Law Council
OF AUSTRALIA

16 October 2024

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

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

Dear Committee Secretary

Inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024

The Law Council of Australia is grateful for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024.

The Law Council's submission is **attached**.

The Law Council thanks the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Working Group, the Financial Services Committee of the Business Law Section, and the Client Legal Privilege Working Group for their assistance in preparing this submission and past responses to consultation papers.

The Law Council also acknowledges and thanks Ms Lana Nadj for extensive work and energy in the early phases of the consultation process, and Mr Mitch Hillier, from Law Firms Australia, for invaluable assistance.

If you have any questions regarding the submission, please contact Dr Brendon Murphy, Senior Policy Lawyer, on

Yours sincerely

Juliana Warner
President-Elect

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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

This submission is informed by contributions from the following Constituent Bodies:

- the Law Institute of Victoria
- the Law Society of New South Wales
- the New South Wales Bar Association
- the Queensland Law Society
- the Victorian Bar Incorporated
- the Law Society of Western Australia
- Law Firms Australia

The Law Council thanks the Anti-Money Laundering and Counter Terrorism Financing (AML/CTF) Working Group, the Financial Services Committee of the Business Law Section, and the Client Legal Privilege Working Group for their assistance in preparing this submission and past responses to consultation papers.

The Law Council also acknowledges and thanks Ms Lana Nadj for extensive work and energy in the early phases of the consultation process, and Mr Mitch Hillier, from Law Firms Australia, for invaluable assistance.

Summary

The Law Council of Australia and its constituent bodies support efforts to combat money-laundering and the financing of terrorism. We support measures that enhance the integrity of the legal profession, including strengthening the understanding of the profession about perceived or actual vulnerabilities relating to financial crime, and strengthening legal practitioners' risk-based assessment of legal services.

The Law Council raises a number of concerns in this Submission and does not support the application of several measures in the Bill to legal practitioners. A list of our recommendations follows this summary.

The Bill is lengthy and complex, substantially amending legislation which already fits this description. The Bill was presented without an exposure draft and with a limited timeframe in which to analyse its impact on affected persons. It contains proposals that were not foreshadowed in the May 2024 consultation papers, including the precise definitions of 'Designated Services' (which are the centrepiece of the Bill so far as legal practitioners are concerned) and the compulsory notice and examination powers (which are particularly problematic for legal practitioners and require further examination more generally).

In the time available, it has not been possible to make a full assessment of the impact of the Bill. It is likely that matters will arise that have not been contemplated at this point. Nevertheless, the Law Council makes this Submission to facilitate ongoing constructive dialogue.

Cost and risk

The Australian legal profession is already comprehensively regulated.

The Bill appears to be based upon the assumption that the legal profession presents a significant money laundering risk. But that appears to be based on inherent risk, not risk as already mitigated i.e. residual risk. The Law Council considers that, having regard to existing regulation and the matters considered in the independent risk analysis of the legal profession commissioned by the Law Council, residual risk is in fact much lower. This is not just a matter of semantics—it is essential that the application of the amended Act to legal practitioners is proportionate to the level of risk, noting the potentially serious consequences of some of its provisions on access to justice.

The legal profession in Australia is overwhelmingly made up of sole practitioners (including barristers who must practise as sole traders) and very small firms (2–4 partners). Most are based in suburban, regional or remote areas. Legal practice is quintessentially small business.

The Law Council is extremely concerned about the compliance cost burden that will be imposed by the Bill. The Government's own estimates indicate compliance costs exceeding $1.85 billion per annum over the next 10 years. The proportion applicable to the legal profession is unknown, but it is likely to be significant, as has been the experience of compliance costs for small legal businesses internationally.

Those costs (or at least a part of them) will have to be passed onto the consumers of legal services—that is, ordinary Australians in need of legal advice to manage their lives and businesses effectively. That will elevate the costs of access to justice and cause some practitioners to stop providing designated services to contain costs, particularly in suburban, regional and remote communities.

The Rules will be a significant part of the AML/CTF regime, yet these have not yet been drafted. It is imperative that, in developing the Rules, duplication is avoided as much as possible and stringent cost minimisation measures are adopted.

There has been insufficient time to consider all the issues that the Bill may raise. A significant part of the Regime has not yet been developed, and the costs of compliance are likely to be high (with adverse effects on the provision of legal services). Accordingly, the Law Council considers that there should be a comprehensive, independent review of the legislation in 2028. However, this should not be viewed as a panacea to the broader concerns raised in this Submission, which should be addressed through separate amendments to the Bill.

Impact on ethical obligations of legal practitioners

One of the Law Council's principal concerns is that, notwithstanding the apparent intention to preserve legal professional privilege (which is the client's privilege, not that of the lawyer), the impact of the suspicious matter reporting and compulsory examination and notice obligations in the Bill will distort the fundamental duties of legal practitioners.

Legal practitioners owe a paramount duty to the court and fiduciary obligations to their clients. This materially supports the rule of law in a democracy such as Australia, and is to the ultimate benefit of Australian society. It is essential that the public can go to a lawyer and provide frank and full disclosure in a secure setting to obtain the legal advice that they need. The provision of unfettered and comprehensive legal advice advances the rule of law as it assists clients in conducting their personal and business affairs within the law.

Ethically, legal practitioners cannot become covert informers to law enforcement about their clients, which is what the relevant provisions would require. The High Court made this clear in the Lawyer 'X' case:

> *'Here the situation is very different, if not unique, and it is greatly to be hoped that it will never be repeated.* ***EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of EF's obligations*** *as counsel to her clients and of EF's duties to the court.' (emphasis added)*

For similar reasons, legal practitioners in Canada are not subject to suspicious matter reporting or compulsory notice or examination obligations. In fact, suspicious matter reporting obligations in the relevant Canadian legislation were struck out by the Canadian Supreme Court in 2015.

Parliament should consider very carefully the serious risks of undermining the rule of law and administration of justice as proposed by the Bill.

The Law Council strongly recommends that the Bill should specifically exempt legal practitioners from complying with the suspicious matters reporting and compulsory notice and examination in the Bill.

To the extent that it is said that the application of those provisions to legal practitioners would be necessary to prevent Australia being grey-listed by the Financial Action Task Force (**FATF**), the Law Council disagrees. Canada does not impose those obligations and has not been grey-listed. It is clearly open to Australia to follow that domestic policy choice and exempt legal practitioners from those obligations.

To the extent that those provisions continue to have application to legal practitioners, there will be serious flow-on effects resulting from the tipping off provisions in the Bill: such as legal practitioners being unable to give clients frank and full advice; and legal practitioners being exposed, on termination of a retainer, to disciplinary conduct or court proceedings and unable to properly defend themselves, without falling foul of the tipping off provisions.

Application of the Bill to barristers

The definitions of 'designated services' in the Bill contain language which was not in the previous consultation papers and which may have inadvertently extended the scope of the provisions further than was intended.

In particular, that part of the definitions that refers to "assisting a person in the planning or execution of a transaction, or otherwise acting for or on behalf of a person in a transaction," may have inappropriately captured many activities of barristers, as well as mediators and arbitrators.

The Law Council does not support the application of the Bill to all barristers (or those barristers and solicitors who act as mediators or arbitrators). There should be a specific exemption for such practitioners or, at least, those taking instructions and therefore relying upon other reporting entities, such as solicitors, who will be undertaking the relevant CDD and risk assessment processes. The Law Council notes that several Bar Associations have made separate submissions to a similar effect.

Other low-risk services

The provisions also appear to have caught other services which ought not be captured such as bail applications; legal practices retaining wills, powers of attorney, original contractual documentation and the like in safe custody; and community legal centres providing certain trust account services. All such services need to be specifically exempted.

Other provisions of concern

The Law Council raises specific concerns about the impact of the Bill on maintaining client confidentiality and the process intended to enable rapid assessment of client legal privilege either by the regulator or outside of the court. The Bill also appears to pre-empt the result of the Australian Government's current review of client legal privilege and Commonwealth investigations.

The Law Council is also concerned about the introduction of compulsory examination powers that involve notices to produce authorised by the Executive, combined with offence provisions (including strict liability offences) which abrogate the privilege against self-incrimination. There was no consultation about this including in the context of their application to legal practitioners.

The Law Council is opposed to encroachment upon the privilege against self-incrimination in the absence of appropriate immunities (such as derivative use immunities).

Further time is needed to examine these significant new powers and provisions. They should not be passed in advance of an additional period in which to consult and advise Parliament.

Recommendations

1. The Act as amended should be subject to formal review as to its effectiveness three years after its commencement, with particular regard to the financial impact on business, the regulatory impact, and wider system impacts—including on access to justice.

2. The Bill should be amended to address the provision of barristers' professional services by exemption or definitional exclusion of those taking instructions from government, or relying on reporting entities—or, at least, solicitors—with further consideration to be given to pro bono services. **[81]**

3. Mediators and arbitrators holding practising certificates should be specifically exempted from the application of the amended Act. **[215]**

4. Community Legal Centres (and similar non-profit organisations) should be specifically exempted from the application of the amended Act. **[217]**

5. Suspicious matter reporting is incompatible with the fundamental duties of legal practitioners. The Bill should be amended to explicitly exempt legal practitioners from the obligation to report suspicious matters arising under s 41. Similarly, legal practitioners should be exempted from any obligation to comply with a s 49 or s 49B notice concerning the affairs of a client. **[123]**

6. Section 123 is incompatible with the fundamental character of the legal profession. The section should be amended so as to exempt legal practitioners.

7. The scope and meaning of 'serious crime' should be clarified. **[135]**

8. In the absence of exemptions as referred to above in relation to ss 41, 49 and 49B, the Bill should be amended:

    - to allow legal practitioners to advise their clients in retainer letters that they have obligations as to suspicious matter reporting and responding to notices about the client's affairs
    - to explicitly allow termination of a retainer and enable associated changes to professional conduct rules dealing with client confidentiality
    - to permit a legal practitioner to disclose to a client the fact that they have lodged or will lodge a suspicious matter report, or have received a s 49 or s 49B notice
    - to permit legal practitioners to seek legal advice, or ethical advice from professional associations as to their obligations
    - to permit legal practitioners to defend themselves in professional conduct investigations, disciplinary proceedings, or court proceedings by adducing the reasons for termination of a retainer. **[158]–[166]**

9. The scope and meaning of the expression "would or could reasonably be expected to prejudice an investigation" should be clarified. **[144]**

10. Clearer guidance should be provided about how "low risk customers" are to be onboarded, including a timeframe for completing a client's KYC record. **[190]**

11. Sections 30(2)(c)(ii) and 36(3) should be amended so as to expressly ***not*** apply to pre-commencement customers. **[190]**

12. Customer due diligence may be enhanced, and efficiency gained, by the introduction of a certification system, upon which parties in the transaction are able to rely. That could be embedded in electronic transactions. **[193]**

13. For real estate transactions involving auctions, the Rules should address the unique problem of receiving instructions urgently before purchase, which precludes time to conduct client due diligence before providing the service. The Bill and/or the Rules should be amended to clarify that something cannot be 'reasonably practicable' if there are not at least 14 days within which to do it. **[194]**

14. Early guidance should be provided as to the circumstances that will constitute "reasonable grounds" for the purposes of s 28(1) of the Bill. **[195]**

15. Section 28(2)(b) should be clarified as to who is a beneficial owner. **[199]**

16. The language in the designated services table (Table 6)—and especially the description of the exceptions (see for example (5C)(b))—should be simplified.

17. The term "assisting" in Table 6 is so broad as to capture almost any form of helping a person. This core term should be either defined or clarified.

18. The Bill should be amended to take account of the timing of court orders, which all occur after the provision of services. The words 'anticipated to be' should be inserted before the words 'pursuant to … an order of the court' in Table 6. **[207]**

19. The archaic term "incorporeal hereditaments" should be removed from the definition of real estate, and replaced with current terminology, such as easements, covenants and beneficial uses. **[214]**

20. The provision of custodial services for clients, such as the retention of customer legal documents (e.g., wills, powers of attorney, etc), should be exempted from the application of the amended Act. **[223]**

21. If no explicit exemption is added to s 41, the period specified for lodging a suspicious matter report should be extended from 5 to 7 or 14 days, or such period as may be appropriate in the circumstances. **[234]**

22. The Act should be amended so that the CEO of AUSTRAC does not have a discretion to decide what information to release to foreign parties about Australian citizens. **[240]**

23. The privilege against self-incrimination should not be abrogated without appropriate immunities (such as derivative use immunities). **[249]**

24. AUSTRAC's compulsory examination powers should not be expanded, especially where they are enforced through the combination of criminal sanctions and abrogation of self-incrimination. There should be proper consultation about these provisions before they are passed. **[250]**

Introduction

1. The Law Council welcomes the opportunity to provide this Submission to the Senate Legal and Constitutional Affairs Legislation Committee to assist in the inquiry into the proposed Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2024 (the **Bill**).

2. The Bill amends the Anti-Money Laundering and Counter-Terrorism Act 2006 (Cth) (**Act**)

3. The Law Council has engaged closely with government during the formative stages of the Bill, including providing extensive submissions in past consultations, and has been a participant in ongoing dialogue over the past decade on the reforms proposed.[1]

4. The Bill has been presented without an exposure draft, and there has been a tight timeframe associated with submissions and the finalisation of the inquiry by the Senate. This has caused difficulties as the legislation is complex; and the impact on the legal profession in the proposed reforms is significant, far-reaching and will impose considerable compliance burdens. Nevertheless, we make this submission to facilitate ongoing constructive dialogue with government.

The Law Council's in-principle support for reform

5. The Law Council of Australia and its constituent bodies extend in-principle support to the Commonwealth's efforts to combat money-laundering, terrorist financing and activities that tend to corrupt foundation social institutions such as the housing market, economic activity, and particularly the integrity and related public confidence in the legal profession and institutions. We acknowledge that one of the duties of government is to protect the national interest from crime and corruption. From the Law Council's perspective, the recruitment of legal practitioners into facilitating criminal activity, advertent or inadvertent, is unacceptable.

6. The Law Council does not oppose those measures in the Bill aimed at strengthening the understanding of legal practitioners of how they may inadvertently facilitate financial crime. Similarly, the Law Council does not oppose measures designed to

[1] *Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Regime in Australia* (2014) https://lawcouncil.au/publicassets/55a83a37-e1d6-e611–80d2–005056be66b1/140430-Submission-2819-Statutory-Review-Anti-Money-Laundering-Counter-Terrorism-Financing-Regime.pdf
Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006 (2015) https://lawcouncil.au/publicassets/44a0844f-e1d6-e611–80d2–005056be66b1/150501-Submission-2982-statutory-review-anti-money-laundering-counter-terrorism-financing-act-2006.pdf
Response to Consultation Paper Legal practitioners and conveyancers: a model for regulation under Australia's anti-money laundering and counter- terrorism financing regime (2017) https://lawcouncil.au/publicassets/450aeeaf-c80a-e711–80d2–005056be66b1/3239%20-%20Response%20to%20Consultation%20Paper%20AML%20&%20CTFR.pdf
Modernising Australia's anti-money laundering and counter-terrorism financing regime (June 2023) https://lawcouncil.au/publicassets/5c2909f1-c16b-ee11–948c-005056be13b5/LCA%20Submission%20with%20annexures%20Modernising%20Australias%20AMLCTF%20regime%2028%20June%202023%20x.pdf
Reforming Australia's anti-money laundering and counter-terrorism financing regime (July 2024) https://lawcouncil.au/resources/submissions/reforming-australias-anti-money-laundering-and-counter-terrorism-financing-regime

strengthen legal practitioners' risk-based analysis of such designated services as they may provide and appropriate risk assessment by legal practitioners. Thus, notwithstanding the additional cost of compliance for what are largely small businesses, and provided that there is explicit recognition in the Explanatory Memorandum to the Bill (**EM**) of the critical need to minimise cost and duplication during the course of development of the AML/CTF Rules **(Rules**) which will accompany the Act and form part of the AML/CTF regulatory regime, the Law Council does not oppose the provisions in the Bill in relation to programs, risk assessments, the modernisation of the Act and those aspects of the Act that are compatible with the legal profession as officers of the court.

7. However, the Law Council's support for other measures in the Bill is qualified, as set out in this Submission. In this regard, there are matters in the Bill affecting the fundamental duties of legal practitioners that are of significant concern. These relate to suspicious matter reporting, responding to notices and compulsory examinations and the tipping off provisions which are incompatible with fundamental duties of legal practitioners and are opposed.

8. There are also matters relating to the definitions of designated services which may have unintended consequences. These will effectively capture areas of the profession and legal service that will have significant effect in circumstances where there is little or no risk. Measures in those areas are disproportionate and are opposed.

