

SUBMISSION

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

1. I welcome the opportunity to make this individual submission to the Senate Legal and Constitutional Affairs Legislation Committee on the proposed amendment to the **Anti-Money Laundering and Counter-Terrorism Financing Amendment ACT 2006 (the Act)**.
2. I congratulate the Government on its ongoing commitment to integrity measures including measures to address money laundering and the financing of terrorism, illicit arms and drug dealing, human trafficking and other abhorrent criminal activity.
3. As acknowledged in the Explanatory Memorandum and second reading speech of the Attorney General, civil society have long advocated for tranche two reforms to deter and disrupt illicit financing by organized criminal enterprises.¹
4. The Bill will amend the Act to extend the existing AML/CTF compliance regime to professional services providers identified as ‘gatekeepers’ who are considered to be high risk by reason of their close connection to various financial transactions.
5. In this submission I argue that barristers should be exempt from the operation of the Act, in essence because they do not pose a money laundering vulnerability and because the burden of compliance will adversely affect the preparedness of barristers to undertake matters at low or no cost with devastating impact on the legal assistance sector.

Risk

6. The AUSTRAC Money Laundering in Australia National Risk Assessment 2024 assesses that lawyers pose a high and stable money laundering vulnerability because of three key matters (at p81):
 - “Lawyers can facilitate money laundering, including unwittingly, through the provision of their professional services.
 - Domestic criminals rely on lawyers, who often work alongside other professionals such as accountants, financial advisers and offshore service providers, to conceal illicit funds and beneficial ownership.
 - Key vulnerabilities associated with lawyers include the criminal use of law firm trust accounts, facilitation of real estate transactions and the creation and administration of legal structures.”

¹ My engagement with these issues commenced in 2016 as President-Elect of the Law Council Australia engaging directly with relevant agencies, and later as Co-Chair of the Open Government Partnership, Chair of Transparency International (Australia) and Chair then President of the Accountability Round Table. I am also a former Chair of the Australian Bar Association and Victorian Bar.

7. The AUSTRAC report itself acknowledges that visibility of suspicious transactions involving lawyers is limited and it relies upon Australian banks reporting the large volume of cash and funds transfers involving lawyers to establish vulnerability. It is thus the services provided by lawyers that are said to create the vulnerability.
8. One case study is cited in support of the risk rating, Case Study 29, involving the knowing misuse of lawyers trusts funds by two lawyers to launder proceeds of crime resulting in criminal convictions. The criminal law provided an appropriate response for law enforcement agencies in that case.
9. With respect to the reference to the authors of the AUSTRAC report, the vulnerability of the legal profession is overstated because it does not account for the extensive regulation of the profession. Unlike real estate agents, dealers of precious gems and metals, casinos and other betting agencies and venues, accountants and other target groups, the legal profession is regulated by legislative provisions and rules overseen by professional regulators with coercive powers of investigation and power to restrict or prohibit practice.
10. Uniquely, lawyers owe overriding obligations to the Courts including to obey the law, not to mislead the Court and to ensure the efficient and proper administration of justice. No other profession owes such a duty. Lawyers can be stripped of their right to practice for unprofessional conduct including breaches of the law, and breach of codes of conduct.
11. In 2016-2017 the Law Council of Australia argued that existing regulatory protections and the additional cost burden of compliance did not justify the inclusion of the legal profession in phase two reforms. Case studies proffered by law enforcement agencies with responsibility for money laundering activities at the time indicated that lawyers were only peripherally involved in a very small number of money laundering activities and that professional conduct rules and existing criminal, and civil laws were sufficient to address those cases. This situation has not apparently changed.

Low/No risk for Barristers

12. The AUSTRAC Report does not distinguish between lawyers generally and barristers practising independently. This lumps the 6000 or so barristers of the independent bars in with the profession generally, despite the fact the risk assessment for barristers is negligible.
13. None of the three key factors identified by AUSTRAC as risk factors is relevant to practice as a barrister.
14. No case study identified in the Report or previously identified by government agencies involves a barrister.
15. In addition to the regulation of the profession noted above, barristers in Australia practice as independent advocates and advisors throughout Australia and do not handle client

funds. The only exception to this is where professional fees are paid in advance, and held in trust, subject to strict rules concerning the dispersal of such funds. They are bound by Barristers Conduct Rules and rules concerning the receipt of trust funds.

16. Barristers are routinely briefed by government lawyers, many of whom do not hold a practising certificate and are bound by other obligations of fidelity and honesty; general counsel or corporate in-house lawyers; and accountants. Many of those providing instructions will work at firms who will otherwise fall within the definition of reporting entity and have the ability and the burden in practice of knowing the client because of the direct relationship with the client.
17. Barristers may also be briefed in public interest matters including on a pro bono basis by in-house lawyers or those with legal training. Typically, these matters do not involve transactions representing a money laundering vulnerability and provide essential assistance to clients seeking to enforce their rights or the rights of a disenfranchised group.
18. Barristers may accept a brief referred by Courts on a pro bono basis as a measure of assistance to the Court.
19. In all cases involving direct briefing, barristers are obliged to require the retention of a solicitor to instruct in circumstances prescribed by the Barristers Conduct rules.
20. Barristers may also be retained to act as mediators and arbitrators to assist with the resolution of disputes. In these cases, the barrister is independent of the parties and poses no risk of vulnerability.
21. Contrary to the services identified as posing a risk for the profession generally (p81 AUSTRAC report), barristers do not:
 - operate trust and other accounts to deposit, hold and disburse client funds;
 - facilitate real estate, business and asset transactions;
 - establish and administer complex domestic and offshore legal structures.

