of the AML/CTF Act and the AML/CTF Rules, should not in and of itself expose a reporting entity to potential civil and criminal liabilities.

Ongoing customer due diligence

39. The Committee agrees in principle with the proposal for ongoing customer due diligence. The Committee notes that the drafting of the current AML/CTF Rules 15.2 and 15.3 - additional KYC in-formation and refreshing customer KYC information - is complex and open to misunderstanding. Therefore, a simplification of these obligations is welcomed.

Enhanced customer due diligence

40. The Committee agrees in principle with the proposal for enhanced customer due diligence (**ECDD**).

41. The Committee notes the proposed extension of the mandatory application of ECDD to circumstances where there is a suspicion of "identity fraud and the reporting entity proposes to continue the business relationship". The wording of the new rule must be precise with respect to that subsentence.

42. The consultation paper states that the rules could set out specific circumstances that should trigger "extended customer due diligence". The Committee does not recommend that another enhanced due diligence concept be introduced over and above ECDD.

43. With regard to the actual ECDD measures, it is the view of the Committee that the current, flexible, approach under rule 15.10 of the AML/CTF Rules should be maintained.

Simplified customer due diligence

44. The Committee agrees that the current customer due diligence provisions are complex. Any flexibility in the current rule 4 of the AML/CTF Rules, particularly around verification, is difficult for reporting entities to both understand and implement.

45. For example, rule 4 has the concepts of "full name" and "name" with respect to an individual. The Committee sees no valid reason why safe harbour individual verification allows for verification of a "name", whereas non-safe harbour mandates verification of a "full name". The Committee also notes that the safe harbour verification requirements for customers who are individuals are different than the corresponding verification requirements for beneficial owners who are individuals.

46. The Committee agrees that the concept of Simplified customer due diligence (**CDD**) should be extended to include what is currently referred to as the "safe harbour" for

individuals, but notes that the concept of "safe harbour" is now ingrained. An alternative would be to follow the New Zealand CDD framework of:

(a) Simplified - similar to current rule 4, simplified and extended to include other lower risk non-individual entities, and formally stating the classes of those entities (including holders of Australian financial services or credit licences):

(b) Standard - to include current low/medium risk individuals, non-individual entities, beneficial owners and politically exposed persons (**PEPs**); and

(c) Enhanced - to include high-risk individuals, non-individual entities, beneficial owners and PEPs (including foreign PEPs).

47. The Committee considers that:

(a) guidance, rather than rules, around how each level of CDD is reached would be required;

(b) verification methods should be technology neutral, and should recognise current available technology and the Document Verification Service; and

(c) identification and verification requirements should also take into account recent changes in technology and requirements under COVID-19 specific relaxations which have meant that identification information is often no longer obtained from the customer via a face-to-face method - a development which appears to have made identity fraud easier to perpetrate and more prolific.

Lowering the reporting threshold for the gambling sector

48. The Committee agrees that there are significant risks in the casino sector. However, the Committee has concerns about the operational implications of reducing the CDD limit in isolation from wider sector reforms.

Amending the tipping-off offence

49. At present, section 123 of the AML/CTF Act prohibits disclosure of the lodgement of a suspicious matter report (**SMR**) or disclosure of information from which it could reasonably be inferred that an SMR has been given, or is required to given, by the reporting entity to AUSTRAC. There is a complicated set of exceptions within section 123 and the consultation paper correctly notes that the current prohibition under section 123 gives rise to significant challenges and risks of non-compliance for reporting entities wishing to centralise certain compliance functions, use related bodies corporate to assist with compliance, and/or outsource certain of these activities.

50. The Committee also notes that the tipping off offence appears to create uncertainty, and have unforeseen consequences, in the context of the relationship between reporting entities, for example where banking services are provided to payment service providers, remitters or centralised digital currency exchanges. One way to address this could be to create a carefully circumscribed exception to the tipping off offence. This would permit the reciprocal sharing of information between a bank and its customer (itself a reporting entity) about SMRs in relation to customers of the bank's customer, in narrowly defined circumstances.

51. The consultation paper suggests a revised prohibition which focuses on conduct or an intention to compromise a law enforcement investigation. This is consistent with the approach in the United Kingdom and Canada and, in the Committee's view, for behaviour that is such a serious criminal offence, it appears to be more appropriate and would alleviate some of the challenges identified above.

Regulation of digital currency exchanges

52. The Committee agrees with, and supports, the regulation of services concerning digital assets.

53. If digital currency is property (as has been held in some other jurisdictions including New Zealand), then, arguably, the activities which the consultation paper singles out for regulation are already captured by items 31, 32, 46 and potentially 33 and 35 of Table 1 in section 6(2) of the AML/CTF Act. It makes sense to clarify the position.

54. The Committee submits that, ideally:

    (a) any improved definitions should align, to the extent possible, with similar definitions in other potentially applicable legislation (e.g., the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth), and other financial services legislation); and

    (b) the types of activities covered by any new or updated obligations will be informed by the current understanding of how digital currencies are used, or likely to be used, as part of criminal activities (with a particular focus on money laundering and terrorism financing).

Modernising the travel rule obligations

55. The Committee welcomes the proposal to review the travel rule, but does not support the model which is proposed in the consultation paper.

56. The Committee is of the view that it is neither practical nor desirable to impose new obligations that are tied to the current definitions associated with "designated remittance arrangements".

57. In terms of desirability, the Committee has previously observed that the key definition of an "arrangement" <*exceptionally broadly defined*> that is for the transfer <*which 'has an extended meaning'*> of money or property", applying the literal meaning, encompasses most commercial transactions of any kind, including for example:

    (a) a postal service;

    (b) a stock exchange;

    (c) a retail shop; and

    (d) cargo ships.

    The Committee also considers that, arguably, many non-commercial arrangements are also caught within the definition, and that there are very few arrangements that can be conclusively confirmed **not** be remittance arrangements.

58. The current definitions operate effectively only because of selective non-enforcement, and the Committee submits that, under those arrangements, there is no sound principle which distinguishes what kinds of arrangements should be treated as regulated remittance arrangements and what kinds should not. The Committee has observed that this can cause grave concern and a significant amount of, arguably, wasted resources for organisations which suspect they may be affected by the regime. The Committee has previously submitted that the definitions should be entirely redrafted, with a view to describing with specificity money services businesses of the kind mentioned in the relevant Recommendations of the Financial Action Task Force.

59. The Committee notes that AUSTRAC has provided industry guidance for remittance service providers on its website, which states that AUSTRAC will not treat many reporting entities as providers of designated remittance arrangements if they also provide other designated services. However, this guidance does not assist the significant number of potentially regulated entities which are otherwise not reporting entities at all (including postal services, retail shops and cargo ships).

60. In terms of practicability, the Committee observes that the current travel rule, as legislated, appears to be based on how SWIFT messaging operated around 2005, but without a full appreciation of all its technical nuances. (The Committee notes that card payments continue to be exempt from travel rule requirements because no SWIFT-like data chain exists for them.) The Committee notes that the key operative definitions concerning

remittance arrangement participants are not consistent with arrangements relating to SWIFT participants, at the present times or circa-2005.

61. A particular concern of the Committee is that the definitions frequently deem a reporting entity's "customer" for the Item 32 "making arrangements" designated service to be people that are not actually customers of that reporting entity (i.e., the reporting entity is in fact acting for the sender, not the recipient, but introduces the payment into the banking system for delivery to the recipient, and can thus be seen as "making arrangements" for the final payment, while knowing only the end account number) and with whom the reporting entity has no relationship.

62. Further, unlike SWIFT, there is frequently no information pathway through which the information might be provided.

63. The Committee has strong concerns that in many scenarios this rule cannot be implemented, noting that:

    (a) just because an entity "receives an instruction" does not mean that there is necessarily any end-to-end communication pathway; and

    (b) for the "making arrangements" pathway, the reporting entity often has no knowledge of at least one of the sender or the recipient.

64. The Committee therefore submits that the end points need far better definition, by way of amendments to the basic definition of remittance services and the parties involved, and if there is in truth no joined up "chain", then the obligations should not arise.

65. At a minimum, the Committee submits that a reporting entity should not be required to include information that it does not have, or to go beyond some limited level of endeavour to find out. The Committee notes that, if reporting entity R receives a batched payment from payment services provider P in the European Union:

    (a) reporting entity R will not know who P's several customers are;

    (b) foreign sender P may be prevented by law from giving reporting entity R detailed information or might simply decline to provide such information to reporting entity R; and

    (c) failure to capture information that is not known will not be a flaw in the system, as it is open for AUSTRAC to ask its international peers to compel that information if it is really needed.

Exemption for assisting an investigation of a serious offence

66. The Committee agrees that it makes sense to allow eligible agencies to issue "keep open" notices to a reporting entity (copying AUSTRAC). It would be important that the effect of relying on such a notice is relief from any liability under the AML/CTF Act and also any other relevant legislation including, for example, the *Proceeds of Crime Act 2002* (Cth), the *Privacy Act 1988* (Cth), and any applicable sanctions legislation.

67. From an AML/CTF perspective, the Committee notes that this removes the difficulties that can arise where a reporting entity might ordinarily want to terminate the provision of designated services consistently with the processes contemplated by Chapter 15 of the AML/CTF Rules when applying ECDD, but where terminating may alert the customer to the fact that their activities were under scrutiny.

68. The use of such notices could also be considered specifically in relation to the efforts of the Australian Taxation Office to be informed by Australia's banking sector about potential fraud.

Revised obligations during COVID-19 pandemic

69. The Committee acknowledges that the changes to Part 4.15 of the AML/CTF Rules which were introduced during the COVID-19 pandemic did provide relief, and sees no reason why they should not either be extended or rolled into the broader CDD obligations. The

Committee also notes that the intention was for the alternative procedures to only be adopted in 'exceptional' circumstances.

70. The Committee acknowledges that the scenarios outlined under Part 4.15 of the AML/CTF Rules include circumstances in which a person/customer may be unable to provide the type of identification and/or verification information typically required to comply with the ACIP obligations. However, the Committee also notes the increased risks currently faced by individuals across Australia of identity theft as a consequence of cyber-attacks and other criminal activity.

71. In the absence of some form of facial recognition, combined with the increasingly digital and 'online' nature of Australia's financial system, it appears that the opportunity for identity theft and fraud has only increased.

72. Accordingly, while noting the benefits of remote access and alternative forms of identification, the Committee encourages the Attorney-General's Department to consider how the AML/CTF Rules could be amended to continue to require some form of face-to-face interaction between the providers of designated services and their customers, particularly at the stage of the process when reporting entities are first obtaining identification information from customers.

73. The Committee submits that various 'collection' methods could be included within the AML/CTF Rules to allow reporting entities the flexibility to adopt practices which are best suited to the nature, size and complexity of their business, and the particular circumstances of their customers.

74. For instance, collection methods involving some form of facial recognition could take the form of:

    (a) face-to-face meetings via an online mechanism during which the individual shows a relevant form of photographic identification (a copy of which can be submitted after the interaction);

    (b) photos sent to the reporting entity which include the face of the individual with a copy of a relevant form of photographic identification;

    (c) for elderly customers or those without access to the technology required to achieve the above outcomes, an alternative form of collection process could be offered, e.g. attendance at a branch of a bank or a post office; and

    (d) for reporting entities who have the technology available to them, facial recognition software could also be employed and acknowledged as a suitable mechanism to satisfy this element of the collection process.

Repeal of the *Financial Transaction Reports Act 1988 (Cth)* (FTRA)

75. For those reporting entities which are 'cash dealers' as defined for FTRA purposes (this applies, for example, to many AFSL holders), the circumstances in which a suspect transaction report (**STR**) must be lodged under the FTRA are different to those which trigger a SMR under the AML/CTF Act. A STR must be lodged for a transaction to which the cash dealer is a party. For a reporting entity there needs to be a connection to the provision or proposed provision of a designated service. For both a STR and a SMR the lodging party has immunity from suit. If the FTRA is to be repealed, the Committee submits that it will be important for policy makers to ensure that it will not mean that certain types of report which AUSTRAC currently receives will cease to be required.

76. The Committee is of the view that it would be beneficial to include any remaining relevant obligations under the FTRA within the AML/CTF legislation, so that certain organisations will no longer need to comply with different obligations under different legislation and there is a 'single source' for AML/CTF obligations in Australia.

77. To further discuss any matters raised in this submission, please contact Chair of the Financial Services Committee

Part 2 Response

Executive Summary

The Law Council of Australia recognises the importance of:

- effectively combating money laundering and terrorism financing;
- ensuring that mitigation measures are proportionate to risk;
- ensuring that mitigation measures are sympathetic to the current regulatory and organisational settings of the profession; and
- ensuring that regulation does not impose unreasonable, additional cost burdens on legal practices, particularly small and medium-sized practices.

The Law Council welcomes further engagement with the Government and, in particular, seeks that:

- the proposed designated services be limited in number and scope;
- the implementation timeline for the proposed introduction of any tranche 2 regulation ensure that legal practices are afforded adequate time to prepare to comply with any new obligations, especially small and medium-sized practices;
- any anti-money laundering and counter-terrorism financing regulation model under consideration be designed to be fully compatible with and not hinder the duty of confidence owed by a legal practitioner to a client, nor a client's legal privilege (legal professional privilege); and
- regulatory design be undertaken from the premise of recognising existing risk mitigation practices.

Submission to Part 2

General comments on Part 2

1. The Law Council's response to part 2 of the consultation paper[1] (**consultation paper**) reflects the work of our Anti-Money Laundering and Counter-Terrorism Financing Working Group and extensive consultation with the constituent bodies of the Law Council. The expertise and experience of various policy committees of Australia's law societies and bar associations, legal regulator departmental heads, lead trust account investigators, professional ethics committees, subject-matter experts and representatives of the Australian Bar Association, including the considered views of senior counsel, have informed this response. We appreciate the magnitude of the challenge ahead for Government and the profession but we are encouraged by the eagerness and willingness of our members across all jurisdictions, in general practice and specialised fields alike, to inform themselves and engage forthrightly and with open minds with this issue. We are grateful for the commitment made by the Attorney-General and the Department to continue to seek this engagement. We are also optimistic about achieving clear and effective outcomes and are committed to continuing to work together to that end.

2. It will not pass unnoticed that, for many years, the Law Council has expressed its members' concerns in the form of opposition to tranche 2. 'Tranche 2' means many things. That includes of course, the proposed new relationship with a Commonwealth regulator AUSTRAC, to be established upon what is at present state and territory-based regulatory terrain. One aspect of that potential relationship would be an obligation to make suspicious matter reports to AUSTRAC.

3. The Law Council's opposition to 'tranche 2' has never and does not entail opposition to anti-money laundering and counter terrorism financing measures as such. Money laundering is a scourge. No solicitor or barrister in Australia wants to be caught up in it, with the exception of criminals who have brought shame on their communities and the profession. These are eventually caught by the long arm of the law; they are expelled from the profession and no excuse may, could or should be made for them. This reform is not about criminals, but about the prospect of unwitting participation in someone else's crime. Money laundering creates devastating consequences for individuals and communities. These include enslavement, impoverishment and corrosion of the entire social fabric. Further criminal behaviour, including the activities of organised crime, can be enabled by money laundering. Financing terrorism is, like money laundering, a serious criminal offence, and participating unwittingly in it is also a risk with unspeakably high stakes, the costs counted in human lives. The profession takes these risks and these crimes seriously. For us, the question is not whether to mitigate the risks of money laundering and terrorism financing, but how.

