



*The ABA acknowledges the relationship between the land on which it and its members work and the First Nations' peoples of Australia*

14 October 2024

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

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Dear Secretary,

**Re: Submission in respect of the Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2024**

### Overview

The Australian Bar Association (ABA) provides the following submission to the Commonwealth Legal and Constitutional Affairs Legislation Committee's inquiry into the Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2024 (Cth), introduced into Parliament on 11 September 2024.

The ABA appreciates and supports the important purpose of the Bill, which is to strengthen Australia's protections against money laundering and terrorism financing, by extending the current regime to "tranche two" entities such as lawyers, accountants and real estate agents.

However, for the reasons set out below, the ABA is concerned that as drafted the Bill arguably may be construed so as to capture services presently provided by members of the independent Bar, even where they act on instructions from a solicitor, in a way that is unintended and undesirable.

The risk (however unlikely) that that construction is held to be the correct one is such that the bulk of the Australian Bar would likely not continue taking briefs in matters caught by Items 1,2, 4 and 6 of Table 6.

The consequence would be a significant reduction in competition, reduced access to justice, and an increase in cost most pronounced in respect of smaller transactions and less affluent persons.

To better secure the objectives of this legislation, and to put the matter beyond doubt, the ABA submits that this matter ought be addressed by minor additional drafting which removes any ambiguity from the legislation.

### **Current drafting of Table 6**

The particular issue which arises concerns the expression of certain of the descriptions regarding “Professional services” by way of “Provision of a designated service” in Table 6 in Schedule 3 Part 3.

Specifically, items 1, 2, 4 and 6 in Table 6 refer 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 to buy, sell or transfer real estate;
- in a transaction to buy, sell or transfer a body corporate or other legal arrangement;
- in a transaction for debt or equity financing; or
- in the creation or restructuring of a body corporate or other legal arrangement.

This formulation is capable of capturing advice provided by barristers in relation to real estate transactions, equity and debt financing, transactions involving the transfer of interests in companies and other legal arrangements, and corporate restructuring. It may also capture legal representation provided by a barrister in settlement discussions or court proceedings relating to those matters.

That may be the case even where the barrister is engaged by an instructing solicitor to provide advice or act for a client, since in such a case it could be argued that the barrister is “assisting” or “otherwise acting for or on behalf of” the client.

To give some content to the undesirability of such an outcome, it would mean that the legislation would arguably apply to advice from a barrister about the completion of a modest residential property which was being used by the seller for rental purposes, or a rent review clause for a modestly valued industrial shed.

### **Consequence of the application of Table 6 to services provided by barristers**

The effect of services provided by barristers being treated as part of the “designated services” provided for in Table 6 is that barristers would become reporting entities for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the Act)* and be required to comply with the obligations imposed by that Act including:

- The obligation to have an AML/CTF program, comprising an ML/TF risk assessment and AML/CTF policies as set out in proposed Part 1A of the Act
- The need to undertake customer due diligence as set out in proposed Part 2 of the Act
- The need to comply with the reporting obligations in Part 3 of the Act
- The need to comply with record keeping requirements imposed by Part 10 of the Act, which include a requirement to retain every document provided by or on behalf of a customer for 7 years.

Those obligations would impose a very significant burden on barristers at the independent Bar who are required, by the Bar rules, to be sole practitioners. Each barrister would be required to develop his or her own systems and employ staff and procure storage capacity in order to comply with the Act.

The Bar structurally is ill suited to meeting the compliance requirements of the legislation and most barristers would likely opt to not take work that would oblige them to take on these compliance obligations unless such work was the core of their practice. The reason for this is barristers instructed by solicitors are able to leave the administrative infrastructure needed to support such compliance with solicitors. It is a major feature of the separate roles of barristers and solicitors, which amongst other things permits justice to be delivered as cost effectively as possible. Consequently, barristers share accommodation and most have limited, and increasingly no, secretarial support.

The result would be far fewer barristers would take this work so competition among barristers would be reduced. Moreover, those likely to remain would be specialist/leaders in such fields and are likely to legitimately command higher fees for their skill set. The consequence would be in respect of smaller matters costs would inevitably become relatively higher and access to justice reduced.

### **Unintended operation**

Based on discussions with the Attorney General's Department, the ABA understands that the Bill was not intended to cover services provided by a barrister who is instructed by a solicitor on behalf of a client (albeit it was intended to apply where a barrister is engaged directly by a client). This is fortified by paras [356] and [376] of the Explanatory Memorandum.

There are sound reasons why services provided by barristers should not be caught by Table 6 where the barrister is retained on instructions from a solicitor:

- (a) Where a barrister is retained by a solicitor, the solicitor will be required to comply with the Act in any event. Requiring the barrister also to comply is duplicative and will add to the cost of providing legal services for no substantive benefit.
- (b) Where a barrister is retained by a solicitor, the barrister's contractual relationship is with the solicitor. Barristers take their instructions from the solicitor and typically do not confer with a client in the absence of the solicitor. This renders barristers ill-equipped to comply with the obligations which the Act imposes (leaving aside the administrative burden of doing so).
- (c) A barrister's retainer in respect of most business transactions tends to be limited. Barristers are often called on to provide advice on the effect of particular clauses or to provide representation when a transaction becomes litigious. It is the solicitor who will determine what aspects of any transaction the barrister is required to advise on or act on.

It is notable that the Explanatory Memorandum speaks of some of the Table 6 services in terms which would not naturally apply to barristers. Thus, para [376] states that “[t]he customer of the designated service in item 4 of Table 6 is the person providing instructions to the reporting entity to plan for, execute, or organise transactions...” See also para [383]. As noted above, a barrister does not take his or her instructions from the client but from the instructing solicitor. This reinforces the view that the Bill was not intended to capture services provided by barristers engaged by a solicitor; however, its present drafting has the effect that it may be suggested that it does capture them.

### **Proposed drafting**

The ABA suggests that the most straightforward way of addressing the matter is to make express provision in the Act, or in a note to the Act, which clarifies the intended operation of Table 6.

For example, a note might be inserted to the following effect:

- “Note: For the purposes of Table 6, the professional will not be acting “in the course of carrying on a business” if the engagement of the professional is by another professional”. OR
- “Note: For the purposes of Table 6, a professional does not assist a person or otherwise act for or on behalf of a person if the engagement of the professional is by another professional.”

The ABA thanks the Commonwealth Legal and Constitutional Affairs Legislation Committee for the opportunity to make this submission, and would like to take the opportunity to note the prompt and cooperative dealings it has had with the Attorney-General’s Department in this regard.

Yours sincerely

Peter Dunning KC  
President