Guiding principles for reform

9. The Law Council endorses an approach to reform as follows:

   a. **Avoid duplicating existing requirements:** Reforms must not replicate or overlap with existing obligations and regulations to ensure that compliance is streamlined. Unnecessary or overly burdensome and costly compliance obligations being imposed on legal practitioners must be prevented.

   b. **Take a proportionate risk-based approach:** Measures must be proportionate to the level of risk in fact associated with money laundering activities.

   c. **Safeguard client legal privilege and other fundamental duties owed to clients:** The AML/CTF regime must protect and uphold privilege and other fundamental duties legal practitioners owe to their clients (such as the duty of confidentiality) and must not compromise the relationship of trust and confidence between legal practitioners and their clients.

   d. **Include clear and unambiguous language:** The legislation must use precise, unambiguous language when outlining the obligations of legal practitioners under the AML/CTF regime to minimise confusion and provide clarity on compliance responsibilities.

   e. **Provide guidance for compliance:** The AML/CTF regulator must provide comprehensive guidance to legal practitioners on how to fulfill their obligations under the AML/CTF regime; and assist them in understanding and meeting their compliance requirements effectively.

f. **Allow for an implementation grace period:** The AML/CTF regime must allow for an implementation grace period after extension to the legal profession, to allow legal practitioners time to familiarise themselves with the new requirements and update their compliance processes.

g. **Ensure consistency with fundamental duties of the profession:** The AML/CTF regime must ensure that legal practitioners are able to operate in a manner consistent with their character as officers of the court.

Consultation and past submissions of the Law Council

10. The Law Council acknowledges that consideration of past submissions has been partially reflected in the Bill, but notes that some significant concerns have not yet been addressed.

11. For the purposes of this submission, we refer the Committee to our submissions from June 2023 and July 2024, which continue to be relevant.

The Bill and the focus of this submission

12. The Bill was introduced into the House of Representatives on 11 September 2024 and referred to the committee on 19 September 2024. The Bill proposes changes to, and additional content for, the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (**the Act**).

13. The Bill, if passed, would be a 168-page Amendment Act consisting of 12 schedules. There are two main purposes of the amendment, the first of which is to extend the governance of the Act to professionals involved in the provision of designated services. The second is to modernise the Act to enable governance of economic activity currently outside the scope of the Act.

14. The Bill contemplates phased commencement, with most provisions commencing on 31 March 2026, and other provisions commencing on 1 July 2026.

15. For the most part, this Submission will focus on those provisions directly connected to legal practitioners.

Background to the Act and role of FATF

16. Discussion of the Bill requires some understanding of the Act that the Bill seeks to amend.

17. The Act was introduced in 2006. The Act was based on recommendations by an international body, the Financial Action Task Force (**FATF**), published in 1990. FATF was originally established in 1989 as an intergovernmental organisation by G7 members, with Australia becoming a foundation member of the organisation. It is otherwise an unelected body, consisting of an executive board of appointees from member states, plus a full-time secretariat based in Paris. Decisions are made in plenary sessions, with the organisation playing an important role in the evaluation of compliance with the standards and recommendations of FATF.

18. This organisation is now effectively a permanent standing body with significant ability to influence domestic law-making of governments around the world through assessment and publication of compliance information at the international level.

19. The original mandate of FATF was a concern to address international money laundering, but over the last 30 years that has expanded to include the financing of terrorism and proliferation of finance linked to weapons of mass destruction. Importantly, the language related to money laundering has extended to include tax evasion as a key compliance concern.

20. The most significant tool available to FATF is to categorise a country as being non-compliant with the 40 standards it has developed (**FATF Recommendations**). Once that happens there is a period of 'enhanced reporting' that is intended to monitor progress towards compliance. Failure to achieve compliance across all 40 FATF Recommendations can result in a country being 'grey listed', or 'black listed' in the worst case. 'Grey listing' leads to an intervention involving 'Increased Monitoring' by FATF whereby the activities of a government in addressing AML risk are subject to regular scrutiny and publicity. 'Black listing' involves a public call to action and the identification of that country and its system as a high risk for money laundering and terrorist financing. In both cases there are direct effects on trade, commerce and financing of listed countries as compliant member states are encouraged to undertake enhanced risk assessments in all financial dealings with those listed countries.[2] In other words, there is an economic imperative driving compliance with the FATF Recommendations.

21. The Act is a complicated piece of legislation, having been amended 50 times since its introduction in 2006. It contains 252 sections in 18 parts and 21 sub-parts, and provides for extensive delegation of regulations and rules, of which there have been 81 during the life of the Act. Operation of the Act is augmented by an extensive set of Rules.[3]

22. The Rules are currently set out in 82 Chapters spanning over 350 pages of content. The Act extends authority to the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) to determine the Rules by which it gives effect to the Act as the principal enforcement authority.[4] The Rules will necessarily expand to govern the legal profession.

23. When the Act was introduced and passed in 2006, it was specifically contemplated that it would be introduced in two tranches. The 2006 legislation enacted the first tranche, regulating banking and finance. The present Bill would enact a second tranche, extending regulation to a range of designated non-financial business and professions, including real estate agents, accountants and the legal profession (**Tranche 2 entities**)[5]

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[2] A useful overview is available here: https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/More-on-high-risk-and-non-cooperative-jurisdictions.html
[3] The most important of these is the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)
[4] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 229.
[5] Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024, Explanatory Memorandum (**EM**).

Background to the Bill and FATF review

24. The stated objectives of the Bill are to:

    a. 'extend the AML/CTF regime to certain higher-risk services';[6]

    b. 'improve the effectiveness of the AML/CTF regime by making it simpler and clearer for businesses to comply with their obligations';[7] and

    c. 'modernise the regime to reflect changing business structures, technologies and illicit financing methodologies'.[8]

25. The modernisation limb of the Bill reflects the growing complexity of business structures and associated legal arrangements, as well as the rapid developments associated with currency and finance, particularly the development of technologies that enable rapid (if not instant) movement of capital and credit, such as digital currency.

26. Although the original legislation was introduced in November 2006, legislation covering Tranche 2 entities was not introduced over the following decade.[9] That became an issue in 2015 when Australia's compliance with FATF recommendations was assessed as part of a 'Mutual Evaluation'.[10]

27. Of the 40 FATF Recommendations checked for compliance, Australia was rated as not compliant in 6 areas, and partially compliant in 9.[11]

28. As a result of the 2015 report, FATF placed Australia in 'enhanced follow up', and made eight priority recommendations to the Australian Government, notably:

    a. 'Undertake a re-assessment of Australia's ML risks'

    b. '…authorities should place more emphasis on pursuing ML investigations and prosecutions at the federal as well at the State/Territory level'

    c. expanding proceeds of crime legislation and recovery

    d. an expansion of the information gathering powers of AUSTRAC, combined with enhanced compliance 'through judicious use of its enforcing authority'

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[6] EM, 2
[7] EM, 3
[8] Ibid.
[9] Anti-Money Laundering and Counter-Terrorism Financing Bill 2006, Second Reading Speech, 1 November 2006, House of Representatives (Hon. Phillip Ruddock): "The second tranche will cover real estate agents, jewellers, lawyers and accountants. Work on the second tranche reforms will commence after implementation of the first tranche has been started. The second tranche legislation will be tailored to meet the particular needs of the small business sectors to which it will apply." (p. 1)
[10] FATF describes the process as: "… in-depth country reports analysing the implementation and effectiveness of measures to combat money laundering, terrorist and proliferation financing. The reports are peer reviews, where members from different countries assess another country. Mutual evaluations provide an in-depth description and analysis of a country's anti-money laundering and counter-terrorist financing system, as well as focused recommendations to further strengthen its system." (https://www.fatf-gafi.org/en/topics/mutual-evaluations.html) (2 October 2024)
[11] Anti Money Laundering and Counter Terrorist Financing Measures: Australia—Mutual Evaluation Report (April 2015) https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-australia-2015.html

e. assessment of risk associated with legal arrangements

f. 'Ensure that lawyers, accountants, real estate agents, precious stones dealers, and trust and company service providers understand their ML/TF risks and are required to effectively implement AML/ CTF obligations and risk mitigating measures in line with the FATF Standards. Ensure that reporting entities implement as early as possible the obligations on enhanced customer due diligence (CDD), beneficial owners, and politically exposed persons introduced on 1 June 2014.'[12]

29. Since 2015 Australia has made changes based on the 2015 recommendations, resulting in the most recent Mutual Evaluation in March 2024 adjusting compliance rankings. As of March, Australia was ranked as being compliant with 18 Recommendations, 'largely compliant' with 12, 'partially complaint' with 6, and non-compliant with 4.[13]

30. According to FATF, an adverse finding may be made about a country in any of the following scenarios:

a. It is not a member of a 'FATF-style regional body (**FSRB**)';

b. It does not allow mutual evaluation results to be published in a timely manner

c. It is nominated by a FATF member or an FSRB for AML/CTF risk;

d. It has achieved poor results on its mutual evaluation, specifically:

i. it has 20 or more non-Compliant (**NC**) or Partially Compliance (**PC**) ratings for technical compliance; or

ii. it is rated NC/PC on 3 or more of the following Recommendations: 3, 5, 6, 10, 11, and 20;[14] or

iii. it has a low or moderate level of effectiveness for 9 or more of the 11 Immediate Outcomes, with a minimum of two lows; or

iv. it has a low level of effectiveness for 6 or more of the 11 Immediate Outcomes (referred to below).[15]

31. Australia is a member of the Asia-Pacific Group on Money Laundering, which is an 'FSRB'. There is no apparent issue with Australia making regular reports that are published in a timely manner. There is no record of Australia being nominated by a member state as being an AML/CTF risk.

[12] Ibid, pp. 10–11.
[13] https://www.fatf-gafi.org/en/countries/detail/Australia.html
[14] These are referred to by FATF as "the Big Six". FATF states that these six "are viewed as vital building blocks for a functional AML/CTF regime, regardless of the risk or context." See FATF (2022), *Report on the State of Effectiveness Compliance with FATF Standards*, FATF, Paris, p.10. Those recommendations relate to (i) the existence of a money laundering offence (R 3); (ii) the existence of a terrorist financing offence (R 5); (iii) targeted financial sanctions related to terrorism and terrorist financing (R 6); (iv) customer due diligence (R 10); (v) record keeping (R 11); (vi) reporting of suspicious transactions.
[15] https://www.fatf-gafi.org/en/topics/high-risk-and-other-monitored-jurisdictions.html

32. Australia is partially compliant or non-compliant with 10 Recommendations.

33. Those compliance issues are:

FATF Standard	Area of Governance	Partially Compliant	Non-Compliant	FATF Priority
1	Assessing risk and applying risk-based approach	X		N
15	New technologies	X		N
16	Wire transfers	X		N
22	DNFBPs: Customer due diligence		X	N
23	DNFBPs: Other measures		X	N
24	Transparency and beneficial ownership of legal persons	X		N
25	Transparency and beneficial ownership of legal arrangements		X	N
27	Powers of supervisors	X		N
28	Regulation and supervision of DNFBPs		X	N
35	Sanctions	X		N

['FATF Priority' is a reference to an adverse finding trigger outlined above at [30].

34. The table demonstrates that none of the areas with compliance issues is identified by FATF as a critical trigger for an adverse finding.[16] The only basis for an adverse finding would be in relation to the effectiveness of the measures. The FATF Evaluation not only involves an evaluation based on the recommendations, but also involves an 'Effectiveness' measure against 11 nominated outcomes.[17] Those outcomes are ranked in four categories: High, Substantial, Moderate and Low. At the last assessment in March 2024, Australia was ranked as follows:

[16] See above at [2929].
[17] https://www.fatf-gafi.org/en/publications/Fatfgeneral/Effectiveness.html

Immediate Outcome No.	Nominated Outcome	Rating
1	Risk assessment, policy and coordination	Substantial
2	International Cooperation	High
3	Supervision	Moderate
4	Preventative measures	Moderate
5	Legal persons and arrangements	Moderate
6	Financial intelligence	Substantial
7	Money laundering investigation and prosecution	Moderate
8	Confiscation	Moderate
9	Terrorist financing investigation and prosecution	Substantial
10	Terrorist financing preventative measures and financial sanctions	Moderate
11	Proliferation financial sanctions	Substantial

35. There were six 'moderate' scores, but nothing lower.

36. While there have been improvements, there remains further work to do before the next Mutual Evaluation scheduled in December 2026.[18] However, based on the 'Immediate Outcomes' threshold specified, as at March 2024, there was no obvious indicator that appeared to trigger Australia being 'grey-listed' at the next evaluation. This underlines the need for a proportionate response to reform.

37. This has particular relevance to the Law Council's position, referred to in further detail in [94] and [125] below that, as is the case in Canada, legal practitioners should not be required to lodge SMRs or respond to notices or compulsory examination powers concerning their clients. Canada has not been grey-listed as a result and the Law Council's position is that Australia similarly would not be grey-listed.

[18] https://www.fatf-gafi.org/en/calendars/assessments.html

Risk concerning legal practitioners

38. One of the core features of the FATF Recommendations is the emphasis given to evidence of risk-informed policy and regulatory structures.[19] Indeed, the requirement to undertake a national risk assessment and integrate risk assessments into practice was a priority recommendation for Australia in 2015.[20]

39. In July 2024, AUSTRAC published a report on Money Laundering Risk in Australia (**AUSTRAC Report**).[21] That report offers some useful information and highlights important vulnerabilities and criminal activities of concern. We note that lawyers are referred to as being professional facilitators **at times** engaged in criminal activity, with specific examples identified including the improper use of trusts, company structures and reliance on client legal privilege to frustrate law enforcement. Lawyers are specifically identified as 'gatekeeper professions' 'not currently regulated by AUSTRAC'.[22] The report draws conclusions about the legal profession, the most significant being that, in the absence of regulation by AUSTRAC, the legal profession presents a 'significant risk of money laundering'.[23]

40. Unfortunately, although referring to lawyers, the AUSTRAC report did not refer to the independent risk-assessment of the legal profession (**Vulnerabilities Analysis**) commissioned by the Law Council as part of the consultation process and published on 9 October 2023.[24] We would ask the Committee to consider the Vulnerabilities Analysis in its entirety, as it stands in contrast to the generalised account presented by AUSTRAC. Many of the conclusions set out in the Vulnerabilities Analysis cast doubt on assertions in the AUSTRAC report relating to legal practitioners.

41. One of the crucial aspects of the Vulnerabilities Analysis is the extensive regulation of the legal profession, both externally and internally. Legal practitioners are subject to an extensive array of professional conduct controls that serve to ensure the integrity of the profession. While there are instances of unsatisfactory and professional misconduct, such matters are dealt with by the profession and those external

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[19] FATF (2012–2023), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html "The FATF Standards have also been revised to strengthen the requirements for higher risk situations, and to allow countries to take a more focused approach in areas where high risks remain or implementation could be enhanced. 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." (p 8)

[20] FATF and APG (2015), Anti-money laundering and counter-terrorist financing measures—Australia, Fourth Round Mutual Evaluation Report, FATF, Paris and APG, Sydney www.fatf-gafi.org/topics/mutualevaluations/documents/mer-australia-2015.html (p. 10)

[21] https://www.austrac.gov.au/sites/default/files/20247/2024%20AUSTRAC%20Money%20Laundering%20NRA.pdf

[22] Ibid, p. 42.

[23] Ibid, p. 69: "The involvement of professional service providers who enable real estate purchases, such as lawyers, conveyancers and real estate agents, pose a significant risk for money laundering. This is because of the absence of measures to enhance transparency of beneficial ownership and AML obligations, as they are not currently subject to AML/CTF regulation.".

[24] https://lawcouncil.au/policy-agenda/regulation-of-the-profession-and-ethics/anti-money-laundering-vulnerabilities-analysis

agencies that assist the courts in the governance of the profession. These are specifically addressed in the Vulnerabilities Analysis.[25]

42. The Vulnerabilities Analysis recognised that multiple dimensions of the legal profession insulate it from the kinds of risk invoked by AUSTRAC:

    a. There is no evidence of the widespread misuse of trust accounts. Trust accounts are highly regulated and audited, with active referral for misuse of trust accounts to the relevant professional bodies when detected. There was uniform recognition by professionals on the proper use of trust accounting and the consequences of doing so.

    b. Cash was rarely a medium of exchange in any context outside deceased estates, with uniform awareness of reporting obligations on any amount exceeding $10,000.

    c. The legal profession is *uniformly* risk averse, meaning individual practitioners and their firms operate in a professional culture that routinely practices defensively to avoid professional risk.

    d. The vast majority of legal practitioners in Australia operate in small and sometimes single practitioner firms, with little or no exposure to any financial transaction involving internationally sourced capital. Most of these practitioners know their clients personally, and often retain an ongoing relationship of service over many years.

    e. There is an active concern that the incorporation of the profession into an active AML/CTF compliance model will have direct implications for increased costs for compliance and professional indemnity insurance.

    f. There is little to no risk in relation to practitioners performing only the activities of barristers.

    g. There are *multiple* factors that already mitigate the risks identified by the AUSTRAC report:

        i. The legal profession's admission and practising certificate requirements;

        ii. Continuing professional development requirements;

        iii. Annual self-certification as a fit and proper person required as part of the annual practising certificate renewal process;

        iv. Existing obligatory reporting of cash transactions to AUSTRAC;

        v. Strong regulation of trust accounts, including regulatory requirements to commence legal practice without supervision and to operate a trust account, monthly reconciliation requirements, the requirement for an

[25] Ibid at 49-50.

annual external audit of the trust account, the external regulatory investigations and audits of trust accounts;

vi. The use of electronic conveyancing which imposes certain verification of identity requirements;

vii. In larger legal practices, accounting and compliance staff to assist practitioners to identify conflicts, and to 'onboard' new clients;

viii. In 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; and

ix. The risk aware, and risk averse, nature of practitioners in their representation of clients and the conduct of their practices appeared to be a significant 'real world' factor leading practitioners to avoid exposure to risk, including ML/TF risk.

h. The Vulnerability Analysis did identify some residual vulnerabilities:

i. Problems with lawyers identifying the source of wealth and background controlling interests, particularly emanating from opaque structures such as trusts

ii. Inability to confirm the source of wealth received from banks

iii. The impact of making enquiries on source of wealth on the relationship of trust with a client

iv. Inability to easily identify politically exposed persons.