4. In 2021, the Senate Legal and Constitutional Affairs References Committee (**Senate Committee**) inquired into the adequacy and efficacy of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime (the **Senate Inquiry**). The bipartisan Senate Committee published its report in March 2022, issuing just four recommendations.[2] Relevantly, these were to expedite the introduction of tranche 2, and in so doing to give specific consideration to:

   - the impact of regulatory burden on small business;
   - the existing regulatory and professional obligations already applicable to tranche 2 entities, including their effectiveness for AML/CTF purposes; and

[1] Australian Government Attorney-General's Department, *Consultation Paper: Modernising Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (April 2023).
[2] Senate Legal and Constitutional Affairs References Committee, *Report: Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (March 2022) p ix.

- protecting legal professional privilege.

5. These three points are in fact the three top priorities for the profession and we are pleased to have reached a position of full accord as to their importance. It is true that in accepting the recommendations of the Senate Committee, the Government has stated its overarching objectives clearly. Tranche 2, we understand, will be legislated. However, in considering the scope of the AML/CTF regime to be applied to the legal profession, the regime should be designed with the particular characteristics of the legal profession in mind and with a focus on the risks specific to the profession, rather than applying the existing framework in its entirety. The consultation paper posits a form that the Department proposes the regime might take, and invites dialogue, yet the various alternative regulatory models cannot really be appreciated until the scope of the legislation is made clear.

6. An assessment of the optimal model requires consideration to be given, among other factors, to the merits and viability of alternative regulatory models, including that in place in the United Kingdom where self-regulatory bodies act as sector-specific supervisors for AML/CTF purposes. The profession's consideration of this question depends on the breadth and scope of the legislation itself as determined in part, under the current proposal, by threshold categories known as designated services. These as yet are not clear. Until the gateway into compliance obligations is well-defined, the breadth of the responsibilities known, and the designated services accompanied by examples and scenarios that may be readily understood, the various alternative regulatory models and the scope of the responsibilities of potential regulators cannot really be appreciated. There is an opportunity, we believe, for the Department to provide this clarity in the second consultation paper, due to be released in September 2023.

7. Effectiveness, proportionality to risk, and clarity in the final outcome are objectives that are common to us all. The Department has already delivered outcomes in the consultation process that we believe may soon provide clear definition, based on the development of preliminary views as to the unlikelihood that designated services will capture barristers' work. The Law Council proposes that the areas of ambiguity or unfamiliarity be the subject of joint workshops in the coming months with subject-matter experts from the practising arm of the profession and jointly with the accounting profession. We thank Daniel Mossop, Evan Gallagher, Alex Engel and Matilda Jureidini in particular for their patient working through of the issues to date. We trust that this submission will further shape our future discussions.

The Consultation Questions

8. This submission takes the following approach to the relevant questions in Part 2 of the consultation paper.

9. In relation to Question 23[3]—This question is addressed in the reverse mode, that is, by way of a response to the proposed designated services which are set out in the consultation paper as background to the question. This response may be found in paragraphs 44 to 64. In order to answer the question directly as it has been formulated, one needs to possess a detailed knowledge of the actual money laundering and terrorism financing risks in the sector. Despite the sector's own knowledge of its practices, money laundering and terrorism financing risk will shortly be the subject of a vulnerabilities analysis. This will be undertaken by a leading independent AML/CTF expert from New Zealand, Neil Russ of Russ + Associates.

[3] 'What services by lawyers, accountants, conveyancers and trust and company service providers should be regulated under the Act so that they can manage their AML/CTF risks? Are these international examples that have worked well for these sectors?': AGD, *Consultation Paper* (April 2023) p 23.

10. In relation to Question 24[4]—This question identifies a key priority for the Law Council's constituent bodies and their members: guidance. It is addressed in paragraphs 24 and 25. Relevant to this issue is also the need for clear definitions, a topic addressed in paragraphs 44 and 45.

11. In relation to Question 25[5]—We focus on trust accounting controls, electronic conveyancing rules and practices, and a range of regulatory practices analogous to employee screening and rescreening. These three risk mitigation practices[6] could be leveraged with appropriate augmentation to satisfy anti-money laundering and counter-terrorism financing objectives. Within the framework of the current proposal, we propose mechanisms for leveraging existing controls in paragraphs 26.3 to 26.5. 'Pathways' workshops are proposed to form part of the consultation process in phase 2, and these are explained in paragraphs 27 to 30.

12. Questions 26 to 28, which cover legal professional privilege and seek feedback in relation to the 'six key AML/CTF obligations' and the lawyer-client relationship, are addressed in paragraphs [95] to [173]. As communicated during the phase one consultation period, the Law Council has been carefully analysing and comparing the experience of other jurisdictions where legal profession regulatory framework now includes regulation for money laundering and terrorism financing risk. We have paid particular attention to the issues of client confidentiality and legal professional privilege in this context. Comparative analysis has included many lengthy discussions as well as the review of different legislative provisions in place in other jurisdictions. While the United Kingdom and New Zealand are certainly of interest, our attention has not been limited to these jurisdictions. In the past six months the President of the Law Council, who is also Chair of the LCA Working Group, has engaged in discussions with the Law Society of Singapore, the Malaysian Bar, the New Zealand Law Society, the American Bar Association, the Solicitors Regulation Authority (UK), the Law Society of England and Wales, the Bar Council of England and Wales and the Federation of Law Societies of Canada. The results of these discussions will inform our ongoing contribution to the consultation process.

13. As Financial Action Task Force (**FATF**) Recommendation 1 makes plain, at the heart of the FATF's regulatory philosophy is a **risk-based approach** to regulation. The Interpretative Notes to Recommendation 1 go so far as to say that in applying the risk-based approach:

> Countries may also, in strictly limited circumstances and where there is a proven low risk of money laundering and terrorism financing, decide not to apply certain Recommendations to a particular type of financial institution or activity, or DNFBP (see below). Equally, if countries determine through their risk assessments that there are types of institutions, activities, businesses or professions that are at risk of abuse from money laundering and terrorist financing, which do not fall under the definition of financial institution or DNFBP, they should consider applying AML/CTF requirements to such sectors.[7]

14. An aspect of the risk-based approach is that limited resources should be deployed to mitigate risk in higher risk areas. At the level of compliance obligations, this is meant to be achieved through more stringent ('enhanced') Know Your Client and associated obligations and conversely, simplified measures or exemptions where the risk is low.

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[4] 'What guidance could be provided to assist those providing proposed legal, accounting, conveyancing and trust/company services in managing these AML/CTF obligations?': AGD, *Consultation Paper* (April 2023) p 23.
[5] 'Are there any existing practices within the accounting, legal, conveyancing and trust/company services sectors that would duplicate the six key AML/CTF obligations? If so, do you have suggestions on how these practices could be leveraged for the purpose of AML/CTF compliance?': AGD, *Consultation Paper* (April 2023) p 23.
[6] Practices in greater number than discussed in this submission could be selected for these purposes. At the stage of scheduling workshops and expert-led discussions, should the Department agree, we will identify further examples for joint examination.
[7] Financial Action Task Force, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (updated June 2021), Recommendation 1 and Interpretative Note to Recommendation 1, p 10 and p 31.

15. For a regulatory strategy to be effective, the Law Council appreciates that it is not enough to simply identify and assess the actual risk. Nor is it sufficient to have on-paper policies in place. The Law Council considers that the critical questions are: are we all sufficiently aware of our risk of participating in money laundering or terrorism financing? Do legal practitioners know what the red flags specific to these crimes are and how to spot them, and can we confidently activate appropriate responses?

16. The Law Council agrees with the risk-based philosophy and the critical importance of education, training and guidance. We consider that, to some degree, steps have already been taken by law societies to this end. However, on 17 February 2023 at its inaugural meeting the reconstituted Anti-Money Laundering and Counter Terrorism Financing Working Group of the Law Council of Australia (the **LCA Working Group**) identified the absence of a base-line analysis of the money-laundering and terrorism financing risk of the profession to be a key stumbling block to the application of the risk-based approach. By virtue of the multi-sectoral nature of the current national threat and risk assessments[8] they understandably do not focus in sufficient detail on the legal profession and the underlying research is now outdated.[9]

17. The LCA Working Group recommended to the Law Council that an independent, peer-reviewed vulnerabilities analysis of the profession be commissioned to remove this obstacle and supply the evidentiary basis for a risk-based approach. The full Council of the Law Council of Australia and the energetic, preliminary work of a subgroup of the LCA Working Group means that the leading expert appointed by the Law Council has now been fully instructed and will be in a position to present the results of the vulnerabilities analysis in time to inform, we hope, legislative design and certainly the next phase of the present consultation. This is not a small undertaking, and considerable energy, time and cost have been devoted to the planning phase by the expert to ensure a process that has integrity and comprehensive reach.

18. The second and equally important limb of the strategy to combat money laundering and terrorism financing identified by the LCA Working Group is the development and implementation of an effective, multidimensional education strategy for the profession. This work began in February and the Law Council expects to launch a campaign with the support of constituent bodies in the second half of the year. Again, the work is the product of a dedicated subgroup of the LCA Working Group. That group includes members of large and small practices across several jurisdictions. The aim will be to create nationally consistent tools to be delivered to practitioners through their professional associations with a focus on maximising practical support for micro- and small practices to ensure that risk mitigation is as cost-effective, and as effective in meeting its aims, as possible.

How the Profession is Structured and its Concerns

19. The focus on supporting smaller practices is based on the reality of how law is practised in the eight jurisdictions of Australia. As we have communicated to the Department and AUSTRAC, of the approximately 90,000 practising solicitors in Australia, **93%** of private solicitors' law firms have 4 or fewer partners. **84% are sole practices** or law practices

[8] AUSTRAC, *Money Laundering in Australia*, 'National Threat Assessment' (2011) and AUSTRAC, *Terrorism Financing in Australia*, 'National Risk Assessment' (2014) available respectively at https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/money-laundering-australia-2011 and https://www.austrac.gov.au/sites/default/files/2019-07/terrorism-financing-in-australia-2014.pdf (each accessed 4 June 2023). This submission does not address proliferation financing but the Law Council expects to have the opportunity to discuss this issue in the second round of consultation.

[9] As noted, (in relation to the national threat assessment) by the APG and the FATF in FATF and Asia-Pacific Group, *Anti-Money Laundering and Counter-Terrorist Financing Measures – Australia: Mutual Evaluation Report* (FATF: 2015) p 124.

with one principal, employing perhaps one or more employees.[10] The dominant form within the profession is the micro-practice.

20. A major concern expressed by the Senate Inquiry and repeatedly by members of the profession through our constituent bodies is the need to design compliance obligations to align with and not duplicate existing mitigation practices. In so doing, it is hoped we will avoid a reform that will impose a cost burden on practices which some will be ill-equipped to absorb. As presently proposed, however, the Law Council is concerned that the compliance regime would essentially extend obligations designed for banks and casinos to micro-practices.

21. Of course, the cost of compliance will depend on the design of the statutory regime.[11] In past years, the Law Council has looked to New Zealand to understand the costs of compliance under a model that also can be described in broad terms as extending tranche 1 obligations to services supplied by tranche 2 entities. The results of those investigations were supplied to the Senate Committee in answers to questions taken on notice.[12] The Law Council has more recently been advised that a 4-partner firm in regional New Zealand with approximately 14 employed solicitors dealing with typical conveyancing, trusts, estate and business/commercial matters, would employ a dedicated compliance officer and related staff of an additional full-time equivalent person to meet the firm's compliance, record-keeping and reporting obligations (this is not unusual) with an estimated cost of at least NZD $100,000 per annum. The costs of any external providers (for example for electronic identity verification) and the additional costs of enhanced due diligence for complex clients are additional to this figure.[13]

22. In north-west Tasmania, there is one legal practitioner for every 2,000 people. With very few exceptions, these men and women are sole practitioners or practice in very small firms. The research shows that Australia-wide, sole practitioners and solicitors working in a law practice with just one principal tend to have been practising law for longer. Analysing the consultation proposal and its potential costs against the characteristics of north-western Tasmania, the LCA Working Group has found that at least one of four consequences is likely to result if significant design modifications are not made to the designated services and consequential obligations. The likely results for north-west Tasmania are:

    - It will push solicitors at a later stage of their career into retirement.

[10] First in 2011, and biennially since 2014, the Law Society of New South Wales has commissioned the consulting firm Urbis to produce a demographic picture of the solicitor branch of the legal profession nationally, on behalf of the Conference of Law Societies. See Urbis, *National Profile 2022* (2023) p 29 (p 33 for employee-to-principal ratios) available at https://www.lawsociety.com.au/state-nsw-legal-profession (accessed 1 June 2023).
[11] Costings undertaken for the Australian Government in June 2017 by KPMG have not been published.
[12] Law Council of Australia, Answers to Questions on Notice, Senate Legal and Constitutional Affairs References Committee *Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* Document No 21 (3 December 2021) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Additional_Documents (accessed 7 June 2023). The Law Council's written submission to the Senate Inquiry also analysed the Deloitte report of 2016 commissioned by the Ministry of Justice, New Zealand, which forecast establishment costs for legal practitioners and conveyancers of $15.29 million in total ($9,725 per regulated entity) with the estimate at the higher end of the range projected to be $76.85 million ($48,800 per regulated entity). This was in a context of a profession with significantly fewer of its members practising in micro- and small practices relative to Australia's profession profile (see paragraph 19 of this submission): Deloitte, 'Report–Ministry of Justice: Phase II Anti-money laundering reforms; Business Compliance Impacts' (September 2018) p 15 available at https://www.justice.govt.nz/assets/aml-phase-2-business-compliance-impacts.pdf (accessed 15 June 2023).
[13] In addition to the annual costs mentioned, a New Zealand law firm of that size would have to meet the costs of an independent audit by a suitably qualified person every 3 years. The Law Council is advised that the audit fee for a firm of the size in this example (assuming a limited assurance audit standard and a review of 15–20 files) would be NZD $15,000 plus GST and possibly more. The cost of additional advice to meet special situations (political exposed persons enquiries, determination of privilege issues and suspicious activity reporting) can also be substantial and is usually not recoverable from the client. It should be noted that these figures are consistent with the Deloitte report (see n 12).

- If not approaching retirement, sole practitioners will be displaced into employment in order to share compliance costs (that is, potentially displaced altogether from their locality, as well as from their practices).
- It could push up the prices of legal representation, with obvious consequences for access to justice in the region.
- There is a criminal law and litigation lawyers' skills shortage in this region at the moment. This existing shortage will worsen if the associated compliance costs are in the order of the corresponding costs in New Zealand.

23. Members of the Law Society of South Australia have also informed the Society that costs of this order would potentially lead to smaller practices becoming unviable in that State. Yet this problem is entirely avoidable. The special question of how best to regulate small business to insure against these outcomes has been the focus of authoritative research including by the Productivity Commission.[14] Such an approach requires sensitivity to the economics of the sector to be present at the design stage, even when regulation is motivated by considerations of law enforcement or national security. The Law Council is concerned that to neglect to take into account the specific circumstances of sole practitioners and smaller law firms is to invite market disruption, encouraging a shift away from small businesses. The Law Council is urged by its members to seek that the Government be cognisant of the financial implications for the profession of this reform agenda, and to seek proportionality at all times, particularly due to the practical implications for access to justice.