In 2016-17, it was universally accepted that barristers did not represent a risk of exploitation because:

- **They are not gatekeepers. Their primary function is to advise on legal matters and conduct litigation.**
 - **They do not know the client. They do not have a primary relationship with clients, typically acting upon instructions.**
 - **They are not identified as a risk. They do not handle client money. They have not been identified in any case study as a vulnerable group exposed to exploitation.**
 - **They are already heavily regulated.**
22. Consequently, it was agreed at that time that if the phase two changes to the AML/CTF regime were enacted, barristers should be exempt from the operation of the legislation.

23. In 2024, the Law Council noted in its Vulnerability Analysis of the legal profession, in summary, that there was some money laundering vulnerability for some lawyers in conducting commercial transactions and that this vulnerability requires the further education of lawyers to address money laundering risk. However, barristers were distinguished and not identified as a vulnerable group.
24. Therefore, there is no identified vulnerability of a barrister, no known report of exploitation or attempt of exploitation of activities of a barrister, and no identified services of barristers of known concern.

It is appropriate therefore to exempt barristers from the operation of the Act.

Cost burden to clients

25. The cost of compliance with regulatory regimes for lawyers is absorbed by practitioners and passed on to consumers by way of fees and other charges. This has contributed to a significant burden of unmet legal need in Australia over the decades the subject of numerous reports commissioned by government and by the Law Council.
26. The legal profession uniquely contributes to unmet need in Australia by its contribution to pro bono work alleviating the cost burden upon governments and assisting Courts in the management of difficult self-represented matters. Its contribution to the most vulnerable clients assists in the mitigating interrelated social and economic stresses with substantial contribution to the overall social and economic well-being of the nation.
27. The Federal Court, Supreme Court and Tribunal operate referral schemes for unrepresented litigants where the Court (and the client) would benefit from the retention of a barrister to represent them. This occurs across a range of matters including commercial, property, tax, migration, common law, family law and rely principally on referrals to barristers on a direct brief basis.
28. If the costs of complying with AML/CTF additional regulation becomes too burdensome, many lawyers, particularly sole practitioners including barristers, will opt not to undertake low value and pro bono work with potentially devastating impact upon the work of the Courts and unmet legal need across Australia.
29. AML/CTF Regulation would potentially impact the provision of walk-in legal assistance services including Court duty lawyers and on-call bail, migration, family violence and family law services.
30. An unintended consequence of the Bill extending to lawyers including barristers is likely to be that lawyers will be less willing to offer services at low or no cost to worthy clients with a potentially devastating effect upon the legal assistance sector.

31. Lawyers are also in a unique relationship of trust and confidence with their clients, such that their communications are protected by legal professional privilege. The common law and statutory protection of the privilege recognises the essential value of the privilege to the administration of justice. Requiring lawyers to report suspicious matters places them in an immediate position of conflict that may require a breach of legal profession privilege and would ordinarily require a lawyer to cease to act.

Exemption of Barristers

32. If lawyers are to be captured by the AML/CTF Act, there are several ways of exempting barristers from the operation of the Act.

Option one – preferred option, blanket exemption

33. S4 of the Act will be amended by the Bill to include relevantly a new definition of a reporting entity:
4. “A reporting entity is a person who provides designated services”
 5. “**reporting entity** means:
 - (a) a person who provides a designated service ..

To exempt barristers from the operation of the amended Act the provision could state:

(4A) A barrister is not a reporting entity for the purposes of s4.

OR

(5BA) Services provided by a person in the course of legal practice as a barrister are not taken to be designated services.

For the avoidance of doubt, there could be further definition of what constitutes a barrister within the subsection or definitions:

***barrister** means a person who holds a current practising certificate under the law of a State or Territory entitling the person to engage in legal practice exclusively as or in the manner of a barrister*

Option two – not preferred exemption for all cases involving an instructor

34. Alternatively, to exempt barristers from the operation of the Amended Act where the barristers acts upon the instructions of a solicitor, the provision could state:

s (5BA) Services provided by a person in the course of legal practice as a barrister on the instructions of a solicitor are not taken to be designated services.”

35. This version is not preferred because the work of the barrister is still low- or no-risk given the nature of the work, the protections of existing regulation and the fact that the instructor is likely to work for a reporting entity in any case.

Option three – not preferred exemption from specified designated services

36. Alternatively, barristers could be exempted from specific designated services. The difficulty with this option is to attempt to capture all of the exempted services undertaken by barristers where the services are already low or no risk and it is left to barristers to identify which work requires compliance with the AML/CTF regimes where their work does not pose the identified risk.
37. Thus a provision could read:

s. (5BA) Services provided by a person in the course of legal practice as a barrister on the instructions of a solicitor or an accountant [or other professional/government/public interest referral entity] are not taken to be designated services under item 1, 2, 4 or 6 [and potentially others] of the table in subsection (5B).

Conclusion

38. The simplest, most efficient solution reflecting an AML/CTF risk management approach is to exempt barristers from the operation of the Act entirely.

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