43. The Vulnerabilities Analysis identified the need for further education for legal practitioners in relation to financial crime. In response, the Law Council and its constituent bodies have developed a significant body of educational materials which are being rolled out to the legal profession to address the issue.

44. In short, while the Law Council accepts that there are instances of deliberate aberrant behaviour, such conduct is not representative of the profession as a whole and the Law Council does not accept that the legal profession as a whole presents a significant risk of money laundering and terrorist financing.

The legal profession in Australia and the systemic effect of the AML/CTF framework

45. There are three significant aspects of the legal profession in Australia that must be recognised for the purposes of the reforms being considered. The first relates to the demographics of the profession and the compliance cost burden that it will be obliged to shoulder. The second relates to the role that legal practitioners play as officers of the court (the judicial branch of government) and the third relates to the fiduciary relationship between legal practitioners and their clients.

Demographics of the legal profession

46. Legal practitioners in Australia are largely divided between solicitors and barristers, enrolled as officers of the Supreme Courts of the various States and Territories. In some jurisdictions there is a fused profession, although even in those jurisdictions practitioners tend to practise as either solicitors or barristers.

47. As set out in prior submissions, we emphasise the unique demographics of the legal profession in Australia. It is not a single entity governed by a single legislative framework as is the case in many international jurisdictions. It is a composite of entities operating within a federal system, characterised by a significant majority in sole or small practice with a relatively few very large firms.

48. There are approximately 90,000 solicitors and 6,000 barristers in Australia, excluding corporate and government lawyers. All barristers operate as sole practitioners. Solicitors also predominantly operate as sole practitioners or in small firms. As at October 2022, there were 16,514 private law practices operating in Australia. 84% were sole practices, whilst 9% were law practices with 2–4 principals. There were 70 law practices with 21 or more principals in Australia. Whilst this amounted to less than 1% of total practices, those 70 practices employed 19% of solicitors in Australia.[26] Thus 93% of law practices in Australia were either sole practitioners or small firms. They predominantly practise in the suburbs and in regional areas. 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.

49. Since it is not proposed that solicitors holding Corporate or Government Practising Certificates will become subject to the Act, the burden of the compliance regime in the legislation will affect those in private practice, which is predominantly small business as demonstrated above.

[26] URBIS 2022 National Profile of Solicitors (26 April 2023) 9 <https://www.lawsociety.com.au/sites/default/files/2023-05/2022%20National%20Profile%20of%20Solicitors%20-%20Final.pdf>

The cost of compliance

50. The Law Council is concerned at the economic impact of the tranche 2 reforms on a profession made up predominantly of sole practitioners and considers that the education program currently being rolled out by the Law Council and its constituent bodies in response to the Vulnerabilities Analysis, together with measures to be adopted to enhance risk assessment of designated services and clients, ought to address any relevant concerns.

51. The government published estimates on tranche 2 reform options in its impact analysis *Reforming Australia's Anti-Money Laundering and Counter-Terrorism Financing Regime* (August 2024).[27] The impact analysis is summarised by the Office of Impact Analysis in these terms:

> *'In terms of annual average costs, implementation of Option 4 is estimated to result in $1.851 billion in regulatory costs to businesses and $29 million to individuals each year over the next 10 years.'*

52. It is unfortunate that this impact analysis was not made available earlier. There has been limited time available for those who will become subject to the regime to consider and analyse the impact.

53. On the assumption that the figures are correct, the AML/CTF reforms will add $1.85 billion per annum to regulatory costs. A substantial portion of that cost, presently unknown, will presumably be attached to the costs of legal services. It is almost certain that much of the increase will have to be passed on to the consumers of legal services, which will increase the costs linked to those services.

54. This impact will be disproportionately felt by those clients, without significant capital, who engage small firms. Legal practitioners will need to bear the balance of the cost, making practice even more difficult. It is also highly likely that some small firms will discontinue certain areas of practice or services to avoid the costs involved in compliance. That occurred in New Zealand when equivalent legislation was introduced.

55. In the context of small firms, compliance will, in all likelihood, involve engagement with external specialist AML services in order to obtain specialist AML knowledge. It is not unreasonable to expect that those costs may be similar to professional indemnity insurance premiums. Even if only in the order of $5000–$10,000 per annum that may be a very significant additional impost upon a small legal practice. An audit of compliance may cost even more. If a larger firm needed to employ an AML Compliance Officer (not an unreasonable assumption in the circumstances) to deal with the additional compliance required, an extra salary burden will need to be shouldered. Anecdotally we understand that has occurred in New Zealand, resulting in additional salary costs.

[27] https://oia.pmc.gov.au/published-impact-analyses-and-reports/anti-money-laundering-and-counter-terrorism-financing-regime

56. In our July 2024 submission, the Law Council provided advice on the projected economic impact on the legal profession.[28] That information remains pertinent. At [31] in that submission we wrote:

> *'The gross revenue data for small firms supplied in the Law Council submission to the Senate Inquiry 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.'*

57. Compliance costs linked to the new regime must also be considered in the context of a State-based system of law and professional regulation. Australian lawyers are subject to regulatory changes at both State and Commonwealth levels, in addition to local economic pressures. The Law Institute of Victoria has highlighted significant concerns linked to the compliance costs of regulation on the legal profession in that state:

> *'…Victorian lawyers are currently grappling with a number of other significant regulatory related changes. Notably, for example, they are facing the forthcoming commencement of a mandatory reporting requirement for the reporting of the suspected misconduct of other lawyers, a new Scale of Costs for party/party costs recovery, new costs thresholds, the implementation of a new VCAT Scale for certain administrators, and increased costs in running a practice, including a 15% increase in professional indemnity insurance premiums.*
>
> *While the LIV recognises the critical importance of ensuring public confidence in the profession, it is deeply concerned about the impact that the concurrent introduction of so many regulatory changes will have on the profession. These concerns are heightened by the fact that these changes in the day-to-day practice of the law in Victoria are occurring in a context in which over 90 per cent of practices are sole traders or small businesses, and in which the legal assistance sector is, as recognised in the recent Independent Review of the National Legal Assistance Partnership, substantially underfunded.'*[29]

58. One of the major concerns of the profession is the impact of compliance costs on suburban, regional and remote practices, and inflationary pressure the reforms will have on the cost of legal services and access to justice. These reforms are occurring in relation to a profession that is subject to extremely stringent and comprehensive

[28] July 2024 Submission at [31] <https://lawcouncil.au/resources/submissions/reforming-australia-s-anti-money-laundering-and-counter-terrorism-financing-regime>.
[29] Law Institute of Victoria—Letter to Law Council of Australia: AML Submission (10 October 2024).

professional obligations and ethical duties: the legal profession operates under a comprehensive, stringent regulatory framework.

59. The Law Council refers to the findings of a 2024 benchmarking survey conducted by the Law Society of New Zealand, which demonstrated that **firms found the AML/CTF compliance costs to be one of the highest compliance requirements for their practices, with AML requiring significant time and costs to ensure proper compliance and auditing**.[30] Furthermore, AML/CFT compliance costs were reported by sole practitioners, small firms (2–19 lawyers) and medium firms (20–49 lawyers) to be a common challenge.[31]

60. There is no reason to think the Australian experience will be different. The impact may in fact be even greater in Australia than in comparable international jurisdictions, including New Zealand, because the Australian Securities and Investment Commission (**ASIC**) charges fees for accessing many of its databases, including company director information.[32] In comparison, many other countries provide free access to basic company information which would be used for AML/CTF verification purposes. For example, in the United Kingdom, Companies House provides free access to a wide range of company information online, including company director details, which supports transparency and ease of doing business. Similarly, the New Zealand Companies Office offers free online access to basic company information, including director details. The same is true in Ireland, where the Companies Registration Office offers free access to some basic company information, and in Singapore, where the Accounting and Corporate Regulatory Authority provides some free access to basic company information.

61. The AML/CTF regime has been designed with large financial institutions in mind and not small business, which may not have the resources to be able to bear the costs and administrative burden of complying with the AML/CTF Regime.

62. The Law Council is concerned that many sole practitioners and small to mid-size practices will be driven out of the profession because of the unsustainable compliance cost. If this occurs, regional and remote communities—communities that are already under-serviced—will disproportionately suffer a reduction in access to justice.

63. **It is the Law Council's position that the regulatory impact on the profession is disproportionate to the risk faced by small law practices, with significant economic impact to the profession and related impact to access to legal services, particularly in suburban, rural and remote communities**.

64. For this reason, it is extremely important that careful attention be directed to eliminating duplication of processes in the development of the Rules; that the compliance burden should be tailored to the risk, for example, there should be simplified CDD for legal practitioners that could be integrated into existing

[30] New Zealand Law Society, Benchmarking costs of law practice in New Zealand (Report, March 2024) 5 (**NZLC Report**) https://www.lawsociety.org.nz/assets/Cost-of-practice-survey/Law-Society-Costs-of-Practice-Report.pdf.
[31] Ibid, 27–29.
[32] We assume that one of the key processes to verify company directors, shareholdings and beneficial owners' identification will be via ASIC connect or other user pays services such as Infotrack.

obligations; and that fees for searches necessary to comply with the legislation should be removed.

Barristers

65. The design logic of the FATF recommendations is risk-based. In the case of "Designated Non Financial Business and Professions" (**DNFBPs**),[33] it focuses on transactional work for a client (including the holding or management of a client's assets) as this is the area where meaningful money laundering and terrorism financing (**ML/TF**) risks have been identified as potentially arising. It is not concerned with the representation of a client in litigation or with advisory work, as these do not entail sufficient ML/TF risk to warrant the cost and burden of regulation.

66. In all Australian jurisdictions, laws regulating the legal profession distinguish between legal practitioners who practise exclusively as, or in the manner of, barristers, and legal practitioners who practise without that limitation. Barristers' practising certificates, and the State and Territory laws under which they are issued, reflect that limitation on the scope of their professional practice. They are permitted to provide services in litigation, dispute resolution, and by way of legal advice. They are precluded from engaging in 'transactional' work for their clients.

67. A divided legal profession enhances access to justice because a small or generalist law practice can brief any barrister, which enables access to specialised advice and representation. The restrictions on barristers' manner of practice also make their cost structures lower than those of comparably expert solicitors, reducing the cost to clients. These structural advantages benefit clients and the community generally.

68. The Law Council specifically addressed the position of barristers in submissions in response to the Consultation Papers in phase one (June 2023) and phase two (July 2024) of the consultation process. The Law Council supported a specific exemption for barristers and provided reasons.[34]

69. We note that, in phase 2 of the consultation process, the Attorney General's Department expressed the view that 'work undertaken by barristers … would not be captured' by the proposed Tranche 2 legislation.[35]

70. The wording of the definitions of Designated Services in the Bill differs from the wording of Designated Services in the Consultation Papers[36] and expands the extent of the activity caught by the definitions. This is because the definitions now use the language '**assisting a person in … (planning) (execution) (organising) of …'**[37]

[33] "Designated Non Financial Business and Professions" is a category used by FATF in its Recommendations.
[34] July 2024 Submission, pp. 18–20.
[35] Australian Government (Attorney General's Department), *Reforming Australia's anti-money laundering and counter-terrorism financing regime: Paper 2: Further information for professional service providers* (May 2024), page 7.
[36] Ibid, pp. 8–15.
[37] Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024, Schedule 3, Part 3.

71. Item 10 of Schedule 3 to the Bill now proposes to include certain professional services as designated services in section 6 of the AML/CTF Act. The definitions are in proposed section 6(5B).

72. As presently drafted, unless qualified or read down, references to 'assisting' in items 1, 2, 4 and 6 of the table in proposed section 6(5B) have the capacity to capture the advice of a barrister in relation to a proposed transaction or the creation or restructuring of a body corporate or legal arrangement, even if it is procured through a reporting entity instructor, and references to 'otherwise acting' in items 1, 2, 4 and 6 of the table in proposed section 6(5B) have the capacity to capture advice and representation in relation to the administrative or judicial approval of a proposed transaction or the creation or restructuring of a body corporate or legal arrangement, even if it is procured through a reporting entity instructor.

73. Contexts where this is likely to arise include advice and representation in relation to an application or potential application for court approval of a transaction involving infant or disabled beneficiaries of a trust or the proceeds of a personal injury judgment or litigation settlement, or in relation to proceedings or potential proceedings for approval or otherwise of a corporate scheme of arrangement or a deed of company arrangement.

74. The changed wording in the Bill (about which there was no public consultation) is problematic, and the Bill provides no explicit exemption for barristers from the scope of the Act.

75. The Law Council understands that separate submissions will be made by several state bar associations in respect of the capture of the work of barristers by the terms of the Bill. While the Law Council understands that there may be some minor differences, all agree that not all barristers, whose work may be covered by the expanded definitions, should be included as reporting entities under the AML/CTF legislation.

76. Similarly, the Law Council does not support the inclusion of **all** barristers whose practices include advisory work or advocacy connected with transactions as reporting entities under the AML/CTF legislation. For example, it makes no sense at all for a barrister, when instructed by a solicitor, to be required to undertake a client risk assessment, duplicate client due diligence undertaken by the solicitor, undertake PEP or sanctions screening or comply with reporting or record keeping provisions when the relationship with the client is likely to reside with the solicitor. That would result in a waste of money; it is, in any event, unworkable and the ML/TF risk must be low.

77. Further, if some classes of barristers' services are such as to require them to enter the regulatory system as reporting entities, the associated economic costs and regulatory burdens will be a strong disincentive to the provision of that class of services. To the extent that barristers respond by excluding such services from their practice, the access of ordinary and perfectly innocent clients to legal advice and representation by barristers will be impeded, to the detriment of society and the economy.

78. The position may be more nuanced where a barrister takes a brief directly from a client. Direct briefs can have a number of sources, which may be private citizens, government, other regulated entities (such as accountants—who regularly brief the tax bar and may be involved in restructuring businesses as a result of insolvency) and corporate actors, for example.

79. The simplest and most appropriate way to address the problem is to qualify proposed section 6(5B) so that it does not treat services provided by a barrister (a legal practitioner holding a barrister's practising certificate and practising accordingly) as designated services. The exemption could be general, or it could be related to the provision of instructions by government or a professional entity that is itself a reporting entity or, at the very least, a solicitor. If the exemption is not general, it would also be appropriate to consider the special position of pro bono services, which may be given (particularly in the context of a charitable organisation or referral service) without the intervention of an external solicitor or accountant.

80. We note that the AML/CTF Act already includes special provisions modifying the operation of the Act in relation to particular entity classes.[38] Having regard to the particular significance of barristers' services to access to justice and the proper functioning of civil society and the economy and recognising the inherently low ML/TF risk that they present, express provision is well justified.

81. **The Law Council considers that the Bill should be amended to address the provision of barristers' professional services by exemption or definitional exclusion as discussed above such as where a barrister is briefed by a solicitor or other reporting entity.**

82. In some Australian jurisdictions, barristers or their clerks may receive fees in advance for their professional services. Where this occurs, if their fees turn out to be less than the pre-payment, they have an obligation to refund any excess. Nobody has suggested that this raises a realistic ML/TF risk. As we understand it, item 3 in the table to proposed section 6(5B) with respect to receiving and holding clients' money is not intended to capture the receipt, holding or refund by barristers of money paid in advance to cover their fees for professional services. **It would be helpful to have this explicitly stated by way of confirmation in explanatory material relating to the Bill**.

Legal practitioners' roles as fiduciaries and as officers of the Court

83. None of the other entities currently regulated, or proposed to be regulated, under the Bill stand in the same position as the legal practitioners. They are neither officers of the Court nor owe fiduciary duties to their clients (or customers), even though some owe some duties of confidentiality.

84. All efforts to regulate the legal profession must begin with the recognition that the legal profession is one of the most regulated groups in the country (**Appendix A** is a helpful

[38] Law Council of Australia, Reforming Australia's anti-money laundering and counter-terrorism financing regime (4 July 2024), [90]

summary of the regulatory framework for Australian lawyers),[39] and they perform a unique function in the administration of justice.

85. This is a by-product of the Westminster system of government where the judiciary functions as an independent branch of government that is institutionally separate from both the legislature and the executive at the Constitutional level. The judiciary exercises unique powers in ensuring the executive and the legislature do not exceed their respective powers.

86. The judiciary cannot function without the legal profession and legal practitioners owe a paramount duty to the courts and administration of justice.[40]

87. Solicitors and barristers are admitted as officers of the court under strict qualifying standards, with foundational ethical duties that are enforced by the profession itself, the courts, and designated government agencies. They are subject to mandatory ongoing education requirements, trust account auditing and fitness to practice requirements. They serve as crucial intermediaries between the arms of government, citizens and the state.