Guidance

24. The consultation paper invites comment on what guidance could be provided to assist those providing, relevantly, proposed legal, conveyancing and trust/company services in managing new AML/CTF obligations. In our consultations, the constituent bodies of the Law Council have persuasively emphasised the need for any reform to be accompanied by high quality guidance provided in a timely fashion. Constituent bodies interact directly with the profession and are on the front line for enquiries, support and the provision of training. Members of law societies have advised their representative bodies that they would benefit from specific guidance and education around:

    (a) minimum documents required for verification of identity of all types of entities;

    (b) developing a secure repository for verification of identity documents with access to security settings;

    (c) accessing beneficial ownership registers and conduct foreign registry searches; and

    (d) training materials that include case studies and examples of red flags.

25. For the benefit of their members, constituent bodies of the Law Council as a matter of course administer effective hotlines, provide professional development throughout the year, and maintain multiple communications channels in urban centres and regional areas. They are ready to supplement these delivery channels with content to support anti-money laundering and counter terrorism financing initiatives.

Design Strategies

26. The design strategies that we ask/urge the Department to consider, with further detail supplied below, include:

[14] Australian Government Productivity Commission, 'Regulator Engagement with Small Business,' *Research Report* (September 2013) especially chapter 3 ('Is a different approach needed for regulating small business?' available at https://www.pc.gov.au/inquiries/completed/small-business/report/small-business.pdf (accessed 15 June 2023).

Amending Definitions in the AML/CTF Act

26.1. **Defining providers to clearly exclude entire categories of practitioners**, such as inhouse lawyers, government lawyers and barristers. The Financial Action Task Force itself excludes inhouse and government lawyers from the definition of Designated Non-Financial Businesses and Professions (**DNFBP**s). Lawyers who practise solely as or in the manner of barristers should be excluded by definition because their work is exclusively litigious and/or advisory, and not transactional: they do not provide services that give rise to appreciable tranche 2 risks which are intended to be caught as designated services. These categorical exclusions could be achieved by amending s 5 ('Definitions') of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**). In addition or alternatively, the exclusion of barristers could be confirmed by appropriate provision in s 6 ('Designated services').

Tightening Designated Services

26.2. **Ensuring that each of the designated services is defined to be clear, and limited according to risk**. The manner in which each service is defined should not result in the entire suite of compliance obligations applying to a low-risk firm. For example, we consider that a definition that captures using a trust account for personal injuries litigation where managing the account is the sole designated service relevant to that firm would produce an inefficient and unfair outcome, and should be avoided. Likewise, it should be made clear that a firm that drafts wills, administers testamentary trusts, and holds a trust account to receive payment of legal fees, but does not create, operate or manage commercial trusts or otherwise manage client money, will not fall within the regime. It is considered that these results can be achieved with tight drafting of the description of the designated services. Further examples where this mechanism might be used are given below.

Issuing Exemptions

26.3. **Issuing clear, legally binding exemptions.** This should be considered where it is not possible to carve out an activity, or not practicable to recognise a legally binding, existing mitigating practice within the definition of a designated service itself. This could include, for example, exempting from the designated service currently described as 'buying and selling real estate', transactions where the incoming proprietor:

(a) is the Commonwealth, state or local government, or a statutory authority;

(b) is a member of an entity already regulated under the AML/CTF Act (for example, a mortgagee financial institution taking possession of a property);

(c) possesses Foreign Investment Review Board approval for the acquisition; or

(d) is a listed domestic company.

Deeming Compliance

26.4. Utilising a **deemed compliance mechanism** either within the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No 1) (Cth) (**AML/CTF Rules**), or within official or officially endorsed Guidance, as the case may be, to recognise practices that achieve the same outcomes as other obligations under the regime. This could include, for example, deemed compliance for sole practitioners and smaller practices with the obligation to formulate and document a practice-wide anti-money laundering and counter terrorism financing risk assessment. Such practitioners could be required to review the sector-wide vulnerabilities analysis, actively apply its findings to the individual circumstances of their own practice, determine their practice's risk appetite and settle upon mitigation measures consistent with those settings. These practitioners could declare that they have undertaken these steps as a condition of the renewal of their practising

certificate,[15] with training provided by the relevant law society and insurer. The Law Council emphasises that this would need to be an active process. Support and guidance materials would need to emphasise that boilerplate approaches are not permissible and that application to the particular circumstances of the practice is required. Other examples might include a recognition of the Know Your Client obligations under the Australian Registrars' National Conveyancing Council (**ARNECC**) Participation Rules,[16] and recognising admission requirements under the Legal Profession Uniform Law (**Uniform Law**) and practising certificate renewals processes for the purposes of deemed compliance with the obligations to undertake employee screening and rescreening.[17]

Augmentation by the profession

26.5. Associated with the above, the Law Council believes that it would be significantly beneficial for consideration to be given by the profession to appropriate **augmentation** of its own suite of existing obligations to address money laundering and terrorism financing. The profession has already made significant headway to achieve this and has commissioned an independent vulnerabilities analysis of the profession. Our continuing dialogue with the Department will also inform this work.[18]

Why We Need Examples of Legal Services: 'Pathways'

27. Any serious consideration of tranche 2 must be thoroughly informed by the practical experience of legal practice to ensure any potential regime is effective and workable. The Law Council's constituent bodies have sought reassurance from the Law Council that the Department understands the realities of daily legal practice. The Executive Secretary of the Asia/Pacific Group on Money Laundering (APG),[19] Dr Gordon Hook, has made the deceptively simple observation that '[i]t is important to understand … the services [accountants and lawyers] offer.'[20] While Dr Hook made this observation in the context of

[15] Nova Scotia Barristers' Society Annual Firm Report, December 31, 2022 is attached as **Annexure 1**. Question 8 deals with lawyers' obligations relating to compliance with client identification rules that have been put in place nationally with the adoption by each province and territory of the Canadian Federation of Law Societies' AML Model Rules.

[16] See paragraphs 88 to 94 of this submission.

[17] See paragraphs 68 to 79 of this submission.

[18] It should be noted that no consultation as to the augmentation of any existing obligations under the Legal Profession Uniform Law and subordinate legislation (or under the equivalent law in the states and territories which are not part of the Uniform Law) has been undertaken. In particular contexts, such as electronic conveyancing, augmentation requires the initiative and participation of other parties. No assumptions are implied in this regard where mention is made in this submission of augmentation. With respect to the Uniform Law, augmentation would be accomplished by Legal Profession Uniform rules, developed and made under Part 9.2 of the Uniform Law. Responsibility for developing (relevantly) Uniform Legal Practice Rules sits with the Law Council so far as they relate to solicitors, and those rules may provide for any aspect of legal practice by legal practitioners, Australian-registered foreign lawyers and law practices. In developing (for example) proposed Legal Practice Rules, the Law Council as a matter of practice consults with its constituent bodies and other stakeholders in developing the proposed rules. The Uniform Law then requires the Law Council to consult with the Legal Services Council and its advisory committees, the Commissioner for Uniform Legal Services Regulation, and the local Uniform Law regulatory authorities. The Law Council must also, with the approval of the Legal Services Council, engage in public consultations on the draft Rules. In practice, the Law Council also consults directly with significant stakeholders including federal, state and territory courts, the Commonwealth and state and territory Attorneys General and relevant government agencies. Following public and direct consultations, the Legal Services Council may, if it approves final draft Rules proposed by the Law Council, submit them to the Standing Committee of Attorneys-General of the Uniform Law jurisdictions, which may either approve the draft Rules or veto them, for particular specified reasons. Legal Practice Rules, together with Admission, Legal Profession Conduct, Continuing Professional Development and general Uniform Rules are statutory instruments which come into effect after publication on the NSW legislation website. These Rules are therefore legally binding and may provide for civil penalties for contraventions (in addition to a contravention of a Rule being capable of constituting unsatisfactory professional conduct or professional misconduct).

[19] The APG is a key member of the international network called 'FATF-styled Regional Bodies' or FSRBs: see 'About Us' at apgml.org.

[20] Dr Gordon Hook, 'Assessing the Risks of Money Laundering and Terrorist Financing through Companies and Trusts', chapter 7 in Chaikin and Hook (eds), *Corporate and Trust Structures: Legal and Illegal Dimensions* (Australian Scholarly Publishing: 2018) p 82.

DNFBP risk assessments, it holds true just as well, we believe, for the process of laying the foundations for significant legislative reform.

28. One way of ensuring that this knowledge is captured and communicated effectively would be to map out each of the steps that is taken by a given party to the relationship to progress the service through its numerous stages to completion. This process would allow the ready identification of duplication, and of risk points. Such an approach would also illustrate how seemingly abstract obligations translate into practice. For example, ethical obligations are expressed at a high level, yet in practice, mandate Know Your Client steps at certain stages of representation. This mapping process would also allow for more concrete consideration of trust accounting controls (including how they could potentially be augmented), by allowing mitigation practices to be observed in the context of inflows into and outflows from a trust account for key transactions.

29. This step-by-step, descriptive approach, has been called a 'pathway' in analogous contexts (such as in tax reform).

30. Developing pathways is reasonably complex and requires the involvement of subject-matter experts (experienced practitioners). Based on consultation roundtables to date and input from constituent bodies, the Law Council has identified four transactions or services that we believe could usefully form the basis for a series of pathways workshops with Government. We consider that these could be conducted jointly with the accounting profession. The Law Council has begun work to map such pathways as set out in **Annexure 2** (included for illustrative purposes). While the list of pathways should be expanded, we have identified the following potential services and transactions:

- plaintiff personal injuries litigation
- a 'cottage conveyance'
- drafting a will in which a testamentary trust is created,[21] and the administration of the estate
- cross-border dealings.

Implementation

31. Before turning to specific questions associated with designated services as raised by the consultation paper, it is important to convey the keen interest of the Law Council, its constituent bodies, and practitioners across the country in knowing when obligations are likely to come into force. The value of a consultation period that allows for a considered exchange to inform design and support services cannot be overstated and is greatly appreciated. There is anxiety within the profession, however, about the prospect of obligations to which considerable penalties for breach attach coming into effect without adequate time to prepare or put in place an effective compliance framework. On behalf of their members, constituent bodies have asked the Law Council to seek assurances of an implementation grace period once the second tranche of the regime were to come into force. This would allow time for legal practitioners to familiarise themselves with the detail of the new requirements and update their compliance processes. The constituent bodies of the Law Council have themselves committed to providing assistance to the profession in complying with any new regime, including raising awareness of the attendant obligations. All newly regulated entities will need guidance as to the interpretation of requirements and the nature and scope of their risk management regimes. The expertise required to meet these needs requires development, which in turn, requires sufficient time.

32. A particular challenge for the legal profession will be the large number of entities that will need both to enhance their processes and to comply under any proposed regulatory regime. This will require a mixture of external resource (new employees or technology)

[21] A testamentary trust is created by a will and comes into effect upon the death of the testator.

that will be in short supply or internal resources that require a significant uplift through training and education. Consequently, to balance the burden on external and internal resources, we suggest that, should the legal profession be required to enrol with AUSTRAC, that this take place in cohorts broken down by size. This could be based on the annual revenue of the law practice (such as $10+ million, $1–$10 million, under $1 million) or the number of partners (50+ partners, 5–49 partners, 4 partners or less). Such an approach has particular benefits:

- Those law firms with the most existing experience and resource could be the first to implement an AML/CTF program, therefore addressing any sector-wide issues identified.
- AUSTRAC could better manage the enrolment of new reporting entities through this staged process.
- External resources could be balanced to best leverage available personnel and technology.
- Training and education could occur for existing partners and employees to best aid compliance.

33. We understand that the regulatory approach foreseen by AUSTRAC does not envisage enforcing breaches until a reasonable time has been given for newly regulated entities for newly regulated entities to achieve compliance. This is particularly important for a profession dominated by small practices. A timeline that includes an extended implementation date, an outlined of phased implementation and commitment to compliance strategies that privilege education and guidance in the first instance, over the early imposition of penalties, would provide reassurance. The Law Council considers that the terms of phased or staged implementation and could be the subject of further discussion, but a commitment to it and overarching principles should be resolved and published in the second consultation paper.

Excluded categories

Inhouse and Government Lawyers

34. The consultation paper makes it clear that the Government intends to comply with the Recommendations issued by the FATF using a risk-based approach, such that over-compliance is not an objective. FATF makes clear that the reference to lawyers and legal professionals in the concept of DNFBPs 'is not meant to refer to "internal" professionals that are employees of other types of businesses, nor to professionals working for government agencies, who may already be subject to AML/CFT measures.'[22] The Law Council anticipates that the second consultation paper will carry a commitment to the same effect. The Law Council considers that the mechanism that the FATF has utilised, namely an exclusion from the definition of the provider of the services sought to be regulated, is appropriate. The appropriate definitional mechanism will become clearer when details of the proposed statutory design and terminology emerge in relation to tranche 2 entities.

Barristers

35. The independent bar in each Australian jurisdiction is made up of legal practitioners who practise solely as or in the manner of barristers and whose practising certificates are specific to that manner and form of practice. They provide advocacy and related services in the conduct of litigation and alternative dispute resolution; some also provide legal advice; but significantly, they do not represent their clients other than in litigation or alternative dispute resolution, they do not carry out transactions for their clients, they do

[22] FATF, *FATF Recommendations* (June 2021) Glossary, definition of 'Designated Non-Financial Businesses and Professions,' p 120.

not set up legal entities or provide company or trust services, and they do not administer or manage their clients' entities, money or investments.[23]

36. The services that have been identified as involving sufficient risk to warrant classification as designated services under tranche 2 all involve transactional work.[24] A legal practitioner who practises solely as or in the manner of a barrister provides litigious and advisory services, but does not provide transactional services. This remains a fundamental distinction between lawyers practising solely as or in the manner of barristers and other legal practitioners.

37. Ordinarily, barristers' fees are paid only after performing the work for which they have been retained, often out of funds in the instructing solicitor's trust account. In some but not all jurisdictions, it is possible for a barrister to receive funds for payment of his or her fees in

[23] These positive and negative elements of legal practice are exemplified by rules 11 and 13 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, applicable to the holder of a barrister's practising certificate under the *Legal Profession Uniform Law* (NSW, Vic, WA):

'11 Work of a barrister

Barristers' work consists of:

(a) appearing as an advocate,
(b) preparing to appear as an advocate,
(c) negotiating for a client with an opponent to compromise a case,
(d) representing a client in or conducting a mediation or arbitration or other method of alternative dispute resolution,
(e) giving legal advice,
(f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs,
(g) carrying out work properly incidental to the kinds of work referred to in (a)–(f), and
(h) such other work as is from time to time commonly carried out by barristers.

…

13 A barrister must not, subject to rules 14 and 15:

(a) act as a person's general agent or attorney in that person's business or dealings with others,
(b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent,
(c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
  (i) conferring with the client, the instructing solicitor, prospective witnesses or experts,
  (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court,
  (iii) viewing a place or things by arrangement with the instructing solicitor or the client, or
  (iv) library research,
(d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate,
(e) be the address for service of any document or accept service of any document,
(f) commence proceedings or file (other than file in court) or serve any process of any court,
(g) conduct the conveyance of any property for any other person,
(h) administer any trust estate or fund for any other person,
(i) obtain probate or letters of administration for any other person,
(j) incorporate companies or provide shelf companies for any other person,
(k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation, or
(l) hold, invest or disburse any funds for any other person.'

