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Committee Secretary
Attorney General's Department Senate Legal
and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Sent via: legcon.sen@aph.gov.au

Dear Committee Secretary,

Please see below for Transparency International Australia's responses to questions on notice.

1. Regarding Transparency International Australia's offer to provide a report and further information on how legal professional privilege under the UK AML regime has resulted in potential misapplication of privilege and effectiveness of the AML/CTF regime.

Research by Spotlight on Corruption's report 'A Privileged Profession: How the UK's Legal Sector Escapes Effective Supervision for Money Laundering' shows that the Legal Professional Privilege (LPP) carve out has resulted in very low rates of Suspicious Activity Reports (SARS) filed by the legal sector and that this may be due to misapplication of privilege.

'The legal sector is exempt from reporting suspicions of money laundering which come to them "in privileged circumstances", including in the course of litigation.[1] While legal professional privilege has a crucial role to play in securing access to justice, its potential for abuse or misapplication may be exacerbating the low rates of Suspicious Activity Reports (SARs) filed by the legal sector. Just 0.52% of SARs filed in 2019/20 came from the legal sector – a fall of over a half since 2012/13, when legal sector SARs represented 1.24% of all SARs filed.[2]

This report discusses the potential abuse of privilege in the absence of proper grounds for doing so and that this undermines the effectiveness of the AML regime. There is limited scrutiny of this privilege under the UK

[1] 8 Section 329(2)(c) of the Proceeds of Crime Act 2002. https://www.legislation.gov.uk/ukpga/2002/29/ section/329.
[2] 0 Independent legal professionals filed 2,660 (0.57% of the total) SARs in 2017/18; 2,774 (0.58%) in 2018/19; and 3,006 (0.52%) SARs in 2019/20. By comparison, accountants filed 5,036 (1.08%) SARs in 2017/18, 4,976 (1.01%) in 2018/19; and 5,210 (0.89%) in 2019/20. Banks file the majority, contributing 371,522 (80.08%) SARs filings in 2017/18; 383,733 (80.21%) in 2018/19; and 432,316 (75.44%) in 2019/20. See: UK Financial Intelligence Unit Suspicious Activity Reports Annual Report 2020. NCA. https:// www.nationalcrimeagency.gov.uk/who-we-are/publications/480-sars-annual-report-2020/file and UK national risk assessment of money laundering and terrorist financing. HM Treasury. https://assets. publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/468210/UK_NRA_October_2015_final_web.pdf.

regime because: 'law enforcement agencies and regulators are not entitled to decide themselves whether a claim to LPP is properly made' and that solicitors do not need to satisfy regulators that their 'claims to LPP are well founded. Such assessments must be made instead by independent counsel178 and it is unlikely that law enforcement bodies would be willing to incur the expense of instructing counsel at the stage of a SAR'.[3]

2. Question regarding how do deal with the tipping off issue, the regulatory requirement to report suspicious activity and ethical obligations to the client.

There is a challenging balance between what will be the regulatory obligations of lawyers and barristers to report suspicious matters to AUSTRAC and their ethical obligations to their clients. It is important to find a solution to this problem so that the legal profession can be brought into the regime.

While many lawyers that facilitate money laundering do so unwittingly, some will be doing so knowingly and there must be a way to prosecute this type of behaviour under the regime.

If a lawyer is given information by a client that should become the subject of a suspicious matter report, this may mean they will have to cease acting for that client, but in doing so this would tip-off that client. This scenario presents a conflict between the lawyer's ethical obligations to their client and their regulatory obligations. The lawyer must also decide whether to submit a suspicious matter report, if they decide the information is privileged, a report would not be not required. It is important to note that in the context of receiving information about their client that would be the subject of a suspicious matter report, the lawyer may not necessarily need to stop acting for their client. They may need to modify their advice or defence.

In forming the suspicion about their client, there are lots of grey areas and many possible scenarios, so creating a universal rule will be problematic. One possible solution could be for the AUSTRAC CEO under their powers given in the Bill, to create an exemption, for example, to allow the lawyer to tell other parties why they might need to cease acting (e.g., opposing lawyers, magistrate), but not their client. Another approach could be providing the lawyer with protection and requiring that they retain their client on the basis that a suspicious matter report has been submitted. This approach, does however, create ethical problems in relation to their client.

Another solution could be to create a separation of duties for medium and larger law firms, requiring a separate part of the organisation to be responsible for decisions around suspicious matter reports, to remove this decision from the lawyer acting on behalf of a client and therefore removing any conflict

[3] Spotlight on Corruption, (2022) 'A Privileged Profession: How the UK's Legal Sector Escapes Effective Supervision for Money Laundering', https://www.spotlightcorruption.org/wp-content/uploads/2022/11/Privileged_Profession.Full_.pdf, p 43.

between ethical and regulatory requirements. We note that this is currently how AML Compliance Officers operate in large financial institutions.

I thank the Committee for the opportunity to provide answers to questions on notice to the inquiry,

Yours sincerely,

Clancy Moore
CEO, Transparency International Australia