88. The significance of the role of lawyers are officers of the court was highlighted by Hon. Marilyn Warren AC, a former Chief Justice of Victoria:

> *'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.'***[41] (emphasis added)

89. Also fundamental to the role of the legal profession is the fiduciary duty owed by the practitioner to their client. A fiduciary duty is a relationship, enforceable in a court and by the profession, characterised as a duty of loyalty. It requires the lawyer to always act in good faith and for the benefit of a client, and to advance the interests of the client by all lawful means.

90. The fiduciary nature of the relationship between lawyer and client is onerous and carefully guarded by the courts and has been for centuries. In *Tyrell v Bank of London*, Lord Westbury LC said '… *there is no relation known to society, of the duties of which*

[39] Law Council of Australia, *Regulation of the Legal Profession*..
[40] E.g.: *Australian Solicitors' Conduct Rules* : Rule 3: "A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty"".
[41] Remarks of the Hon. Marilyn Warren AC Chief Justice of Victoria on the Occasion of Joint Law Societies Ethics Forum Melbourne, 20 May 2010.

it is more incumbent upon a court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client.'[42]

91. The duty functions in particular by demanding the lawyer *not* act in ways that undermine the obligation to loyal and faithful service. Fundamentally, a lawyer may not act in ways against a client's interests that are in conflict with the demands of others. The reason why the relationship between solicitor and client is fiduciary, and the nature of that duty, was explained by Mason J in *Hospital Products v US Surgical Corp*:

> *'The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations, viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.*
>
> *It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.'*[43]

92. Core aspects of how that relationship is manifested include the contract of service (the retainer), preservation of the client's best interests, and the maintenance of secrecy.

93. In the common law tradition secrecy is manifested as the requirement to keep matters discussed and documented confidential, and in the maintenance of any privilege arising from the engagement. The fundamental purpose of secrecy is to facilitate open, frank and complete discussion on matters affecting the legal position of the client. It is a fiduciary relationship based upon trust and confidence.

94. Other common law jurisdictions also acknowledge the importance of the role of legal practitioners. We draw the attention of the Committee to the decision of the Canadian Supreme Court in *Canada (Attorney General) v. Federation of Law Societies of Canada.*[44] In this case the Supreme Court struck out a number of provisions of the AML legislation operating in that country (**including the suspicious matter reporting obligation**). In doing so, important comments were made about the unique nature of the legal profession, including:

[42] (1862) 10 HLC 26 at 44; 11 ER 934 at 941.
[43] (1984) 156 CLR 41 at 97.
[44] 2015 SCC 7, [2015] 1 SCR 401.

> *'Clients—and the broader public—must justifiably feel confident that lawyers are committed to serving their clients' legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer's ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This* ***duty of commitment to the client's cause is an enduring principle that is essential to the integrity of the administration of justice****.'*[45]
>
> *'The duty of commitment to the client's cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice.* ***Public confidence depends not only on fact but also on reasonable perception****. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients.'*[46]
>
> *'I conclude that* ***there is overwhelming evidence of a strong and widespread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer's commitment to his or her client's cause….*** *The duty of commitment to the client's cause ensures that 'divided loyalty does not cause the lawyer to 'soft peddle' his or her [representation]' and prevents the solicitor-client relationship from being undermined. In the context of state action engaging s. 7 of the Charter, this means at least that (subject to justification****) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty****, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through.* ***The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer's duty of commitment to serving the client's legitimate interests****.'*[47] (emphasis added)

95. Legal practitioners also play a special role in maintaining the rule of law and their role is an important element in the fight against corruption, and organised crime. Legal practitioners 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

[45] Per Cromwell J at [96].
[46] Ibid, [97].
[47] Ibid, [102]–[103].

existing professional obligations are a significant risk-mitigation factor. FATF also accords recognition to the unique role of lawyers globally.[48]

96. It is because legal practitioners owe a paramount professional conduct duty to the court and fiduciary duties to their client, that any attempt to legislate in ways that compromise those aspects of the profession are matters of concern as they go to the heart of the essential duties of legal practitioners.

Areas affecting fundamental duties of legal practitioners

97. The Law Council has significant concerns about aspects of the Bill that we consider distort the paramount duty to the court and compromise the fiduciary nature of the duty to the client.

98. **Accordingly, the Law Council does not support the application to legal practitioners of provisions in the Bill having the effect that legal practitioners may be**:

- required covertly to inform on a client to a prosecuting authority, by filing a suspicious matter report (**SMR**), in breach of obligations of confidentiality, thereby fundamentally undermining the lawyer/client relationship (see section 41);
- exposed to receipt of a notice under sections 49 or 49B or a compulsory examination about a client's affairs, about which a legal practitioner will be unable to take instructions from a client and the legal practitioner will be prohibited from informing a client that they have submitted, or are required to submit, a client's confidential information or documents to a government authority (see s 123);
- unable to advise a client about an SMR or s 49 or s 49B notice, and therefore unable to advise a client fully about the consequences of a client's particular course of action (see s 123);
- unable to terminate a retainer with a client (in the absence of just cause and reasonable notice required by Rule 13.1.3 of the *Australian Solicitors' Conduct Rules*), following lodging an SMR, or receipt of a notice under s 49 or s 49B, thereby placing a legal practitioner in an impossible ethical position. That position will be ongoing until such time as professional conduct rules permit termination of the retainer (inconsistency between s 41 and professional conduct rules);
- exposed to either disciplinary action, or court proceedings, if a retainer is in fact terminated (professional conduct rules);
- unable to defend themselves properly in either disciplinary investigations or court proceedings for terminating a retainer, without breaching the tipping off provisions in the Bill (see s 123);
- being required to keep records for a minimum of seven years, which may at any time be sequestered to AUSTRAC on notice to produce in the absence of a judicially considered warrant (ss 49, 49B); and

[48] FATF (2012–2023) *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF, Paris) see Interpretive Note to Recommendation 23.

- required to bear a reverse the onus of proof as a common feature of the limited defences available under the Act/Bill.

In our view, addressing those matters will require amendment to the legislation and consequential amendment to related forms of State based regulation of legal practitioners (i.e. professional conduct rules).

Comments on application of the Act to the profession

99. One of the provisions of considerable concern is suspicious matter reporting arising under section 41 of the Act.

Suspicious matter reporting: application of s 41

100. Section 41 has been in operation since the commencement of the Act in 2006. The amendment to section 6 as proposed in the Bill (Schedule 3) will extend those obligations to real estate agents, accountants and the legal profession where those parties engage in designated services.

101. The Law Council welcomes the inclusion of s 41(2A) in the Bill but, notwithstanding this, remains very concerned about abrogation of the duty of confidentiality owed by legal practitioners in relation to suspicious matter reporting. This is particularly the case since any SMR filed by a legal practitioner may invite service of notices under s 49 and s 49B from AUSTRAC, and others, or compulsory examination seeking further information about a client's affairs.

102. Section 41(1) sets out when a reporting obligation arises for a 'reporting entity'.[49] The provision is exceptionally broad.

103. A reporting entity will have a reporting obligation where there is a suspicion on reasonable grounds that:

    a. the client or agent is not who they say they are (s 41(1)(d), (e));

    b. the information obtained 'may be relevant' to the investigation or prosecution of tax offences;

    c. the information obtained 'may be relevant' to the investigation or prosecution offences against any Commonwealth, State or Territory law, or proceeds of crime recovery or the equivalent state law (s 41(1)(f));

    d. the service that is requested is in preparation for nominated offences (such as funding terrorism, dealing with frozen assets, or dealings with a proscribed person or entity) (s 41(1)(g));

[49] A "reporting entity" is defined in s 5 of the Act to mean "a person who provides a designated service." A "person" has an expanded meaning in the AML Act (s5) and is defined as "any of the following: (a) an individual; (b) a company; (c) a trust; (d) a partnership; (e) a corporation sole; (f) a body politic. Note: See also sections 237 (partnerships), 238 (unincorporated associations) and 239 (trusts with multiple trustees")". The extension of legal personality functions to make the reporting obligation both a personal responsibility and a corporate responsibility. A "designated service" (discussed previously) is defined in s 6 of the Act, and with the passing of the Bill will include new provisions that will capture several services involving the legal profession.

e. the information 'may be relevant' to investigating or prosecuting a financing terrorism offence (s 41(1)(h)); and

f. the information 'may be relevant' to investigating or prosecuting a money laundering offence (as defined in s 5) (s 41(1)(j)).

104. The first observation relates to the term 'may be relevant'. This term is very broad. As an ordinary word the term relevant means the object having some bearing on or reference to the matter at hand. In law, relevant is a term with legal meaning referring to whether information is able to rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[50] The use of the word "may" renders the meaning of this term so broad that it can capture any information with minimal logical connection.

105. The related observation is that one of the requirements is linked to information that '**may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory'** (s41(1)(f)(iii)). The term 'offence' is problematic. It is a defined term in the Act, but in such a way that it effectively leaves open ended the scope of what can be captured by the Act or is required to be reported. Section 5 of the Act defines 'offence' as follows:

> *(a) a reference in this Act to an offence against a law of the Commonwealth (including this Act) includes a reference to an offence against section 6 of the* Crimes Act 1914 *that relates to such an offence; and*
>
> *(b) a reference in this Act to a particular offence includes a reference to an offence against section 6 of the* Crimes Act 1914 *that relates to that particular offence.*

106. Section 6 of the *Crimes Act 1914* (Cth) refers to the offence of being an accessory after the fact. This leaves open the full scope of the law, including the criminal laws of the Commonwealth and the various States and Territories, ranging from genocide[51] to stealing fish from ponds,[52] as examples.

107. What is a reasonable suspicion may also be of concern. In the High Court in *Thoms v Commonwealth*,[53] Gordon and Edelman JJ observed, in relation to 'reasonable suspicion' in the context of the Migration Act, at [58]:

> *'Reasonable suspicion is objective: facts must exist which are sufficient to induce a reasonable suspicion in the mind of a reasonable officer that a person is an unlawful non-citizen. The officer's reasonable suspicion that a person is an unlawful non-citizen must be 'justifiable upon objective examination of relevant material'; but that is something* ***'substantially less than certainty'****. The reasonable suspicion may turn out to be wrong but that does not mean that, at all relevant times, the officer did not reasonably suspect that the person was an unlawful non-citizen. The*

[50] For example, *Evidence Act 1995* (Cth), s55
[51] Criminal Code Act 1995 (Cth), s268.3
[52] *Crimes Act 1900* (NSW), s512
[53] [2022] HCA 20; 401 ALR 529.

> *question is whether the reasonable suspicion continued for the duration of the person's detention.' (*Footnotes omitted, emphasis added *).*

108. This highlights that the test is objective. As an objective test it is open for a court to declare, retrospectively, that the suspicion was not sufficiently founded. The other aspect of the test is the threshold for reporting is low. The threshold for doing so is something 'substantially less than certainty' although it must be based on *some* evidence capable of causing a reasonable person to form a suspicion that the relevant circumstance exists or will exist.

109. A major problem with the test for legal practitioners is that the threshold for reporting a suspicious matter is lower than the threshold required for the termination of the retainer with the client. This is specifically addressed below at [152]-[155].

110. The SMR provisions are civil penalty provisions (s 41(4)). Under the Act, the civil penalty provisions are potentially devastating. While many civil penalty provisions are 'infringement notice provisions', meaning they are determined in the form of a standard penalty or fine, s 184(1C) provides that ordinarily a contravention of s 41 is *not* to be dealt with as an infringement notice unless the circumstances are essentially minor. In most cases a contravention of s 41 is determined as a pecuniary penalty by a court.

111. The fine attached to a breach of s 41 is among the most significant fines known to Australian law. For a body corporate that fine is up to 100,000 penalty units. For an individual, that fine is up to 20,000 penalty units. The value of a penalty unit will be $330 (or higher) by the time the Act is in operation. This makes the SMR penalties regime (which was designed for financial and gambling institutions—not sole traders or other small business) extremely severe. In the context of small business, it is extraordinarily harsh, and potentially crippling for any legal practitioner caught up in it.

112. There is a defence available in the Act: s 236. The defence is available in criminal[54] and civil penalty prosecutions,[55] as well as recovery of the proceeds of crime.[56] The defence operates where '*the defendant proves that the defendant took reasonable precautions, and exercised due diligence, to avoid the contravention in respect of which the proceedings were instituted*.'[57] Here the operative term is 'reasonable steps', which is an invitation to consider the facts of each case. Central to that consideration will be the extent to which Act has been complied with. There is a general absence of reported authority on what constitutes 'reasonable precautions' in this context.

113. The Law Council does not question SMRs as such—they may be of great assistance to law enforcement. The critical issue is whether it is appropriate to impose a statutory reporting obligation upon legal practitioners under threat of sanction.

[54] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 236(1)(a).
[55] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 236(1)(b).
[56] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 236(1)(c).
[57] *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), s 236(2).

114. A reporting obligation of this kind compromises the fidelity to the client, which carries a potential fundamental conflict with the role of lawyers as officers of the courts. The dilemma arising is the client in this context is suspected of engaging in, or proposing, unlawful activity. That a client may be suspected of engaging in, or proposing, unlawful activity, or has done so, may not be uncommon in legal practice. It is an ordinary aspect of legal practice to advise a client about what are lawful and unlawful options and encourage compliance with the law. The ability for a client to be able to discuss that, and their options, is a cornerstone of the duty owed to the client. The ability of the lawyer to advise against a proposed course of conduct is a fundamental and ordinary part of advice work.

115. But here the requirement under the Act, under threat of an extraordinarily harsh penalty, is to report a *suspicion* to a prosecuting agency. That aspect is significant. One potential outcome of that is the potential for the lawyer to effectively be recruited into an investigation into the client, which is anticipated by changes to Part 2 of the Act contained in Schedule 10 to the Bill.

116. In our view, the requirement to covertly inform on a client to the executive is irreconcilable with the paramount duty to the court and the duty to a client and is ethically unacceptable. We draw the Committee's attention to the views of the High Court called on to consider the 'Lawyer X' scenario in *AB (a Pseudonym) v CD (a Pseudonym)* (2018) 362 ALR 1 at [10]:

> *'EF's actions in purporting to act as counsel for the Convicted Persons while covertly informing against them* ***were fundamental and appalling breaches of EF's obligations as counsel to her clients and of EF's duties to the court****.' (emphasis added)*

117. Lawyers who work in the criminal law may be regularly confronted with guilty and delinquent clients. Under no circumstances can a lawyer to whom a client has made an admission, even to a very serious offence, disclose that without the explicit consent of their client. Indeed, they are required to continue to act under strict conditions in accordance with the Australian Solicitors Conduct Rules.[58] That obligation stands in stark contrast to what is being set out in the Bill.

[58] In particular, ASCR 20: 20 *Delinquent or guilty clients***:** 20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client—20.1.1 has lied in a material particular to the court or has procured another person to lie to the court, 20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered, or 20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court, must—20.1.4 (Repealed) 20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression. 20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty—20.2.1 may, subject to the client accepting the constraints set out in Rules 20.2.2–20.2.8, but not otherwise, continue to act in the client's defence, 20.2.2 must not falsely suggest that some other person committed the offence charged, 20.2.3 must not set up an affirmative case inconsistent with the confession, 20.2.4 must ensure that the prosecution is put to proof on its case, 20.2.5 may argue that the evidence as a whole does not prove that the client is guilty of the offence charged, 20.2.6 may argue that for some reason of law the client is not guilty of the offence charged, 20.2.7 may argue that for another reason not prohibited by Rule 20.2.2 or 20.2.3 the client should not be convicted of the offence charged, and 20.2.8 must not continue

118. While these are examples taken from the criminal law, rather than from commercial or transactional law, they identify the fundamental ethical principle which is undermined by an obligation to file an SMR.

119. There are very limited grounds on which a lawyer may breach client confidentiality. These are set out in Rule 9 of the *Australian Solicitors' Conduct Rules*. Those are:

    a. Express or implied authority from the client (R 9.2.1)

    b. Where required by Act of Parliament (R 9.2.2)

    c. When seeking professional conduct advice within the profession (R 9.2.3)

    d. Disclosure is made for the sole purpose of preventing a serious crime (R 9.2.4)

    e. Disclosure is made for the purpose of preventing imminent serious physical harm to the client or another person (R 9.2.5)

    f. Disclosure is made for the purpose of insurance cover (R 9.2.6)

120. As can be seen, these rules specifically allow a solicitor to report matters involving the commission of serious crime and would certainly extend to making a report of knowledge of client involvement in the commission of a serious offence such as terrorism. This is a professional ethical obligation that operates independently of AML/CTF legislation.

121. On the other hand, informing on a client in the manner envisaged by the Bill—about something which **may** be **relevant** to an **investigation which may not have even commenced about a wide array of potential offences**—is repugnant to the duty owed by legal practitioners to the courts and to the duty owed by legal practitioners to their client.

122. Further, being required to breach a duty of confidentiality to make a report of something suspicious, to what may potentially be a prosecuting authority, undermines the ability of legal practitioners to provide full and frank advice, especially when it the SMR provision is read in conjunction with the tipping off provision in s 123. We also note that the SMR provisions must be read in conjunction with the reformulation of privilege set out in Schedule 4 (discussed below).