Rule 14 excludes things done 'without fee and as a private person not as a barrister or legal practitioner'. Rule 15 exempts conduct 'as a private person and not as a barrister or legal practitioner' that would otherwise offend rule 13(a), (h) or (l).

[24] AGD, *Consultation Paper* (April 2023) p 22.

advance of performing that work.[25] If the fees turn out to be less than the amount received, the excess will be repayable. This is the only context in which a barrister may end up paying money back to a client.

38. The particular characteristics of barristers' practice and the ethos and regulation of the bar are discussed in greater detail *inter alia* in the submission of the NSW Bar Association of 8 June 2023. In summary, the money laundering and terrorism financing risks associated with the independent bar are extremely low.

39. The best and clearest way to deal with the position of barristers in the tranche 2 legislation would be to provide expressly that a legal practitioner practising solely as or in the manner of a barrister is not thereby a reporting entity or, if the design preference is to focus on designated services, to make clear that a practitioner practising solely as or in the manner of a barrister does not thereby provide designated services.

40. If lawyers practising solely as or in the manner of barristers were treated as reporting entities, the administrative burden would be disproportionately onerous, the public's access to justice would be consequently impaired, and any resulting public benefit would be disproportionately low. Barristers as such are sole practitioners and sole traders, and cannot engage in any trade or profession that is inconsistent with their role as barristers. These points are made clear *inter alia* in the submission of the NSW Bar Association of 8 June 2023.

41. It is also to be expected that the communication of information to or by a barrister in connection with litigation or the provision of legal advice will always or nearly always be covered by legal professional privilege. The Government and the FATF correctly recognise that legal professional privilege must be maintained, and that the confidentiality of privileged communications cannot be compromised by an obligation to report. This underscores the absence of utility in treating barristers as reporting entities.

Services provided for non-commercial purposes

42. The Law Council considers the exclusions noted on page 22 of the consultation paper (services provided for non-commercial purposes and as noted, litigation) are reasonable and appropriate in the circumstances. We suggest that an additional exclusion be considered (which is proposed to apply to dealers in precious metals), namely that the AML/CTF regime will not apply to legal practitioners dealing in cash transactions less than AUD$10,000 and any transactions involving payments made by electronic funds transfer, or through an electronic lodgement network operator by cheque.[26]

Litigation

43. The Law Council welcomes as necessary and appropriate the exclusion of litigation from the scope of the proposed regime. Specific clarification is sought that civil litigation, family law litigation, occupational discipline litigation, administrative appeals, criminal litigation and other quasi-judicial litigious processes such as patent and trade mark appeals, and tribunal proceedings, would be exempt from the regime.

[25] See, for example, the *Legal Profession Uniform Law Application Regulation 2015* (NSW) cl 15. This allows direct access clients to provide and barristers to receive funds into a dedicated and independently examined 'trust money account', thereby providing effective security for the payment of the barrister's fees. The NSW Bar Association reports that only 1.5% of barristers make use of the facility. It does not involve the management of clients' money in a conventional sense. It also seems fairly clear that such arrangements do not present a realistic risk of money laundering or terrorism financing.

[26] This exclusion is noted in relation to dealers in precious metals and stones: AGD, *Consultation Paper* (April 2023) p 24.

Designated Services

44. Extending the scope of the current AML/CTF regime to include the legal profession will have a significant impact on the sector. Aside from the definitions in s 5 of the AML/CTF Act, the designated services listed in s 6 are the gateways to the compliance regime. Every legal practitioner apart from those excluded will need to review and interpret each individual designated service and come to an appreciation of whether they or not they are required to develop part A[27] and part B[28] programs under the Act and Rules. The designated services thus bear the potential of bringing in to the regime a very significant proportion of the profession, or alternatively, a more targeted sector, depending on how the designated services are framed. Whether or not bright lines are drawn will determine the amount of time spent by practitioners in working to understand whether their practice comes within the regime, the extent of the risk they take in acting upon their interpretation (and the anxiety some will experience), as well as the cost some will feel they need to expend to obtain advice as to the scope of the provisions. Over-compliance is costly and runs directly counter to a risk-based approach and where there has been confusion about scope, as there has been in some jurisdictions, over-compliance has been one result.

45. We accordingly urge the Department to provide a refined list of designated services to inform the next phase of consultation. For the benefit of concerned practitioners, examples of legal services drawn from daily life that illustrate what does and does not fall within the scope of a defined service should be included. As discussed in the roundtable meetings, the marginal cases are often the very cases that create anxiety and unnecessary costs. As such, we ask that the examples deal with the margins, as well as illustrating the central points within the scope of the services proposed.

46. The 'gatekeeping' role played by legal professionals (as gatekeepers to the legitimate financial system) was the original rationale and remains the reason for bringing them with other DNFBPs into the scope of the FATF's Recommendations. That is, the focus on this group is due to their participation in transactions. For this reason (as well as in consideration of the special role of legal practitioners in the administration of justice), litigation has always been exempted. Family lawyers, personal injuries lawyers and criminal defence lawyers are often organised in firms where their sole focus and service offering is in their chosen area of law. They are engaged in representing clients with respect to litigious matters and do not undertake transactional work. However, the list provided on p 22 may be interpreted as capturing these, and others, whose practices are similarly circumscribed. We do not consider that this is the intention of the Department, and it is contrary to the experience of other jurisdictions where DNFBPs are regulated for money laundering and terrorism financing risk according to a risk-based approach. We ask that special attention be given to including examples in the next consultation paper which establish that these and other practitioners [29] are not captured simply because they maintain a trust account for receipt and disbursement of settlement monies or court-ordered payments, and legal fees.

47. The prefatory phrase on p 22 of the consultation paper, 'lawyers when they prepare or carry out transactions for clients….' implies the need for an underlying transaction separate from a trust account inflow and payment. If this understanding is correct, the mere fact of maintaining a trust account would not bring a law practice into scope if it does not otherwise provide any designated service. However, if this implication is not accepted as correct, a large proportion of Australia's 90,329 solicitors will otherwise be brought within scope merely by virtue of having a trust account.

48. A list of questions and concerns is provided below to inform the process of refining the definitions.

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[27] AML/CTF Act, s 83 and s 84(2) and Ch 8 of the AML/CTF Rules.
[28] AML/CTF Act, s 83 and s 84(3).
[29] Other examples include boutique planning and environment advisory and litigation practices, health law practices, migration law firms, employment and industrial law firms, animal law firms and sports law practices.

The Proposed Designated Services:

Lawyers when they prepare or carry out transactions for clients, relating to buying and selling of real estate

49. Since the FATF Recommendations were drafted to include DNFBPs in 2003, electronic conveyancing in Australia has fundamentally changed the risk profile of this activity insofar as legal practitioners are participants. While there are differences between the rules and the AML/CTF regime objectives, the ARNECC regulatory framework, described on pages 40 to 42, establishes rigorous, legally binding obligations upon participants to verify the identity of their client. The Law Council considers that it would place a heavy and unnecessary regulatory burden upon legal practitioners (particularly property lawyers) to require them to comply with both the ARNECC framework and the AML/CTF regime. We seek that further consideration be given to this important area of legal practice, jointly with Government, potentially through the pathways mechanism already proposed.

50. If this item is included as a designated service it would be desirable to define 'real estate'. It would be appropriate to align the definition with that of 'real property' in s 195.1 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth):

> "***real property***" includes:
> (a) any interest in or right over land; or
> (b) a personal right to call for or be granted any interest in or right over land; or
> (c) a licence to occupy land or any other contractual right exercisable over or in relation to land.

51. Alternatively, consideration could be given to the definition of 'interest in Australian land' in s 12 of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

Lawyers when they prepare or carry out transactions for clients, relating to managing of client money, securities or other assets

52. The Law Council seeks clarification in relation to the following questions.

52.1. How is 'managing' defined?

52.2. How are 'other assets' to be defined?

52.3. Is the intention to include maintaining a trust account for the payment of legal fees? The Law Council seeks assurance that funds held in a solicitor's trust account on account of fair and reasonable legal fees, disbursements and counsel's fees are to be excluded from consideration of whether a designated service is being provided.

52.4. Is the intention to include the receipt and disbursement of settlement money following the resolution of a dispute? The Law Council seeks assurance that funds held in a solicitor's trust account on account of receipt of settlement monies from licensed insurers and other credit licensed entities[30] and for disbursement of counsel's fees, are excluded from consideration of whether a designated service is being provided. **Annexure 2** gives plaintiff personal injuries litigation as an example.

52.5. In addition to the above, the receipt, holding and disbursement of trust money to, in and from a trust account maintained by a legal practitioner where the relevant inflows of funds

[30] including holders of an Australian Financial Services Licence. In these circumstances, inflows into a trust account, it is submitted, pose no or negligible risk of money laundering or terrorism financing.

into the account originate only with the following categories of payers should be excluded from the definition of designated services:

(a) Commonwealth, state or local government or a statutory authority

(b) a domestic listed company

(c) the holder of an Australia Financial Services Licence

(d) credit licensed entities (such as litigation lenders, banks and insurers).

In the alternative, exemptions should be made to prevent triggering onerous compliance obligations with respect to transactions involving only these parties.

52.6. Is the intention to include:

(a) funds under a National Disability Insurance Scheme plan or at the direction of the National Disability Insurance Agency?

(b) a capital raising by a domestic listed company or managed investment scheme?

(c) a court-supervised scheme of arrangement under the *Corporations Act 2001* (Cth) (the **Corporations Act**)?

(d) funds held and disbursed pursuant to a grant of probate or letters of administration?

(e) funds under the direction of the office of a public trustee or a guardianship of administration order?

(f) funds received according to a court order, for example, a compensation order for a minor or a disabled person?

Lawyers when they prepare or carry out transactions for clients, relating to [the] management of bank, savings or securities accounts

53. Clarity should be provided as to the meaning and object of this proposed set of services, including the definition of 'management'.

Lawyers when they prepare or carry out transactions for clients, relating to [the] organisation of contributions for the creation, operation or management of companies

54. The Law Council seeks clarity as to what in practical terms, is intended to be subject to further regulation within this category.

55. In the absence of significant clarification and risk-based justification, the Law Council submits that this should not be included as a designated service.

56. There is a risk of inadvertently capturing the following activities, which is considered inappropriate and likely to be highly disproportionate to risk:

(a) court-supervised schemes of arrangement under the Corporations Act;

(b) capital raising, merger or acquisition by a domestic listed corporation;

(c) advising directors on their legal obligations and duties;

(d) holding company meetings;

(e) auditing accounts and financial reporting;

(f) taxation advice;

(g) reporting and compliance obligations; and

(h) acting in relation to workplace health and safety and workers' compensation obligations.

Lawyers when they prepare or carry out transactions for clients, relating to [the] creation, operation or management of legal persons or legal arrangements (e.g. trusts)

57. Trusts serve many legitimate and important functions in Australian life. A severely brain-injured child might benefit from an income trust established by their parents to manage capital and supply a regular source of funds for personal support and maintenance. There are legitimate commercial purposes for trusts, including tax and estate planning and wealth management utilised widely across Australian society. The Law Council submits that the object of this designated service should not be to capture dealing with trusts for non-commercial purposes at all,[31] but nor is it self-evident that money laundering and terrorism financing risk is associated with the establishment of trusts for commercial purposes. The Law Council notes that the Panama Papers and other 'leaked' caches of similar document have not shown Australian legal practitioners to have been acting improperly. Certainly, statutory investment vehicles such as managed funds, listed investment trusts and superannuation funds should be excluded from the proposed scope and at a minimum, 'operation or management' must be clearly defined and examples should be given. The potential to capture the following activities is considered inappropriate and disproportionate to risk and the Law Council asks that further consideration be given to whether the intention is to capture:

(a) advising trustees on their legal obligations and duties;

(b) holding meetings of members;

(c) auditing accounts and financial reporting;

(d) providing taxation advice;

(e) reporting and compliance obligations; and

(f) changing trustees.

58. As previously noted, current drafting appears to capture the drafting of almost any will, which usually involves the creation of a testamentary trust that takes effect upon the death of the testator. If this interpretation is correct, this form of words would result in a significant additional number of legal practitioners falling within the scope of the regime and increasing costs significantly.

59. In the absence of significant clarification and risk-based justification, the Law Council seeks that this proposed designated service be excluded.

Lawyers when they prepare or carry out transactions for clients, relating to buying and selling business entities

60. As with real estate transactions, the practice of buying and selling a business as a matter of course requires the practitioner to undertake conflicts checks, client identification and verification and associated due diligence measures, including enquiries to confirm that the client's goals and instructions are lawful. These obligations have their sources in ethical rules (particularly Rule 8 of the Australian Solicitors' Conduct Rules), the common law, statute and subordinate legislation and do not depend on the value of the transaction.[32] The transactions will also already involve banks regulated for money laundering and terrorism financing risk.

[31] We note the intention expressed in the consultation paper not to include activities where they serve purposes that are not commercial: AGD, *Consultation Paper* (April 2023) p 22.
[32] A practitioner is also exposed to the risk of civil liability if their negligent or other wrongful conduct should cause loss.

61. Given the prospect that this proposed designated service as currently worded may capture the small end of the market with deleterious and disproportionate consequences due to the compliance costs, the Law Council proposes the definition be modified by a threshold, such that the sale of an individual business for consideration less than $20,000 does not amount to a designated service.

Proposed Designated Services with respect to Trust and Company Service Providers

62. The Law Council notes that relevance of the list of designated services related to trust and company service providers (**TCSP**s) to legal practitioners. This list of designated services, which has its origins in Recommendation 22 paragraph (e) of the 40 + 9 FATF Recommendations, is designed to encourage the regulation for money laundering and terrorism financing risk of anyone, including a legal practitioner, who carries on a business of providing the listed services rather than as a one-off service. While this includes a legal practitioner or an accountant, as Dr Hook has noted, '[m]ore often than not, TCSPs are incorporated entities offering a wide range of financial services in addition to the services listed by the FATF.'[33] The Law Council notes that in the United Kingdom, to provide any of the relevant services except on an occasional basis requires registration as a TCSP with HM Revenue and Customs. The sector supervisor for the legal profession in England and Wales, the Solicitors Regulation Authority, manages this process for solicitors and makes a recommendation to HM Revenue and Customs, with whom it liaises directly until an approval to act and inclusion on the register is granted. However, TCSPs are not supervised by the Solicitors Regulation Authority and overlaps in jurisdiction between AML/CTF supervisors are managed by the relevant supervisors by consent.

63. As with the proposed list of designated services drawn from FATF Recommendation 22 paragraph (d), the Law Council seeks greater clarity as to the precise definitions proposed with respect to those activities, and in particular, whether activities that do not include undertaking a financial transaction for a client in this context would nevertheless fall within scope. As such, it would also be helpful to clarify that the provision of advisory services (legal advice) is not included merely because it relates to the subject matter of the various activities listed.

64. Reducing and refining the designated services provides the first opportunity for the Government to apply the risk-based approach by ensuring that activities which present a low risk of money laundering and terrorism financing are not included. Subject to the clarifications sought above, the Law Council submits that if designated services are to be legislated for legal practitioners, they be limited to those discussed in paragraphs 49 to 53 above, and the designated service that would capture buying and selling businesses exclude transactions where the consideration is less than $20,000, as set out above. In the absence of significant clarification, and justification of money laundering and terrorism financing risks, the Law Council submits that the following should be excluded from being designated services:

    (a) organisation of contributions for the creation, operation or management of companies; and

    (b) creation, operation or management of legal persons or legal arrangements (e.g., trusts).