123. **Accordingly, the Law Council's position is that legal practitioners should be specifically exempted from Suspicious Matter Reporting.**

124. Alternatively, the requirement for practitioners to report should be amended to align with existing requirements to terminate a retainer where a client has specifically given instructions to proceed in unlawful activity after the legal practitioner has advised against it.

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to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence. 20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must— 20.3.1 advise the client against that course and warn the client of its dangers, 20.3.2 not advise the client how to carry out or conceal that course, and 20.3.3 not inform the court or the opponent of the client's intention unless—(i) the client has authorised the solicitor to do so beforehand, or (ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

125. It is worth noting that Canada, which does not permit suspicious matter reporting by legal practitioners, has not been grey-listed.[59] Indeed, despite the rejection of the Canadian Supreme Court of aspects of the AML/CTF regime affecting the profession, Canada was rated as largely or partially compliant with respect to those measures touching on the legal profession in its most recent (2021) evaluation.

Notices to produce

126. Schedule 9, Part 2 introduces new sections 49B and 49C into the Act. These must be read in conjunction with the existing s 49, which is also subject to minor amendments through the Bill.

127. These sections authorise the AUSTRAC CEO and certain law enforcement agencies,[60] including investigating officers,[61] to issue a notice to produce (i) information, and/or (ii) documents, on receipt of a suspicious matter report. Failure to comply with the notice is a civil penalty provision.

128. These provisions apply if a person has information or a document that may assist the AUSTRAC CEO with:

    a. obtaining or analysing information to support efforts to combat money laundering, terrorism financing, proliferation financing or other serious crimes; or

    b. identifying trends, patterns, threats or vulnerabilities associated with money laundering, terrorism financing, proliferation financing or other serious crimes.

129. The Law Council is concerned that the scope of these provisions are so broad, imprecise and opaque that they could conceivably be invoked to compel any person in the community (including a law practice or associate of a law practice) to provide specified information and produce specified documents about any other person or entity, simply on the basis that it *may* assist the AUSTRAC CEO with the performance of any of the AUSTRAC CEO's functions. It is not clear where judicial oversight may be applicable. The threshold for the authorisation of notices is very low.

130. Section 49B is activated by the AUSTRAC CEO giving a person a written notice requiring any such information to be given, or such documents to be produced, as is specified in the notice within a specified period. The criterion for giving a notice is that the AUSTRAC CEO reasonably believes that the person to whom the notice is given has knowledge of the information, or possession or control of the document specified in the notice that will assist the AUSTRAC CEO carry out the AUSTRAC CEO's functions.

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[59] *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c. 17

[60] These are set out in s 49(1): (a) the AUSTRAC CEO; or (b) the Commissioner of the Australian Federal Police; or (c) the Chief Executive Officer of the Australian Crime Commission; or (d) the Commissioner of Taxation; or (e) the Comptroller-General of Customs; or (f) the National Anti-Corruption Commissioner; or (g) an investigating officer who is carrying out an investigation arising from, or relating to the matters mentioned in, the information..

[61] A term defined in the Act: investigating officer" means: (a) a taxation officer; or (b) an AFP member; or (c) a customs officer (other than the Comptroller-General of Customs); or (d) an examiner of the Australian Crime Commission; or (e) a member of the staff of the Australian Crime Commission; or (f) a National Anti-Corruption Commission officer.".

131. The EM[62] states that section 49B as it relates to money laundering, terrorist financing and proliferation financing gives effect to FATF Recommendation 29, which recognises that a Financial Intelligence Unit should be able to obtain additional information from reporting entities and should have access on a timely basis to the financial, administrative and law enforcement information that it requires to undertake its functions properly. The EM then states that the inclusion of 'other serious crimes' also reflects the objects clause of the Act at section 3 and the functions of the AUSTRAC CEO at section 212 of the Act.

132. Section 49 and 49B depart from the FATF Recommendations in two respects:

    a. they apply to a person (defined in section 6 of the AML Act) and not to a reporting entity;

    b. the inclusion of other serious crimes is a domestic policy choice, not a matter of international concern—c.f. the domestic objects in sections 3(1)(aa–)–(ad) with international concern objects in sections 3(1)(a) and (b) and 3(3)(a).

133. The EM also describes[63] that the purpose of section 49B is to assist in circumstances where a person comes to AUSTRAC's attention independently of a domestic SMR. Such a circumstance includes referral from an international FIU or Australian law enforcement agency.

134. The EM[64] lauds the benefits of section 49B—'to better enable AUSTRAC to collect information from reporting entities and other persons to deliver its financial intelligence functions, and to support cooperation and collaboration among reporting entities and law enforcement agencies to detect, deter and disrupt money laundering, the financing of terrorism and other serious crimes.'

135. Section 39B(2)(a) defines "serious offence" as "an offence against a law of the Commonwealth, or a law of a State or Territory, that is punishable by imprisonment for 2 years or more." That definition is inconsistent with the threshold for serious Commonwealth offences,[65] which sets the benchmark at offences that carry a prison term of 3 or more years, and also the way in which serious and serious indictable offences are defined in State law. In New South Wales, for example, a serious indictable offence is an offence punishable by a prison term of 5 years or more.[66] Many offences with a penalty of 2 years would not be regarded as particularly serious in the calendar of crimes known to the criminal law, and many of those would be dealt with summarily in a Local or Magistrates' Court. This threshold is too low and requires clarification.

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[62] *Anti Money Laundering and Counter Terrorism Financing Amendment Bill 2024, Explanatory Memorandum*, from [146]ff
[63] Ibid, [802]
[64] Ibid, [803]
[65] Note that the term "serious Commonwealth offence" is defined broadly in s 15GE of the *Crimes Act 1914* (Cth) as crimes that carry a maximum term of imprisonment of 3 or more years that fall within a series of categories declared in s 15GE(2), which include crimes of violence, money laundering and tax evasion.
[66] *Crimes Act 1900* (NSW), s4.

136. Sections 49 and 49B raise several issues, particularly if they are to be applied to legal practitioners:

    a. the sections are compulsory information gathering powers;

    b. the sections can apply to anyone—there is no limitation as to the person (defined in section 5 of the AML/CTF to include individuals and non-individuals) to whom a notice can be given, other than that the AUSTRAC CEO must reasonably believe the person has knowledge of the information, or possession of the document, that is specified in the notice;

    c. 'serious crimes' is a term of art, not a defined term in the AML/CTF Act;

    d. section 49B is silent as to who can, in what circumstances, and on what objective basis, request the AUSTRAC CEO to consider issuing a section 49B notice;

    e. there does not need to be a connection between a subject to whom the information or document specified in the notice relates and the provision of a designated service by a reporting entity to that subject.

137. Most importantly for legal practitioners, the tipping off offence in the new section 123 applies to a legal practitioner served with a s 49 or s 49B notice but the crime prevention provision contained in s 123(4) does not.

138. Thus, a legal practitioner served with such a notice concerning a client's affairs may not inform the client, must bear the burden of answering the notice, or challenging it, without instructions from the client and obviously must bear the cost of answering or challenging the notice. That is quite different to the position with notices served by other regulators such as ASIC, the ACCC and the ATO.

139. Section 49C is also problematic for legal practitioners. Section 49C is activated by the AUSTRAC CEO giving a person a written notice authorising the person to give the AUSTRAC CEO any such information, or to produce any such documents, as *may* assist the AUSTRAC CEO with the performance of the AUSTRAC CEO's functions. The section then provides that information may be given or documents may be provided, despite any general law obligation of confidentiality.

140. The EM[67] explains that the purpose of section 49C is to empower the AUSTRAC CEO to authorise the voluntary provision of information or documents to AUSTRAC, in recognition of '*AUSTRAC's public-private partnerships, and other forms of cooperation between AUSTRAC and reporting entities, which facilitate cooperation to detect, deter and disrupt financial crime'*. The EM goes on to state that the 'Fintel Alliance' is a public-private partnership that brings together the private sector, including major banks, as well as law enforcement and security agencies from Australia and overseas to, among other things, '*proactively work with AUSTRAC on live intelligence cases and on strategic level analysis'*. The purpose of section 49C is to ensure recipients of a notice can voluntarily disclose information '*without exposing*

[67] *Anti Money Laundering and Counter Terrorism Financing Amendment Bill 2024, Explanatory Memorandum*, at [149]

cooperative persons to legal risks such as breach of privacy or contractual obligations as a result of sharing the information.'

141. The purpose of section 49C thus appears to be to provide a statutory device (effectively a standing 'authorisation' to disclose customer information) to protect a 'cooperative person' from the legal consequences of voluntarily disclosing client confidential information. While that may be an attractive outcome for financial institutions, legal practitioners are not an arm of law enforcement and it is no part of their role to be co-opted into law enforcement. The section does not obviate the fundamental ethical problems that would confront legal practitioners in adopting that course of action.

Tipping off

142. Schedule 5, Part 1 will function to repeal the existing s 123 of the Act and replace it. The revised tipping-off provisions in proposed s 123 still raise matters of significant concern.

143. Section 123(1) sets up the criminal offence of tipping off which, in brief terms, is that a reporting entity must not disclose that it *has lodged or is required to lodge* an SMR, *or* that it *has provided or is required to provide information or produce documents* pursuant to s 49(1) or proposed s 49B, if the disclosure of information would, or could, reasonably be expected to prejudice an investigation of an offence under Commonwealth, State or Territory law. No investigation need have been commenced.

144. The Law Council considers that the notion of what would or could reasonably be expected to prejudice an investigation to be uncertain in its scope. We suggest that this matter is so important that relevant examples should be included in the legislation itself.

145. According to the EM[68] providing any information to a client about making a suspicious matter report is declared to be prejudicial to an investigation. It states that situations where disclosure would or could reasonably expect be expected to prejudice an investigation include a reporting entity notifying a customer who is the subject of an SMR, or their known associate, that a suspicion was formed in relation to their behaviour and an SMR has been submitted. This kind of disclosure risks criminals taking action to hide or disguise their illegal activities.

146. Section 123(4)(c) then provides an exception if a legal practitioner makes the disclosure 'in good faith' for the purposes of dissuading the customer (i.e. client) from engaging in conduct that constitutes, or could constitute, an offence against the law of the Commonwealth or of a State or Territory.

147. However, the legal practitioner bears the evidential onus in any prosecution. Accordingly, in effect, a legal practitioner who provides a designated service, who advises a client that they have made or are required to make a suspicious matter report, is potentially liable under s 123(1), with an associated evidential burden of proof during subsequent proceedings. If they do so in the context of trying to dissuade

[68] Explanatory Memorandum, at [473]

the client from engaging in unlawful conduct, the best they can hope for is to rely on s 123(4) in any subsequent investigation or prosecution. This unsatisfactory state of affairs is further confused by the terms in the EM:

> *[479.] Subsection 123(4) allows legal practitioners, qualified accountants or a person specified in the AML/CTF Rules to disclose SMR-related information where it relates to the affairs of a customer of the reporting entity. The disclosure must be made in good faith and for the purposes of dissuading the customer from engaging in conduct that constitutes, or could constitute, an offence against a law of the Commonwealth or of a State or Territory.*
>
> *[480.] For example, in discussions with a client, a legal practitioner or qualified accountant should focus on the client's financial activities and how they could be breaking the law. The reporting entity* ***should try not to disclose*** *that they have submitted, or are required to submit, a SMR. Specifically disclosing that they have or will submit a SMR, would or could reasonably be expected to prejudice an investigation,* ***even if the exception allows it.*** *(Emphasis added)*

148. The exception that operates in s 123(4) is really no more than a reflection of the ordinary duty of a legal practitioner to provide advice to a client who has intimated an intention to break the law. The EM basically suggests that a lawyer must tell the client not to engage in the conduct that might be unlawful, but not to do so in a way that will alert them to the obligation to report them.

149. The client is therefore deprived of important advice, which itself may deter a client from pursuing a particular course of action, that advice being that the client's behaviour has caused, or could cause, the legal practitioner to form a suspicion and would need to comply with the practitioner's obligation to submit an SMR. Thus, a legal practitioner's fundamental duty of loyalty and confidence owed to the client, which is already displaced by the reporting obligation in s 41, is further compromised by the tipping off prohibition. That is an untenable position.

150. Further, the way in which s123 is framed raises the distinct problem of a reporting entity (including a legal practitioner) being unable to seek professional advice where they have been served with a s49/s49B notice without running the risk of triggering s123. The tipping off provision may have the unintended effect of preventing a lawyer from seeking appropriate confidential ethical advice from their professional colleagues and advisory bodies without an explicit exemption for that practice.

151. The Law Council does, however, welcome the new proposed subsection (5) which permits disclosure by one reporting entity to another for the purpose of detecting, deterring or disrupting money laundering, the financing of terrorism, proliferation financing, or other serious crimes. It would be helpful to define what is meant here by a serious crime, possibly by reference to the applicable maximum sentence or penalty for the crime. Cf. [135] above.

Termination of retainer

152. The flow-on effect of being required to report covertly on a client to a law enforcement body (in this case AUSTRAC) is that legal practitioners could nevertheless be placed in a position where they are unable to terminate their retainer with the client. If they do terminate, they may be subject to disciplinary investigation or court proceedings, which they cannot properly defend because the full and true basis for termination cannot be disclosed.

153. This is because the threshold for reporting a suspicious matter is low: see, for example, section 123(1)(d). On the other hand, professional conduct rules for solicitors do not, for reasons relating to access to justice and solicitors' position as officers of the court, allow termination of a retainer without just cause and on reasonable notice.[69] A mere suspicion, even if reasonably based, may well not reach the threshold of just cause (which, on the contrary, is likely to require a great deal more than a mere suspicion).

154. Termination of a retainer brings with it substantial professional risk and may be grounds for a complaint to legal regulators and may trigger liability for breach of contract (as a client would have been issued with a notice in writing that the retainer has been terminated, without being given reasons for doing so). That would amount to a termination of contract.

155. Notwithstanding the provisions of s 235 (protection from liability) a legal practitioner may still not be able to defend themselves adequately because the legal practitioner would not be able to explain to either a professional regulator, or to the Court, the impossible position in which the legal practitioner has been placed (by reason of having filed an SMR or produced material in response to a s 49 or s 49B Notice) without falling foul of the tipping off provisions. It would also be impossible for a lawyer (with duties of absolute honesty owed to the Court) to provide a half-baked or artificial answer that the client no longer fell within risk appetite. Regardless of whether a bank or other financial entity could properly give such an answer, it would not accord with a lawyer's obligations to a supervising court.

Reverse onus of proof

156. One of the features of the Bill (and Act) is the presence of provisions that place an evidential onus of proof on the accused when seeking to engage a defence. As a general principle of criminal sanctions, it is the prosecution that bears the burden of proving the elements of its case beyond reasonable doubt. Where there is an obligation on the part of the accused to go to proof, that proof is established on the balance of probabilities, with a shifting burden on the part of the prosecution to disprove that defence.[70] This is orthodox principle and not necessarily controversial, as it simply ensures that when a defendant wishes to raise a defence available in law, there is a corresponding obligation to adduce sufficient evidence in support of the

[69] *Australian Solicitors' Conduct Rules*, Rule 13.
[70] Classically, see *Woolmington v DPP* [1935] AC 462

claim. In cases where that information is uniquely known by the defendant, an evidential burden is not controversial.

157. The Bill deploys an evidential burden for the defendant in four locations.

a. Section 39A(4) permits a defendant to claim a defence of carrying out a designated service where a customer has provided a false identity and otherwise liable for an offence under s139,[71] if the defendant was doing so in the course of acting under a Keep Open notice issued under s39, thereby providing assistance to authorities.

b. Section 123(4) provides a form of defence to a tipping off offence linked to a defence based on crime prevention. The defence applies where a legal practitioner provides information to a client in the context of providing advice to dissuade that person from engaging in unlawful activity. The requirement to adduce evidence is not, on the surface, problematic, except that here there is explicit mention in the EM of the limits on what can be disclosed to the client, and the inability to adduce evidence linked to tipping off, which makes this defence unworkable.

c. Section 123(5) provides a defence where the disclosure is made to another reporting entity for the purpose of disrupting offences under the Act. This information would be uniquely known to the defence, and as such is not controversial.

d. Section 66A(11) relates to the transfer of virtual assets. Again, it relates to knowledge unique to the defendant and not controversial.

Amendment options

158. The Law Council wishes to advance a position that supports the important underlying policy of the AML/CTF agenda, but also ensures that the legal profession's essential core is not compromised in the process.

159. In this regard, the Law Council considers that legal practitioners (although subject to other provisions of the legislation) should not be obliged to file suspicious matter reports at all (as is the position in Canada) or answer s 49 or s 49B Notices relating to their client's affairs by reason of their paramount duty owed to the court and their fiduciary obligations owed to their clients.

160. If, notwithstanding that principled position, government nevertheless determines to impose these obligations on legal practitioners in respect of SMRs and ss 49 and 49B notices, then the matters set out below need to be addressed to minimise the adverse consequences faced by legal practitioners and their clients.

161. A person seeking to engage a designated service should be advised at point of contact that there is a positive obligation to report certain activities to government and to answer certain Notices. This will require a change to the professional conduct rules.

[71] It is an offence under this section to provide a designated service where the client has used a false name.