Existing practices

65. As noted in the consultation paper, Australia will undergo its next FATF Mutual Evaluation between 2025 and 2027. Alongside technical compliance with its Recommendations, the FATF's keen interest is to measure how effectively a country applies its anti-money laundering and counter terrorism financing measures. The observations that follow, which

[33] Hook, 'Assessing the Risks', p 83.

deal with existing practices, are motivated by a desire to ensure that effective outcomes are achieved.

66. The legal profession in Australia operates under a comprehensive, stringent regulatory framework. Lawyers are bound by strict ethical and professional standards, subject to rigorous licensing and oversight, and owe fundamental common law and statutory duties to their clients, including that of client confidentiality and legal professional privilege. The Law Council submits that any extension of the AML/CTF regime to the legal profession must take this robust pre-existing framework into account, ensuring that existing obligations are not needlessly duplicated and that any additional obligations do not undermine the unique constellation of duties and responsibilities to which legal practitioners are subject.

67. The consultation paper asks: Are there any existing practices within the accounting, legal, conveyancing and trust/company services sectors that would duplicate the six key AML/CTF obligations?[34] We welcome the invitation and respond below. Yet we are conscious that describing practices one by one and even undertaking a gap analysis between AML/CTF rules and 'existing practice' leaves out a key ingredient. It is far from a pointless process—it will elicit, we hope, useful information. But a defining characteristic of legal practice, which is difficult to convey, is the way in which actual daily legal practice is informed by and steeped in ethics and professional responsibility. Ethics education begins with tertiary legal studies and ends on retirement. It is reinforced and applied through repetition, mentoring, professional collegiality, and decision-making frameworks that with repeated application become integrated into the fabric of who one is, as a lawyer. As the Hon Justice Martin of the Supreme Court of Western Australia told law students, ethical problems that arise in daily practice are nuanced. Legal ethics are 'indispensable to navigating the daily challenges of legal practice' and 'any attempt at a comprehensive written codification is likely to fail. Real ethical problems are invariably subtle.'[35] In practice, these subtleties are experienced regularly. Problems on a file, or with a client, are talked out with a senior colleague or with an equal, sometimes with the assistance of the law society or bar association but typically that is reserved for thornier issues. None of the existing practices described below can be properly understood without an appreciation of the fundamental ethical responsibilities that the practitioner owes to the court, the client and the community as a whole, and an appreciation of the fact that these are not abstract considerations but are embedded in ordinary, daily legal practice.

Employee screening and re-screening

68. One element of an AML/CTF framework is for a business or practice to that ensure employees and independent contractors do not pose a money laundering or terrorism financing risk to the business. This risk is mitigated within the AML/CTF regime by undertaking employee due diligence. Law firms, too, have systems in place, partly based on profession-wide systems within each jurisdiction, but checked and implemented at a practice level, to help ensure that employees and independent contractors who are engaged by a law firm are persons of integrity.

69. For the legal profession, the screening and rescreening of practitioners is achieved in the first instance through admissions standards. A practitioner's fitness to practice is then verified through the process of granting a practising certificate and, subsequently (usually annually), when the solicitor applies for the practising certificate to be renewed. Within the practice itself, the supervisory responsibility of the principal over employed solicitors and non-professional staff is fundamental to legal practice.

[34] Question 25, AGD, *Consultation Paper* (April 2023) p 23.
[35] The Hon Justice Kenneth Martin, 'Legal Ethics: Navigating the Daily Minefields', Address, Legal Theory and Ethics course, University of Western Australia, 17 August 2015, available at supremecourt.wa.gov.au, 'Speeches', (accessed 10 June 2023).

70. Part 8.3 of the AML/CTF Rules set out the elements of the AML/CTF requirements in Australia. A relevant entity must have:

(a) a documented program for screening and re-screening employees and independent contractors; and

(b) a documented plan of the consequences an employee/ contractor will face where there is a failure to comply with the AML/CTF program without reasonable excuse.

71. The Law Council has considered AUSTRAC's Guidance[36] and notes that among other steps, AUSTRAC suggests that as one of a number of methods contributing to the vetting process, enquiries be undertaken to ascertain whether a prospective or existing employee possesses a state or territory gaming regulator-issued licence to perform their functions. AUSTRAC notes in this context the potential significance of whether a 'fit and proper person' test must be met before such a licence is granted. This contributes to the strength of the vetting process.[37]

72. Taken together, the four analogous mitigation practices in place within law firms are:

(a) admissions standards;

(b) the granting of practising certificates and their renewal;

(c) supervision of employees; and

(d) trust money controls.

73. In order to be admitted to legal practice, candidates must pass the **fit and proper person** test and be of good fame and character. Section 17(c) of the Uniform Law sets out the fit and proper person test requirement. Section 17(2)(b) stipulates that the matters set out in the Admission Rules (for example, the Legal Profession Uniform Admission Rules 2015) must be taken into account. This includes student conduct reports (including with respect to practical legal training undertaken),[38] additional independent evidence of character[39] and a police report.[40] Case law elaborates on the meaning of 'good fame and character', which includes the enduring moral qualities of the individual, and reputational considerations with respect to the individual (which has important consequences, of course, for the profession).[41] The admissions standards provide that a practitioner will be disqualified if they are no longer a fit and proper person, thus ensuring the continuing nature of the obligation.

74. For the Uniform Law jurisdictions, the provisions that govern the issue of practising certificates, including their renewal, are found in Pt 3.3 Divs 2 and 3 of the Uniform Law. Section 45(2) of the Uniform Law prohibits granting or renewing a practising certificate if a regulatory authority considers that the applicant is not a fit and proper person. Rule 13 of the Legal Profession Uniform General Rules 2015 sets out the criteria that may be considered for the purposes of section 45. This extensive set of grounds accords wide discretion to the regulatory authority, including to consider whether 'the applicant is currently unable to carry out satisfactorily the inherent requirements of practice as an

[36] AUSTRAC, 'Employee due diligence' including 'How to screen and rescreen employees' (last updated 24 March 2023) https://www.austrac.gov.au/business/how-comply-guidance-and-resources/amlctf-programs/employee-due-diligence (accessed 5 June 2023).
[37] AUSTRAC also notes that its guidance on this topic is general (that is, not specific to any particular industry sector) and 'relates to situations which pose the highest ML/TF risk and may exceed the minimum requirements' as set out in the AML/CTF Act and AML/CTF Rules: AUSTRAC, 'Employee due diligence', online.
[38] Legal Profession Uniform Admission Rules 2015 (NSW), r 19.
[39] Legal Profession Uniform Admission Rules 2015 (NSW), r 16.
[40] Legal Profession Uniform Admission Rules 2015 (NSW), r 18.
[41] High Court authority for this test is found in *Re Davis* (1947) 75 CLR 409 at 420 per Dixon J and *Council of The Law Society of New South Wales v Hislop* [2019] NSWCA 302 at [43].

Australian legal practitioner'. The criteria are set out for illustrative purposes in **Annexure 3**.

75. As part of the renewal process, applicants must disclose any matters which may affect their suitability to continue to hold a practising certificate. Such matters are listed in legislation[42] and their contents and the significance of disclosure to the legal regulator are the subject of professional ethics training prior to admission. Within this same renewal process, the practitioner applicant must disclose whether any show cause event which might affect their fitness to hold a practising certificate has taken place[43] and whether there has been any disqualification from managing a corporation under any law in Australia. While AML training is not mandatory, continuing education in ethics and professional responsibility and practice management are, and the renewal process requires the applicant to certify that they have met the minimum mandatory requirements. Risk management training is a precondition to granting a principal's practising certificate. At present this typically includes training for cyber risk and fraud, but the risk management framework is, of course, designed to establish an awareness and practices to identify and appropriately mitigate all foreseeable risks to a practice.

76. It is a cardinal rule within law firms that principals must supervise professional and non-professional staff. Rule 37 of the Australian Solicitors Conduct Rules unambiguously provides 'A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.' The primacy of the role of the supervising principal underpins every facet of practice. The client retainer is a contract between the principal of the firm and not the employee who may have day-to-day carriage of the file. The principal's failure to supervise may result in

    (a) a finding of unsatisfactory professional conduct

    (b) a finding of professional misconduct

    (c) a personal costs order against the principal.

77. These sanctions act as strong disincentives to fail to properly supervise, and insurers train principal solicitors extensively on this point. Firms that maintain trust accounts also have extensive trust money and account controls that place limits on who can deal with the account.[44] The Law Council understands that some firms undertake criminal records checks of staff who are not qualified legal practitioners, on a risk-sensitive basis.

78. We note that the FATF recognises that the level of assessment (vetting of staff and principals) should be proportionate to the risk the practice faces and the role of the employee. In its risk-based Guidance, the FATF notes that the assessment may include:

    (a) criminal records checking; and

    (b) other pre-employment screening, for example, background verification and credit reference checks.[45]

79. While the effectiveness measures outlined above would need to be interpreted in the context of a practice's own assessment of its risks, based on the AML/CTF framework for

[42] To take Queensland as an example, 'suitability matters' are listed in the *Legal Profession Act 2007* (Qld) s 9. They include being an insolvent under administration, being convicted of an offence, having contravened a law about trust money or trust accounts, and being 'unable to carry out the inherent requirements of practice as an Australian legal practitioner': https://www.legislation.qld.gov.au/view/html/inforce/current/act-2007-024#sec.9

[43] To continue with Queensland, 'show cause' events are set out in Sch 2 to the *Legal Profession Act*. By way of example, these include becoming bankrupt or having been served with a creditors' petition, being a director of a company that is being wound up or having been convicted for a serious offence or any tax offence in any jurisdiction: https://www.legislation.qld.gov.au/view/html/inforce/current/act-2007-024#sch.2.

[44] Trust accounts are discussed in their own right in paragraphs 80 to 85 below.

[45] FATF, *Guidance for a Risk-Based Approach: Legal Professionals* (June 2019) at [143].

currently regulated entities it would appear that the measures described may well be sufficiently robust to meet the demands of a high-risk environment.

Trust accounting

80. It must be made clear at the outset that the Law Council does not regard the practices outlined below as substitutes for AML/CTF measures. It does not. Trust accounts have arisen over time as a result of a legal practitioner's fiduciary relationship with their client (as beneficiary). In a fiduciary relationship, the fiduciary (the legal practitioner) has a duty to account to the beneficiary. Trust money controls accordingly have developed to ensure the separation of funds held for the client from those utilised as operating accounts, and a series of other supporting regulatory controls. Rigorous trust account investigations programs in every jurisdiction track practitioner observation of customer due diligence, reporting and record-keeping within the trust account framework, and require practitioners to address any weaknesses in those areas in order to minimise risk to them and to their clients. Nevertheless, as the original foundation was the expression of the fiduciary relationship, the controls in place are fitted to that context. Despite this, they may prove to be a tool that could help guard against the criminal client, too—that is, where there is a real risk of misuse for money laundering or terrorism financing. This prospect would need to be explored in greater detail with the participation of the Government, trust accounting regulators and other relevant experts but some suggestions are offered below. In this regard, it should be noted that further increasing regulation that is not sympathetic to existing processes in this area raises the real risk that legal practitioners become increasingly unwilling to hold and operate trust accounts. This could have a number of impacts, including for barristers who rely on solicitors to hold their fees in trust, and for clients where firms potentially offer fewer services that require deposits to be held, such as conveyancing.

81. Trust account operating manuals are detailed and voluminous and the description supplied in this submission does not purport to be comprehensive.[46] Happily, statutory rules for legal practitioners' duties to account for trust money exhibit 'significant uniformity across Australia.'[47] A trust account is a special bank account that can only be opened with a specific financial institution (vetted and placed on a select list of nominated banks by the legal regulator), that a legal practitioner (or law firm) must maintain when she or he receives and holds money on behalf of clients or third parties. Trust money[48] includes money received in advance for legal costs, 'controlled money'[49] and money that is subject to the law practice's authority to handle on behalf of others. This latter power can only be exercised on written instructions. To handle trust money, individuals working in a law practice must complete a prescribed trust account course, pass an assessment, and be deemed suitable by the relevant legal regulator.[50]

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[46] Professor Dal Pont directs readers of his own leading textbook to Mortenson's *Client Money: Trust Account Management for Australian Lawyers* (LexisNexis Butterworths, 2017) for a more detailed treatment of the subject: GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co: 2021, 7th ed) at [9.05] n 1.

[47] Dal Pont, *Lawyers' Professional Responsibility* at [9.05].

[48] *Legal Profession Act 2006* (ACT), Dictionary; *Legal Profession Act Uniform Law* (NSW), s 129(1); *Legal Profession Act 2006* (NT), s 235(1); *Legal Profession Act 2007* (Qld), s 237(1); *Legal Practitioners Act 2007* (SA), Sch 2 cll 11, 12; *Legal Profession Act 2007* (Tas), ss 231(1); *Legal Profession Uniform Law* (Vic) s 129(1) and *Legal Profession Uniform Law* (WA), s 129(1).

[49] 'Controlled money' is trust money (money entrusted in the course of or in connection to the provision of legal services) that is subject to a written direction to deposit money to an account of an authorised deposit-taking institution, other than a general trust account, over which the law practice has or will have exclusive control. Controlled money can only be deposited in the account specified in the written direction which must be effected as soon as practicable (that is, without delay). Each jurisdiction sets out specific record-keeping obligations for controlled money, see Dal Pont, *Lawyers' Professional Responsibility* [9.10] n 8.

[50] In Victoria the legal regulator for trust money and accounts is the Victorian Legal Services Board. In Western Australia the legal regulator for these purposes is the Legal Practice Board of Western Australia. In all other jurisdictions it is the law society for that jurisdiction that regulates trust money and accounting. Note that funds received for the purposes of electronic conveyancing (discussed on pp 40-42 of this submission) are trust money. In order to undertake electronic conveyancing, under Australian law a law practices must have at least one principal holding a practising certificate with trust account authorisation, and access to a solicitor's general trust account.

82. Under the Uniform Law, legal practitioners, law practice associates, the approved banks, external examiners, and any other designated entities are required to promptly report any irregularities or suspected irregularities involving trust accounts to the regulatory authority.[51] Failure to comply with this reporting requirement can result in penalties and be deemed unsatisfactory professional conduct or professional misconduct. Neither a law practice's lien over documents, nor the practitioner's duty of confidence (nor, it follows, legal professional privilege) may be relied upon within the coregulatory framework of the Uniform Law to excuse a failure to report a suspected or actual irregularity. It may be that existing trust accounting regulations for Australian legal practitioners could be augmented to incorporate threshold reporting obligations for cash and structuring to the trust account regulator.

83. The Uniform Law imposes certain requirements for the examination of a law practice's trust records. A law practice must have its trust records externally examined by a suitably qualified person appointed as an 'external examiner' at least once in each financial year, in accordance with Uniform Rules made under the Uniform Law. The external examiner is authorised to examine the affairs of the law practice in connection with the examination of the trust records—a power that affords a broad scope for thorough review and assessment. Likewise, the relevant legal regulatory authority has the power to conduct external investigations or authorise an external investigator in relation to specific allegations or suspicions regarding trust money, trust property, trust accounts, or any other aspect of the law practice's affairs. The term 'affairs of the law practice' is defined in the legislation and encompasses various elements, including required accounts and records, other records, and transactions involving the law practice or its associates. These powers recognise the importance of examining and investigating the overall operations and activities of a law practice beyond just the trust records.