162. This should appear as a clear term in any retainer agreement. This will also require a change to the professional conduct rules. However, because of the language in s 123, providing notice to a client of an obligation to report could constitute an offence if termination occurs after the filing of an SMR. **There needs to be an acknowledgment that alerting the client to that fact at the outset does not constitute tipping off. There should be confirmation of this in the legislation.**

163. The professional conduct rules need to be amended to provide that the fact of filing an SMR or the fact of receiving a s 49 or s 49B Notice constitutes just cause for termination of the retainer, and clarification on the breach of confidentiality if required in rule 9 of the ASCRs.

164. **Section 123 should contain an express provision that nothing in the section precludes a legal practitioner from terminating a retainer with a client**. That would appear to be consistent with the policy we have gleaned from the proposed legislation that there is no intention on the part of the legislature to force people to continue to act (thus 'keep open notices' referred to in Schedule 10 are not mandatory).

165. **There should be an express provision that, for the purposes of terminating a retainer with a client, nothing in s 123 prevents a legal practitioner from disclosing the fact that an SMR has been lodged or the fact that a s 49 or s 49B notice has been received by the legal practitioner (but without disclosing the content).** This will ensure that the client can receive important advice from the legal practitioner about the effect of the client's proposed course of conduct.

166. Finally, there should be a provision that nothing in s 123 precludes a legal practitioner from defending him or herself in professional conduct or disciplinary investigations or court proceedings as a result of termination of the retainer.

Comments on Schedule 1: AML/CTF programs and business groups

AML/CTF programs

167. Schedule 1 to the Bill will replace Part 7 of the Act, for the purpose of requiring reporting entities to establish and maintain AML programs. A program is defined in the Bill as an administrative process involving a method of risk assessment and policies for the management and mitigation of the risk of money laundering / terrorist financing.[72]

168. The reporting entity must have a risk program in place before the provision of a designated service and must conduct a risk assessment for each instance of providing a designated service.[73] This requirement is a civil penalty provision.[74]

[72] Schedule 1 Item 24 page 12, s 26B.
[73] Schedule 1 Item 24 page 12ff, Div 2, ss 26C, 26D.
[74] Schedule 1 Item 24 page 15, s 26E.

169. The content of policies is articulated in proposed s 25F. Section 26F provides:

> *(1) A reporting entity must develop and maintain policies, procedures, systems and controls (AML/CTF policies) that:*
>
> *(a) appropriately manage and mitigate the risks of money laundering, financing of terrorism and proliferation financing that the reporting entity may reasonably face in providing its designated services; and*
>
> *(b) ensure the reporting entity complies with the obligations imposed by this Act, the regulations and the AML/CTF Rules on the reporting entity; and*
>
> *(c) are appropriate to the nature, size and complexity of the reporting entity's business; and*
>
> *(d) comply with any requirements specified in the AML/CTF Rules.*

170. The establishment of a program requires the appointment of an internal compliance officer, a senior approving officer, combined with an obligation to review the program every 3 years.[75] It is noted that this is a civil penalty provision in which every instance of non-compliance may incur a penalty.[76]

171. The Law Council's immediate concerns with this model are:

    a. The entire model is based on an assumption that the legal profession operates on a complex corporate model. As set out above, the vast majority of legal practitioners operate on the basis of small firm models, which may involve a small number of partners, and mostly sole practitioners. Barristers are required to operate as sole traders. The result is that there is an immediate administrative burden placed on the firm.

    b. The establishment of a program is a time-consuming exercise that will require expertise in the construction of the program. Many lawyers will not have the relevant expertise. There are two likely results. First, the practice will have to outsource the relevant expertise, which involves a financial cost. Second, and in the alternative, the firm will develop its own programs which may or may not be compliant.

    c. The identity of the designated compliance officers within a small firm is likely to be the practitioners themselves, which creates a tension in the internal auditing process. The practitioner is effectively being asked to check for compliance of their own work or will be required to pay for an external audit.

172. There is a serious concern linked to the punitive aspect of these programs. Section 26F(9) provides: 'A reporting entity that contravenes subsection (1) commits a ***separate contravention*** of that subsection in respect of ***each designated service***

[75] S 26F(4)(f)(ii).
[76] S 26F(8)

that the reporting entity provides to a customer at or through a permanent establishment of the reporting entity in Australia.'

173. Section 26F(10) further provides: 'A reporting entity that contravenes subsection (1) commits **a separate contravention of that subsection on each day** that the reporting entity provides designated services at or through a permanent establishment of the reporting entity in a foreign country.'

174. Given the penalties involved, the consequences for a small firm or sole practitioner are significant.

175. For most existing reporting entities, the reforms will mean (among other things):

    a. Undertaking a fresh risk assessment to be incorporated within a new AML/CTF Program;

    b. Adopting a new AML/CTF Program in a substantially different format (discussed below) which dispenses with the current division between Part A (compliance with Chapter 8 or 9 of the AML/CTF Rules as applicable) and Part B (governing customer identification rules), and replaces it with a requirement for AML/CTF Policies to be applied to address relevant risks and to implement customer identification rules.

    c. Applying risk-based decision-making at the time of any specific customer identification to determine the approach to be adopted to identification.

176. The new format for an AML CTF Program will involve carrying out a unique risk assessment for the business of the reporting entity (new section 26C(1)) coupled with adoption of specific policies containing tactical rules for addressing relevant risks (see section 26F(1)). A reporting entity will be exposed to large civil penalties under the AML/CTF Act for failing to comply with its AML/CTF Policies (see, for example, new section 26G and Division 2 of Part 15 of the Act). At present this exposure would arise only for a failure to apply an AML/CTF Program which is a comparatively high-level document.

177. The Law Council considers that it is probable that, in future, under the approach proposed in the Bill, a reporting entity will be exposed to large civil penalties for minor low-level errors in the application of AML/CTF Policies, and this exposure could out of proportion to the consequences of the failure. That aspect is of particular concern if prosecutions and penalties are subsequently used as a measure of the 'success' of the AML/CTF model.

178. ML/TF Risk Assessment is now defined under Section 26C to include undertaking 'an assessment that identifies and assesses the risks of money laundering, financing of terrorism and proliferation financing that the reporting entity may reasonably face in providing its designated services.'

179. The requirement to conduct a proliferation financing risk assessment is new. Proliferation financing is defined very widely, in fact wider than the FATF definition.

180. The Law Council considers the requirement that every reporting entity will be required to understand the breadth of proliferation financing and conduct a proliferation financing risk assessment, notwithstanding the fact that the overwhelming majority of reporting entities face no reasonable proliferation financing risk, to be disproportionate to the risk.

Business groups

181. A business group will exist where there are 2 or more entities, and they are under common control (new section 10A(3)). If at least one of them provides designated services, such a group can form a reporting group (new section 10A(1)).

182. A new concept of 'lead entity' is proposed to be added to the Act but this expression will be defined later in the AML/CTF Rules (new section 10A(5)).

183. A 'lead entity' will be treated as a reporting entity, even if it does not provide designated services. It will breach the AML/CTF Act if any of the reporting entities in the group provides designated services without the required ML/TF Risk Assessment or AML/CTF Program being in place. Depending upon how the notion of a 'lead entity' is ultimately defined, in a group of companies for which designated services are a small fraction of the group's business (and are likely to be provided only through specific subsidiaries), this may have material consequences for governance and liability at the group level. It is also unclear how this concept could be applied to a reporting entity that is an Australian subsidiary of a group of foreign companies.

184. Is it not clear whether an Australian parent company is to be liable for any compliance failure of a subsidiary in a foreign jurisdiction that is a reporting entity by virtue of section 6(6)(c) of the Act. This would be a material amendment to the existing liability regime for Australian companies, and it appears probable that it would duplicate liability of the subsidiary in the foreign jurisdiction.

Comments on Schedule 2: Customer due diligence

Simplified and enhanced CDD

185. Schedule 2 to the Bill will introduce changes to the Act linked to performing due diligence checks (**CDD**) before providing a designated service. There are limited exemptions available to facilitate certain transactions to be started before completion of the service.

186. It is difficult to comment on the proposed simplified and enhanced CDD provisions as drafted. For example, it is not clear how simplified CDD differs from normal CDD, given a reporting entity must ensure that simplified CDD still allows it to meet all CDD obligations in respect of the customer, including establishing all the matters required on reasonable grounds in s 28(2) ([241] of the EM). Similarly for enhanced CDD, and where a reporting entity identifies the involvement of foreign politically exposed persons, there is no description of the additional identification and verification measures required to complete CDD, as again the reporting entity is tasked with determining what is reasonable, unless the AML/CTF Rules state otherwise.

Pre-commencement customers

187. The intention of providing some compliance relief in respect of pre-commencement customers is supported, but that intention is undermined by the requirement that initial CDD is required when there is a significant change in the nature and purpose of the business relationship with the customer which results in the ML/TF risk of the customer being medium or high. It is difficult to envisage how a regulated entity may determine that the ML/TF risk of a pre-commencement customer has changed without having undertaken some level of initial CDD with respect to that customer in the first place.

188. Additionally, given the interaction between assigning a risk rating and obtaining the correct amount of KYC information for initial CDD ([210] of the EM), it is unclear how a reporting entity is expected to correctly assign a ML/TF risk rating to a pre-commencement customer without obtaining KYC information. The expectation that reporting entities will already have, or are expected to obtain, KYC information appears to run counter to the intention of s 36 which is to reduce the compliance burden associated with transitioning pre-commencement customers to the regime.

189. An alternative approach would be to allow regulated entities a reasonable period (e.g. 24 months) in which to apply CDD measures to pre-commencement customers. Without such a timeframe, there is a risk that regulated entities will need to apply a risk rating to pre-commencement customers prior to 1 July 2026 to facilitate compliance with s 36 from the legislation commencement date.

190. If the proposed approach for pre-commencement customers is retained, we make the following comments:

- It appears, in relation to s 36(3), that for ongoing CDD requirements for pre-commencement customers, relief is provided from complying with s 30(2)(b), but otherwise reporting entities are expected to comply with the remainder of s 30 ([225] and [229] of the EM). This would include reviewing, updating and reverifying KYC information relating to the pre-commencement customer at a frequency appropriate to the ML/TF risk (s 30(2)(c)). The obligation assumes that a minimum amount of KYC information has been obtained by a reporting entity in relation to pre-commencement customer when there is no pre-existing legislative requirement to obtain such information. Clearer guidance is required on how low risk customers are to be onboarded onto the regime, including a timeframe for completing a client's KYC record for the purposes of ongoing CDD. For pre-commencement customers who are, and remain, 'low risk', it should be sufficient if a client's KYC record is completed at some point within three years of the legislation commencement date, unless there is a new designated service provided to the client which would bring forward the requirement to obtain KYC information and complete the client's KYC record.
- In respect of the new s36(3), s30(2)(c)(ii) should be expressly added such that it does not apply to a customer that is a pre-commencement customer.
- In respect of proposed s36(4), undertaking initial CDD if there is a SMR obligation may in effect amount to tipping off, since an astute client may connect the fact that their additional information or request has resulted in an immediate

request for CDD. Although proposed s 123(2) no longer expressly prohibits disclosing information '*from which it could reasonably be inferred'* that the relevant suspicion has been formed, the circumstances that may result in breaching the tipping off prohibition should be clarified.

Duplication of processes

191. Legal practice is based on the client relationship. A client, as opposed to a customer, is characterised by an ongoing relationship. The frequency of contact will vary depending on the circumstances. Legal practices tend to have clients that work with them for many years. Firms will usually have a group of clients for whom they are the advisor of choice. In that context the identity of the client, their history and motivations may be well-known and, in that context, ongoing client due diligence may be straightforward.

192. However, one aspect of the reforms appears to be the likelihood of repeating due diligence verification at multiple times, by multiple people, during the execution of designated services. In some instances that may be necessary. For example, the client may hitherto be unknown to the lawyer, or there may be a request for a new service. In these examples there is a case to deploy CDD. However, given the size and nature of the business model of the legal profession in Australia, and given the pre-existing knowledge of the client in many cases, the Law Council cautions against unnecessary duplication of processes. That is particularly the case for small or sole practitioner firms, which will not have the kind of sophisticated due diligence processes available to them as larger corporate entities, particularly financial institutions.

193. The Law Council considers that a system of certification ought to be developed as part of the reform whereby once a customer's identity and motive linked to the transaction has been established (by for example by a financial institution), this can be certified by a party involved in the transaction (by that financial institution), and all other parties involved in the transaction can rely on the certification for the purposes of satisfying due diligence. In the context of transactions that are electronic, that certification could be embedded in the process.

The auction problem in property transactions

194. Auctions often involve multiple potential purchasers seeking urgent advice on contracts in circumstances where there is insufficient time to conduct CDD and so it not possible to undertake client due diligence before commencing the service as required by the proposed s 28 (Schedule 2, Part 1, Item 7). In property transactions there is often a fixed amount of time in which the contract can proceed to exchange, which impacts on the time required to undertake CDD. An exception currently exists in the Rules and in s 29 that permits this provided the solicitor proceeds to confirm the identity of the client and associated due diligence aspects as soon as reasonably practicable (specified as 14 days in the current Rules).[77] **The Law Council recommends that the next iteration of the Rules continue that practice.**

[77] *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (Cth), Chapter 28

Reasonable grounds

195. Under the proposed new section 28(1), a reporting entity must not commence to provide a designated service to a customer if the reporting entity has not established on reasonable grounds each of the matters specified in the new section 28(2). The new section 28(6) will provide that the AML/CTF Rules may specify requirements that must be complied with for the purposes of establishing those matters on reasonable grounds. Obviously to the extent that the new Rules will be different to the current Chapter 4 of the Rules, there will be material changes to existing processes of reporting entities. It will be important for these new Rules to be finalised as soon as possible to enable implementation of the changes. Further, there is the distinct possibility that the Rules will remove the potential flexibility as to what is reasonable.

Identity of beneficial owner

196. One of the matters specified in the proposed section 28(2) is 'the identity of any person on whose behalf the customer is receiving the designated service'. The EM[78] gives as an example a trustee receiving a service on behalf of beneficiaries. Greater clarity on the intended scope of this provision would be desirable and further examples ought to be included in the EM.

197. New Zealand had a similar concept but contained in the definition of beneficial owner: 'beneficial owner means the individual who—(a) has effective control of a customer or person on whose behalf a transaction is conducted'.

198. The lack of clarity around how this definition of beneficial ownership was interpreted resulted in confusion and necessitated a clarifying definition of beneficial owner being included in the Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Regulations 2011 updated by Anti-Money Laundering and Countering Financing of Terrorism (Definitions) Amendment Regulations (No 2) 2023:

> *'5AA Inclusion: individual with ultimate ownership or control of customer or person*
>
> *For the purposes of the definition of beneficial owner in section 5(1) of the Act, beneficial owner—*
>
> *(a) includes a person with ultimate ownership or control of the customer, whether directly or indirectly:*
>
> *(b) includes a person on whose behalf the transaction is conducted that is a customer of a customer, but only if the person meets the requirement set out in paragraph (a).'*

199. The Law Council considers that unless s 28(2)(b) is either removed or clarified, it will cause confusion and disproportionate costs for reporting entitles.

[78] *Anti Money Laundering and Counter Terrorism Financing Amendment Bill 2024, Explanatory Memorandum*, at [208]

Comments on Schedule 3: Regulating additional high-risk services

200. Part 3 of Schedule 3 extends regulation to 'Professional Services', the ambit of which touches on many aspects of legal practice. We have dealt with many of our concerns with this above.

201. The Act applies at any time that a 'person' provides a 'designated service'. 'Person' is defined broadly, and includes both human actors, bodies corporate, and trust arrangements.[79] A 'designated service' is a defined term, currently set out in s 6 of the Act. The Bill includes an amendment that will expand the scope of those services to include a range of services currently provided by the legal profession.[80]

202. For the Act to be triggered, there must be an underlying transaction, which is the provision of a designated service, subject to any exception in the Act or Rules.

203. Designated services are based on nominated activities that are connected to certain transactions to or on behalf of others. These services are (1) real estate; (2) business entities where the client is a beneficial owner; (3) managing monies; (4) equity and debt financing; (5) shelf company arrangements; (6) corporate and trust structures; (7) nominee arrangements; (8) nominee shareholder arrangements; and (9) providing registered business addresses. These are set out below.

Item No.	*Service/Conduct*	*Linked to*	*Provided to*
1	assisting a person in the planning or execution of a transaction, or otherwise acting for or on behalf of a person in a transaction	(a) sell **real estate**; or (b) buy real estate; or (c) transfer real estate (other than a transfer pursuant to, or resulting from, an order of a court or tribunal); in the course of carrying on a business	A person
2	assisting a person in the planning or execution of a transaction, or otherwise acting for or on behalf of a person in a transaction	(a) sell a **body corporate or legal arrangement**; or (b) buy a body corporate or legal arrangement; or (c) transfer a body corporate or legal arrangement (other than a transfer pursuant to, or resulting from, an order of a court or tribunal); in the course of carrying on a business where the person is or will be a **beneficial owner** of the body corporate or legal arrangement	A person

[79] *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth), s5: ""person" means any of the following: (a) an individual; (b) a company; (c) a trust; (d) a partnership; (e) a corporation sole; (f) a body politic. Note: See also sections 237 (partnerships), 238 (unincorporated associations) and 239 (trusts with multiple trustees).
[80] Schedule 3, Part 3, Item 10.