84. Within a firm, it is the principals (or sole practitioner) who possess the authority to act on the trust account, and strict rules limit the delegation of that power in the principals' absence. On an annual basis, as a prerequisite to the renewal of their practising certificate, solicitors are required to make a declaration as to whether they have handled trust money.

85. As mentioned, the profession's stringent regulation of trust accounts may afford an analogy with the transaction monitoring program under Pt 15.4 to 15.7 of the AML/CTF Rules. The regulation of trust accounts by the various legal regulators demonstrates a risk-based approach, and the Uniform Law imposes an obligation to refer matters to the police or a relevant prosecuting authority if the legal regulator has reasonable grounds for believing another person has committed a serious offence. In the case of the Law Society of New South Wales, for example, while the Council of the Law Society of New South Wales is prevented from discussing specific cases by the confidentiality provisions of the legislation, it confirms that matters are regularly referred to the NSW Police and/or the Australian Federal Police. This has included instances where suspicious activity potentially associated with money laundering has been identified. The Law Council is advised that discussions are currently underway between that Law Society's Trust Account Department, and various police agencies and regulators with an interest in money laundering, to identify opportunities to improve cooperation.

Conveyancing

86. As previously mentioned, every legal process undertaken by a legal practitioner within a law firm is undertaken within the bounds (and with the assistance) of a set of intersecting ethical obligations. The starting point for understanding conveyancing as conducted by a legal practitioner is the duty under Rule 8 of the Australian Solicitors' Conduct Rules namely that '[a] solicitor must follow a client's lawful, proper and competent instructions.'

[51] For example, in New South Wales, the practice is that notification is made to the Law Society Trust Accounts Department; in Victoria it is to the Victorian Legal Services Board: see n 50 above.

This rule imports a duty to identify the client, understand the purpose of the client's instructions and not to act if those instructions are for an improper or unlawful purpose.

87. Of course, the differences between the formality of the AML/CTF regime and this guiding principle are acknowledged, and it is acknowledged that the information generated by the solicitor in making these enquiries is and remains confidential, unless they reveal a fraudulent intention on the part of the client. Yet there is a significant correlation between the enquiries taken by practitioners in practice and the risk-based measures prescribed by the AML/CTF Act and Rules. Bearing in mind the regulatory oversight of a solicitor's trust account, the practitioner's duty to the court and duty under Rule 8 of the Australian Solicitors' Conduct Rules, the Law Council considers that it would be a high and unnecessary burden for property lawyers to have to comply with both the electronic conveyancing rules, discussed below, and the AML/CTF framework, unless they were in perfect alignment.

88. In all participating jurisdictions, the framework developed by the ARNECC governs electronic conveyancing. Save for an extremely small fraction of transactions,[52] all settlements must be completed by an Electronic Lodgment Network (**ELN**). ELNs require funds to be provided from a registered financial institution (that is, a regulated entity) or funds transferred directly into a legal practitioner's trust account. Practitioners consider the use of cash for such deposits to be highly unusual and the Law Council is advised that in practice, the proposed use of cash would cause the solicitor to make further enquiries. There is a convention not to accept cash. Where exceptions occur, if the amount equal or exceed $10,000, the practitioner is required to notify AUSTRAC under s 15A of the *Financial Transaction Reports Act 1988* (Cth).[53]

89. It is a matter of grave concern that recent figures show real estate to constitute 57% of assets confiscated as proceeds of crime in Australia[54] and it would be of enormous assistance to the profession to know which of these transactions, if any, involved legal practitioners and under what circumstances. While the Law Council does not purport to have any forensic skill in this context, the possibility is suggested that there may be a time lag, insofar as the illicit acquisitions of the properties may pre-date the recent introduction of mandatory electronic settlements in the major jurisdictions. Of course, this may not be correct. The Law Council would like to understand which, if any, professional entities were involved in a representative capacity in the transactions.

90. Under the ARNECC framework, Model Participation Rules have been made and adopted by participating jurisdictions under the Electronic Conveyancing National Law. The Model Participation Rules establish the obligation of a 'Subscriber', in this case, the legal practitioner, to verify the identity of their client. Under rule 6.5.2, this obligation can be discharged by taking reasonable steps to identify the person or applying the 'Verification of Identity Standard', as set out in Schedule 8 of the Participation Rules. If a practitioner uses the 'Verification of Identity Standard', they are deemed to have taken reasonable

[52] These include water rights where banks take or discharge a mortgage over the water right. Further information could be sought as to any other residual paper transactions, but experts advise the Law Council that such transactions are vanishingly small in number and appear to be of low or nil risk for money laundering or terrorism financing. Further, in New South Wales the ARNECC framework for verification of identity, right to deal and retention of evidence has been imported into the paper environment pursuant to rule 4.1, rule 4.3 and rule 5 of the NSW Conveyancing Rules made under s 12E of the *Real Property Act 1900* (NSW).

[53] Since 2004, Model AML Rules developed by the Canadian Federation of Law Societies have included a Cash Transactions Rule prohibiting a legal practitioner from receiving or accepting cash in an aggregate amount of over CAN$7,500 in respect of any one client matter. The Model Cash Transaction Rule has been adopted by the legal regulator (law society, *barreau* or barristers' society as the case may be) in every Canadian province and territory as a by-law or legally binding rule made under the enabling statute for the regulatory body. The text of the Cash Transactions Model Rule (October 2018) is available here: flsc.cau/what-we-do/fighting-money-laundering-and-terrorist-financing/ (accessed 2 June 2023).

[54] Alex Engel, Assistant Secretary, Keynote address to the ACAMS Australasia Conference, Sydney, 19 June 2023 and see AGD, *Consultation Paper* (April 2023) p 18.

steps under rule 6.5.6. Guidance regarding the obligation to verify identity has been issued by ARNECC.[55]

91. Rule 6.4 of the NSW Participation Rules establishes a practitioner's obligation to verify their client's right to deal, being their client's entitlement to be a party to the transaction. For example, for a vendor client, the practitioner must establish that the client is the registered proprietor of the subject land being sold. Guidance regarding the obligation to verify the right to deal has been issued by ARNECC.[56] Practitioners are required to retain all supporting evidence in completing a client's verification of identity for no less than seven years from the date of lodgment of the final binding instrument in a transaction.[57] Guidance has been issued by ARNECC as to practitioners' obligations to retain evidence when transacting for a client.

92. In addition to the safeguards set out above, the Australia Taxation Office has a mandatory requirement that a Foreign Resident Capital Gains Withholding Certificate be obtained for any transaction to the value of $750,000 or above. This application usually includes the provision of a Tax File Number and also forces those individuals seeking to legitimise any ill-gotten gains to reveal sensitive and detailed information about themselves. Further, the Foreign Investment Review Board provides an important regulatory and compliance monitoring system for any foreign person planning to invest in or purchase Australian residential, agricultural or commercial land. Practitioners seeking approval are required to complete a complex application often with significant sensitive and detailed information for anyone seeking to invest or purchase, creating an additional barrier (and detailed profile) for anti-money laundering and counter terrorism financing purposes.

93. As is the case with a number of other transactions and legal services (that we hope may be the focus of workshops with the Department in the near future) we note that conveyancing involves legal practitioners following other actors who already regulated for anti-money laundering and counter terrorism financing purposes (and some who may be regulated under tranche 2). The Law Council considers that measures should be undertaken to facilitate reliance on other regulated entities such that the second regulated entity is released from the responsibility of duplicating the client due diligence that will already have been undertaken by another regulated entity.

94. For sole practitioners and practitioners in small and medium-sized firms who undertake conveyancing, we urge that there be alignment between standard or simplified AML/CTF customer due diligence obligations and the verification of identity standards applicable in electronic conveyancing, to include both a 'reasonable steps' measure as set out in the ARNECC Model Participation Rules and, critically, a safe harbour construction. The safe harbour is a very important element for smaller and less well-resourced practices to achieve compliance and remain able to provide services in the communities in which they practise.

Legal professional privilege, confidentiality and the lawyer-client relationship

95. The following questions have been posed in the consultation paper (Questions 26 to 28):

How can the Government ensure legal professional privilege is maintained while also ensuring the known money laundering and terrorism financing risks are appropriately addressed?

[55] Model Participation Rules Guidance Note 2, Verification of Identity https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-2-verification-of-identity.pdf.
[56] Model Participation Rules Guidance Note 4, Right to deal https://www.arnecc.gov.au/wp-content/uploads/2021/08/mpr-guidance-note-4-right-to-deal.pdf.
[57] Model Participation Rules, rule 6.6.

Do you have a view about the approaches taken to preserve legal professional privilege in comparable common law countries, including the United Kingdom and New Zealand?

Are any of the six key AML/CTF obligations likely to particularly impact the relationship between a lawyer and their client?

Background: Three key requirements

96. Before we can answer these questions we must first define the critical obligations under the AML/CTF regime, namely:

    (a) the requirement to maintain an AML/CTF program;

    (b) the requirement (in certain circumstances) to make suspicious matter reports; and

    (c) becoming subject to the audit and information-gathering powers of AUSTRAC.

Implementation of an AML/CTF program

97. Section 81(1) of the AML/CTF Act sets out the obligation of a reporting entity to maintain an AML/CTF program. The purpose of identifying, mitigating and managing risks under Part A of a program is related to the obligation under s 36 of the AML/CTF Act for a reporting entity to monitor its customers. Chapter 8 of the Rules gives content to that obligation, by requiring Part A of a program to enable the reporting entity to understand (among other things) the nature of the business relationship with its customer types, to identify significant changes in money laundering and terrorism financing risk, and to include a requirement that, in determining an appropriate risk-based procedure for inclusion in Part B of a program, the reporting entity must have regard to the money laundering or terrorism financing risk relevant to the provision of the designated service.[58]

98. The 'applicable customer identification procedures' required under Part B of an AML/CTF program are set out in Ch 4 of the AML/CTF Rules. Those procedures require a reporting entity to identify the name, date of birth and residential address of the customer (if the customer is an individual who is not a sole trader), as well as the customer's business name, address of business and ABN (if the customer is a sole trader), and various company details including, for example, company name, registered-office address, and ACN (if the customer is a domestic company).[59]

99. The AML/CTF Rules require there be a procedure for verifying particular identification information, depending on the type of customer[60] and that the AML/CTF program include 'appropriate risk-based systems and controls' to determine whether further information about the customer should be collected and verified.[61]

100. A reporting entity is required to maintain records:

    (a) relating to the provision of a designated service to a customer for 7 years after the making of the record, unless an exemption under the AML/CTF Rules applies (such as for customer-specific documents and publicly-available statements);[62]

    (b) of the applicable customer identification procedure undertaken, and the information obtained in the course of carrying out that procedure for 7 years, from the date on which the reporting entity ceased providing any designated services to the customer;[63]

[58] AML/CTF Rules, rules 8.1.5 and 8.1.6.
[59] AML/CTF Rules, rules 4.2.3, 4.2.4 and 4.3.3.
[60] See AML/CTF Rules, r 4.2.6 for individuals and r 4.3.5 for domestic companies.
[61] See AML/CTF Rules, rr 4.2.5, 4.2.8 for individuals and rr 4.3.4, 4.3.6 for domestic companies.
[62] AML/CTF Act, s 107; AML/CTF Rules, rule 29.2.
[63] AML/CTF Act, ss 112, 113.

(c) of the adoption of its AML/CTF program for 7 years, ending after the day on which the adoption ceases to be in force.[64]

Suspicious matter reporting

101. Section 41 of the AML/CTF Act requires a reporting entity to provide AUSTRAC with a suspicious matter report (**SMR**) within 3 business days (or, in certain cases, 24 hours) if:

(a) the reporting entity *commences or proposes to provide* a designated service to a person;

(b) there is a *request* from the person to provide a service the reporting entity ordinarily provides; or

(c) there is an *inquiry* from the person as to whether the reporting entity would be prepared to provide a service of a kind the reporting entity ordinarily provides;

and the reporting entity suspects on reasonable grounds any of the matters set out in s 41(1)(d)-(j).

102. The matters set out in paragraphs (d)-(j) of s 41(1) are broad. They range from a suspicion that the person is 'not who they say they are' to a suspicion that the service proposed to be provided, requested or inquired of is 'preparatory' to the commission of a money laundering or terrorist financing offence. Under s 41(1)(f), a reporting obligation may arise if the reporting entity 'suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may either:

(a) be relevant to an investigation of, or prosecution of, an offence as specified at s 41(1)(f)(i)-(iii); or

(b) be of assistance in the enforcement of a law of the *Proceeds of Crime Act 2022* (Cth), regulations under that Act, or a corresponding state or territory law.

103. The formulation of s 41(1)(f), which provides that the reporting entity has information 'concerning the provision, or prospective provision, of the service' appears to contemplate information obtained in the course of providing a service. While the scope of this provision does not appear to have been considered by an Australian court, it would be strange if, given the breadth of s 41, information under s 41(1)(f) had to be limited to information concerning the precise service provided, rather than information which came to light in the course of providing that service.

104. Pursuant to Ch 18 of the AML/CTF Rules, a SMR must contain, among other things, a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion.[65]

105. Section 123 of the AML/CTF Act prohibits a reporting entity from disclosing that they have given an SMR or any information from which it could be reasonably inferred that the responsible entity has given, or is required to give, an SMR other than to an 'AUSTRAC entrusted person'. A responsible entity commits an offence by breaching s123 and is liable to imprisonment for 2 years.[66]

106. While s 124(1) of the AML/CTF Act provides that a SMR is not admissible in court or tribunal proceedings as evidence as to whether a SMR was prepared or given to AUSTRAC, or whether particular information was contained in a SMR, s 124(2) qualifies this, by providing that s 124(1) does not apply to proceedings for various specified criminal offences, or to proceedings in connection with a civil penalty order under s 175 of the AML/CTF Act.

[64] AML/CTF Act, s 117.
[65] AML/CTF Rules, rules 18.2(6) and (7).
[66] AML/CTF Act, s 123(11).

Auditing and information-gathering

107. AUSTRAC also has broad audit and information-gathering powers under the AML/CTF Act.

108. Under s 147, an authorised officer may enter a reporting entity's business at any reasonable time if the occupier has consented, or if entry is pursuant to a monitoring warrant. Upon entry, the officer may search the premises for compliance records, reports, or any other thing that may be relevant to the obligations of a reporting entity under the AML/CTF regime and inspect and copy documents relating to information provided under the AML/CTF regime.[67] An authorised person may also require a person to answer questions and produce any document relating to the operation of the AML/CTF regime.[68] If the authorised officer is entering pursuant to a monitoring warrant, failure to comply with s 150(2) is an offence, with an imprisonment term of 6 months.[69]

109. Under s 167, if an authorised person believes on reasonable grounds that a reporting entity has information or a document relevant to the operation of the AML/CTF regime, the officer may issue a notice requiring the reporting entity to provide any such information or documentation. The officer may inspect and make and retain copies of any documentation provided in response to a notice.[70] Non-compliance with a notice is an offence, with an imprisonment term of 6 months.[71]

Risk of disclosure of privileged communications

110. Legal professional privilege is a rule of substantive law which protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or legal services, or for use in actual or reasonably anticipated legal proceedings.[72]

111. If the definition of a reporting entity is expanded to include legal practitioners engaging in the proposed designated activities, legal practitioners will become subject to the obligations required as part of the implementation of an AML/CTF program (the **Preventative Measures**), SMR reporting obligations (**SMR Obligation**), and audit and information-gathering powers of AUSTRAC under the AML/CTF regime. These obligations and powers all pose concerns for the maintenance of legal professional privilege.

The Preventative Measures

112. While the Preventative Measures do not necessarily entail the communication of privileged materials, if extended to legal practitioners they will require a legal practitioner to keep records of information relating to the provision of a designated service for a period of 7 years. The obligation to keep records in s 107 of the AML/CTF Act is broadly expressed. It arguably includes privileged communications between a legal practitioner and their client, if those communications relate to the provision of any designated service by the legal practitioner.

113. In light of the broad audit and information-gathering powers of AUSTRAC, by which an officer may request any documentation 'relevant to the operation of the Act', there is a risk that a legal practitioner may be required to disclose records containing privileged information.

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[67] AML/CTF Act, s 148.
[68] AML/CTF Act, ss 150(1)-(2).
[69] AML/CTF Act, s 150(3).
[70] AML/CTF Act, s 170.
[71] AML/CTF Act, s 167(3).
[72] *Esso Australia Resources Limited v The Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 (**Esso**); see also *Evidence Act 1995* (Cth), ss 118-119.

SMR Obligation

114. The second risk to the disclosure of privileged materials arises from a reporting entity's obligations to issue an SMR in a broad range of circumstances. As noted above, the reporting obligation in s 41 may apply where a reporting entity has not yet commenced providing a designated service to a person, and may arise even if the reporting entity does not yet have a reasonable ground to suspect that the service is preliminary to, or may be relevant to, an investigation into a relevant offence. That is because a mere suspicion that a person has provided incorrect identity information is sufficient to trigger the reporting obligation.

115. As noted above in paragraph [103], the reporting obligation also appears to apply to information obtained *in the course* of providing a service.

116. A SMR must contain (among other things) a description of any designated service to which the suspicious matter relates, and a description of the reasonable grounds for the suspicion, both of which are likely to require the disclosure of privileged communications.

117. While s 124(1) of the AML/CTF Act provides some protection, by providing that a SMR is not admissible before a court or tribunal as evidence as to whether, among other things, particular information was contained in a SMR, this is subject to exceptions for proceedings relating to various criminal offences and civil penalty orders under the AML/CTF Act, and does not detract from the fact that s 41(2) would still require disclosure of privileged communications.

Audit and information-gathering

118. Finally, the audit and information-gathering powers of AUSTRAC pose a significant risk to the disclosure of privileged material. Beyond the disclosure of records referred to above in paragraph [113], the power of an officer to request any information or documentation relevant to the AML/CTF regime is exceptionally broad and would capture any legal advice provided in connection with the provision of a service regulated by the AML/CTF Act.

119. Without adequate protections, the features of the AML/CTF regime outlined above give rise to a significant incursion into a client's right to have a candid exchange with their legal representative.[73]

120. While s 242 of the AML/CTF Act provides that the Act 'does not affect the law relating to legal professional privilege', without further protections, that section is inadequate. As noted in our submission to the Senate Inquiry,[74] s 242 of the Act merely states that the substantive law with respect to legal professional privilege is not affected by the Act. That is not the same thing as providing that a reporting entity is exempt from its obligations to report suspicious matters or provide information or documents in circumstances where legal professional privilege would be disclosed. The effect of this is that legal practitioners subject to the AML/CTF regime will be subject to two irreconcilable obligations. The first of these is an obligation not to waive the protections afforded to a client in respect of privileged communications. The second is an obligation to comply with the broad reporting and information-gathering provisions of the AML/CTF Act, which could entail the disclosure of privileged communications.

121. The intended consequence of the AML/CTF regime is that it requires legal practitioners to report on the activities of their clients if the conditions in section 41(1) are satisfied. There is a distinction between this, and privilege not applying where the communication is to

[73] *Esso* at [111].
[74] Law Council of Australia, Submission, Senate Legal and Constitutional Affairs References Committee *Inquiry into the Adequacy and Efficacy of Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* Document No 30 (15 September 2021) at [87] available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AUSTRAC/Submissions (accessed 10 June 2023).

facilitate the commission of a crime or fraud.[75] The AML/CTF regime requires disclosure in a broad range of circumstances, upon satisfaction of exceptionally low thresholds. The communications need not be in 'furtherance' of a crime or fraud. They must simply give rise to any one of a number of suspicions, which may or may not involve criminality.

122. That includes where there is a suspicion that a client or a potential client is not who they claim to be. One can imagine circumstances in practice where such a suspicion might arise because an individual has different names on different forms of identification. While this may be an indication of money laundering, it does not necessarily signify money laundering. There may be no criminality and yet the reporting obligation under s 41 would be triggered.

123. Similarly, a reporting obligation under s 41 is triggered where the reporting entity suspects that it has information concerning the provision of a service that may be relevant to the investigation of an offence. Section 41 therefore appears to apply to offences which have not yet occurred. It appears to apply even if the information does not concern the conduct of the reporting entity's client.

124. The reporting obligation under s 41 of the AML/CTF may also arise if a legal practitioner is advising a client on the criminality of conduct if the advice relates to a proposed designated activity. If a client were to seek advice in relation to a real estate scheme which would constitute fraud if carried out, it is arguable that even if the scheme has not been, and is not ultimately, carried out, at the point in time that the client proposes the scheme, the legal practitioner has information which 'may' be relevant to the investigation of that person for an offence.

125. The legislation, as currently drafted, would present a significant abrogation of legal professional privilege.

Ways in which legal professional privilege may be protected

126. To better identify protections for legal professional privilege, the consultation paper invites a comparative analysis particularly with the statutory anti-money laundering and counter terrorism financing regimes in place in New Zealand and the United Kingdom.

New Zealand

127. In New Zealand, the relevant legislation is the *Anti-Money Laundering and Countering Financing of Terrorism Act 2009* (**AML/CFT Act (NZ)**). The legislation applies to legal practitioners in respect of activities which broadly align with the proposed designated activities.

128. Under the AML/CFT Act (NZ), a reporting entity is required to:

(a) establish, implement and maintain a compliance programme including procedures, polices and controls to detect and manage and mitigate the risk of money laundering and financing of terrorism;[76]

(b) conduct a risk assessment before conducting any customer due diligence or establishing a programme under s56;[77]

(c) conduct customer due diligence if the reporting entity establishes a business relationship with a new customer, if the customer seeks to conduct an occasional transaction or activity through the reporting entity, or if there is a material change in information, or insufficient information in respect of an existing customer.[78] The obligation to conduct customer due diligence and monitor transactions to ensure

[75] *Baker v Campbell* (1983) 153 CLR 52; see also *Evidence Act 1995* (Cth), s 125(1).
[76] AML/CFT Act (NZ), s 56.
[77] AML/CFT Act (NZ), s 58.
[78] AML/CFT Act (NZ), ss 11, 14.

that they are consistent with the reporting entity's knowledge about a customer is an ongoing one;[79]

(d) keep records that are reasonably necessary to enable the transaction to be 'readily reconstructed' at any time, and keep records of suspicious activity reports, identification and verification, and other records relevant to the establishment of a business relationship and relating to risk assessments, for at least 5 years after the completion of the transaction, making of a report, business relationship or regular use of the records (as the case may be);[80] and

(e) where the reporting entity has reasonable grounds to suspect a transaction or proposed transaction is or may be relevant to investigation or prosecution of any person for a money laundering offence (among other things), no later than 3 working days after forming suspicion, report that activity.[81] Section 40(4) provides that this reporting obligation does not require any person to disclose information that the person believes on reasonable grounds is a privileged communication.

129. Further, while failure to report a suspicious activity under s 40 is an offence under s 92(1) of the Act, s 92(2) provides that '[i]t is a defence to a prosecution under this section if a reporting entity believes on reasonable grounds that the documents or information relating to the activity were privileged communications'.

130. A 'privileged communication' is defined in s 42 as:

(a) a confidential communication, passing between two lawyers, a lawyer and his or her client, or their agents, made for the purpose of obtaining or giving legal advice;

(b) a communication subject to the general law governing legal professional privilege; or

(c) a communication in specified sections of the Evidence Act.[82]

However, a communication is not privileged if, among other things, there is a *prima facie* case the communication was made for a dishonest purpose or to enable or aid the commission of an offence.[83]

131. Information-gathering powers are set out at sections 132, 133, and 143 of the Act, and include the powers to:

(a) on notice, require the production of all records, documents and information relevant to the supervision and monitoring of reporting entities;[84]

(b) at any reasonable time, enter a place for the purpose of conducting an on-site inspection of the reporting entity, and require the reporting entity or an employee to answer questions and provide any information reasonable required;[85]

(c) order production of or access to records, documents and information from the reporting entity that is relevant to analysing information received by the Commissioner under the Act (with or without court order).[86]

132. Each of the above sections provides that nothing in those sections requires any person to disclose any privileged communication. Where a person refuses to disclose information under these sections on the grounds that it is privileged, s 159A provides that that person,

[79] AML/CFT Act (NZ), s 31(2).
[80] AML/CFT Act (NZ), ss 49, 49A, 50, 51.
[81] AML/CFT Act (NZ), ss 39A, 40.
[82] AML/CFT Act (NZ), s 42(1).
[83] AML/CFT Act (NZ), s 42(2).
[84] AML/CFT Act (NZ), s 132(2)(a).
[85] AML/CFT Act (NZ), s 133.
[86] AML/CFT Act (NZ), s 143.

the Commissioner, or an AML/CTF supervisor may apply to a District Court judge for an order determining whether the privilege claim is valid.

133. There is a further information-gathering power under s 118 of the Act, where a search warrant is issued under s 117. That power authorises an enforcement officer to search a place for evidential material, inspect and copy any document, and require the occupier of the place to answer any questions. The Act does not provide any protection for privileged communications in such circumstances.

134. To ensure the protection of privileged communications in all circumstances where a risk of disclosure arises, the Australian regime, if extended to apply to legal practitioners carrying out the proposed designated activities, should extend the protection of legal professional privilege to circumstances where a search is conducted under a warrant.

135. In summary, in order to protect legal professional privilege, the AML/CTF Act would need to be drafted so as to provide for specific exceptions to the reporting requirements of legal practitioners and the audit and information-gathering powers of AUSTRAC. Using the New Zealand regime as guidance, legal professional privilege could be protected under the AML/CTF Act by:

    (a) incorporating a definition for 'privileged communications' which aligns with the common law right of legal professional privilege, and legal professional privilege as defined in the *Evidence Act 1995* (Cth);

    (b) making the reporting obligation in s 41 subject to an exception that a legal practitioner is not required to disclose any information that the practitioner believes, on reasonable grounds, is a privileged communication;

    (c) providing that it is a defence to prosecution under s 123(11) if a practitioner believes, on reasonable grounds, that information or documents relating to a 'suspicious matter' were privileged communications; and

    (d) providing that a legal practitioner is not required to disclose any privileged communication in respect of AUSTRAC's information-gathering powers under ss 148, 167 and 170.

136. In addition to the above, statutory protections for legal professional privilege would be required in the context of AUSTRAC's information-gathering and auditing functions, including in circumstances where a monitoring warrant is issued, similar to those that apply in the United Kingdom such that, specifically:

    (a) a person may not be required to produce information or documents or answer a question which that person would be entitled to refuse on the grounds of legal professional privilege; and

    (b) a statutory provision would apply to ensure that 'a warrant does not confer a right to seize privileged material'.

    While these would go some way in protecting privileged information, as discussed below these measures nevertheless arguably fail to adequately protect privilege in circumstances where a legal practitioner is subject to a search under regs 69 or 70 and has not been provided with notice of the materials seized.

United Kingdom

137. The anti-money laundering regime in the United Kingdom comprises the *Proceeds of Crime Act 2002* (UK) (**Proceeds of Crime Act**), the *Terrorism Act 2000* (UK) (**Terrorism Act**) and the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK) (**Regulations**).

138. The Regulations provide that obligations concerning customer due diligence, record keeping and investigation apply to 'relevant persons', which includes 'independent legal professionals'.[87] 'Independent legal professionals' is defined as 'a firm or sole practitioner who provides legal or notarial services to other persons' when participating in various financial or real property transactions.[88] Those transactions broadly mirror the proposed designated activities. There is an exception where a 'relevant person' under reg 8 engages in such an activity 'on an occasional or very limited basis', but a number of conditions need to be satisfied for the exception to apply, such that its practical operation is exceptionally narrow.[89]

139. Under the Regulations, a 'relevant person' is required to:

    (a) take appropriate steps to identify and assess the risk of money laundering or terrorism financing to which its business is subject, taking into account the information available and the size and nature of its business;[90]

    (b) keep up-to-date records of any steps taken to assess risk, and provide a risk assessment to the relevant supervisory authority on request;[91]

    (c) apply customer due diligence measures (including verification of identity) if they establish a business relationship with a customer, suspect money laundering or terrorist financing, or doubt the veracity of documentation or information obtained for identification or verification purposes;[92] and

    (d) keep records of customer due diligence, and supporting records in respect of a transaction (to enable the transaction to be reconstructed) for 5 years beginning on the date on which the relevant person knows or has reasonable grounds to believe that the transaction is complete or the business relationship has come to an end (subject to certain exceptions).[93]

140. Privilege is protected in relation to information-gathering, and suspicious activity reporting.

141. The Regulations provide for three main means by which information may be gathered:

    (a) First, a 'supervisory authority' may require a person who is or was a relevant person, by notice in writing, to provide specified information and documents. That includes a power to require the person to provide a copy of any suspicious activity disclosure made under the Proceeds of Crime Act or the Terrorism Act.[94]

    (b) Second, a duly authorised officer may at any reasonable time, enter the premises of a relevant person and take copies of documents found, if the officer has reasonable grounds to believe that the relevant person may have contravened the Regulations.[95]

    (c) Third, a justice may issue a warrant if satisfied that there are reasonable grounds for believing that, among other things, a relevant person has failed to comply with a notice under reg 66, in which case the executing officer may enter and search the premises, take copies of documents or information and require any person to provide an explanation of any relevant document or information.[96]

[87] Regulations, reg 8(2)(d).
[88] Regulations, reg 12(1).
[89] Regulations, reg 15(2)-(3).
[90] Regulations, reg 18(1)-(3).
[91] Regulations, regs 18(4), 18(6).
[92] Regulations, regs 27, 28.
[93] Regulations, regs 40(2)-(3).
[94] Regulations, regs 66(1), (1A).
[95] Regulations, reg 69.
[96] Regulations, reg 70.

142. Regulation 72 provides that, with respect to each of these powers, a relevant person may not be required to 'provide information, produce documents or answer questions which that person would be entitled to refuse to provide, produce or answer on grounds of legal professional proceedings in proceedings in the High Court', and that a warrant under reg 70 does not confer the right to seize such material.[97] It is submitted that the inclusion of similar provisions in respect of an authorised officer's powers under s 148 of the AML/CTF Act would afford some degree of protection where a practitioner is subject to a search by consent or by warrant under s 147.