Item No.	*Service/Conduct*	*Linked to*	*Provided to*
3	receiving, holding and controlling (including disbursing) or managing a person's	(a) **money**; or (b) accounts; or (c) securities and securities accounts; or (d) virtual assets; or (e) other property; **as part of assisting the person in the planning or execution of a transaction**, or otherwise acting for or on behalf of a person in a transaction, in the course of carrying on a business (**other than in a circumstance covered by subsection (5C**))	A person
4	assisting a person in organising, planning or executing a transaction, or otherwise acting for or on behalf of a person in a transaction, for **equity or debt financing** relating to:	(a) a **body corporate** (or proposed body corporate); or (b) a **legal arrangement** (or proposed legal arrangement); in the course of carrying on a business	A person
5	selling or transferring	**shelf company**, in the course of carrying on a business	the buyer or transferee
6	assisting a person to plan or execute, or otherwise acting on behalf of a person in, the creation or restructuring of:	(a) a **body corporate** (other than a corporation under the Corporations (Aboriginal and Torres Strait Islander) Act 2006); or (b) **a legal arrangement;** in the course of carrying on a business	the person and any beneficial owner, trustee or beneficiaries
7	acting as, or arranging for another person to act as, any of the following, on behalf of a person (the nominator), in the course of carrying on a business	(a) a director or secretary of a company; (b) a power of attorney of a body corporate or legal arrangement; (c) a partner in a partnership; (d) a trustee of an express trust; (e) a position in any other legal arrangement that is functionally equivalent to a position mentioned in any of the above paragraphs; other than in a circumstance covered by subsection (5E)	The nominator
8	acting as, or arranging for another person to act as	a nominee shareholder of a body corporate or legal arrangement, on behalf of a person (the nominator), in the course of carrying on a business	The nominator
9	providing a registered office address or principal place of business address	of a body corporate or legal arrangement, in the course of carrying on a business	The person

204. The term 'legal arrangement' has been defined in the Bill, and will be inserted into s 5 of the Act[81] as follows: 'legal arrangement means: (a) an express trust; or (b) a partnership; or (c) a joint venture; or (d) an unincorporated association; or (e) an

[81] Schedule 3, Part 3, Item 8.

arrangement, including a foreign arrangement such as a fiducie,[82] treuhand[83] or fideicomiso,[84] similar to an arrangement mentioned in any of the above paragraphs'.

205. There are exceptions set out in ss 5C,[85] 5D[86] and 5E.[87] Section 5C relates to certain monies held in trust for services, disbursements or resulting from court order. Section 5D specifies the source of payments relevant to s 5C(d) as a government body. Section 5E qualifies certain money received for designated services where the funds are sourced in a court order or linked to proceedings in Bankruptcy. These are explained in the EM,[88] but broadly relate to instances where the source of money is known and tied to the proper discharge of legal work.

206. The intention is apparently to enable the Rules to deal with the need for exceptions as they arise.

207. The Law Council is concerned that 'designated services' are cast so broadly that they may capture far more activities than intended, and the language of the exceptions unnecessarily dense and should be simplified.

The need to clarify the scope of 'assisting'

208. Many of the designated services referred to in Schedule 3 are triggered by activities linked to 'assisting' a person. This is not a defined term, and as such has its ordinary meaning. 'Assisting' in its simplest form means 'help' or the action(s) involved in giving aid to another.[89] The term is very broad, and potentially can capture any actions involved in providing advice, information and any intervention linked to a designated transaction. For example, there is a difference between intentionally providing and

[82] (French) A trust arrangement through which monies are to be distributed in a particular way or held until a particular time.
[83] (German) A trust arrangement through which monies are to be distributed in a particular way or held until a particular time.
[84] (Spanish) A property arrangement whereby property can be owned by one party, and made use of and enjoyed by another, often when the party making use of the property is otherwise prevented from ownership for legal reasons.
[85] Proposed section 5C provides "(5C) For the purposes of item 3 of the table in subsection (5B), the circumstances are as follows: (a) the money, accounts, securities, securities accounts, virtual assets or other property being held or managed is payment by the person for the provision of goods or services by the business; (b) both: (i) the business does not provide any designated services other than the services referred to in item 3 of the table in subsection (5B); and (ii) the money, accounts, securities, securities accounts, virtual assets or other property being held or managed is for payments reasonably incidental to the provision by the business of a service that is not a designated service; (c) the money, accounts, securities, securities accounts, virtual assets or other property being held or managed is to be received or payable under an order of a court or tribunal; (d) the service provided by the business is the receipt or disbursement of a payment mentioned in subsection (5D); (e) the service is any other designated service; (f) a circumstance specified in the AML/CTF Rules. Note: An example of a circumstance to which paragraph (b) applies is fees paid to a barrister for representation in legal proceedings or property management services."
[86] Proposed section 5D provides: "(5D) (5D) For the purposes of paragraph (5C)(d), the payments are: (a) a payment to or from any of the following: (i) a government body; (ii) a court or tribunal of the Commonwealth, a State, a Territory or a foreign country; (iii) a public international organisation; (iv) a person who is licensed under a law of the Commonwealth, a State or a Territory to provide insurance, including self-insured licensees; or (b) a payment of a kind specified in the AML/CTF Rules."
[87] Proposed section 5E provides: "(5E) For the purposes of item 7 of the table in subsection (5B), the circumstances are: (a) acting, or arranging for another person to act, in a fiduciary capacity pursuant to, or as a result of, an order of a court or a tribunal; or (b) acting as the trustee of a regulated debtor's estate (within the meaning of Schedule 2 to the Bankruptcy Act 1966); or (c) a circumstance specified in the AML/CTF Rules."
[88] Explanatory Memorandum at [370], p. 83.
[89] *Australian Concise Oxford Dictionary*; *Oxford English Dictionary*.

applying expertise in the pursuit of a certain goal, and the mere provision of information.

209. While it may be an intended policy to capture any activity linked to the designated service, the effect of that ambit may well exceed the intended scope. For example, it is difficult to see how the mere provision of a standard contract of sale and purchase of land could be intended to be a designated service.

210. Similarly, the way in which the Table of Designated Services is drafted and presented creates uncertainty in whether **all** legal practitioners operating **a trust account** will be captured as reporting entities. While there is an exception set out in the proposed s 5C, the language of the section is complicated. As it stands every lawyer operating a trust account may be captured by the Act. Having regard to the stringent regulation of trust accounts already in place that seems unnecessary.

211. The Law Council considers that the scope of 'assisting' as a core term in the provision of a designated service should either be defined or clarified, and exemptions in the Table be explicitly clarified.

The scope and timing of court orders

212. There is a temporal problem with the exclusion relating to court orders. It often may not be clear that a court order will be the result at the time when the service is provided. Indeed, the court order may be the result of services that are provided prior to the settlement of the matter and resolution by order of the court.

213. In this instance we recommend that the Bill be amended to exempt from the definition of designated services where the transfer is '**anticipated to be** pursuant to, or resulting from, a court order'.

Remove and clarify archaic terms

214. Section 5, Item 1 in Schedule 3 makes reference to 'incorporeal hereditaments' as part of the definition of 'real estate'. This term has fallen into disuse and should be clarified so as to clearly state a reference to easements, covenants and beneficial uses.

Exemption for mediators, arbitrators and alternative dispute resolution

215. A key area of legal practice involves alternative dispute resolution and mediation. These are mandated in many areas of practice, and very often engaged in areas involving family law, community disputes, bankruptcy and commercial disputes. These matters can often involve arrangements and advice connected to real estate, escrow, non-residential property, distribution of monies and corporate restructures.

216. Many ADR matters are facilitated by professional mediators, who may be a solicitor or barrister, under the instructions of solicitors, with no relationship with the person. **The Law Council recommends an explicit exemption for mediators and arbitrators from designated services.**

Exemption for community legal centres

217. The Law Institute of Victoria has advised that one of the services offered by many CLCs is the use of a trust account to hold monies for or on behalf of a client. That situation can arise where, for example, money is received for payments, disbursements or distribution for or on behalf of a client. Because of the very limited resources available to CLCs, one of the likely results of the reforms is that CLCs will stop providing services that bring them within the scope of the AML/CTF Act.

218. We note the existence of an exception in the proposed s 6 Table of Designated Services.[90] That exemption may function to cover CLCs. **We would, however, recommend that Community Legal Centres be specifically exempted.**

219. The Law Council submits that such an exemption is appropriate owing to the nature of the legal work undertaken by CLCs, which is often purely advisory or representing a client in a legal proceeding, and because CLCs are at an extremely low risk of being targeted by, or caught up in, money laundering or terrorist financing operations. Consequently, requiring CLC's to implement and adhere to burdensome and costly AML/CTF requirements would be disproportionate to the level of risk associated with CLCs and money laundering activities. This is particularly so given that the significant compliance costs associated with implementing AML/CTF Regime obligations will either need to be borne by the Government through the provision of additional funding to CLC's for this specific purpose, or by CLCs themselves out of existing budgets. If the latter occurs, CLC's will likely need to cease to provide designated services altogether, which will result in those most in need from being denied access to justice.

Exemption for custodial services

220. The definition of *exempt legal practitioner service* in section 5 of the AML Act is to be repealed. That expression is used in the description of two designated financial services in Table 1 in section 6:

> *46 providing a custodial or depository service, where:*
>
> *(a) the service is provided in the course of carrying on a business of providing custodial or depository services; and*
>
> *(b) the service is not an exempt practitioner service*
>
> *where the customer of the designated service is the client of the service.*
>
> *47 providing a safe deposit box or similar facility, where:*
>
> *(a) the service is provided in the course of carrying on a business of providing safe deposit boxes or similar facilities; and*

[90] Schedule 3 Part 3 Item 10 page 69.

(b) the service is not an exempt practitioner service

where the customer is the person who is, or the each of the persons who are, authorised to lodge items in the safe deposit box of similar facility.

221. The Act currently defines *exempt legal practitioner service* to mean a service that, under the AML/CTF Rules, is taken to be an exempt legal practitioner service for the purposes of the Act. Rule 40 provides:

40.2 A service is taken to be an 'exempt legal practitioner service' if:

(1) it is provided in the ordinary course of carrying on a law practice and is a custodial or depository service other than conduct that under section 766E(1) of the Corporations Act 2001 constitutes providing a custodial or depository service; or

(2) it is provided in the ordinary course of carrying on a law practice and is a safe deposit box or similar facility other than in relation to physical currency.

222. The EM (at page 77) states:

'The exemption that previously applied to legal practitioners is no longer required, as legal practitioners carrying out these designated services are now intended to be regulated entities under the AML/CTF Act'.

223. The proposed amendments may mean that any law practice providing a custodial or depository service or a safe deposit box or similar facility in the ordinary course carrying on a legal practice (**for example, holding original wills, title deeds, contracts**) would be providing a designated service. The Law Council considers this to be an undesirable and unnecessary outcome if it is unconnected to any other designated service and there should be a clear exemption for this.

Comments on Schedule 4: Legal professional privilege

224. Schedule 4 to the Bill will make important changes to the way in which client legal privilege is addressed.

225. The Law Council has made extensive submissions previously expressing our concerns about the effect of the tranche 2 reforms on client confidentiality and client legal privilege. We refer to and rely on those submissions without replicating them here.[91] We have also addressed concerns relating to the overlap between confidentiality and privilege earlier in this submission. We also emphasise that the expression 'legal professional privilege' must be understood as the client's legal privilege, as the privilege belongs to the client, not the lawyer, and the lawyer is bound to protect that privilege in the interests of the client, especially where breach of it may expose that person to legally enforceable consequence.

[91] Law Council of Australia, *Reforming Australia's anti-money laundering and counter-terrorism financing regime* (4 July 2024), pp. 34–37

226. We reiterate our concerns in relation to breaches of client confidentiality and the effect on the essential character of the client relationship.

227. The new definition of privilege must also be read in conjunction with the capacity of the Minister to make rules with respect to privilege claims anticipated in section 242A (Guidelines in relation to legal professional privilege) and the new concept of an LPP form.

228. There is also a limited exception to the SMR obligation in section 41 in the context of privileged information and/or documents, contained in Section 41(2A). This provides that a reporting entity may refuse to give the AUSTRAC CEO an SMR about a matter if it reasonably believes at all of the information comprising the grounds on which it holds a relevant sufficient is privileged on the ground of LPP.

229. The EM states that the amendments are intended to both clarify the operation of LPP in the context of the Act, and strengthen the protections for the disclosure of information subject to LPP:[92]

> *Schedule 4 would clarify the treatment of information subject to … [LPP] for the purposes of the reporting and information disclosure obligations in the AML/CTF Act. Existing section 242 already provides that the AML/CTF Act does not affect the law relating to … [LPP]. The Bill provides* ***stronger protections*** *for the disclosure of information or documents subject to [LPP] …* ***These amendments preserve the core intention of the doctrine of … [LPP]*** *in both common law and statute,* ***and ensure that regulated entities who handle client information that is subject to … [LPP] can comply with their reporting and information disclosure obligations under the AML/CTF Act.*** [emphasis added]

230. The EM further states that:[93]

> *Amendments made by Schedule 4 are intended to preserve the important common law doctrine of [LPP] and statutory client privileges … The[y] … will ensure that client information that is subject to [LPP] is handled appropriately, and reporting entities can nevertheless comply with their reporting and information disclosure obligations under the AML/CTF Act.*
>
> *405. The policy intent of the amendments … would not require the disclosure of information or a document as part of any reporting and information disclosure obligations where the reporting entity or notice recipient reasonably believes that the information or document is subject to legal professional privilege. The reporting entity or notice recipient would be required to fulfil their reporting or information disclosure obligations to the extent possible without disclosing the privileged information or document.*

[92] Explanatory Memorandum [16]–[17] 4.
[93] Explanatory Memorandum, at [404], p. 90

Inadequate protection of client legal privilege

231. The Law Council notes that, notwithstanding the terms of the EM, the proposed amendments do not afford adequate protection for LPP because the client (the owner of the privilege) cannot be consulted, and the legal practitioner cannot take instructions. The legal practitioner is required to make assertions of LPP without client approval.

232. Further, by obliging legal practitioners to file an SMR in relation to confidential material, and an LPP form in relation to privileged material, there is a likelihood of confusion and the inadvertent disclosure of privileged information which can then be communicated by AUSTRAC to other law enforcement bodies. That position cannot be retrieved.

233. This proposed mechanism for dealing with privileged documents and/or information that is privileged is convoluted, conceptually confusing, and will likely be extremely difficult for legal practitioners to apply in practice—especially if they are a smaller firm or a sole practitioner with limited resources and experience navigating LPP. Indeed, in complex circumstances, the Law Council submits that it would be almost impossible for a sole practitioner or small practice to dedicate the resources needed to consider all relevant documents and information to determine whether they are privileged or not in the timeframe provided.

234. While the Law Council appreciates that the Bill does afford an additional two days in the context of potentially privileged documents and information '*to allow additional time … to consider whether privilege … applies to information required to be contained in a SMR … [and is] intended to reduce inadvertent disclosures of privileged information by alleviating the time pressures associated with suspicious matter reporting under section 41'*, we consider that five days is far too short of a timeframe to achieve this objective. In complex cases the volume of materials over which privilege is claimed can be significant. Assessment of the claim can also be complex where there is a question of inadvertent waiver, especially in large organisations. Most importantly, the availability of an independent and suitably qualified advisor may take days. **The Law Council considers that the time for responding should be 7–14 days or such reasonable time as is appropriate in the circumstances.**

235. Consequently, the Law Council considers that the proposed provisions will almost certainly result in the inadvertent disclosures of privileged information. This puts legal practitioners at risk of breaching professional obligations and ethical duties to their clients, and potentially being subject to serious professional sanction as a consequence. Further, there is no provision in the Bill clarifying what is to happen to privileged information or documents provided to AUSTRAC erroneously on the mistaken belief that they were not privileged. **This should be addressed**.

Comments on Schedule 5: Tipping off offence and disclosure of AUSTRAC information to foreign countries or agencies

236. Much of Schedule 5 is concerned with the revised Tipping Off offence. Because of the impact and relationship with that provision and suspicious matter reporting we have referred to s 123 in detail already.

237. Schedule 5 also contains amendments to sections 126 and 127 of the Act. Of themselves, these provisions do not seem controversial. However, this must be read on conjunction with a related repeal of s 127(3).

238. The EM outlines the intended purpose of that amendment:

> *491. Item 5 repeals the list of agencies, authorities, bodies or organisations of the Commonwealth authorised to disclose AUSTRAC information to the government of a foreign country, or to a foreign agency under subsection 127(3). This list is intended to be moved into the AML/CTF Rules when they are remade. Moving the list of agencies to the AML/CTF Rules would enable a greater degree of flexibility and would ensure this provision does not easily become outdated and require legislative amendment to correct.*

239. We note the Senate Standing Committee on the Scrutiny of Bills expressed some concern with respect to this amendment, stating:

> *1.5 Allowing the rules to designate the Commonwealth, State and Territory entities which can disclose AUSTRAC information to foreign governments is a significant delegation of legislative power over matters that are more appropriate for Parliament to consider. While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. Noting that these matters are being removed from their existing status in primary law, the committee expects that a stronger justification should have been provided.*
>
> *1.6 Further, it is unclear to the committee why flexibility may be needed in this instance given the list of Commonwealth, State and Territory agencies who can disclose such information is necessarily limited and not liable to frequent change. This issue has not been sufficiently explored in the explanatory materials.*[94]

240. The Law Council agrees with Scrutiny of Bills Committee. In this case the CEO of AUSTRAC would be in a position to unilaterally determine when and to whom AUSTRAC information would be released. Some of that information may have national security implications. Information of this nature may have relevance for the investigation of criminal offences in Australian or overseas. Law enforcement

[94] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest (Digest No 1 of 2024, 18 January 2024) [1.5]–[1.6] 4.

agencies in Australian and overseas are required to comply with local and Australian law with respect to information requests. Determining what agencies have access to that information is a matter that is properly dealt with in the Act.

Comments on Schedule 9: Powers and definitions

Compulsory examination powers

241. Schedule 9 will introduce new compulsory examination powers. The Law Council considers that the powers should be subject to a valid claim for client legal privilege made by the person the subject of the notice to produce or examination. This would reflect ASIC examination and production powers, noting ASIC's acknowledgement in Information Sheet 165 that a person has a right to refuse to answer questions or provide information / documents on the basis that the answer or information would disclose information that is covered by a valid claim of LPP. Given the Bill already acknowledges that a valid LPP claim is a basis for not disclosing information in a SMR, and noting that the information gathering powers appear to be largely based on ASIC's extant powers, it would be preferable that information or documents do not need to be disclosed under AML/CTF compulsory powers where such information or documents is the subject of a valid LPP claim.

Abrogation of the privilege against self-incrimination

242. Currently, Part 14 of the Act deals with the privilege against self-incrimination (PSI) in the context of AUSTRAC's information gathering powers. In sum, the current provisions provide that:

    a. s167 provides that authorised officers may (subject to certain conditions) require reporting entities (and/or their employees or officers or agents) to provide information or documents;

    b. Section 169 deals with PSI in the context of giving information or producing a document under section 167 of the AML/CTF Act, and provides that '*a person is not excused from giving information or producing a document under section 167 on the ground that the information or the production of the document might tend to incriminate the person or expose the person to a penalty*'—though the information or document is not admissible in evidence against them (subsection 2):

    c. in civil proceedings other than proceedings under this Act or proceedings under the Proceeds of Crime Act 2002 that relate to this Act; or

    d. in criminal proceedings other than proceedings for an offence against this Act, or proceedings for an offence against the Criminal Code that relates to this Act.

    e. Subsection 169(2) provides for limitations on the admissibility of the information provided in evidence against the person, including that it can only be used in civil and criminal proceedings under the AML/CTF Act, or proceedings under the POCA that relate to the AML/CTF Act.

243. In so doing, it provides a limited 'use' immunity, which, by excluding certain proceedings, means the information or documents can be used against the person in those specified proceedings.'[95]

244. The Bill proposes to make changes to the interaction between the AML/CTF Regime and PSI. Specifically, it will expressly include a new express abrogation of the privilege against self-incrimination (new section 172K of the AML/CTF Act, proposed to be inserted by Item 5 of Schedule 9 to the Bill), and will expand the scope of the existing abrogation of PSI.

245. The specific changes proposed by the Bill are as follows:

    a. It will amend section 166, simplified outline, so that it now reads:

        > An authorised officer may obtain information or documents.
        >
        > If the AUSTRAC CEO believes on reasonable grounds that a person has information or a document that is relevant to compliance with this Act, the regulations or the AML/CTF Rules, or an offence against the Crimes Act 1914 or the Criminal Code that relates to this Act, the regulations or the AML/CTF Rules, the AUSTRAC CEO may require the person:
        >
        > (a) to produce to the AUSTRAC CEO, within the period and in the manner specified in the notice, any such documents; or
        >
        > (b) to appear before an examiner for examination under this Division on oath or affirmation and to answer questions, and to produce any such documents.
        >
        > The examiner may, and must if the examinee so requests, cause a record to be made of statements made at an examination under this Division. A statement made by a person at an examination under this Division of the person is admissible in evidence against the person in certain proceedings except in certain circumstances.

    b. It will insert a new sub-division at the end of current Part 14 that empowers the AUSTRAC CEO to obtain information and documents in certain circumstances (namely, if it believes on reasonable grounds that a person has information or documents relevant to compliance with the AML/CTF regime, or to an offence relating to the regime);

    c. It will insert several new sub-sections regarding PSI as it applies in relation to that specific sub-division:

        i. Section 172K, which provides that it is not a reasonable excuse for an individual to refuse or fail to answer a question, produce a document or sign a record on the grounds that doing so may incriminate them;

        ii. Subsection 172K(3), which provides a limited use immunity such that the information and documents provided are not admissible as evidence in civil proceedings or criminal proceedings against the individual that has

[95] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest (Digest No 1 of 2024, 18 January 2024) [1.8] 5.

provided them, subject to certain exceptions. Consequently, information and documents may only be used in civil or criminal proceedings insofar as they relate to the falsity of the information or document provided.

d. It will repeal and replace current section 167(1), which concerns PSI in the context of AUSTRAC's information gathering powers, so that:

   i. notices can be issued to any person reasonably believed to have knowledge or information relevant to compliance with the Act or the regulations, which expands the class of recipients from current or former reporting entities, or their current of former employees or agents;

   ii. the scope of information that can be requested is limited—it must be relevant to the compliance with, or enforcement of, the Act; and

   iii. non-compliance with a notice issued under subsection 167(2) will be both a criminal and civil penalty so AUSTRAC can address noncompliance with a notice without referral for criminal prosecution (currently, it is only a criminal penalty).

e. It will insert new sub-sections altering PSI in the context of AUSTRAC's information gathering powers by adding three further proceedings to the list of the proceedings that are excluded from the scope of the use immunity (namely, proceedings for an offence against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing in section 5 of the Act), thereby further restricting the scope of the use immunity.[96]

246. As noted by the Scrutiny of Bills Committee:[97]

> *… abrogating the privilege [against self-incrimination] represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege … [it is necessary to] consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. … any justification for abrogating the privilege … will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity' … [and] the extent to which safeguards to protect individual rights and liberties, such as a use or a derivative use immunity, are included within the bill.*

247. The EM claims that 'the abrogation of the privilege … is proportionate and reasonable, as it balances the rights and interests of the individual with benefits to the public that arise from the investigation and prosecution of serious criminal offences such as money laundering and the financing of terrorism', and that '… the abrogation is no more than necessary to ensure AUSTRAC's effectiveness in monitoring and ensuring compliance with the AML/CTF Act, the AML/CTF Rules and the regulation'.[98]

[96] Explanatory Memorandum [845] 153.
[97] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest (Digest No 1 of 2024, 18 January 2024) [1.11] 5.
[98] Ibid, 21 [55], [846] 153.

248. However, the Law Council is concerned that the abrogation of self-incrimination does not provide a use immunity or derivative immunity, as noted by the Scrutiny of Bills Committee, and '*remove all immunities in relation to criminal proceedings relating to offence against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing'*.[99] For these reasons, the Scrutiny of Bills Committee considers, and the Law Council agrees, that the abrogation goes beyond what is necessary to ensure the achievement of the legitimate objective of enhancing AUSTRAC's efficacy. That is particularly the case since 'money laundering' has an expanded and very broad definition under the Act.[100]

249. Further, while the new section 172 abrogation does include a use immunity in proposed subsection 172K(3), it does not provide a derivative use immunity. As pointed out by the Scrutiny of Bills Committee, including a derivative use immunity is critical to prevent '*anything obtained as an indirect, consequence of the information or documents provided from being admitted in proceedings'*.[101]

250. **In these circumstances, the Law Council does not consider it necessary or appropriate to expand the abrogation of PSI in relation to all offences against a provision covered by the definitions of money laundering, the financing of terrorism, and proliferation financing, and it is concerned by the Bill's failure to provide for any use or derivative use immunity in the context of section 167, and by the failure to provide a derivative use immunity in proposed section 172K**.[102]

251. The Law Council notes that other jurisdictions do not abrogate the PSI and are compliant with the FATF recommendations. For example, in Ireland, section 81 of the *Criminal Justice (Money Laundering and Terrorist Financing) Act 2010* provides that 'Nothing in this Chapter requires a person to answer questions if to do so might tend to incriminate the person'.

Strict liability offences—Schedule 9

252. The Law Council notes that clause 5 of Schedule 9 to the Bill includes a number of strict liability offences—specifically, proposed new subsections 172C(1–)–(3), s 172D (being present at an examination without meeting the criteria), s 172F (refusing or failing to comply with a requirement made by an examiner), s 172G (of failing to comply with a requirement to read or sign a statement), s 172H (copying, publishing, or communicating the contents of the record of an examination, except in the course of preparing, beginning or carrying on a proceeding), and s 172J (breaching a condition related to the disclosure of the copy of the record of an examination).

[99] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Scrutiny Digest (Digest No 12 of 2024,18 September 2024) [1.13] 6.
[100] Which could range from genocide (*Criminal Code 1995* (Cth), s268.3 to stealing fish from ponds (*Crimes Act 1900* (NSW), s512.
[101] Ibid [1.15] 7.
[102] Ibid [1.16] 7.

253. Of these, proposed new section 172C is of concern owing to its penalty—each of the other strict liability offences in the Bill each carry a maximum penalty of 30 penalty units.

254. Section 172C provides that:

> *172C Requirements made of persons appearing for examination*
>
> *(1) If a person appears for examination in accordance with a notice given under subsection 172A(2), the examiner may examine the person on oath or affirmation and may, for that purpose:*
>
> *(a) require the person to either take an oath or make an affirmation; and*
>
> *(b) administer an oath or affirmation to the person.*
>
> *(2) The oath or affirmation to be taken or made by the examinee for the purposes of the examination is an oath or affirmation that the statements that the examinee will make will be true.*
>
> *(3) A person commits an offence of strict liability if the person refuses or fails to comply with a requirement made under subsection (1).*
>
> *Penalty: 3 months imprisonment.*

255. The Law Council refers to the analysis of the Scrutiny of Bills Committee regarding this offence:

> *Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so. As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the Guide to Framing Commonwealth Offences.*
>
> *The … Guide to Framing Commonwealth Offences states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual'.*

256. As acknowledged by the EM, these '*amendments engage with the right to the presumption of innocence in Article 14(2) of the ICCPR … [which] provides that a person charged with a criminal offence has a right 'to be presumed innocent until*

proven guilty according to law'. The EM asserts that the specific strict liability offences in the Bill 'are not inconsistent with the presumption of innocence because they are reasonable, necessary and proportionate in the pursuit of a legitimate objective', and that their application is appropriate because:[103]

a. … [it] is likely to significantly enhance and effectiveness of enforcement of the new powers in Schedule 9 by deterring non-compliance;

b. the centrality of the examination power to AUSTRAC's ability to monitor compliance is such that it is appropriate that there be a significant deterrent to conduct that undermines the exercise of the power the information to be obtained through the exercise of the powers is critical to AUSTRAC's ability to monitor and ensure compliance with the AML/CTF regime, which in turn is aimed at protecting the community from money laundering, terrorism financing and other serious crimes

c. a person receiving a notice under the new powers will be made aware of the criminal offences applicable for non-compliance, to guard against the possibility of inadvertent contravention, and

d. in relation to some offences, terms of imprisonment are not applicable to ensure the sanction for the offence is proportionate to the gravity of the conduct and required deterrent effect.

257. With regard to the subsection 172C(3) offence in particular, the EM claims that the strict liability offence:[104]

> *… is appropriate as the information that would be obtained through an examination will be critical to AUSTRAC's ability to monitor compliance with the AML/CTF Act, the AML/CTF Rules or the regulations. In turn, this information will assist AUSTRAC in detecting, deterring and disrupting money laundering, the financing of terrorism, and other serious offences. The penalty is sufficient enough as a deterrent to potential conduct that may undermine the exercise of the power, and falls well below the threshold for strict liability offences under the Guide to Framing Commonwealth Offences.*

258. However, as recognised by the Scrutiny of Bills Committee, the penalty associated with the section 172C(3) offence of three months imprisonment is 'considerably higher' than the 60 penalty unit threshold for strict liability offences under the Guide to Framing Commonwealth Offences, and is not consistent with the requirement that offences subject to strict liability are not punishable by imprisonment. The Scrutiny of Bills Committee also noted that the EM does not explain why '… this particular offence is appropriate for strict liability, including why it is necessary and appropriate to remove the fault element'.[105]

[103] Explanatory Memorandum (n 3) [43]–[44] 17–18.
[104] Ibid [738] 140.
[105] Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, Scrutiny Digest (Digest No 12 of 2024,18 September 2024) [1.29]–[1.30] 10.

259. Further, where the AUSTRAC CEO has required a person to appear before an examiner the person will commit an offence punishable by imprisonment if they intentionally or recklessly refuse or fail to comply with a requirement of an examiner (see new section 172C(5)). Unlike the similar power of examination found in section 597 of the Corporations Act 2001 (Cth) (**Corporations Act**) the proposed power in section 172C of the AML/CTF Act does not have:

    a. an exception for reasonable excuse as found in a number of subsections of section 597 CA; or

    b. a provision for an answer to be inadmissible in subsequent proceedings brought against the person, subject to conditions, as found in section 597(12A) Corporations Act.

260. In the Law Council's view provisions of the kind found in s597 of the Corporations Act 597 CA ought to be considered.

Comments on Schedule 10—Exemptions

Exemptions ought to be in the Act

261. The Law Council supports moving exemptions currently found in the Rules into the Act because it will reduce complexity.

Keep open notices: s 39B

262. Where a senior member of a relevant agency has issued a 'keep open' notice, new sections 39A, 39B and 39C will relieve a reporting entity from compliance with the requirements of its AML/CTF policies, and its initial and ongoing customer due diligence obligations, to the extent that it 'reasonably believes that compliance with that section would or could reasonably be expected to alert the customer to the existence of a criminal investigation'. This will require material adjustments to the way that certain customer relationships will be managed in the future. This will take time to implement.

263. Schedule 10 to the Bill includes provisions that enable nominated law enforcement bodies[106] to issue a reporting entity with a notice to keep the designated service open for the purposes of assisting law enforcement investigate a serious offence. This is defined as 'an offence against a law of the Commonwealth, or a law of a State or Territory, that is punishable by imprisonment for 2 years or more'.[107] There is also provision for the investigation of an equivalent law in a foreign jurisdiction.[108]

264. The reference to 'an offence against a law' is so broad that its literal meaning touches on *any* offence that carries with it a term of imprisonment of 2 or more years either

[106] Section 39B(4): "(4) The agencies are as follows: (a) the Australian Border Force; (b) the Australian Crime Commission; (c) the Australian Federal Police; (d) the National Anti-Corruption Commission; (e) the New South Wales Crime Commission; (f) the police force or police service of a State or the Northern Territory; (g) a Commonwealth, State or Territory agency prescribed by the AML/CTF Rules."
[107] Section 39B(2)(a).
[108] Section 39B(2)(b).

inside or outside Australia. The EM[109] indicates the intended breadth of the investigation:

> *'A serious offence is an offence against any law of the Commonwealth, or a law of a State of Territory, that is be punishable by imprisonment of at least 2 years; or an offence against a law of a foreign country that involves an act or omission that, if it had occurred in Australia, would have constituted an equivalent offence.'*

265. We refer to [135] discussed above, noting that the reference to "serious crime" in this context is inconsistent with the threshold for that term across Australian law.

266. It is noted (and welcome), that the intention of the legislation is *not* to require the lawyer to provide the service reluctantly or against their wishes. Note 2 to s 39A states 'A keep open notice does not compel a reporting entity to continue to provide a designated service to a customer.' That is also reflected in the EM[110]: 'the reporting entity will retain the discretion to choose whether to continue to provide a designated service to a customer after receipt of a keep open notice.'

267. As outlined previously,[111] the High Court has spoken firmly against the transformation of the legal profession into an arm of law enforcement. The legal profession should not be asked to facilitate or support the policing arm of the executive branch of government. Accordingly, in our view, there should be no ability to issue keep open notices to legal practitioners.

Comments on Schedule 12—Transitional provisions

268. The Law Council's view is that there is likely to be considerable effort required to create appropriate transitional rules for the implementation. To take only one example, it may be desirable to preserve the effectiveness, after the commencement date for the amendments, of any customer identification carried out by or for the benefit of a reporting entity in the preceding 3 years or so under its then applicable AML/CTF Program and applicable laws. There may also be a case for allowing the use of existing applicable customer identification procedures as prescribed by the current Chapter 4 of the Rules for the provision of designated services during a period after the commencement of the legislative changes. It may take time to craft the form of appropriate transitional provisions in relation to matters of this complexity.

Consequential issues

Guidance and rules

269. The Law Council welcomes the proactive stance of AUSTRAC by engaging with the legal profession early in the development of the Rules. We support any activities that ensure the publication of guidance and rules well in advance of the 1 July 2026 commencement date.

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[109] Explanatory Memorandum at [897]
[110] Explanatory Memorandum, at [890] (p. 160).
[111] See paragraph [116] in this submission.