143. However, there are still challenges to the practical application of these protections. The most significant of these is that a search may be conducted (for example, if by warrant) without providing notice to the legal practitioner. In that case, a legal practitioner may not have an opportunity to identify which materials may be subject to legal professional privilege so as to know which information or documentation he or she is entitled to refuse to provide. In circumstances where the legal practitioner commits an offence under s 150(3) of the AML/CTF Act for failure to comply with a request made under a monitoring warrant, there is a risk that legal practitioners will not stand in the way of the seizure of privileged materials, thereby undermining any protection provided for.

144. One way of addressing this would be for the AML/CTF Act to provide for a mechanism which deals specifically with searches under warrants, whereby:

    (a) all documentation seized pursuant to a search power under a monitoring warrant is 'sealed';

    (b) a legal practitioner is given a reasonable opportunity to review the seized material in order to determine whether to make a claim of legal professional privilege;

    (c) any material subject to a claim of privilege is provided to a court for determination of whether the material is in fact privileged; and

    (d) no copies or examination of that material is permitted prior to the court making that determination.

145. While there is no positive obligation to report suspicious activity under the regime in the United Kingdom, it is an offence under s 330 of the Proceeds of Crime Act if:

    (a) a person knows or suspects or has reasonable grounds to know or suspect that another is engaged in money laundering;

    (b) the information on which that knowledge or suspicion is based came to the person in the course of business; and

    (c) the person can identify the other person, and does not disclose the information on which his knowledge or suspicion is based.[98]

146. However, s 330(6) provides that a person does not commit an offence if the person has a reasonable excuse for not making the required disclosure, or if the person is a professional legal adviser and the information giving rise to the knowledge or suspicion information came to him in privileged circumstances.[99]

147. The definition of legal professional privilege under common law is not expressly incorporated into the meaning of 'privileged circumstances'. 'Privileged circumstances' is defined at s 330(10)-(11) of the Proceeds of Crime Act as a communication by a client in connection with the giving of legal advice, by a person seeking legal advice from the legal adviser, or by a person in connection with legal proceedings or contemplated legal

[97] The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (UK), regs 72(1) and (4).
[98] A similar offence exists under s 21A of the Terrorism Act.
[99] See also s 21A(5) of the Terrorism Act.

proceedings, but does not apply to communications made with the intention of furthering a criminal purpose.[100] It therefore appears that there may be circumstances in which a legal adviser has received information which is subject to legal professional privilege under the common law, but does not fall within the definition of 'privileged circumstances,' under the Proceeds of Crime Act, such as where a lawyer representing one client, holds information that is privileged as between another client and their lawyer, subject to a contractual provision that legal professional privilege is not waived.[101]

148. Arguably, the application of two standards of protection for privileged communications under the United Kingdom's anti-money laundering regime creates uncertainty as to the circumstances in which practitioners may be entitled to maintain a claim of privilege. Any protections included in the Australian regime should also be expressly framed to include legal professional privilege as it applies at common law, and under the Evidence Act, to avoid such uncertainty. This is the approach that has been adopted in New Zealand.

149. To provide protections for legal professional privilege under the AML/CTF regime would not undermine the regime, though it would limit its application. The fact that the United Kingdom and New Zealand have extended legislation to legal practitioners, while safeguarding legal professional privilege, speaks to this. Further, as noted above in paragraph [121], a communication will not be subject to a claim of legal professional privilege where the communication is to facilitate the commission of a crime or fraud. In such circumstances, a legal practitioner would be required to disclose the relevant communications, notwithstanding that they were made in the context of legal advice or legal proceedings.

150. Moreover, the Interpretative Note to FATF Recommendation 23 provides for this very exception, stating that:

> Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.[102]

151. Finally, such an approach is consistent with other statutory regimes. Under s 353–10 of the *Taxation Administration Act 1953* (Cth), the Commissioner of Taxation may by notice require a person to produce information, documentation or give evidence to the Commissioner. Under section 353–15, the Commissioner may enter premises and access, inspect and make copies of documents. An occupier's failure to provide assistance to the Commissioner is an offence. However, the Commissioner cannot compel an individual to provide information or documentation where the underlying communication is privileged.[103]

152. Similarly, under the *Independent Commission Against Corruption Act 1988* (NSW), the Commission shall 'set aside' a requirement to produce a statement of information, any document or other thing, and shall not exercise a power of entry, inspection and copying if it appears to a Commissioner that 'any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist' the requirement to produce, or inspect, and it does not appear to the Commissioner that the person consents to the production or inspection.[104]

153. Under Victoria's anti-corruption legislation, where a claim of privilege is made in relation to a request for a document or thing, IBAC must consider the claim without inspecting the document or thing, and, if it does not withdraw the production requirement, must apply to

[100] See also s 21A(8)-(9) of the Terrorism Act.
[101] Legal Sector Affinity Group (UK), Anti-Money Laundering Guidance for the Legal Sector, chapter 13, 'Legal Professional Privilege', p 163.
[102] FATF, *FATF Recommendations* (June 2021), p 90.
[103] Australian Government, Australian Taxation Office, Legal Professional Privilege Protocol, June 2022 at [7].
[104] *Independent Commission Against Corruption Act 1988* (NSW), ss 24(2), 25(2).

the Supreme Court of Victoria for determination of the privilege claim.[105] Where a search warrant has been executed and a claim of privilege is made, the searcher must cease exercising the search warrant in respect of the relevant document and require the material to be sealed, for delivery to, and determination by, the Supreme Court of Victoria.[106]

Implications for the duty of confidentiality

154. As we noted in our submission to the Senate Inquiry:[107]

(a) The duty of confidentiality is broader than the doctrine of legal professional privilege. Under s 117 of the *Evidence Act 1995* (Cth), a confidential communication is a communication made in such circumstances that, when it was made, the person who made it, or the person to whom it was made, was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

(b) While legal practitioners are subject to duties not to disclose information which is confidential to a client and acquired during the client's engagement,[108] there are a number of exceptions to this duty—most significantly, a legal practitioner may disclose confidential information if they are compelled by law to do so.[109]

155. For the reasons given above at [112]–[125], there is a risk that in complying with the reporting and disclosure obligations under the AML/CTF Act and AML/CTF Rules, a legal practitioner may be required to disclose confidential information. There is no protection in the AML/CTF Act or AML/CTF Rules, as presently drafted, which exempts reporting entities from providing information or documentation on the basis that such information is confidential.

156. In light of the exception to the duty of confidentiality which arises where a legal practitioner is compelled to disclose confidential information by law, the consideration of a duty of confidentiality differs from consideration of legal professional privilege; if the AML/CTF Act did not include protections for confidential information, the legal practitioner would not be acting in breach of their duty of confidentiality.

157. That is not to say that the disclosure of confidential information will have no implications on the duty of confidentiality.

158. Where confidential information is disclosed pursuant to the AML/CTF Act or AML/CTF Rules, it will lose its quality of 'confidentiality' and will therefore not be able to be the subject of a claim for legal professional privilege in the future. That is because in order for a communication to be privileged, it must be confidential.[110]

159. In circumstances where disclosure of information may be required for suspicious matter reporting under s 41 *prior* to a legal practitioner having even been retained to provide a designated service, or at *very early* stages of any retainer, there is a risk that the legal practitioner is not yet aware of the dominant purpose of the client's, or potential client's communication, and may not be in a position to assess whether the communication is subject to a claim for legal professional privilege. Given s 123 of the AML/CTF Act prohibits a reporting entity from disclosing to a customer that they have given a SMR, or disclosing any information from which it could be reasonably inferred that the responsible

[105] *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic) (**IBAC Act**), ss 59L, 59M.
[106] *IBAC Act*, ss 97, 100, 101.
[107] LCA, Submission, Senate Inquiry (15 September 2021) at [98]-[100].
[108] For example, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), rule 9.1; Legal Profession Uniform Conduct (Barristers) Rules 2015, rules 114, 115.
[109] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW), rule 9.2.2; Legal Profession Uniform Conduct (Barristers) Rules 2015, rules 114, 115.

[110] *Esso* at [35]; *Evidence Act 1995* (Cth), ss 118, 119.

entity has given, or is required to give, a SMR (other than in very limited circumstances), seeking further clarity with a potential client as to the nature of any communications made for the purpose of assessing the privileged status of a communication may give rise to a risk of tipping off.

160. The inclusion of a protection, drafted in similar terms to s 114(5) of the *National Anti-Corruption Commission Act 2022* (Cth), providing that the fact that a person is not excused from making a disclosure does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that disclosed material, may go some way in addressing this concern.

161. The record-keeping obligations imposed on reporting entities under the AML/CTF regime may also give rise to an increased risk that confidential information is leaked in a data breach.

162. Finally, the protection of confidentiality is not inconsistent with the FATF Recommendations. As noted in paragraph [150], the Interpretative Note to FATF Recommendation 23 provides for an exception to reporting of suspicious transactions where the relevant information was obtained in circumstances subject to professional secrecy.

Implications for the legal practitioner-client relationship of the Preventative Measures and the SMR Obligation

163. The hallmark of the practitioner-client relationship, and indeed, the administration of justice, is that a client can make full and frank disclosure to their lawyers.[111] This concept underpins the protection afforded to communications between legal practitioners and their clients by way of legal professional privilege.[112]

164. If the AML/CTF regime is extended to legal practitioners providing certain designated services, without affording adequate protections for legal professional privilege and confidentiality, this will impact the practitioner-client relationship in three ways.

165. First, as noted above in paragraphs [112]–[125] and [155], the regime creates a tension between the rights of a client to maintain privilege over communications with a practitioner made for the dominant purpose of seeking legal advice, the duty of confidentiality a practitioner owes to their client, and the obligation of a practitioner to disclose such information to a regulatory body, or otherwise be subject to civil or, in certain cases, criminal, penalties. Without protections contained in the AML/CTF regime to resolve that tension, the conflicting nature of those duties make the practitioner-client relationship untenable. While the AML/CTF regime does not require a reporting entity the subject of a SMR Obligation to cease acting for their client, there is a question as to whether, in light of this tension, a legal practitioner can properly act in interests of their client.

166. Second, as a matter of perception, the regime is likely to undermine the confidence that clients have in legal practitioners. In holding that the extension of Canada's Proceeds of Crime legislation (*Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c. 17 to legal practitioners was unconstitutional, the Supreme Court of Canada in *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401, considered the impact that the legislation would have on the independence of the bar. Cromwell J (LeBel, Abella, Karakatsanis and Wagner JJ, agreeing) accepted the submission made by the Federation of Law Societies of Canada, that the mandatory record-keeping and disclosure obligations imposed on legal practitioners would require

[111] As submitted to the Senate Inquiry: LCA, Submission (15 September 2021) at [80]-[82], citing *Grant v Downs* (1976) 135 CLR 674; [1976] HCA 63.
[112] *Esso* at [111].

legal practitioners to 'act as a government repository' and thereby undermine the practitioner's duty of commitment to his or her client's cause.[113]

167. Third, as a result of that change in perception, as a matter of *practical operation*, clients with matters that fall within the scope of the AML/CTF regime may be reluctant to seek legal advice from, or disclose all relevant facts to, legal practitioners. This would significantly undermine the administration of justice, by affecting access to legal advice and representation.

168. Of critical concern is the fact that the matters that would be covered by the AML/CTF regime under the proposed designated activities are complex—they concern activities relating to interests in real estate and personal property, and the creation and structuring of companies and businesses. All of those activities are heavily regulated by law. Foreseeable consequences of failing to obtain legal advice, or failing to provide relevant information, in connection with such activities are:

    (a) non-compliance with the legal requirements governing such transactions, which may affect the validity or performance of the relevant transaction, and give rise to disputes between the parties—for example, a failure to provide all material information in the context of the purchase of real property may cause delays such that property settlement does not occur within the time stipulated by the contract; and

    (b) allegations of negligence, or breaches of duty, in connection with the entry into various transactions—for example, claims brought by beneficiaries for breach of trust.

169. While not all services provided by legal practitioners will fall within the scope of the proposed designated activities, these are nonetheless sufficiently broad to capture a significant proportion of work carried out by the legal profession. In this way, the impacts noted above are likely to be wide-reaching.

The 'six key obligations' and their impact on the legal practitioner-client relationship

170. Legal practitioners are already subject to extensive regulation:

    (a) As noted in paragraph [88], solicitors are subject to reporting obligations for 'significant cash transactions' (involving an amount of at least AUD$10,000, or its equivalent) under the *Financial Transaction Reports Act 1988* (Cth).[114]

    (b) Legal practitioners are subject to stringent requirements to conduct due diligence (including verification of identity) and keep records with respect to real property settlements.[115]

    (c) For jurisdictions applying the Uniform Law, the relevant local designated authority has the power to conduct an audit of the compliance of a law practice if the authority considers there are reasonable grounds to do so based on the conduct of the practice or a complaint against the practice, and an investigator may, by notice, require a lawyer to produce specified documents, information or otherwise assist in the investigation of the complaint.[116]

    (d) While not limited in application to legal practitioners, the Schedule to the Criminal Code Act 1995 (Cth) (the **Criminal Code**) criminalises dealing with proceeds of crime or financing terrorism.[117]

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[113] *Attorney-General of Canada v Federation of Law Societies of Canada* [2015] SCC 7; RCS 401, 433 [75], 435-7[80]-[84], 441-443 [97]-[103].
[114] *Financial Transaction Reports Act 1988* (Cth), s 15A.
[115] As discussed in paragraphs [86] to [92].
[116] See, for example, Legal Profession Uniform Law 2014 (NSW), s 256.
[117] Criminal Code, Chapter 5, Part 5.3 and Chapter 10, Part 10.2.

171. Considered in isolation, five of the 'six key obligations' namely the requirements of customer due diligence, ongoing customer due diligence, developing and maintaining an AML/CTF Program, record keeping, and enrolment and registration with AUSTRAC are unlikely to significantly impact on the relationship between a legal practitioner and their client. However, when these obligations are considered together with the additional reporting obligations under the AML/CTF regime, there is likely to be an adverse impact on the relationship between a legal practitioner and their client, for the reasons set out in paragraphs [163] to [169], above. Indeed, it is considered that the extension of the AML/CTF regime to legal practitioners for the proposed designated services would present significant risks to the maintenance of legal professional privilege and confidentiality. Those risks are likely to erode the relationship between a legal practitioner and its client by affecting the perception of legal practitioners as independent advisers, and, as a result, the willingness of individuals and companies to seek legal advice, thereby undermining the administration of justice.

172. While protections can be incorporated into the AML/CTF regime to ensure that these risks do not materialise (and to the extent the regime is extended, should be incorporated into the AML/CTF regime), the Law Council considers that there is a serious question about the work the extended regime would do in circumstances where AUSTRAC's information-gathering powers are significantly curtailed by those protections. The AML/CTF regime is a regime designed to bestow wide reporting obligations, and information-gathering powers, on AUSTRAC. If the protections necessary to protect legal professional privilege, confidentiality and the legal practitioner–client relationship are incorporated into that regime, the regime, as intended to operate, will have limited application.

173. The Law Council is committed to taking risk-based, proportionate action to effectively mitigate the risks of money laundering and terrorism financing. We anticipate that the augmentation of existing regulatory obligations (as outlined during the consultation process and in this submission) will be an important element of the profession's armoury in guarding against the risk of money laundering and terrorism financing. The vulnerabilities analysis of the national legal profession will inform this work, and the results of that analysis are expected to provide a solid foundation for risk-based augmentation and our ongoing discussions with the Department.